Mechanisms for Resolving Construction Disputes

Benoît KOHL

President of CEPANI, Professor at the Universities of Liège (ULiege) and Paris 2 (Panthéon-Assas) and Member of the Brussels Bar

Melissa MAGLIANA

Partner in the international arbitration practice group at LALIVE in Zurich, Switzerland

I. Introduction

1 International construction projects are often large in scale, highly technical, and involve multiple players – including owners, contractors, sub-contractors and suppliers – all working on independent – yet interrelated – workstreams. The sheer number of actors, all working under significant time and cost constraints, coupled with unexpected developments and frequently unclear risk allocation provisions, means that construction projects are prone to disputes.

2 During the performance of the contract, disputes can arise regarding whether work falls within the contractor's scope of work or entitles the contractor to a variation or change order; whether certain acceleration measures need to be taken to recoup delays and at whose cost; or whether a certain milestone or progress payment has become due. Finding ways to address such issues as they arise and to find a way forward is critical to ensuring that the progress of the project is not negatively impacted and to avoid a loss of trust or other deterioration of the parties' relationship.

3 It is common for these issues – whether addressed and temporarily resolved during the project or not – to resurface, together with others, at the close of the project. At the close of the project, disputes might concern the issuance of completion certificates and whether outstanding works are minor or prevent their issuance; disagreements regarding the start or duration of the warranty period; the financial accounting of the project, including the number of days of delay and the contractor's entitlement to extensions of time, prolongation costs, and any additional costs for variations. They may also relate to defects and the existence or scope of the contractor's obligation to remedy or repair them, including, in particular in relation to latent defects. These disputes, like the

projects to which they relate, can be complex. They frequently involve extensive fact-finding that can cover the life of the project, and highly technical issues, including critical path analyses, multiple claims and parties, and large amounts in dispute.(*1)

4 While resolving these matters through final and binding legal proceedings will inevitably require either litigation or arbitration, this is typically viewed as the absolute last resort, not least due to the time and cost that such proceedings entail. Not surprisingly, the construction industry is one of the main users of alternative dispute resolution ("ADR") mechanisms, ranging from simple negotiation to dispute boards and expert determinations. These mechanisms, while different in nature and approach, are all aimed at avoiding disputes or, at a minimum, addressing them promptly as and when they arise, both to stave off any negative impact on the parties' continued collaboration and the successful completion of the project, as well as – ideally – to render the need for litigation or arbitration at the close of the project unnecessary.

5 In the present contribution, we will first look at the two main forms of dispute resolution, arbitration and litigation, and the relative advantages and disadvantages that these two methods of dispute resolution present (Section II). We will then turn to the various "alternative" methods of dispute resolution that have been developed and employed in the construction industry with a view to avoid ending up in arbitration or litigation, starting with those methods employed over the course of the project to address disputes as and when they arise (Section III), and turning thereafter to those employed after project completion with a view to resolving disputes without the need for litigation or arbitration (Section IV). Finally, in Section IV, we will briefly touch on ways of combining the various different mechanisms, including multi-tiered dispute resolution clauses.

II. Final and binding dispute resolution mechanisms

6 Like most commercial contracts, construction contracts will generally include a provision defining the forum in which disputes arising out of the contract are to be finally and bindingly resolved. While litigation of construction disputes before the courts of a particular state remains an option, in particular for domestic disputes, international arbitration is today the preferred dispute resolution mechanism for international disputes.(*2)

(*1) See *e.g.*, the Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, pp. 5 and 10. These features are not unique to arbitration, but rather, apply to all dispute resolution mechanisms which address construction disputes.

(*2) Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, pp. 6 and 22. See also White & Case and Queen Mary University of London International Arbitration Survey 2021, p. 5.

7 After first considering the advantages and disadvantages of arbitration in Section A, we will consider the advantages of litigation and why parties may nevertheless wish to submit their disputes to the jurisdiction of the state courts in Section B. Section C will then highlight the role that state courts frequently have to play regardless of whether disputes are subject to litigation or arbitration, namely when it comes to assistance with the taking of evidence, interim relief, and the blocking of calls on bank guarantees.

A. ARBITRATION

8 Arbitration is a means of dispute resolution whereby the parties agree to refer their disputes to one or more independent and impartial arbitrators, rather than to the state courts of any jurisdiction, for decision. Where parties wish to submit disputes to arbitration, they generally so-provide through dedicated arbitration clauses in their contracts, recording their decision to derogate from the jurisdiction of state courts and instead to submit a dedicated category of disputes, for instance, all disputes "arising out of or in relation to the contract," to arbitration. In addition, parties usually also specify the "seat" of the arbitration, a sort of procedural "home jurisdiction," which determines the applicable procedural law; the substantive law applicable to the dispute; the number of arbitrators; and the language of the proceedings. Because arbitration proceedings are defined by the agreement of the parties and there are very few limitations to the principle of party autonomy, the parties are free to regulate many other procedural aspects, whether in their arbitration clause or by means of subsequent agreements.

9 The arbitrators, of which there are usually one or three, will typically be selected by the parties and form an arbitral tribunal that is responsible for the conduct of the proceedings and the rendering of an arbitral award deciding the claims that were put to it by the parties. Arbitration proceedings may also be administered by an institution, in which case the parties generally choose to subject their proceedings to the procedural rules developed by that institution. Arbitral institutions are frequently associated with national or international chambers of commerce; among the institutions offering arbitration services are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Singapore International Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the Swiss Arbitration Centre, and the Belgian Centre for Arbitration and Mediation (CEPANI). Alternatively, the parties may opt to do so without an arbitral institution and save the fees associated with doing so, in which case they may either choose to adopt a pre-defined set of rules, such as those developed by the United Nations Commission on International Trade Law (UNCITRAL), or define the procedural rules themselves and/or in cooperation with the arbitral tribunal.

10 Numerous surveys and market data confirm that arbitration is today the preferred method of dispute resolution for cross-border construction disputes.(*3) This preference is reflected in the fact that many standard-form contracts used in the construction industry, such as those developed by the International Federation of Consulting Engineers (FIDIC), the Joint Contracts Tribunal (JCT) or the commercial arm of the Institution of Civil Engineers (NEC), provide for arbitration, rather than litigation, as the default form of dispute resolution where other attempts at avoiding or resolving disputes fail.(*4)

11 Available statistics also show that construction disputes comprise a substantial – and growing – proportion of the total disputes submitted to international arbitration, both ad hoc and institutional. Construction disputes in 2023 accounted for some 30 % of ad hoc arbitration disputes and a substantial portion – between 5 and 25 % - of the caseload of the major arbitral institutions.(*5) In 2023, construction disputes comprised 25 % of International Chamber of Commerce arbitration and between 6-17 % of the caseload of the London Court of International Arbitration, the Singapore International Centre, and the Hong Kong International Arbitration Centre. Construction disputes also account for the largest number of applications for ICC emergency arbitrations(*6) and requests for the ICC's expert services.(*7) In some countries, specific arbitration institutions have been developed for the resolution of disputes in the construction sector at

(*3) White & Case and Queen Mary University of London International Arbitration Survey 2015, pp. 2, 5-6 and 8-9 (90 % of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56 %) or together with other forms of ADR (34 %)); White & Case and Queen Mary University of London International Arbitration Survey 2018, pp. 2 and 5-6 (97 % of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48 %) or in conjunction with ADR (49 %)); and White & Case and Queen Mary University of London International Arbitration Survey 2021, pp. 2 and 5 (97 % of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (31 %) or together with other forms of ADR (59 %)).

(*4) S. Stiegler and S. Archer, "Contractual Dispute Resolution in Construction Contracts", *The Guide to Construction Arbitration*, 5th ed., London, G.A.R., 2023.

(*5) Jus Connect Industry Insights: Construction Arbitration Report dated 7 June 2023, available at https://dailyjus.com/reports/2023/06/industry-insights-construction-arbitration-report; ICC Dispute Resolution 2023 Statistics, pp. 4 and 13 (25 %, a number largely consistent with previous years, in which the case load ranged between 21-25 %, see ICC Dispute Resolution Statistics for the years 2020 to 2022), available at https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf; Hong Kong 2023 Statistics (17 %), available at https://www.hkiac.org/about-us/statistics; LCIA Annual Casework Report 2023, p. 8 (6 %), available at file:///C:/Users/mmagliana/Downloads/1.%20LCIA%20Annual%20Casework%20Report%202023%20(1).pdf; Singapore International Arbitration Centre Annual Report 2023, p. 40 (8 %), available at https://siac.org.sg/wp-content/uploads/2024/04/SIAC_AR2023.pdf.

(*6) ICC Dispute Resolution 2020 Statistics, p. 20; ICC Dispute Resolution 2021 Statistics, p. 15; ICC Dispute Resolution 2022 Statistics, p. 15; and ICC Dispute Resolution 2023 Statistics, p. 17.

(*7) ICC Dispute Resolution 2020 Statistics, p. 23; ICC Dispute Resolution 2021 Statistics, p. 18; ICC Dispute Resolution 2022 Statistics, p. 18; and ICC Dispute Resolution 2023 Statistics, p. 20. The ICC's expert services include (i) proposing experts and neutrals (non-binding proposal); (ii) appointing experts and neutrals (binding appointment); and (iii) administering expert proceedings, with the available services including coordination between the parties and the expert, monitoring deadlines, supervision of costs, and review of the expert's draft report: see the ICC Dispute Resolution 2023 Statistics, p. 19.

the national level. This is the case, for instance, in the Netherlands, with the *Raad van Arbitrage voor de Bouw* (RvA).(*8)

12 The reasons for which arbitration has emerged as the preferred means of resolving construction disputes are several.

13 As an initial matter, selecting arbitration in international disputes in which the parties are domiciled in different jurisdictions avoids the parties having to opt for the state courts of one of the parties, a choice that is inevitably disadvantageous to the party whose jurisdiction is not chosen. Where they select arbitration, the parties will have to agree on the seat of the arbitration, which determines the applicable procedural law (the *lex arbitri*), as well as the applicable substantive law. But these two laws can be different and, in any event, need not correspond to the laws of either party's home jurisdiction. Moreover, the parties can choose the language of the proceedings, allowing them to select a language that is common to both or that reflects the language of the contract.

14 Among the key advantages of arbitration is undoubtedly the international enforceability of arbitral awards. Thanks to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards can today be enforced in 172 jurisdictions.(*9) While enforcement of state court judgments in other jurisdictions may be possible pursuant to regional instruments(*10) or the private international laws of individual jurisdictions, the absence of a comparable multilateral treaty for the enforcement of state court judgements presents a significant disadvantage of litigation as a means of dispute resolution in cross-border matters.(*11)

15 A further important advantage of arbitration lies in the relative finality of arbitral awards. Under the laws of most jurisdictions, arbitral awards will generally not be subject to any review on the merits and can only be challenged on limited grounds, such as lack of jurisdiction or improper constitution of the tribunal, failure to respect due process, or where the decision amounts to a violation of public policy. In general, therefore, parties can rely on the outcome of an arbitration proceeding being final, avoiding the

(*8) Incorporated in 1907, the RvA is an independent foundation employing more than 100 arbitrators. RvA arbitrators (expert-members) are selected primarily based on their track record in the construction industry. Virtually all lawyer-members are judges or former judges. Hearings are generally held near the building site involved, allowing arbitrators to immediately inspect the technical points of dispute if necessary. In 2019 and 2020, parties filed a total of over 1,200 construction disputes with the RvA (see https://www.raadvanarbitrage.nl).

(*9) There are currently 172 parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, see https://www.newyorkconvention.org/contracting-states (last accessed 28 June 2024).

(*10) For instance, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

(*11) The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters presently only has thirty Contracting Parties: see https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last accessed 26 July 2024).

uncertainty that can be associated with multiple instances of appeal before state courts. Moreover, by selecting an arbitral seat such as Switzerland, which restricts the number of instances that will review a challenge to an arbitral award(*12), parties can further restrict the scope of post-award litigation, which can drag out the dispute resolution process.

16 From a more practical perspective, the parties' ability to tailor the arbitral procedure to their needs and to select their own arbitrators are also significant advantages of arbitration, in particular when it comes to construction disputes. With respect to the procedure, arbitration, of course, affords the parties the ability to choose the *lex arbitri* and the applicable law – and to have them be different – as well as the language of the proceedings and the general rules of procedure. More than that, however, depending on the type of dispute and its complexity, the parties can influence how and when evidence is submitted, presented to, and heard by the tribunal. This can be particularly important when it comes to expert evidence, which is often not only complex but also decisive. The arbitral process offers the parties and tribunals far-reaching flexibility to agree on the best way to present expert evidence with a view to ensuring that it is fully understood by the arbitral tribunal.

17 Similarly critical is the ability to choose one's arbitrators. Having arbitrators with industry experience; a familiarity with construction contracts and the types of disputes they give rise to; and an interest in and willingness to delve into what can be highly technical matters can directly impact not only the course and outcome of the proceedings, but also their efficiency throughout. Where arbitrators come with an understanding of standard contracts and risk allocation; how projects are organized; and how delay analyses are performed, much time can be saved.

18 Finally, arbitration proceedings are not public in the same way that some court proceedings are, and in some cases – depending on the seat of the arbitration(*13), the applicable procedural rules(*14), or the terms of the parties' agreements – may even be confidential. This can be attractive in the construction industry, where parties may be particularly keen on avoiding public disclosure of disputes given the potential reputational implications and the impact on existing and future business relationships.

(*12) By way of example, challenges to arbitral awards rendered in Switzerland are heard directly and exclusively by the Swiss Supreme Court.

(*13) Some arbitral seats, such as England and Singapore, provide for the confidentiality of arbitration proceedings.

