HICAC 2026

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

HICAC 2026 – HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

› Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

09th & 10th APRIL 2026

REX HOTEL SAIGON
141 Nguyen Hue Boulevard,
Sai Gon Ward, Ho Chi Minh City

Scan the QR for more details

ORGANIZATION COMMITTEE

1 SCLVN

Society of Construction Law – Vietnam
Hội Pháp luật Xây dựng Việt Nam

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

SCLVN is a socio-professional organization, voluntarily established by Vietnamese citizens and organizations operating in the field of construction law.

Purpose: support each other to improve knowledge and qualifications, information exchange on construction law, contribute to create the stable and sustainable environment for construction activities in Vietnam and the country's socio-economic development.

SCLVN is operating under the administrative management of the Ministry of Home Affairs, the sector management of the Ministry of Construction and other related Ministries and government agencies on the activities of the Society in accordance with laws and regulations.

Individual members: Engineers, Architects, Lawyers, legal expert, Quantity Surveyor, commercial expert and other experts who are Vietnamese citizens operating in fields related to construction law.

Organizational members: Vietnamese organizations established in accordance with Vietnamese law, operating in the field of construction and construction law.

2 VIAC

Vietnam International Arbitration Centre
Trung tâm Trọng tài Quốc tế Việt Nam

VIETNAM INTERNATIONAL ARBITRATION CENTRE

Vietnam International Arbitration Center (in Vietnamese: Trung tâm Trọng tài Quốc tế Việt Nam, abbreviation: VIAC) was established under Decision No. 204/TTg dated 22 April 1993 of the Prime Minister of the Socialist Republic of Vietnam on basis of the merger of the Foreign Trade Arbitration Council (established in 1963) and the Maritime Arbitration Council (established in 1964). Since the Ordinance on Commercial Arbitration 2003, then replaced by Law on Commercial Arbitration 2010 and up to present, under the applicable Charter, VIAC is an independent organization – a legal entity. Arbitral Awards rendered by Arbitral Tribunals at VIAC are final and enforceable within Vietnam and in over 170 countries and territories that are State members of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention 1958).

As the leading Vietnamese arbitration & mediation institution with international credibility and, VIAC has administered thousands of domestic and international disputes in various fields of commerce, such as sale of goods, logistics, insurance, construction, finance and banking, joint venture projects, energy, infrastructure, etc. with involvement of businesses coming from almost all provinces in Vietnam. VIAC is also the only arbitration institution in Vietnam known to handle international disputes with participation of disputing parties from many countries and territories that are important trade and investment partners of Vietnam. Throughout three decades of its operation, VIAC has been spreading its wing as a reputable international mediation and arbitration institution in Vietnam, gaining trust and becoming the destination for both domestic and international business communities.

HICAC 2026

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

› Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

INTRODUCTION

Against the backdrop of rapid infrastructure expansion and increasingly complex construction projects, Vietnam's construction industry is facing heightened dispute risks and growing demand for efficient, internationally aligned dispute resolution mechanisms. This calls for a dedicated forum to facilitate timely dialogue on emerging trends, practical approaches, and developments in construction arbitration, addressing key opportunities and challenges in both domestic and cross-border contexts.

Building on the success of HICAC in previous years, SCLVN and VIAC are pleased to co-organize the **Ho Chi Minh City International Construction Arbitration Conference – HICAC 2026**, bringing together construction businesses, arbitrators, counsel, experts, and practitioners to exchange insights and promote best practices in construction arbitration.

Please scan this QR code to get the latest updates on and how to register for **HICAC 2026.**