(*14) See, e.g. the 2023 Swiss Rules of International Arbitration, which provide in Article 44 that unless agreed otherwise and subject to certain exceptions, the parties shall "undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitration proceedings not already in the public domain" or the 2021 UNCITRAL Arbitration Rules, which provide in Article 34(5) that an arbitral award can only be made public where all parties have consented or where and to the extent disclosure is required by law.

19 While the advantages of arbitration when it comes to resolving international disputes are many, arbitration is far from perfect.

20 As an initial matter, arbitration is a matter of contract, meaning that the jurisdiction of the arbitral tribunal is necessarily limited to disputes (i) between those persons who agreed to have their disputes submitted to arbitration, and (ii) falling within the scope of disputes that were submitted to arbitration. This has two main implications of particular relevance to construction disputes. First, parties that did not consent to arbitrate – or to arbitrate their disputes together – generally cannot be forced to do so. This means that it may not be possible to hear related disputes arising out of different contracts between different parties, for instance, between the owner and contractor under the main contract, on the one hand, and the sub-contract between the contractor and the relevant sub-contractor, in a single proceeding. While arbitration has developed a series of procedural mechanisms to address this challenge, such as allowing for the joinder of additional parties, consolidation of proceedings, and even intervention, the practical availability of these mechanisms will necessarily always depend on the scope of the parties' agreement to arbitrate. Second, it means that Tribunals have no power to order relief, whether on the merits or procedurally, against third parties. As discussed further in Section C below, this means that orders compelling third parties to produce evidence or a bank to refrain from paying out funds pursuant to an unjustified call on a bank guarantee remain the remit of the state courts.

21 Moreover, arbitral tribunals are separate from the state judicial system and do not themselves have the powers of enforcement that state courts do. Accordingly, while arbitral tribunals can render final and binding decisions as well as grant interim relief – including *ex parte* in some jurisdictions and under some rules – arbitral tribunals are generally dependent on state courts for the enforcement of their decisions.(*15) While state courts in many arbitration-friendly jurisdictions are available to assist tribunals(*16), this can nevertheless have an impact on the efficacy of the relief offered by arbitral tribunals, in particular where time is of the essence, such as when it comes to certain forms of urgent interim relief.

(*15) Some jurisdictions, such as Belgium, permit arbitral tribunals to "enforce" their decisions through the imposition of penalties for non-compliance known as "*astreintes*". See Article 1713(7) of the Belgian Judicial Code, which provides for the possibility for the arbitral tribunal to order a party to pay an "*astreinte*". However, recourse to the state court will usually be necessary to enforce payment of the "*astreinte*" in the event of non-compliance with the arbitral tribunal's order, if made under the sanction of such an "*astreinte*".

(*16) In Switzerland, for instance, the provisions of the arbitration law provide that the parties and the tribunal may request the assistance of the state courts with the enforcement of interim relief and/or the taking of evidence. Notably, this also applies where the arbitration is seated abroad. See the Swiss Private International Law Act, articles 183, 184 & 185as, available in English (unofficial translation) at https://www.swissarbitration.org/wp-content/uploads/2021/05/20210129-Chapter-12-PILA_Translation_English.pdf.

22 Finally, on a more practical level, concerns have been raised about the speed, cost and efficiency of arbitration proceedings(*17) as well as about its suitability as a means to resolve lower-value disputes (*i.e.*, less than USD 10 million).(*18) Users' frustration with the time and cost of dispute resolution proceedings has led to the development of a series of other dispute resolution mechanisms aimed at avoiding disputes altogether; narrowing them; or finding alternative ways to resolve them, even if on a provisional basis, over the course of a project.(*19) It is these alternative mechanisms that we discuss in Section III below.

B. Litigation

i. Litigating Construction Disputes

23 While arbitration remains the most widely used dispute resolution method for disputes relating to large-scale or international construction projects, in certain cases, recourse to the courts may be preferable. This is notably the case, in Belgium, as in many other countries, in the case of domestic construction disputes. Court litigation offers some advantages over arbitration for construction cases: court proceedings are typically public, providing transparency and a public record of decisions, which can be useful for setting legal precedents and providing more certainty on the outcome of a case. The cost argument is also regularly put forward: while litigation can be expensive, it sometimes turns out to be less costly than arbitration, which can involve significant administrative fees and arbitrator costs.

24 Also, in some courts, judges may have expertise in construction disputes that is comparable to that of arbitrators specializing in this area. Of course, we need only mention, in England and Wales, the Technology and Construction Court ("TCC"), which deals primarily with litigation of disputes arising in the field of technology and construction (it includes building, engineering, and technology disputes, professional negligence claims, and IT disputes, as well as enforcement of adjudication). The TCC often involves both complex legal arguments and heavyweight technical issues, and as a result, TCC judges deal with some of the most arduous and complex disputes that come before the courts.(*20) In civil law jurisdictions, similar evolutions can be observed. In Belgium, for example, several courts of first instance and commercial courts have

(*17) Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, pp. 3, 5-6, 22 and 25.
(*18) Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, pp. 5 and 15-16.
(*19) Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, pp. 5 and 25-26.
(*20) The proliferation of adjudication following its introduction in the Construction Act 1996 led to fewer disputes going before the court but did give the court a new role in enforcing adjudication decisions. The Construction Act gives parties to a "construction contract" a right to refer matters to adjudicators, with the aim of aiding cash flow in the construction sector by allowing disputes to be settled without the need for lengthy and costly court proceedings. See below, Section II.B.*i*.

specialized chambers for construction disputes. The same applies at the appeal level, in each of the country's five appeal courts.

25 But, of course, there is still one advantage that is more important than others, and that is specific to construction disputes: given the nature of construction disputes, inevitably, the disputes often concern a number of parties. These parties might share joint, several, or partial liability, or they might form a liability chain. The procedural rules in most civil law jurisdictions permit the joinder of all these parties into a single litigation proceeding. An advantage of litigation (independent of the jurisdiction), as compared to arbitration, is the ability to join those other parties into the proceedings and thereby seek to achieve a resolution of the entire dispute in that set of proceedings. This approach avoids the need for parallel or sequential costly proceedings on the same matter and allows for a quicker and more comprehensive resolution of multi-party disputes. Additionally, other parties who might be legally affected by the dispute's outcome can often be joined as third parties in the litigation proceedings.(*21)

26 In Belgium, third parties, such as subcontractors, can be included in ongoing proceedings by issuing a writ of summons (*citation/dagvaarding*). If a litigating party believes it has a potential claim against a third party, dependent on the litigation's outcome, it can notify the third party. The third party can then be forced to join the litigation as an intervener (articles 811 to 814 of the Belgian Judicial Code ("BJC")). As an intervener, the third party can present its own arguments and evidence. It is also possible to request the intervention of a third party, not with the intention to bring an immediate claim against this third party, but also to render the findings in the final judgment binding on this party. Such a request can even be made for the first time in an appeal.(*22) This means that in any subsequent litigation between the third party and one of the original parties, the facts established by the first court are binding. Moreover, even without a notice of dispute, any party with a legal interest in the outcome can join the proceedings as an intervener.

27 Similar options exist in Switzerland. Pursuant to article 81 *et seq.* of the Swiss Code of Civil Procedure ("SCCP"), a litigating party that intends to pursue claims against a third-party can ask the court to join that third party to the ongoing proceedings by means of a third party action (*Appel en cause/Streitverkündungsklage*). Article 78 *et seq.* SCCP allows a litigating party to give a third party notice of a dispute (*Dénonciation d'instance/Einfache Streitverkündung*). The third party may then choose to disregard

(*21) T. Frad and A. Leonard, "Chapter 4: Litigation, A. National Litigation", in A.J. Roquette and T.C Pröstler (eds), *International Construction Disputes: A Practitioner's Guide*, The Hague, Kluwer Law International, 2022, p. 147 and ff., n° 2 and n° 42.

(*22) Pursuant to article 812 BCJ, "Intervention to obtain a conviction may not be made for the first time on appeal.". However, it is considered that this does not prohibit the intervention of a third party in the appeal in order to make the decision binding on the third party.

the notice or intervene in the litigation to support the notifying party. Except in exceptional circumstances, in both cases, the result of the proceedings, including the factual findings of the court, will be binding on the third party in any subsequent proceedings with the notifying party. Pursuant to article 73 *et seq.* SCCP a third party may also intervene in an existing litigation on its own initiative, either by suing the existing parties to the litigation (*Intervention principale/Hauptintervention*) or by making a request to the court to join the existing proceedings as an intervener in support of one of the parties (*Intervention accessoire/Nebenintervention*).

28 Finally, in some countries, the law gives subcontractors carrying out construction work a direct contractual claim against the employer. In Belgium, such a right is provided by article 1798 of the (old) civil Code.(*23) In a subcontracting chain, each subcontractor enjoys this direct claim, regardless of its place in the chain, but the claim can only be brought against the co-contractor of the contracting party.(*24) Launching a direct action in turn forces the employer to withhold all payment to the main contractor after a direct claim has been made, otherwise, he is at risk of paying twice. In case of a dispute regarding the conditions or the effects of such a direct claim (or regarding the employer's right to oppose some exceptions to the direct payment), court proceedings will be necessary, as there is no direct contract relationship between the sub-contractor and the employer and, hence, no arbitration agreement. In Switzerland, pursuant to articles 837(1)(3) and 839 of the Swiss Civil Code, contractors or subcontractors may secure their claims for payment by placing a contractor's lien on any property on which they have performed physical work, as long as they do so within four months of the completion (*Hypothèque des artisans et des entrepreneurs/Bauhandwerkerpfandrecht*). As with the Belgian direct contractual claim, court proceedings will be necessary unless there is an arbitration agreement in place between the owner of the property and the contractor or subcontractor.

29 The same reasoning applies in the opposite direction when it comes to an action by the employer against a subcontractor, for instance, where a building is affected by defects attributable to the subcontractor and the employer has no means of recourse against the contractor – for example, in the event of the latter's bankruptcy. Absent any contractual basis for such an action or arbitration clause governing it, such an action, if

(*23) See B. Kohl, *Contrat d'entreprise*, Répertoire Pratique du Droit Belge, Brussels, Bruylant, 2016, pp. 667-697.

(*24) For instance, a subcontractor of the main contractor, being the first level subcontractor, must bring his direct claim against the employer (that is, the ultimate client); the sub-subcontractor (second in the chain), only to the main contractor, and so on.

available(*25), would have to be based in tort and – absent any agreement providing for arbitration of such claims(*26) – asserted before the state courts.

ii. Selected questions regarding the procedure

30 It is obviously not possible, in the limited space of this contribution, to set out in full the principles of civil procedure before the state courts (in civil law jurisdictions). We will therefore confine ourselves to identifying two particular procedural elements that are of more specific importance in construction disputes: on the one hand, the frequent recourse to court-ordered mediation; on the other hand, the very frequent recourse to judicial expertise.

Court-ordered mediation

31 In most civil law jurisdictions, including Belgium and Switzerland, judges are expected to encourage and facilitate settlements between parties. Court-promoted settlements are highly practical and can be an effective tool for resolving disputes, particularly in the context of construction contracts and the lengthy court proceedings that can arise from them.

32 Whereas mediation is a relatively long process in which the parties try to find a solution to the dispute themselves, with the help of a neutral mediator, conciliating judges will try, over a short period of time (often 90 or even 120 minutes), to get the parties to resolve their dispute and may, to do so, give their preliminary opinion, suggest possible settlement solutions to the parties, and/or confront them with the legal and judicial risks and realities of their respective positions. The conciliating judge is independent and impartial, like the mediator.

33 In Belgium, the Parliament passed an act in 2013 to create the first conciliation chambers: however, these were limited to the Family Courts. The law of 18 June 2018, then enshrined the judge's conciliatory role. Following the entry into force of the

(*25) Under Belgian law, such actions by the employer against the subcontractor have been almost impossible due to a 1973 decision of the Supreme Court (*Cour de cassation*) (see B. Kohl, *Contrat d'entreprise*, *op. cit.*, pp. 698-716). From January 1, 2023, however, the situation will change radically following the adoption of the new Book 6 of the Civil Code, which reforms the law on non-contractual liability (law of February 7, 2024, published in the *Moniteur belge* on July 1, 2024). The new 6.3, § 2 of the Civil Code states: "Unless otherwise provided by law or contract, the legal provisions on non-contractual liability apply between the injured party [i.e. the client] and the auxiliary of his co-contracting party [i.e., the sub-contractor]. However, if the injured party claims, on the basis of non-contractual liability, compensation from the auxiliary of his co-contracting party for the damage caused by the non-performance of a contractual obligation, the latter may invoke the same defenses that his principal [i.e. the general contractor] may invoke on the basis of paragraph 1 and which concern the performance of the obligations in which the auxiliary participates. The auxiliary may also assert the defenses that he himself may assert against his contractual partner i.e. the general contractor] on the basis of paragraph 1."

(*26) It might be, for instance, that the arbitration clause in the subcontract between the subcontractor and the contractor provides for the possibility of the subcontractor agreeing to arbitrate any claims asserted by the employer.

2018 Act, some courts have introduced *ad hoc* and individual pilot conciliation initiatives in non-family cases: in Brussels, this is the case with the Enterprise Court and the Court of Appeal, where amicable settlement chambers have been set up. Parties can try to resolve their dispute with the help of a magistrate.

34 In view of the good results of these experiments - with an agreement rate of almost 80 % - the legislator, in a law passed on 19 December 2023, wanted to further encourage the use of ADR by requiring the creation of ADR chambers (*Chambres de Règlement amiable*) in all civil, commercial, and social courts (courts of first instance, labor courts, company courts, and courts of appeal). The aim of the Act is also to improve the way in which these ADR chambers operate and to clarify certain procedural rules.

35 The main feature of conciliation before the ADR chambers of the state courts is that it remains a voluntary process (it cannot be imposed). Furthermore, strict confidentiality of what is said before the ADR chambers is provided to prevent any party from being prejudiced in the event of a return to "conventional" legal proceedings. ADR chambers' hearings are not open to the public, and the judge will not have access to the case if the parties subsequently decide to initiate legal proceedings following the failure of their conciliation.

36 Conciliation may take place during legal proceedings or prior to any proceedings ('pre-litigation' conciliation). In the latter case, the dispute may be submitted to the ADR chamber at the request of one of the parties or by mutual agreement. The parties will be summoned by the clerk's office to a hearing of the ADR chambers. No bailiff's fees, procedural indemnities, or listing fees will be payable. The conciliation procedure ends with a report stating the failure of the conciliation or the terms of the agreement. In order to encourage pre-litigation conciliation, it is stipulated that such a request is treated as a formal notice (which makes it possible to claim interest for late payment) and that the limitation period is suspended for the duration of the conciliation.

37 In Switzerland, parties are generally required to attempt to settle their disputes through mandatory conciliation proceedings prior to bringing a civil action in court. This obligation, which is enshrined in article 197 *et seq.* of the SCCP, does not, however, apply universally. For instance, pursuant to article 198(f) of the SCCP, pre-litigation conciliation proceedings are not mandatory for actions that can be brought before the commercial courts of Aargau, Bern, St. Gallen, or Zurich – where many construction disputes are likely to be brought. However, even apart from the mandatory conciliation, it is not unusual for the Swiss courts, including the commercial courts, to attempt to bring the parties to a settlement. The Zurich Commercial Court in particular is well-known for its high settlement rate, as it is the court's practice to summon the parties to

a conference after the first round of pleadings have been exchanged to discuss its preliminary views and encourage the parties to resolve their disputes on that basis.

Technical experts

38 Unlike in arbitration proceedings, in most civil law jurisdictions, it is typically the court's responsibility to appoint an expert. Furthermore, the court usually provides specific instructions to the expert. The extent to which parties can influence the selection and instruction of the expert varies by jurisdiction, but ultimately, the court always retains full control over the selection and instruction of the expert.

39 In Belgium, state courts must now give priority to searching for experts in the National Register of Judicial Experts and Sworn Translators, Interpreters, or Translator-Interpreters. This Register was created by a law of April 10, 2014. Only in cases of urgency or when the profile sought is not available or not listed in the Register, may the court, by reasoned decision, designate a person not listed in the Register. This appointment will be made under the strict conditions laid down by law (article 555/15 of the Judicial Code).

40 In practice, courts often heavily rely on expert opinions to resolve construction disputes, making the court-appointed expert particularly significant. The expert's role is to supply the court with the necessary technical knowledge and scientific expertise to address relevant technical questions. Additionally, the expert assists the court in establishing and evaluating the technical facts. Even in specialized construction chambers, judges rarely have the technical expertise required to investigate and decide the complex questions that frequently arise in construction disputes.

41 In Switzerland, the court has the right to appoint an expert, whether upon the request of a party or ex officio, pursuant to article 183 SCCP, and such expert evidence can be critical in particular in construction disputes. While parties also have the right to submit options from experts they appoint, such opinions are not treated as evidence, but rather as the mere pleadings of the party.(*27) This will change with a revision to the SCCP on 1 January 2025, pursuant to which expert opinions submitted by the parties will be elevated to factual evidence, on par with documents and photographic evidence (*Titres/Urkunden*). This marks an important change given the challenges presented by exclusive reliance on court-appointed expertise, both in terms of the delays that obtaining such expert opinions entails, as well as the burdens it places on the parties to

(*27) Judgement of 11 September 2015 (BGE 141 II 433), para. 2.6: "*Private expert opinions therefore do not constitute evidence in civil proceedings. Contrary to the opinion of the lower court and the respondent, the case law on social insurance law according to BGE 125 V 351 does not apply within the scope of application of the ZPO. Rather, the case law invoked by the appellant is applicable, according to which the expert opinions of a party appointed expert are not to be accorded the quality of evidence, but of mere assertions made by the party.*"

preserve evidence – for instance of defects in an ongoing construction project – pending a court-appointed expert's appointment and inspection.(*28) That said, however, the evidentiary value of factual evidence submitted by the parties is for the court to assess, and it remains doubtful whether the opinions of party-appointed experts will be seen by the Swiss courts as an adequate substitute for those of experts appointed by the court.

C. Court litigation as a supporting instrument for arbitration proceedings

42 Recourse to the state courts can also provide support in preparation for, or as part of, arbitration proceedings. We discuss below three of the most frequent examples of how state courts remain highly relevant in construction disputes, even where the parties have selected arbitration as the means of dispute resolution. We do so by taking the example of Belgium, although the principles will be similar in many – and in most, if not all, civil law – jurisdictions.

i. Taking evidence

43 The rules and practicalities of gathering evidence differ in litigation, arbitration, and other forms of ADR. In court, the provisions of the applicable domestic civil procedure dictate the framework for evidence collection. In arbitration generally, and even more so before a specific dispute arises, this framework is more adaptable and can be tailored to the parties' interests. This flexibility allows parties to create specific evidentiary solutions tailored to the particular construction project, its complexity, and the likely disputed facts. The preservation of evidence often benefits all parties by ensuring the proper documentation of facts, thereby avoiding ambiguities that frequently give rise to disputes, and frequently also speeding up their resolution. The guiding principles of efficiency, speed, and procedural fairness govern the rules in both state courts and arbitration.

44 In some cases, it may not be possible for the claimant to avoid recourse to state courts to obtain or preserve evidence. This is especially the case when the arbitration proceedings have not yet been initiated, and there is a risk of evidence disappearing.

45 Moreover, even when the production of documents is ordered by the arbitral tribunal, recourse to the state courts is still sometimes necessary. Indeed, the arbitrator is unable to compel the parties (and even fewer third parties) to submit to the measures he orders.(*29)

(*28) See T. Siegenthaler, "ZPO-Revision: Privatgutachten als Beweismittel – Wirkung und Nebenwirkungen" (2024), Baurecht 2024, p. 93 *et seq*.

(*29) In Belgium, under article 1700, § 4 BJC, the arbitrator may "*if a party holds evidence, (…) enjoin him/her to produce it in the manner he/she shall determine and, if necessary, under penalty of a fine*", but this injunction will only be enforceable

46 In Belgium, the 2013 reform of arbitration law significantly improved this situation. Article 1680(4) BJC now provides that: "*The President of the Court of First Instance ruling as in summary proceedings shall take all necessary measures to obtain evidence in accordance with Article 1708. His decision is not subject to appeal*". Article 1708 BJC provides that: "*A party may, with the agreement of the arbitral tribunal, request the president of the court of first instance ruling as in summary proceedings to order all necessary measures for the taking of evidence in accordance with Article 1680, § 4*".(*30) Such a procedure therefore presupposes the agreement of the arbitral tribunal. The question remains controversial as to whether the state court retains the power to assess the relevance of the documents requested: should the court apply the 'usual' criteria applicable to the production of documents.(*31) Or should the court limit itself to acting as the '*bras armé'* of the arbitral tribunal without interfering in the latter's decision as to the measures to be implemented with a view to obtaining evidence? The case law is divided(*32), but the doctrine seems to support the second solution.(*33)

47 The possibility of recourse to the summary proceedings judge (*juge des référés*) may now seem theoretical insofar as the party who resorts to summary proceedings in such a case will have to justify the impossibility of usefully applying article 1708 BJC, given the fact that the judge called upon to rule in the application of this provision is sitting "as in summary proceedings" ("*comme en référé*"). Recourse to summary proceedings could, however, be justified, for example, if the document production is necessary before the arbitral tribunal is constituted. The same would apply if the urgency justifies taking the measure without waiting for the tribunal's authorization.(*34) This

---

on the basis of an exequatur obtained from the court of first instance. Similarly, with regard to third parties, the power of the arbitral tribunal is even more limited, so that an arbitral tribunal will not be able to compel a third party who refuses to testify or produce evidence without the intervention of the state courts.

(*30) These provisions provide for the intervention of the President of the Court of First Instance 'as in summary proceedings' ("*comme en référé*"). This ensures that the proceedings are dealt with in the same way (and, above all, within the same timeframe) as summary proceedings ("*référé*"), while at the same time relieving the claimant of the need to prove urgency, which is presumed to be the case.

(*31) Before the state courts (in Belgium) a request for production of documents is indeed subject to a number of conditions: *(i)* the document must contain evidence of a relevant fact; *(ii)* the request must relate to a document, in the broadest sense, i.e. a written document but also photographs, recordings, computer data, a password, etc.; *(iii)* the document may be held by a party or a third party: this procedure does not allow the opposing party's file to be explored for no specific purpose. The production of documents is therefore not a substitute for the American "discovery" procedure; *(iv)* Finally, the document to be produced must exist (it cannot be a document to be created)" (see D. Mougenot, "Chapitre 3 - La réception des preuves" in de Leval, G. (dir.), *Droit judiciaire – Tome 2: Procédure civile – Volume 1: Principes directeurs du procès civil Compétence-Action-Instance-Jugement*, 2nd ed., Brussels, Larcier, 2021, p. 726).

(*32) The Court of First Instance of Brussels rendered contradictory decisions on this issue (see judgement of 12 June 2019 (R.G. 2019/28/C) and of 4 December 2019 (R.G. nº 2019/2282/A) (cited by M. Berlingin and L. Atyeo, "Appui du juge étatique dans l'obtention de mesures d'instruction", *b-Arbitra* 2021/1, pp. 222-233, n° 1).

(*33) See M. Berlingin and L. Atyeo, *op. cit.*, n° 16-19; M. Draye, "Article 1700", *Arbitration in Belgium – A Practitioner's Guide*, N. Bassiri et M. Draye (ed.), Alphen aan den Rijn, Kluwer Law International, 2016, pp. 385-386.

(*34) See M. Berlingin and L. Atyeo, *op. cit.*, n° 10 and n° 14. In other words, although it is up to the parties or one of them to refer the matter to the President of the Court of First Instance (the arbitral tribunal cannot do so on its own initiative), the

could be the case when the claimant provides sufficient evidence that there is an imminent risk of the documents disappearing(*35): measures to preserve evidence can be considered "*provisional and conservatory measures*", in the meaning of art. 1683 of the Belgian Judicial Code. This provision does not impose a specific time limit on the power of the *juge des référés*. Hence, when urgency is established, the state courts retain the authority to preserve evidence even after the constitution of the arbitral tribunal.(*36)

ii. Interim measures – Conservatory attachments

48 In most jurisdictions, even in the presence of an arbitration agreement, the parties may apply to the court for provisional and conservatory measures without having this be considered a waiver of the arbitration agreement.

49 In Belgium, this principle, which applies both before and after the constitution of the arbitral tribunal, is codified in article 1683 BJC.(*37) Moreover, pursuant to article 1698, in the event of arbitration proceedings, whether in Belgium or abroad(*38), the *juge des référés* will have the same power of intervention as he/she has in relation to usual proceedings brought before the state courts. He/she will exercise this power in accordance with his/her own procedures, taking into account the particularities of arbitration.(*39)

50 Under Belgian law, the following specific requirements have to be fulfilled to obtain interim or provisional relief in summary proceedings(*40): the requested relief must be urgent, which implies (i) that adequate relief cannot be obtained in time from

---

prior authorisation of the arbitral tribunal is necessary for the referral to the state court to be admissible.

(*35) P. Van Leynseele and M. Dal, *op. cit.*, n° 22.

(*36) This situation might raise questions regarding the relationship between the preservation of evidence by the state court during arbitral proceedings and judicial assistance by the state court to the tribunal in its evidence-taking, as outlined in 1708 BJC. "However, there may be a need for both even during a pending arbitration and, arguably there is no compelling reason not to permit both in parallel. The choice is to be made by the parties or, respectively, the tribunal in each individual case. Also, it will ultimately be the tribunal deciding on whether any evidence preserved by a state court […] will be admitted to the arbitration file at all" (L. Beisteiner, "Chapter 5: Provisional Measures Specific to Construction Arbitration: Focus on the Austrian Legal Framework and Jurisprudence", *in* C. Baltag and C. Vasile (eds), *Construction Arbitration in Central and Eastern Europe: Contemporary Issues*, Kluwer Law International, 2019, p. 113).

(*37) For an overview of the availability of interim relief in Switzerland, see Christopher Boog, 'Chapter 18, Part III: Interim Measures in International Arbitration', in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide (Second Edition), (© Kluwer Law International; Kluwer Law International 2018), pp. 2543-2566.

(*38) Pursuant to Article 1676, § 8 of the Belgian Judicial Code, the power of the courts set out in Article 1698 applies irrespective of the place of arbitration and notwithstanding any agreement to the contrary.

(*39) O. Caprasse, "Chapitre 1 - L'arbitrage" in de Leval, G. (dir.), *Droit judiciaire – Tome 2: Procédure civile – Volume 3: Saisies conservatoires, voies d'exécution et règlement collectif de dettes Arbitrage, médiation et droit collaboratif Procédure électronique*, 2nd édition, Brussels, Larcier, 2021, p. 279.

(*40) See N. Bassiri and M. Draye, "Commentary on Part VI of the Belgian Judicial Code, Chapter IV: Article 1698", in N. Bassiri and M. Draye (eds), *Arbitration in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2016, pp. 255-264, n° 13.

the arbitral tribunal that is competent to hear the merits(*41); and (ii) that the requesting party must demonstrate a reasonable risk for severe or irreparable harm. Moreover, the requesting party must show a prima facie case that would justify granting the requested measure.

51 The *juge des référés* cannot order any actions that are irreversible or that could affect the outcome of the case (Article 1039 BJC). Within these constraints, Belgian courts have the freedom to authorize a variety of interim and conservatory measures upon request. These measures may include maintaining the current situation, preserving evidence, and providing provisional remedies.

52 In construction disputes, recourse to interim relief before the *juge des référés* is often essential, especially when the project is still underway. The court's intervention may be necessary to avoid a situation where construction work is halted. Examples may include an order upon the contractor for the continuation of the works, or an order upon the employer for making interim payments to the contractor, amongst others.(*42)

53 A specific set of measures includes conservatory attachments ("*saisie conservatoire*"). The Belgian Judicial Code exclusively grants the power to order such attachments to Belgian courts: arbitral tribunals are prohibited from granting conservatory attachments (Article 1691 BJC). This authority rests with a specially appointed "judge of attachments" ("*juge des saisies*"), a specialized judge within the Court of First Instance who decides "as in summary proceedings", unless the law allows for a unilateral (i.e., *ex parte*) request. The requesting party can seek an attachment order in urgent cases, provided that their claim is certain and executable. Additionally, the debt amount must be determined or ascertainable based on a preliminary estimate (Articles 1413 and 1415 BJC).(*43)

(*41) However, there is case law which does not impose such a condition. See a.o. the decision of the Court of Appeal of Brussels of 17 January 2020: "*it does not follow from the provisions of the Judicial Code that, in the presence of an arbitration clause, recourse to the interim relief judge would be permitted only insofar as the arbitrator's inability to order urgent and provisional measures in time is demonstrated in a concrete and detailed manner*" (Brussels Court of Appeal, 17 January 2020, *b-Arbitra* 2020/1, p. 141).

(*42) The most important difficulty with interim performance orders is that an interim measure should not anticipate the result of the main proceedings. Therefore, the state courts should not grant a decision on the merits under the guise of interim relief. In any case, even if the measure exceptionally anticipates the main proceedings that will be brought before an arbitral tribunal, it should – inherent in the concept of 'provisional' relief – in principle, be reversible. In particular, the state courts will probably not grant the interim measure where it would not be possible to reinstate the status quo ante in case the main proceedings (before an arbitral tribunal would subsequently fail to justify the measure – i.e., where the measure would establish a "*fait accompli*").

(*43) N. Bassiri and M. Draye, *op. cit.*, n° 33-38. The proceeding can be summarized as follows: "the requesting party may instruct the bailiff to place eligible assets of the opposing party under attachment, if he or she possesses a title in form of a judgment, be it domestic or foreign (Article 1414 Belgian Judicial Code). In this case, the debtor may apply to the judge of attachments to obtain relief of the attachment (Article 1420 Belgian Judicial Code). In all other cases, the competent judge will issue an attachment order within eight days following – generally – an ex parte request. The judge of attachments

iii. "Blocking" of the bank guarantee

54 It is very common for bank guarantees or bonds to be set up as part of construction projects.

55 Guarantees may include tender guarantees, advance payment guarantees, performance guarantees, payment guarantees, retention money guarantees, etc.(*44) The form and characteristics of these guarantees can vary widely, but they will most often be first-demand bank guarantees. Under a first-demand bank guarantee, objections related to the underlying construction contract being guaranteed, as well as objections arising from the contract between the guarantor and the applicant, are generally inadmissible in the legal relationship between the guarantor and the beneficiary. Most notably, the bank cannot withhold payment to the employer on the grounds that the contractor has performed to specification or remedied all defects. Instead, the beneficiary is entitled to receive payment upon their sole demand and the assertion that the guaranteed event has occurred. In such cases, the guarantee applicant must seek a refund of the collected amount from the beneficiary.(*45)

56 In contrast, bonds may be designed to impose a merely accessory obligation on the guarantor, meaning the obligation is connected to the performance of the underlying main contract. Additionally, parties have the contractual freedom to agree on any combination of the two pure forms of guarantees and bonds.

57 If the applicant (usually the contractor) believes that the beneficiary (usually the employer) call on the guarantee was unlawful —for example, where a performance guarantee is called despite the contractor having met the specifications—the applicant typically must resolve the issue through arbitration (or litigation). This means pursuing repayment of the drawn amounts in proceedings to determine whether the contractor's performance met the contractual terms. This process underscores the essence of a guarantee, often considered "as good as cash."(*46) However, in specific situations, where the applicant is able to foresee such an unlawful call on the guarantee, the applicant may be able to prevent the payout and block the guarantee. For instance, under Belgian law, this is possible if the drawdown is clearly fraudulent or abusive.(*47) Depending on the

---

determines the limit up to which attachment is permitted. (Articles 1417–1418 Belgian Judicial Code)" (N. Bassiri and M. Draye, *op. cit*, n° 36).

(*44) See in general: C. Harris and J.D. Evans, *The Guide to Construction Arbitration*, 2nd ed., Law Business Research, 2018, pp. 27 ff.

(*45) See L. Beisteiner, "Chapter 5: Provisional Measures Specific to Construction Arbitration: Focus on the Austrian Legal Framework and Jurisprudence", *in* C. Baltag and C. Vasile (eds), *Construction Arbitration in Central and Eastern Europe: Contemporary Issues*, Kluwer Law International, 2019, p. 101.

(*46) L. Beisteiner, *op. cit.*, p. 102.

(*47) See a.o. T. Hurner, "Limite à l'exécution des garanties à première demande : l'abus ou la fraude manifestes", *Dr.banc. fin.* 2020/1, pp. 22-24; A. Despontin, "Les exceptions à l'appel à la garantie bancaire à première demande", *JT* 2014,

contract, there may be a delay between the calling of the guarantee and its payment. Even if no delay is stipulated, banks usually do not pay out immediately but inform the parties of the payment timeline, typically within a few days. When the beneficiary has called the guarantee and payout is imminent, and the applicant (contractor) has serious concerns about the lawfulness of the drawdown, they may seek interim relief to block the guarantee.

58 Before the constitution of the arbitral tribunal, the applicant typically needs to submit an application to block a guarantee call-off to the competent state courts.(*48) Once the arbitral tribunal is constituted, the applicant must choose between the arbitral tribunal and the competent state court. As L. Beisteiner explains, blocking a bond, however, is generally ill-suited for arbitration for several reasons.(*49) Firstly, arbitration may not be available if the guarantor is a third party to the main contract with the arbitration clause. Typically, the arbitration clause does not apply to a third party's guarantee of performance under the main contract (e.g., the contractor). Secondly, arbitration might not be preferable because, in many jurisdictions, arbitral tribunals cannot issue *ex parte* relief.(*50) If the employer must be heard before an order is issued, the few days the bank has to pay the called sum may expire in the meantime. Conversely, Belgian state courts can issue interim relief *ex parte* and, if necessary, within a few hours.

III. Alternative dispute resolution mechanisms

A. Introduction

59 Litigation and arbitration offer a means of resolving contractual disputes when they have crystallized, frequently at the close of a project. They do little to assist the parties in proactively addressing and seeking to resolve disputes in the course of a project before any resulting claims are ripe to be asserted in legal proceedings. Nor do they assist with finding ways to resolve disputes at the close of the project, when the various issues, whether temporarily resolved over the course of the project or not, frequently come together.

pp. 618-621.

(*48) If the contract allows, the applicant may also seek emergency arbitration if interim relief from the state courts is unattainable or undesirable for any reason.

(*49) L. Beisteiner, *op. cit.*, p. 103.

(*50) On the availability of *ex parte* relief in Switzerland, see Christopher Boog, 'Chapter 18, Part III: Interim Measures in International Arbitration', in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide (Second Edition), (© Kluwer Law International; Kluwer Law International 2018), pp. 2543-2566, at p. 2555 et seq.

60 As discussed in Section B, the long-term duration of many construction projects and the need for the parties to continue to collaborate and progress even when disputes arise along the way have resulted in the development of mechanisms to avoid or, at a minimum, proactively address and resolve disputes – whether on a permanent or temporary basis – if and when they do arise. At issue here is above all adjudication, whether statutory – where available – or contractual, primarily in the form of dispute boards. Other frequently used mechanisms to resolve disputes during or at the close of a project include expert determinations (Section C), mediation and conciliation (Section D), early neutral evaluations (Section E) and mini-trials (Section F).

B. Adjudication and dispute boards

61 Perhaps the most common ADR mechanism used in the construction industry is adjudication. Adjudication is provided for by statute in some jurisdictions, in which cases are conducted pursuant to the relevant domestic legislation. However, parties can also agree contractually to have their disputes adjudicated by an adjudicator or a dispute board. As described further below, adjudication differs from many other forms of ADR in that it is specifically designed to assist parties to quickly resolve disputes as they arise, generally on a provisional but binding basis, to allow the project to continue without unnecessary paralysis or disruption. The parties are obliged to comply with the decision of the adjudicator or dispute board but can have those decisions revisited, if they so wish, in subsequent legal proceedings. While the decision of the adjudicator or disputes board is thus designed to be quick and to "temporarily" resolve matters, market research suggests that such 'pay now, argue later' mechanisms in fact do resolve disputes permanently, thus doing away with the need for subsequent litigation or arbitration.(*51)

i. Statutory Adjudication

62 Statutory adjudication is a dispute resolution mechanism provided for in the domestic legislation of some jurisdictions, whereby the parties appoint an adjudicator, often a lawyer or technically qualified professional, to resolve disputes that arise over the course of a construction project. The decisions of the adjudicator are rendered within a very short timeframe and must be complied with by the parties, who retain their right to have the dispute subsequently and finally determined through arbitration.

63 England, Wales, and Scotland were the first jurisdictions to introduce a statutory adjudication regime.(*52) Since then, a number of jurisdictions have followed; notably,

(*51) Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, p. 20.

(*52) See the Housing Grants Construction and Regeneration Act 1996 (England and Wales) and Housing Grants Construction and Regeneration Act 1996 (Scotland) (Commencement No. 5) Order 1998; Scheme for Construction Contracts

New Zealand(*53), certain states of Australia(*54), Ireland(*55), Ontario (Canada)(*56), Malaysia(*57) and Singapore.(*58) There are significant differences in the scope and application of these statutory regimes, with some jurisdictions, such as the United Kingdom and New Zealand, making the process broadly available for disputes arising out of construction contracts and others limiting it to the enforcement of payment schemes. In all cases, however, the process calls for fast-track resolution of disputes, with the adjudicator's binding – and enforceable – decision having to be issued somewhere between 10 and 28 days.(*59)

64 Adjudication was introduced as a means to assist with cash flow over the course of a project by allowing disputes to be quickly resolved so as to avoid impasses and the withholding of payments.(*60) The underlying principle is 'pay now, argue later', meaning that parties are to comply with the decision of the adjudicator – and in particular to promptly make any payments ordered to be made – without prejudice to their disagreement with the adjudicator's decision and their right to subsequently submit the same issue to arbitration, should they wish to do so.(*61)

65 It follows that the parties' compliance with the decision of the adjudicator, or rather, the enforceability of the adjudicator's decision, is critical to the functioning of this ADR mechanism. Legislation in those jurisdictions with statutory adjudication generally provides for the enforcement of the adjudicator's decision even where it is considered wrong in fact or in law, thereby giving it a form of "temporary finality". While the parties are required to comply with the adjudicator's decision, as mentioned, they do so without prejudice to their right to submit the matter to arbitration or litigation, as the case may be, at a later date, should they wish to do so. Anecdotal evidence

(England and Wales) Regulations 1998 and Scheme for Construction Contracts (Scotland) Regulations 1998. For a recent discussion on the development of statutory adjudication in the England, Scotland and Wales, see: Lindy PATTERSON, 'Adjudication' in ROQUETTE/PRÖSTLER, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.B., Section II, pp. 52-58, paras. 2-30.

(*53) See the Construction Contracts Act 2002.

(*54) See the Building Construction Industry Security of Payment Act 1999 No. 46 (New South Wales); the Construction Contracts Act 2004 (Western Australia); and the Construction Contracts (Security for Payments) Act 2004 (Northern Territory).].

(*55) See the Construction Contracts Act 2013.

(*56) See the Construction Lien Amendment Act 2017 (Ontario).

(*57) See the Construction Industry Payment and Adjudication Act 2012.

(*58) See the Building and Construction Industry Security of Payment Act 2004.

(*59) For a general overview of the different statutory regimes, see Patterson, 'Adjudication' in Roquette/Prröstler, International Construction Disputes (Bloomsbury, 2022), Ch. 2.B.

(*60) L. Patterson, 'Adjudication' in Roquette/Prröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.B., pp. 51-52, para. 1.

(*61) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

suggests, however, that only some 10 % of disputes that are adjudicated ultimately go to litigation or arbitration for final determination.(*62)

ii. Contractual adjudication and dispute boards

66 While statutory adjudication has proven immensely successful, as described above, it is by definition only available in those jurisdictions that have corresponding legislation in place. As an alternative to statutory adjudication, it is also possible to introduce the principles of adjudication contractually, i.e., through the parties' agreement, typically in the construction contract itself, to appoint an adjudicator or, alternatively, a "disputes board" to resolve their disputes over the course of a project.

67 A number of institutions have rules providing for the appointment of an adjudicator that parties are free to adopt and incorporate into their contracts.(*63)

68 Dispute boards are panels appointed by the parties to render decisions and/or recommendations on disputes referred to them over the course of a project. They are typically comprised of one or three members, although their composition can vary depending on the size and complexity of the project at issue. Where there is a three-member board, each party will generally nominate one member, often an engineer or construction professional, and the chairman, often a lawyer, will be appointed by

(*62) L. Patterson, 'Adjudication' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.B., p. 58, para. 30. See also M. Smith, H. MacCarthy and J.-H. HO, 'Alternative Dispute Resolution in Construction and Infrastructure Disputes' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024) ("There is, however, a 'chorus of observations' from experienced TCC judges and textbook writers to the effect that, in England and Wales at least, in most cases adjudication achieves a resolution of the underlying dispute."). Notably, Lord Justice Coulson of the Court of Appeal of England and Wales has remarked: "I rather cavil at the suggestion that construction adjudication is somehow 'just a part of ADR'. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town.": see *John Doyle Construction Ltd (In Liquidation) v. Erith Contractors Ltd* [2021] EWCA Civ 1452 (Coulson LJ), para. 29.

(*63) See, for example, the HKIAC Adjudication rules, which were developed on the basis of a consideration of various – primarily English law – sources, including the English Housing Grants, Construction and Regeneration Act 1996. Hong Kong International Arbitration Centre Adjudication Rules 2009, Introductory Notes, available at https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/Adjudication/HKIAC_Adjudication_Rules_2009.pdf. See also the Lagos Chamber of Commerce International Arbitration Centre, Lagos Chamber of Commerce International Arbitration Centre Adjudication Rules 2020, available at www.laciac.org/wp-content/uploads/2021/03/LACIAC-Adjudication-Rules-2020.pdf; Ontario Dispute Adjudication for Construction Contracts ODACC, with the rules available at: https://odacc.ca/en/; the Asian International Arbitration Centre, AIAC Adjudication Rules and Procedures 2012, available at https://admin.aiac.world/uploads/ckupload/ckupload_20190930053228_47.pdf; German Arbitration Institute (DIS), DIS-Adjudication Rules 2010, which offer both adjudication and dispute board procedures, available at https://www.disarb.org/fileadmin/user_upload/Werkzeuge_und_Tools/DIS_Adjudication_Rules_V-2.pdf.

party-nominated members or by an institution.(*64) In the case of a one-member board, both parties must agree on the member's qualifications.(*65)

69 Like adjudicators, dispute boards are intended to address and resolve disputes as and when they arise over the course of a project to minimize the impact on project completion and, ideally, avoid the need for litigation or arbitration at a later stage. Dispute boards found their origins in the United States in the 1970s, where they were introduced as a more objective alternative to the default process whereby the "engineer" was the first-instance decision-maker in the case of disputes.(*66) They have increasingly gained in popularity and have been used in many high-profile international construction projects, including the Channel Tunnel Project, the Channel Tunnel Rail Link Project, the Sydney Desalination Plant Project, and the construction of venues for the 2012 London Olympic and Paralympic Games.(*67) While originating and most frequently used in construction projects, dispute boards are increasingly also being used in other long-term contractual arrangements, such as research and development and shareholder agreements.(*68)

70 The most common form of dispute boards is a standing dispute boards.(*69) Standing dispute boards are established at the outset of a project and remain in place throughout its term(*70), with its members receiving regular updates on the progress of

(*64) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*65) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*66) J. Jenkins, 'Dispute Avoidance and Resolution', in *International Construction Arbitration Law (Third Edition)*, Arbitration in Context Series, Volume 1 (Kluwer Law International, 2021), Chapter 3, Section 3.03[D]; L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*67) J. Jenkins, 'Dispute Avoidance and Resolution', in *International Construction Arbitration Law (Third Edition)*, Arbitration in Context Series, Volume 1 (Kluwer Law International, 2021), Chapter 3, Section 3.03[D]; L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*68) The ICC Dispute Board Rules in particular are designed for use in various industries, with the ICC noting that dispute boards are also used in "research and development, intellectual property, production sharing and shareholder agreements". See ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Foreword. See also Hong Kong International Arbitration Centre, Hong Kong International Arbitration Centre Adjudication Rules 2009, Introductory Note, available at https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/Adjudication/HKIAC_Adjudication_Rules_2009.pdf (noting that the rules "should also be suitable for contracts other than construction").

(*69) By way of example, the 1999 FIDIC Red Book as well as the 2017 editions of the Red, Yellow and Silver Books provide for standing dispute boards; the 2015 ICC Dispute Board Rules also apply to standing dispute boards.

(*70) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

the project and frequently also visiting the construction site.(*71) A standing dispute board that is informed and stays abreast of progress from the outset can engage with and closely monitor a project; observe first-hand any problems as they arise; and render prompt and informed decisions on disputes submitted to them.

71 An alternative to standing dispute boards is an *ad hoc* dispute board, which is called upon only if and when a dispute arises and whose mandate expires upon the rendering of its decision.(*72) Ad hoc dispute boards are perceived to be less costly than standing dispute boards while still providing a mechanism to address and resolve disputes as and when they arise. That said, however, ad-hoc dispute board members will not have the same comprehensive understanding of the project and its evolution over time, something that may impact the efficiency of their involvement and also have an impact on the parties' willingness to accept their decisions. Indeed, there is a perception among users that decisions made by standing dispute boards are more likely to be complied with than those made by *ad hoc* dispute boards, particularly where the standing dispute board was appointed and in place from the outset of the works.(*73)

72 The concrete role of the dispute board will depend on the specific mandate given to it by the parties.

73 Dispute *adjudication* boards, such as those foreseen in the FIDIC standard form contracts, render decisions on the matters put to them within a relatively short timeframe of approximately three months.(*74) These decisions are immediately binding on the parties and must be complied with, without prejudice to the parties' right to have the dispute fully and freely adjudicated in a subsequent arbitration procedure. To preserve this right, a party must register its dissatisfaction with the decision by issuing a "notice of dissatisfaction," generally within a fixed period of 30 days.(*75) Where a party fails to issue a notice of dissatisfaction, the decision becomes final and binding and can no

(*71) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*72) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024). The 1999 Yellow and Silver books provided for ad hoc dispute boards, although the second edition of these contracts issued in 2017 changed this, providing instead for standing dispute avoidance and adjudication boards (DAABs).

(*73) Pinsent Masons and Queen Mary University of London International Arbitration Survey 2019, p. 19.

(*74) ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Article 221(1) (90 days from the filing of the statement of case); FIDIC 1999 Contracts, Clause 20.4 (84 days); FIDIC 2017 contracts Clause 21.4 (84 days); Hong Kong International Arbitration Centre, Hong Kong International Arbitration Centre Adjudication Rules 2009 available at https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/Adjudication/HKIAC_Adjudication_Rules_2009.pdf (56 days).

(*75) See, e.g. ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Article 5 (providing for 30 days to issue notice of dissatisfaction); see also 2017 FIDIC Red, Yellow and Silver Books, Clause 21.4.4 (providing for 28 days).

longer be revisited, including in a subsequent arbitration. On the other hand, where a notice of dissatisfaction is issued and a particular dispute is subsequently referred to arbitration, the arbitral tribunal will generally have full powers to revisit the merits of the decision, and the parties are not limited to the arguments advanced before the dispute board or in their notice of dissatisfaction.(*76) Dispute *review* boards ("DRBs"), on the other hand, typically do not render decisions, but only non-binding recommendations, although these recommendations may also become final and binding if neither party issues a notice of dissatisfaction.(*77) Finally, combined dispute boards ("CDBs") issue recommendations or decisions, where so-requested.(*78)

74 In addition to their role in resolving disputes, dispute boards may assist the parties in avoiding disagreements likely to result in a dispute or through informal assistance with such disagreements where both parties agree.(*79)

75 Parties wishing to agree on the use of a dispute board must include or incorporate corresponding contractual provisions into their agreements. Where the parties use FIDIC standard form contracts, provisions providing for standing dispute boards will already be included. This is the case in the 1999 standard conditions of contract for construction (the "Red Book"); plant and design-build (the "Yellow Book"), and EPC/Turnkey projects (the "Silver Book"), as well as in their subsequent 2017 editions, in which the boards were renamed dispute *avoidance and* adjudication boards ("DAABs") to emphasize their role in dispute avoidance.(*80)

76 Where the parties do not make use of the FIDIC standard form contracts, they may adopt or incorporate the dispute board rules of one of the various institutions that have developed them, including the International Chamber of Commerce, the Chartered Institute of Arbitrators, the American Arbitration Association, CIETAC, and the Chinese Arbitration Association(*81), or define their own rules. The ICC Dispute Board Rules,

(*76) FIDIC Red, Yellow and Silver Books 2017, Clause 21.6.

(*77) ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Article 4.

(*78) ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Article 6.

(*79) See, e.g. ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Articles 4-6, 16-17; FIDIC 2017 Red Book, Clause 21.4; FIDIC 2017 Silver Book, Clause 21.4.4.

(*80) L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*81) ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Article 5, available at https://iccwbo.org/wp-content/uploads/sites/3/2024/02/ICC-DRS873-5-ENG-Dispute-Board-Rules-2015-2018-Appendices.pdf; Chartered Institute of Arbitrators, Dispute Board Rules 2014 available at www.ciarb.org/media/3934/ciarb-dispute-board-rules-practice-standards-committee-august2014.pdf; American Arbitration Association Dispute Resolution Board Hearing Rules and Procedures effective from 1 December 2000; China International Economic and Trade Arbitration Commission, Construction Project Dispute Review Rules 2015, available at www.cietac.org/index.php?m=Article&a=show&id=2776&l=en; Chinese Arbitration Association International Arbitration Centre, CAA Construction DAB Rules 2016, available at http://en.arbitration.org.tw/DAB_Class.aspx?BigClassID=0d92a49c-ab6a-41e6-90fb737fdd518653.

for instance, offer the choice between dispute review boards, dispute adjudication boards, or combined dispute boards and offer a set of rules governing the procedures before each.(*82)

77 The challenge faced by contractual adjudication, however, is the absence of any enforcement mechanism for the decision of the adjudicator or disputes board, a feature of statutory adjudication that – as discussed above – is critical to its success.(*83) Ultimately, the parties' undertaking to comply with the decision of the adjudicator or dispute board pending final resolution of the dispute in arbitration (e.g., where a notice of dissatisfaction was issued), like the parties' agreement that those decisions shall become final and binding in the absence of such a notice of dissatisfaction within the agreed time period, are purely contractual. A party's failure to comply with the decision of a dispute board can thus only be sanctioned through the remedies for breach of contract under the applicable law. However, the prospect of having to initiate legal proceedings during the course of a project to enforce the decision of the adjudicator or disputes board is antithetical to the very principle of adjudication, which is precisely to avoid the need for legal proceedings – not to create a further reason to pursue them.

78 This has resulted in efforts to replicate contractually the enforceability of adjudicator decisions that exist in statutory adjudication, the idea being – not that the enforcement mechanisms be used, but instead that the prospect of enforcement will result in greater compliance. FIDIC, for example, has sought to address enforcement concerns in the 2017 editions of its Red, Yellow, and Silver Books by clarifying that an arbitral tribunal has jurisdiction to enforce the decision of a DAAB by way of an interim or partial award pending its determination of the dispute in its final award.(*84) Similarly, the ICC's standard dispute board model clauses provide that where one party fails to comply with a decision of the dispute board, the other party may "refer the failure itself" to arbitration, and the party that failed to comply "shall not raise any issue as to the merits of the Decision as a defence to its failure to comply without delay with the Decision."

79 Against this backdrop and as part of its attempts to accelerate the efficient resolution of disputes on an international level, the United Nations Commission on International Trade Law recently adopted a model clause on adjudication that seeks to address these concerns by expanding the contractual agreement to adjudicate to also include an

(*82) ICC Dispute Board Rules effective from 1 October 2015 (with appendices effective 1 October 2018), Article 5, available at https://iccwbo.org/wp-content/uploads/sites/3/2024/02/ICC-DRS873-5-ENG-Dispute-Board-Rules-2015-2018-Appendices.pdf.

(*83) J. Jenkins, 'Dispute Boards', in *International Construction Arbitration Law (Third Edition)*, Arbitration in Context Series, Volume 1 (Kluwer Law International, 2021), Chapter 5, Section 5.08[A]; and L. Patterson and N. Higgs, 'Dispute Boards' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*84) FIDIC Red, Yellow and Silver Books 2017, Clause 21.7.

enforcement mechanism for the decision of the adjudicator. Triggered by a 2022 proposal of the Swiss delegation aimed at developing a system of international adjudication that could offer the benefits of statutory adjudication on an international level(*85), UNCITRAL's Working Group II was tasked in July 2022 to consider ways to further accelerate the resolution of disputes, including through adjudication.(*86) Between October 2022 and February 2024, Working Group II developed a series of Model Clauses on Specialised Express Dispute Resolution (SPEDR), which were approved by UNCITRAL at its 57th session in June/July 2024.(*87)

80 The model clause sets out the parties' binding agreement to an adjudication process whereby disputes may be submitted to an adjudicator for determination within a short timeframe.(*88) The parties' undertaking to comply with that determination is subject to direct enforcement by means of a fast-track, highly expedited, arbitration proceeding in which the tribunal considers only whether a party has breached its obligation to comply with the adjudicator's determination and, if so, orders such compliance, resulting in an enforceable arbitral award mandating compliance with the adjudicator's determination. As in the case of statutory arbitration, compliance with the adjudicator's decision is without prejudice to the parties' right to submit the same matter to an arbitral tribunal for a final resolution on its merits.

C. Expert determination

81 Expert determination is a process whereby parties agree to submit certain disputes, usually those of a technical or accounting nature, to one or more independent experts for determination. While it can be used during the course of a project, it is more typically used at the end, to assist the parties in resolving disputes before initiating – and often as a pre-condition to the initiation of – arbitration or litigation.(*89) Such disputes might relate, for instance, to the existence/cause of defects; the cause of project delays; or the preparation of the final accounts.

(*85) Note by the Secretariat on the Settlement of Commercial Disputes: Adjudication, Document A/CN.9/WG.II/WP.225 dated 27 January 2022, annexing the Proposal by Switzerland, available at https://documents.un.org/doc/undoc/gen/v22/003/13/pdf/v2200313.pdf?token=I60ygBmzqJB4AlDomk&fe=true.

(*86) Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17), paras. 223–225, available at https://documents.un.org/doc/undoc/gen/221/088/8e/pdf/2210888e.pdf?token=MjTHV6xiKCmQpEMAHo&fe=true.

(*87) Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17 (A/79/17).

(*88) Final version of model clause.

(*89) Bernd EHLE, 'Expert Determination' in ROQUETTE/PRÖSTLER, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., p. 69, para. 13. On (binding) expert determination in Belgium, see, e.g., M. Von Kuegelgen, La tierce décision obligatoire. Applications en matière immobilière, *Jurim Pratique* 2023, liv. 3, 251-268; B. Kohl et A. Rigolet, "La tierce décision obligatoire, un mode alternatif de règlement des litiges", *in* O. Caprasse (ed.), *Modes alternatifs de règlement des conflits. Réformes et actualités*, Commission Université Palais, n° 178, Limal, Anthemis, 2017 pp. 121-162; O. Caprasse, "De la tierce décision obligatoire", *JT* 1999, pp. 565-576.

82 Expert determination is typically agreed upon construction contracts with reference to the model rules of a dispute resolution institution that administers and supervises expert determination procedures.(*90) Notable institutions that offer expert determination services are the ICC(*91), CEPANI(*92), the German Arbitration Institute(*93), the LCIA(*94), and the Centre for Effective Dispute Resolution(*95), the Institute of Chemical Engineers(*96), and the Institute of Arbitrators & Mediators Australia.(*97) However, parties are also free to conduct *ad hoc* expert determination proceedings for which they can design the procedural and administrative aspects of the proceedings 'from scratch'.(*98)

83 Expert determinations are usually limited to narrow issues, most often factual and of a highly technical nature, that are disputed and that the parties agree to have resolved by a third party with the requisite expertise to do so.(*99) The decision maker in an expert determination is thus typically an industry or technical expert, selected and engaged on the basis of his or her qualifications and know-how, and entitled to draw upon it.(*100) The expert may be designated or chosen by the parties or – where the parties have selected institutional rules – by an institution. Sometimes the contract will provide that, where the parties are unable to agree on an expert, they may apply to the courts for a designation. Experts are rarely legally trained, as a result of which expert determinations are often conducted in a less 'legalistic' manner: experts do not necessarily decide matters solely on the basis of parties' evidence and submissions, and they are not required to provide reasons for their determination.(*101)

(*90) There are limited statutory provisions governing expert determinations: see B. Ehle, 'Expert Determination' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., pp. 71-72, paras. 22-25.

(*91) See the ICC Rules for the Administration of Expert Proceedings effective 1 February 2015. See also the ICC Rules for the Appointment of Experts and Neutrals effective 1 February 2015.

(*92) CEPANI Rules of Technical Expertise, available at https://cepani.be/files/publications_documents/documents/rules/expertise_en.pdf. On the application of the CEPANI Rules of Technical Expertise in the context of construction disputes, see B. Kohl, "Le règlement des litiges immobiliers sous les auspices du Centre belge d'arbitrage et de médiation (Cepani)", *Jurim Pratique* 2014, pp 262-267.

(*93) DIS Rules on Expert Determination effective 1 May 2010.

(*94) LCIA draft rules/clause on expert determination where the LCIA acts as appointing authority and administrator, available at https://www.lcia.org/Search/Default.aspx?q=expert+determination (last accessed 8 July 2024).

(*95) CEDR Model Expert Determination Agreement 2019, available at https://www.cedr.com/wp-content/uploads/2019/10/CEDR-Expert-Determination-Agreement-2019.pdf (last accessed 8 July 2024).

(*96) Institution of Chemical Engineers White Book 2016.

(*97) IAMA Expert Determination Rules effective from 3 August 2016, available at https://www.resolution.institute/common/Uploaded%20files/Rules%20and%20Regulations/RI-Expert-Determination-Rules.pdf (last accessed 8 July 2024).

(*98) B. Ehle, 'Expert Determination' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., p. 69, para. 15.

(*99) B. Ehle, 'Expert Determination' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., pp. 68-69, para. 5.

(*100) B. Ehle, 'Expert Determination' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., p. 68, para. 6.

(*101) M. Smith, H. McCarthy and J.-H. Ho, 'Alternative Dispute Resolution in Construction and Infrastructure Disputes' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

84 Expert determinations, like the decisions of contractual adjudicators and dispute boards, are not directly enforceable.(*102) However, in contrast to such decisions, which are by definition interim decisions that may be revisited in subsequent litigation or arbitration, parties usually agree that the expert determination will be final and binding(*103), save in exceptional circumstances such as fraud, partiality of the expert, or a material departure from the expert's instructions.(*104) The key advantage of expert determination in such situations lies in its potential to eliminate the need for subsequent arbitration or litigation by bindingly resolving a factual or technical issue upon which the outcome of a future dispute may depend. Indeed, where a dispute turns on the very factual or technical issue that was submitted to the expert for determination, having that issue resolved in a binding manner early on may, in some cases, de facto resolve the dispute or at a minimum facilitate the parties' settlement of the dispute by eliminating the uncertainty relating to one key element thereof. Parties usually agree that an expert determination will be final and binding, except in conciliation.

D. Mediation and conciliation

i. Introduction

85 Research undertaken in 2010 by King's College London, in association with the Technology and Construction Court (TCC), showed that, in England, mediation is used to resolve about 35 % of all disputes that go to court in relation to construction work.(*105) In summary, the findings show that parties do not generally wait until a hearing is imminent before attempting to settle their dispute, and successful mediations are mainly carried out during the exchange of submissions or as a result of disclosure.(*106) Of course, it is pointed out that the cost savings attributed to successful mediations are the most important incentive for parties to consider mediation.

86 There is no obligation for any party to reach a settlement through ADR, and the neutral mediator cannot compel the parties to enter into an agreement or to adhere to any

(*102) B. Ehle, 'Expert Determination' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., p. 68, para. 8.

(*103) See, e.g. article 13.4 of the CEPANI Rules of Technical expertise, which provides that "Unless otherwise agreed, the findings and conclusions of the expert(s) shall be binding on the parties to the same extent as their contractual provisions".

(*104) B. Ehle, 'Expert Determination' in Roquette/Pröstler, *International Construction Disputes* (Bloomsbury, 2022), Chapter 2.C., p. 68, para. 8; M. Smith, H. McCarthy and J.-H. Ho, 'Alternative Dispute Resolution in Construction and Infrastructure Disputes' in *The Guide to Construction Arbitration – Fifth Edition* (Global Arbitration Review, 2024), available at https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition (last accessed 9 July 2024).

(*105) See N. Gould, C. King and P. Britton, *Mediating Construction Disputes – An Evaluation of Existing Practice*, London, King's College ed., 2010.

(*106) However, the report shows that where settlement was reached prior to judgment, the most successful method used was "classical" negotiation, not mediation.

agreement that may be made during the ADR process. A dispute is only settled when a formal agreement is reached and (usually) documented in writing by the parties.

87 Mediation and conciliation very often express a similar process.(*107) They both involve the use of a neutral third party to assist in resolving disputes. The primary difference between the two is the role of the neutral party.

ii. Mediation(*108)

88 In mediation, the neutral party facilitates discussions between the disputing parties, helping them to understand each other's perspectives and find a mutually acceptable solution. The mediator does not impose a decision but works to guide the parties towards a settlement. The process is voluntary, and the outcome is non-binding unless the parties reach an agreement and decide to formalize it.

89 The mediator is a qualified individual who assists the parties in reaching a compromise. The relationship between the mediator and each party is crucial for successful mediation. The first significant step in the mediation process is the choice of the mediator. This is particularly important for construction disputes, which often involve highly specialized technical knowledge. In addition to the skills required for commercial mediation, the parties are usually looking for a person who can also demonstrate a certain amount of experience: this could be an engineer or a person with a good knowledge of the technique concerned, or a lawyer who, through his or her experience, can demonstrate that he or she has acquired a certain knowledge of the practices and specificities of the construction industry.(*109) Alternatively, the parties can authorize the mediator

(*107) Sometimes, "the term conciliation is employed describing a method which in reality displays characteristics of mediation and vice versa" (E. Zlatanska, "Mediation and Conciliation: In Pursuit of Clarity", in M. O'Reilly (ed), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb), Sweet & Maxwell, 2016, Volume 82, Issue 2, p. 146). The meaning of mediation and conciliation can vary between different countries and legal systems. The author points out that mediation originates from *mediare* which means "to occupy a middle position" whereas conciliation comes from *conciliare* meaning "to bring together". In other words: "it is undeniable that mediation and conciliation are two separate and autonomous ADR mechanisms but they both lack clear and uniform definitions" (E. Zlatanska, *l.c.*).

(*108) The mediation process is clearly not a dispute resolution technique specific to the construction sector. It is a broader process that potentially covers any commercial dispute. We will only cover some of the essential elements of this process. Many books on the mediation process have been published. See, for example, at international level, K.J. Hopt and F. Steffek, *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2012; R. Feehily, *International Commercial Mediation. Law and Regulation in Comparative Context*, Cambridge, Cambridge University Press, 2022; E. Filler, *Commercial Mediation in Europe: An Empirical Study of the User Experience*, Kluwer Law International, 2012.

(*109) "The selection of the mediator is as much about choosing the person with the right interpersonal skills as it is about the mediator's knowledge of the subject matter of the dispute. And it is much more about picking the mediator with the right interpersonal skills than finding the person who will determine what the 'right' answer is" (J. Jenkins, *International Construction Arbitration Law*, 2nd ed., Kluwer Law International, 2021, p. 145). The author sets out the various criteria to be considered when selecting a mediator, including the familiarity with the subject matter of the dispute or of the businesses within which the parties operate, the mediator's reputation, his/her availability, and, as far as possible, the proof that the mediator received

to call on the services of an independent technical expert, who will provide him or her with a better technical understanding of the dispute between the parties. The mediator will thus be better informed of the parties' respective requests and will be able to organize the mediation while being fully aware of the technical constraints of each position (and of the technical consequences of any proposals the parties may make during the mediation process). Expert advice may also enable the mediator to formulate an accurate solution for the parties when this solution is based on technical elements. Moreover, the mediation rules of the main institutions may provide explicitly the possibility for the mediator to call on the services of an expert.(*110)

90 Information shared with the mediator is kept strictly confidential. This confidentiality allows each party to speak openly and honestly about the dispute from their perspective and to discuss possible settlement terms.(*111) The mediator uses this confidential information to form an independent view of the dispute.

91 Unlike a judge or arbitrator, the mediator's perspective is not constrained by legal or procedural rules but only by the information provided by the parties: the mediator seeks information that extends beyond what is typically shared with a judge, arbitrator, or justice of the peace.

iii. Conciliation

92 Conciliation is a form of dispute resolution similar to mediation in which a neutral third party – a "conciliator" – is engaged by parties to help them reach a settlement of their dispute.(*112) In conciliation, the neutral party may take a more active role in proposing solutions based on legal and factual assessments of the dispute: whereas the mediator is an impartial third party who only helps the disputing parties reach an

---

a theoretical and practical training regarding mediation processes. The author also points out the likely prejudices of the mediator: "[…] time and time again the question is asked whether the mediator is a 'black letter lawyer' or a 'commercial man', or whether the mediator is a 'contractor's' or an 'employer's' man. These matters are, in practice, clearly of great significance to the users of the medication process and for that reason should not be ignored. After all, the process requires the parties to reach agreement, and it is in no one's interest if one party perceives the mediator as being partial to the position of the other. However, while there is often great pressure and much temptation to influence the process of mediation, much as is (quite properly) done when selecting an arbitrator, the best result must be to select a mediator who does not have a reputation for favouring the position of one party or the other" (J. Jenkins, *l.c.*, p. 146).

(*110) For instance, art. 7.7 of the CEPANI Mediation Rules reads as follows: "*In the context of, and for the benefits of, his/her mission, the Mediator may, with the consent of the Parties, heard third Parties if they accept to be heard or, when it appears useful in the search for a solution, consult an Expert in one or more specific fields with a view to aiding the Parties*".

(*111) It should not be forgotten that, in the construction industry as in some other sectors, disputes relating to defects or technical problems may have a direct impact on certain technical construction data or commercial information (notably the calculation of margins and profits) that the company wishes to keep confidential.

(*112) It sometimes explained that parties would usually resort to mediation when there is a substantial dispute that has already surfaced and that is very difficult to resolve without outside assistance. In contrast, conciliation would be used almost always preventively, as soon as a dispute or misunderstanding arises. Thus, "the conciliator attempts to stop a substantial conflict from developing" (E. Zlatanska, *op. cit.*, p. 150).

agreement (the mediator being in charge of the process of seeking to resolve the problem but not the outcome), the conciliator actually evaluates the dispute and strives to construct a just resolution that he proposes to the parties for their approval or rejection.(*113)

93 The conciliator's suggestions are usually not binding, but they can provide a basis for negotiation and settlement. This is usually determined by the contract governing the dispute. The process can be more structured than mediation and may be preferred in cases where legal interpretations are necessary.(*114) In some cases, the parties may even extend the conciliator's mission, and ask him or her to provide an opinion (legal and/or technical) on their dispute, a mechanism going more in the direction of other forms of ADR, such as early neutral evaluation (discussed below in Section E).

94 The benefits of conciliation are similar to those often cited in favour of mediation: conciliation is generally less time-consuming (and therefore cheaper) than litigation or arbitration, is flexible (with no prescribed procedure), and helps re-establish a relationship of trust between the parties.

iv. Conduct of the Mediation/Conciliation

95 The mediator will usually prepare a draft mediation agreement, which, among other things, clarifies that those leading the mediation for each party must have the necessary authority to settle. This is particularly important in cases where third parties, such as subcontractors, professional advisers (such as engineers or architects), insurers, or lenders, have an interest in the outcome. While there is usually some understanding of these complexities, it is essential for the party needing to report to and obtain approval from other interested parties to ensure these parties are engaged in the mediation process.

96 After the introductory and administrative stages of the mediation, the parties are typically invited to present position papers to the mediator and each other. The functions of the position paper are: "(i) to educate the mediator about the parties' current positions and the possible avenues for a successful settlement and (ii) to educate the parties' decision-makers (who, likely as not, will not previously have had direct exposure to the other party's case) about the key factors he should take into account in agreeing to a settlement on the terms that the other party considers acceptable".(*115)

(*113) E. Langleland, "The Viability of Conciliation in International Dispute Resolution" (1995) *50 Dispute Resolution Journal* 34, p. 41.

(*114) However, this is not a rule as such. In some cases, conciliation can be a less structured process.

(*115) Jenkins, *International Construction Arbitration Law*, 2nd ed., Kluwer Law International, 2021, p. 148.

97 Following the exchange of position papers (and possibly reply position papers), the mediator can, before the mediation hearing ask follow-up questions to suggest areas that might need further development or clarification in the written presentations. Where appropriate, if the issues involve specific technical knowledge, the mediator may consider, with the agreement of the parties, calling on the services of an expert in the field concerned, in order to gain a better technical understanding of the interests or issues involved.

98 After the hearing (or, where appropriate, after several hearings and, if necessary, individual meetings between the mediator and each party separately), it is generally possible to determine whether an agreement between the parties can be envisaged. First, it may become evident that no further progress can be made, making it pointless to continue. In this case, the parties may draw up a document establishing that no agreement has been reached at the end of the mediation process. This is not a requirement, but will sometimes be requested, especially where the arbitration clause first requires the parties to attempt mediation. Drawing up such a document noting the absence of agreement between the parties at the end of the mediation process makes it easier to prove that the mediation stage was attempted in good faith by the parties (in particular by the claimant).

99 The second possibility is that the parties reach an agreement. When this occurs, the challenge for the mediator and the parties is to document the settlement in an acceptable form, ideally before the hearing concludes. Typically, only relatively straightforward disputes can be fully documented with the available resources at the hearing, even if both parties' lawyers are present. This is particularly true in the case of construction disputes, where the agreements are frequently not (solely) financial, but also technical in nature. For example, if the agreement resulting from mediation includes an undertaking by the building contractor to carry out certain work, technical specifications may need to be drawn up. However, having a written record of the agreement that is signed by the parties before leaving the mediation hearing, even if it is only in simple terms and merely records the heads of agreement, greatly reduces the risk of the agreement being reconsidered and potentially falling apart before being finalized.

v. Institutional or ad hoc mediation/conciliation

Advantages of institutional mediation/conciliation

100 Mediation can be organized by the parties themselves. In this case, they must determine the details of the mediation procedure, the method for setting the mediator's fees, and the effects of any agreement reached at the end of the mediation process.

101 The parties may, however, agree to use a dispute resolution center, which will provide them with mediation rules and certain ancillary services.(*116) Every institution has its own set of rules, which provide a framework for the mediation process, and its manner or form of administration to assist the parties and the mediator in the process. For example, the ICC's International Centre for ADR, CEPANI, and the Swiss Arbitration Centre offer assistance services to parties wishing to use mediation.

102 Institutional mediation, conducted under the institution's rules, provides significant benefits to the overall process. This advantage stems from comprehensive case management that persists throughout, even after the mediator's appointment. Institutional mediation influences key aspects such as selecting mediators from a pool of trained and experienced professionals(*117), using tried and tested procedural tools, defining the mediator's role and privileges, ensuring confidentiality, managing costs, and more. These benefits outweigh any perceived high costs.(*118)

103 The institution sets the fees payable to the mediator (usually based on an hourly rate) and administers the financial aspects of the procedure. The institution also provides assistance to the parties, for instance, in cases of disagreement over the place or language of the proceedings, objection to the proceedings, lack of payment, stay of the proceedings, challenge and/or replacement of the mediator, etc.

104 Interestingly, since such institutions offer several methods of dispute resolution, they can also offer the parties a combination of mediation and another method of resolution. For example, if, as is often the case in construction disputes, there are highly specialized technical issues to be considered, the institution selected by the parties to organize the mediation can also provide support by appointing an expert to assist the mediator (if necessary) with technical issues.

Specific institutions for the construction industry: the situation in Belgium

105 In Belgium, CEPANI is considering creating a division specializing in the settlement of construction industry disputes. In the coming months, CEPANI will therefore provide a range of dispute resolution tools specifically for the construction sector. CEPANI also plans to compile a list of arbitrators, mediators, and experts specialized in the construction sector.

(*116) For a comparison between the mediation rules of selected institutions, see G. Sharp, "International Mediation – A Comparative Table of Institutional Mediation Rules", *Kluwer Arbitration Blog*, September 28, 2014.

(*117) In Belgium, CEPANI members can indicate in their profile that they are accredited mediators (accreditation by the Federal Mediation Commission). This helps the CEPANI Appointments Committee to select a mediator if the parties wish the mediation to be conducted by an accredited mediator.

(*118) See S. Garg and T. Karia, "Chapter 5: Institutional Mediation", *in* G.T. Dunna (ed), *Conciliation and Mediation in India*, Global Trends in Dispute Resolution, Volume 11, Kluwer Law International, 2021, p. 132.

106 In addition to CEPANI, which offers a variety of dispute resolution tools dedicated to the construction industry, including mediation, there are at least two other Belgian institutions dedicated specifically to the resolution of construction disputes through mediation and conciliation.(*119) These are (i) the *Chambre de Conciliation, d'Arbitrage et de Médiation en matière immobilière* and (ii) the *Commission de conciliation construction.*

107 The *Chambre de Conciliation, d'Arbitrage et de Médiation en matière immobilière* ("CCAI") was created in 2005 by various local associations of notaries, lawyers, architects, land surveyors, and expert architects. The CCAI brings together lawyers and technical experts who are supposed to complement and assist each other for the purpose of resolving disputes in a fast and cost-effective manner. One of the distinct features of the CCAI procedure is the collaboration that exists between legal and technical experts for the resolution of disputes. The CCAI Rules provide that mediation and conciliation must be conducted by a college composed of one technical expert and one lawyer. In the case of arbitration, the CCAI Rules provide that a three-member arbitral tribunal must, as a rule, include at least one technician and one lawyer. Disputes will be resolved by single arbitrators only in exceptional cases or upon the request of both parties.(*120)

108 The *Commission de conciliation construction* ("CCC") was set up in 2001 by four institutions: the Confédération de la construction (now "Embuild" an organization of employers comprising approx. 15,000 businesses in the field of construction); the consumers' association Test-Achats; the Bouwunie (formerly known as Nacebo, the Flemish federation of the SMEs in construction); and the Royal Federation of Architects in Belgium. The Flemish Architects organization (the NAV) joined the CCC in 2005.(*121) Article 7 of the CCC's Procedural Rules sets forth a model clause that the parties can insert into their contracts. It obliges the parties to insert the CCC's model clause into all the contracts they conclude with third parties for the execution of the works of a project. Consequently, all the contractors, subcontractors, and architects working on that project should, in principle, be bound by the same conciliation clause. The jurisdiction of the CCC is limited and well-defined. First, the dispute must relate to defects of a technical nature and any related dispute arising from them. Second, a consumer must be a party to the dispute. Disputes exclusively between professionals are expressly excluded from the CCC's jurisdiction. Finally, the works must have been

(*119) See S. Bourgois, D. De Block, B. Kohl and R. Vermeersch, "Dispute Resolution in the Construction Industry: Belgium", *International Construction Disputes Book*, London, Globe Business Publishing, pp. 325-337.

(*120) The collaboration between the legal and the technical ADR experts increases the understanding of the dispute and the chances of amicable settlement between the parties. However, in purely legal disputes, having the presence of two mediators or conciliators seems redundant.

(*121) For an overview of the conciliation process under the *Commission de conciliation construction*, see B. Van Lierde, "Commission de conciliation construction: quinze ans d'ADR des litiges dans la construction résidentielle", *For.Immo.* 2016, liv. 10, 3; B. Kohl, "La Commission de conciliation-construction. Deux années d'activité", *Droit de la Consommation*, n° 65, 81-85.

ordered or purchased off plans by the consumer for his or her personal needs.(*122) According to the CCC's statistics(*123), approximately 100 cases are handled by the CCC every year. In the great majority of cases (85 %), disputes are submitted by consumers. The CCC has a relatively high success rate: an average of three out of four cases are settled amicably by the parties.

vi. International and national regulations in relation to mediation/conciliation

The Mediation Directive

109 In 2008, the European Union adopted the "Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters" (O.J, 24/05/2008, nr. L 136/3) ("the Mediation Directive") to promote the amicable settlement of disputes, including mediation, particularly in cross-border cases.(*124) (*125) This Directive requires Member States to establish mechanisms ensuring that agreements reached through mediation can be made enforceable, and these agreements are recognized and enforceable in other Member States under existing enforcement legislation. Although the Directive encourages mediation and identifies a number of potential advantages of mediation, it does not impose an obligation on parties to mediate. Nor does it contain detailed guidelines for the conduct of a mediation; rather it provides high-level principles. It envisages that Member States will create their own mediation guidelines in accordance with their own procedures.

110 The Directive's impact has, however, been limited, leading to a 2017 European Parliament acknowledgment that it has not met its goals of promoting mediation.(*126)

(*122) The CCC-nominated conciliator has in fact a dual mission. On the one hand, he or she must try to make the parties come to an agreement during the entire duration of the mission. On the other hand, the conciliator must observe and consider all the necessary elements regarding the technical defects. The combination of conciliation and expertise makes sense in the framework of construction disputes. A conciliator will indeed need to have a good understanding of the dispute in order to present the parties with acceptable proposals. The Procedural Rules also provides that the technical conclusions of the expert-conciliator are considered to be made contradictorily and bind the parties. Thus, even if the conciliation were to fail, the court would be able to rely on the conclusions of the expert-conciliation and would not necessarily have to order a preliminary judicial expertise.

(*123) See 2022 annual report of the *Commission de conciliation construction* (www.constructionconciliation.be).

(*124) For a in-depth commentary of the Mediation Directive and its application in the Member States, see a.o. N. Alexander, S. Walsh, et al. (eds), *EU Mediation Law Handbook*, Kluwer Law International, 2017; A. Howard, *EU Cross-Border Commercial Mediation: Listening to Disputants - Changing the Frame; Framing the Changes*, Kluwer Law International, 2021.

(*125) On the impact of the Mediation Directive on construction disputes, see a.o. H. André-Dumont, "The New European Union Directive on Mediation. Its impact on Construction Disputes" (2009) 26 *International Construction Law Review*, pp. 119 ff.

(*126) European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive').

National regulations

111 While Member States are obliged to transpose the Mediation Directive, they are free to adopt certain specific rules.

112 *In Belgium,* mediation was neither recognized nor regulated until 2001. The law of 19 February 2001 first introduced mediation in the field of family law matters. Eventually, by a law of 21 February 2005, mediation was extended to all civil matters. The Judicial Code now contains a chapter dealing exclusively with mediation (Chapter 7, Articles 1724 to 1737 BJC).(*127) As in other countries, this does not mean that mediation was not used in Belgium before 2001 or 2005; mediation was however a purely informal process.

113 The law of 21 February 2005 intends to develop the practice of mediation by, *inter alia,* giving guarantees as to the qualification of mediators(*128), and the confidentiality of the process, on the one hand, and introducing the possibility of a "judicial approbation" ("*homologation*") of the agreements reached in mediation, on the other hand. Article 1724 BJC provides that any dispute regarding negotiable rights can be referred to mediation.(*129)

(*127) See a.o. O. Caprasse et N. Biessaux "Chapitre 2 - La médiation" *in* de Leval, G. (dir.), *Droit judiciaire – Tome 2: Procédure civile – Volume 3*, 2nd ed, Brussels, Larcier, 2021, p. 327-349; H. Verbist, "Chapter 10: The Belgian Law on Mediation", *in* J.C. Goldsmith, A. Ingen-Housz, et al. (eds), *ADR in Business: Practice and Issues across Countries and Cultures I*, Kluwer Law International, 2006, pp. 249-262; G. De Leval, L. Golvers, G. Keutgen, P. Taelman, F. Van de Putte, H. Van Houtte, P. Van Leynseele, H. Verbist and P. Walters, *La Nouvelle Loi sur la Médiation – De Nieuwe Wet op de Bemiddeling*, Cepani, Brussels, Bruylant, 2005; D. Nigmatullina and J. Billiet, "Chapter 3: Belgium", *in* N. Alexander, S. Walsh, et al. (eds), *EU Mediation Law Handbook*, Kluwer Law International, 2017, pp. 59-92; M. Gonda, *Droit et pratique de la médaition*, JLMB Opus, Brussels, Larcier, 2021.

(*128) The parties are free to choose a non-accredited mediator but cannot thereafter submit their agreement to judicial approbation (*homologation*). The Federal Mediation Commission has regulated mediator training but training itself is provided by the private sector. The programme comprises a common core of 100 hours, divided into at least 40 hours of theoretical training and at least 40 hours of practical training: *the common core* covers the general principles of mediation (ethics/philosophy), study of the various Alternative Dispute Resolution Methods, applicable law, the sociological and psychological aspects and the process of mediation; *the practical exercises* cover the subjects in the programme and, through role-play, develop negotiation and communication skills. In addition to this common core, there are programmes specific to each type of mediation (at least 30 hours, freely divided between theoretical and practical training time). There are specific programmes in family, civil and commercial, labour, and "public entities" mediation (see the website of the Federal Commission for Mediation: https://www.cfm-fbc.be).

(*129) Initially, the Judicial Code used to restrict the power of legal persons under public law to have recourse to mediation. Such persons could only take part in mediation if so duly authorized by a law or a Royal Decree. In the field of construction, this restriction was significant given that public works form an important part of the activity. Fortunately, this article was amended by a law of December 21, 2018. Article 1724 of the Judicial Code now states that "any dispute of a proprietary nature, whether cross-border or not, *including disputes involving a legal person governed by public law*, may be the subject of mediation". Henceforth, in the event of a dispute with public authorities, building contractors or real estate developers (a.o.). can attempt mediation, for example in matters relating to the performance of public contracts (or in matters relating to town and country planning, the environment, expropriation, etc.).

114 When a (construction) contract contains a mediation clause, the parties are bound to respect it. Such a clause may also be invoked before a state court or arbitrator to whom a claim has been referred. Indeed, according to article 1725, § 2 BJC, "The judge or arbitrator hearing a dispute that is the subject of a mediation clause shall suspend consideration of the case at the request of a party unless the clause is invalid or has expired in relation to that dispute. The exception must be proposed before any other defense or exception. The consideration of the case will continue once the parties or one of them has informed the Clerk's office and the other parties of the end of the mediation."

115 An agreement reached between the parties in mediation has the same legal value as a contract. The Judicial Code allows the parties to increase the binding force of their agreements. Whether the mediation is voluntary or judicial, the parties may submit their agreements for judicial approval ("*homologation*") to be recorded in a consent judgment, provided that the mediation was conducted by an accredited mediator.

The Singapore Convention

116 The Singapore Convention on Mediation (2020) provides a framework for the enforcement of mediated settlement agreements across borders, enhancing the attractiveness of mediation for international construction disputes. This convention ensures that mediated settlements can be enforced in signatory countries, providing greater certainty and encouraging the use of mediation.(*130)

117 Until the introduction of the Singapore Convention on Mediation, an often-cited challenge to the use of mediation (or conciliation) in commercial disputes was the lack of an efficient and harmonized framework for cross-border enforcement of settlement agreements resulting from mediation (or conciliation).(*131) It was in response to this need that the Singapore Convention on Mediation was developed and adopted by the United Nations.

118 Only international commercial settlement agreements resulting from mediation can be enforced under the Singapore Convention on Mediation. This means that: (i) the mediation settlement agreement must be international (Art 1(1)); the mediation

(*130) For a commentary of the Convention, see a.o. N. Alexander, S. Chong and V. Giorgadze, *The Singapore Convention on Mediation: A Commentary*, 2nd ed., Global Trends in Dispute Resolution Series, Volume 8, Kluwer Law International 2022; G. Palao (ed.), *The Singapore Convention on Mediation. A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation*, London, Edward Elgar, 2022.

(*131) For the purposes of the Convention, the terms 'mediation' and 'conciliation' can be taken to be interchangeable. Consequently, for mediations or conciliations conducted in Belgium, it is irrelevant whether the mediation (or conciliation) was conducted with the assistance of a mediator accredited by the Federal Mediation Commission (within the meaning of Article 1726 of the Judicial Code) or with the assistance of a non-accredited mediator or conciliator: in both cases, the agreement reached in the mediation (or conciliation) can benefit from enforceability under the Singapore Convention.

settlement agreement must be commercial (which obviously includes construction disputes) (Art 1(2)); and (iii) the Convention does not apply to settlement agreements that are enforceable as a judgement or arbitral award (Art 1(3)(b)).

119 According to art. 3(1) of the Singapore Convention on Mediation, settlement agreements can be directly enforced by the competent authority of a Party state, in accordance with its rules of procedure and under the conditions laid down in the Convention. Where a dispute arises relating to a matter which has already been resolved by the settlement agreement, the agreement can be invoked to prove that the matter has been resolved (Art 3(2)).

120 The competent authority of a Party state to the Singapore Convention on Mediation may refuse to grant relief on the grounds laid down in the Convention, including: (i) if a party to the settlement agreement was under incapacity (Art 5(1)(a)), (ii) if the settlement agreement is not binding, null and void, inoperative or incapable of being performed under the law to which it is subjected, or has been subsequently modified (Art 5(1)(b)), (iii) if there was a serious breach by the mediator in terms of applicable mediator standards (Art 5(1)(e) SCM), or failure to disclose circumstances that raise doubts as to mediator impartiality or independence (Art 5(1)(f)), without which the party would not have entered into the agreement, or (iv) if granting relief would be contrary to the public policy of the Party-state (Art 5(2)(a)).

121 Lastly, Parties to the Singapore Convention on Mediation have been given the option to make the following reservations when signing the Convention: (i) to qualify that the Convention would not be applicable to settlement agreements to which its government or other public entities are parties (Art 8(1)(a)); (ii) to adopt an opt-in approach which provides that the Convention only applies to the extent that the disputing parties agree to its application (Art 8(1)(b)).

122 As of 1st August 2024, the Convention has 57 signatories and 14 parties. Notably, if some significant countries (such as Australia, Brazil, China, India, Japan, United Kingdom or United States), have signed the Convention (and some of them have ratified it), the countries of the European Union have not yet signed the Convention. In 2022, the European Union intended to engage in discussions with stakeholders to see where they stand on the question of whether the Convention can be beneficial. Moreover, there is the question of competence, as it has not yet been assessed whether this is a legal instrument of exclusive competence of the Union or whether there is shared competence of the European Union with its Member States. The EU Commission has made its internal

analysis and believes that it has competence, but it must still be decided whether this competence is exclusive.(*132)

E. Early Neutral Evaluation

123 Early Neutral Evaluation (ENE) is a process in which the parties engage a neutral third party to provide a non-binding assessment of the merits of their claims. This approach offers the advantage of obtaining a "private opinion on the dispute's merits from an independent, respected, and often expert source".(*133) There is no set procedure for ENE, and the key elements of the process are typically outlined in the underlying construction contract. ENE is usually conducted on a 'without prejudice' basis and may address factual disputes, technical issues, legal merits, or a combination of these. Unlike other alternative dispute resolution methods such as adjudication or expert determination, ENE does not conclude with a binding decision. The evaluator does not settle legal issues or suggest a particular resolution. Instead, the evaluator provides an assessment of what the likely outcome might be if the case were to proceed to full litigation or arbitration, which serves as a valuable motivation for the parties to come to an agreement.

124 The evaluation is privileged and non-binding unless the parties decide otherwise. ENE can result in a direct settlement or be followed by other ADR methods. It offers a swift, authoritative, and objective assessment of a claim's merits without incurring the expenses of arbitration or litigation. ENE is especially beneficial when parties have widely differing views on their chances of success and an inadequate understanding of litigation risks. It can help align the parties' expectations regarding future litigation or arbitration, provide a realistic indication of potential outcomes, and narrow down the issues to facilitate other ADR forms.

125 The parties and the appointed evaluator usually document their respective roles and responsibilities in writing. The agreement should be as detailed as possible for clarity. At a minimum, it should include clauses regarding the confidential and without prejudice nature of the process, the impartiality of the evaluator, the scope of documents each side must disclose, whether the evaluator must explain the reasoning behind the evaluation, the binding nature of the evaluation, the calculation of the evaluator's fees (and the repartition of such fees between the parties), the timetable and the procedure for conducting the ENE, etc.

(*132) See H. Verbist, "Report on Roundtable on the Position of the European Union on the Singapore Convention on Mediation" organized on 18 June 2021 by the European Law Institute (ELI) Slovenian hub and the Forum for International Concilation and Arbitration (FICA), 6 March 2022 (http://www.ecdr.si/index.php?id=214).

(*133) M. Smith, J. McCarthy and J.H. Ho, Alternative Dispute Resolution in Construction and Infrastructure Disputes, *G.A.R. Review*, 12 October 2023.

F. MINI-TRIAL

126 A mini-trial, also known as an executive tribunal, is a non-binding, flexible form of ADR in which each party presents its case, typically through legal advisers, to a mini-trial committee. The committee is comprised of a decision-maker each of the parties, chaired by a neutral that can be appointed by the parties or by a third party, such as an arbitral institution. The task of the committee is to reach a consensus and achieve a valid agreement between the parties.

127 The mini-trial helps the parties settle their disputes through the direct involvement of senior party representatives. For this mission to succeed, it is essential that each party appoint a person of sufficiently high level – the CEO of the company or a senior executive – to be able to take sufficient distance from the dispute and consider the interests of the company. The assessors must also be able to bind the company. The mini-trial process allows senior executives to consider the legal arguments from both sides and negotiate a settlement from an informed perspective, avoiding further legal procedures or remedies.

128 The mini-trial is considered more suitable than mediation for very large cases or when involving senior executives who have not previously been engaged with the case is desirable.(*134)

IV. Combining dispute resolution mechanisms & multi-tier clauses

129 With full-fledged arbitration or litigation proceedings serving as the last resort, and so many diverse mechanisms available to assist parties in the resolution of disputes along the way, the question of how best to combine the various available options arises. This is typically done by means of so-called "multi-tier dispute resolution" – or "escalation" – clauses, in which the parties lay out a series of procedures, or mechanisms, that they agree should (or must) be undertaken before any litigation or arbitration proceedings are commenced.

130 The purpose of escalation clauses is to ensure that the parties exhaust all possible means of resolving the dispute amicably before heading down the path of litigation or arbitration. Moreover, it is often thought that having ADR procedures already set out and provided for in the contract allows parties to pursue such mechanisms without having them perceived as a sign of weakness by the other side. When negotiating and agreeing on such escalation clauses, the parties can decide to make the individual steps

(*134) M. Smith, J. McCarthy and J.-H. Ho, "Alternative Dispute Resolution in Construction and Infrastructure Disputes", *The Guide to Construction Arbitration*, 5th ed., London, G.A.R., 2023.

of their escalation clause mandatory, i.e., make them *preconditions* to the initiation of any legal proceeding, or they can simply set forth the desired means of escalating a dispute. Drafting clauses to accurately reflect the parties' intentions in this respect can be important to avoid this issue giving rise to disputes at a later stage.

131 As discussed above, standard form contracts such as those offered by FIDIC provide that disputes must first be submitted to a disputes board for resolution, with arbitration following only thereafter, if a notice of dissatisfaction is issued and the parties are unable to amicably resolve the dispute thereafter.

132 When drafting their own contracts, parties are free to craft their own dispute resolution mechanisms and to agree on any number or combination of measures they wish; indeed, apart from litigation and arbitration on the merits, which are mutually exclusive with respect to a given scope, nearly all combinations are possible.

133 Typically, escalation clauses will begin by calling for the parties to attempt to amicably resolve the dispute, i.e., to simply negotiate, for a certain period of time. Indeed, direct communication between the parties aimed at mutually agreeable solutions without any third-party intervention is generally the preferred starting point due to its potential to resolve disputes quickly and simply. Frequently, contractual clauses will also identify *who* is to participate in such negotiations (e.g. members of the project team; CEOs or other management executives, whether individually or in the form of a steering committee; or members of the respective entities' management boards), often providing for an escalation among various levels of seniority. The idea here is to ensure that if disputes cannot be resolved at the project level by those most familiar with the details of the dispute, they should be timely brought to the attention of senior representatives who are further removed and more likely to seek commercial solutions aimed at preserving business relationships and avoiding unnecessary legal proceedings.

134 Thereafter, where direct negotiations between the parties have failed, parties either resort directly to arbitration or incorporate one of the other mechanisms described above that involve an independent and neutral third party to assist in some form. Adjudicators or dispute boards, whose primary purpose is to resolve disputes during the project, would typically already have been consulted and rendered their decisions by this stage, in particular where this is agreed to be a mandatory pre-requisite for the initiation of any subsequent legal proceedings. Accordingly, it is more typical to see escalation clauses provide for expert determinations or mediation or – albeit somewhat less frequently – for ENE or mini-trials, before resorting to arbitration or litigation.

135 Although multi-tier dispute resolution provisions are now standard in major international construction contracts, they must be drafted with care. Not only should the parties consider carefully the types of mechanisms that are most appropriate for the particular contract and project at issue, but parties should also be mindful that creating strict preconditions to their ability to initiate legal proceedings can give rise to difficulties, for instance where the initiation of legal proceedings is required to comply with statutes of limitations that might result in claims becoming time-barred. Moreover, the parties will want to ensure that such clauses are as clear as possible regarding what exactly is required from the parties and what the consequences of non-compliance will be. It is unfortunately the case that multi-tier clauses, whose purpose is to avoid costly and time-consuming litigation, end up giving rise to disputes, for instance regarding whether the contractually agreed steps were complied with and/or whether arbitration proceedings were commenced prematurely, something – in some jurisdictions – may have implications for the arbitral tribunal's jurisdiction. Depending on the parties' interests, their motivations in crafting a particular multi-tier dispute resolution clause, and the specific ADR mechanisms that are incorporated, it may be that simply providing for a process – without making that process a mandatory pre-requisite for the initiation of legal proceedings – will be sufficient to achieve the party's goals. This might be the case in particular where the ADR steps are in any event dependent on the parties' good faith participation in order to yield results.