05
Main sessions

40+
Domestic & Foreign Experts

07+
Sideline events

150+
In-person Participants

20+
Partners

Gold Sponsos

Silver Sponsos

Venue

REX HOTEL SAIGON,
141 Nguyen Hue Boulevard, Sai Gon Ward, Ho Chi Minh City

EVENT TIMELINE

	Morning section	Afternoon section	Evening
06-07/04 Monday & Tuesday	Workshop | **FIDIC Claims And Disputes Course**		
08/04 Wednesday	Side Event – by SIAC | **Workshop on "Climate change and construction arbitration"** Liberty Central Saigon Riverside Hotel (Apollo 1+2, Level 02, 17 Ton Duc Thang, Sai Gon Ward, HCMC Side Event – by ASA | **Workshop on "Comparative Perspectives on Construction Disputes: International Practice and Vietnamese Law"** Caravelle I, Level 3 – Caravelle Hotel (19-23 Lam Son Square, Saigon Ward, HCMC)	Side Event | **Asian ADR & Construction Roundtable 2026** Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC	**WELCOME RECEPTION** Hoa Mai Restaurant (5th floor, Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC)
09/04 Thursday	**GENERAL SESSION - Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives** Lotus Ballroom (1st floor – Executive Wing), Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC	**SESSION A – International Construction Contracts** Lotus A (1st floor – Executive Wing), Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC **SESSION B – Dispute Avoidance And Resolution Mechanisms For Construction Activities** Lotus B (1st floor – Executive Wing), Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC	**GALA DINNER** (for Speakers, Sponsors, Delegates and Paid Guests)
10/04 Friday	**SESSION C – Topical Issues In Construction Arbitration** Lotus A (1st floor – Executive Wing), Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC **SESSION D – Regional Construction Arbitration** Lotus B (1st floor – Executive Wing), Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC	Side Event – by VIAC & SCLVN | **Seminar on "Lessons from Metro and Railway Projects: Practical Challenges and Opportunities in Managing Contracts and Risk"** Lotus A (1st floor – Executive Wing), Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward, HCMC	
11/04 Saturday	Networking event | **VIAC – HCMC Branch Side visit and Ho Chi Minh City tour** (For Speakers, Sponsors, Delegates, and Full-package guests)		
12/04 Sunday	Side Event – by SCLVN | **Workshop on "Making and Writing of DAAB Decisions & Opinions"** Liberty Central Saigon Citypoint Hotel, Apollo 2 Room, 2nd Floor 59–61 Pasteur Street, Sai Gon Ward, HCMC		

SPEAKERS

Mr. **NGUYEN BAC THUY**

Head of Economics and Construction Contracts – Department of Construction Economics – Ministry of Construction, VIAC Listed Arbitrator, Member of Executive Committee of Society of Construction Law – Viet Nam (SCLVN)

Mr. **VU ANH DUONG**

Permanent Vice President and General Secretary, Vietnam International Arbitration Centre (VIAC)

Mr. **ĐO KHOI NGUYEN**

Partner, YKVN;
Head of International Arbitration

Ms. **VU THI HANG**

Chief of Secretariat, Member of the Scientific Council , Viet Nam International Arbitration Centre (VIAC)

Mr. **NGUYEN NAM TRUNG**

Chair of Society of Construction Law – Vietnam (SCLVN), FIDIC Certified Contract Manager/ Trainer/Adjudicator

Mr. **LEE SWEE SENG**

Federal Court Judge
Federal Court of Malaysia

Prof. **SARWONO HARDJOMULJADI**

FIDIC Ambassador and FIDIC Accredited Trainer; Dispute Avoidance and Adjudication Board

Mr. **RATAN SINGH**

Chairman of Society of Construction Law – SCL India

Mr. **VU LE BANG**

Co-managing partner at Nishimura & Asahi (Vietnam) Law Firm in HCMC

Mr. **MINO HAN**

Partner at Peter & Kim

Ms. **NGUYEN PHUONG TRINH**

Founding Partner of TNP Law
Vice chair of Society of Construction Law – Vietnam (SCLVN)

Ms. **NGUYEN THI HOA**

Lecturer at Ho Chi Minh City University of Law (Vietnam)

Ông **ANEL IDRIZ**

Giám đốc & Nhà sáng lập tại Alternative Logic

Assoc. Prof. **NASEEM AMEER ALI**

Associate Professor,
Massey University (New Zealand)

SPEAKERS

Ms. JOANNA SEETOH

Accredited Specialist in Building & Construction Law, Fellow of the Singapore Institute of Arbitrators

Mr. NGUYEN THANH LONG

FIDIC Certified Trainer/ Contract Manager, Chairman cum Managing Partner at VinaQS

Mr. TILAK KOLONNE

Dispute Board member/ Adjudicator, Arbitrator, Expert Witness

Mr. MIAN SHERAZ JAVAID

Chair Society of Construction Law – SCL Pakistan

Mr. EDIYANTO ARIEf

Founder of EA Law Firm

Ms. NGUYEN THI THU TRANG

Partner at Dzungsrt & Associates LLC

Ms. ASYA JAMALUDIN

Partner at CMS

Mr. KEVIN ATTRILL

Managing Director at Ankura

Dr. TRINH HAI YEN

Lecturer at International Law Faculty, Diplomatic Academy of Viet Nam, VIAC's Listed Arbitrator

Dr. NGUYEN MAI LINH

Acting Head of the Department of International Commercial Dispute Resolution, Faculty of International Law, Hanoi Law University

Ms. LESLEY TAN

Partner
Wong Partnership LLP

Ms. DINH ANH TUYET

Founding Lawyer
and Managing Partner
IDVN Lawyers

Ms. TRAN NGUYEN THIEN TRANG

Manager, Delay Expert Secretariat

Mr. FRÉDÉRIC GILLION

Partner
Pinsent Masons MPillay LLP

SPEAKERS

Mr. HO CHIEN MIEN

Partner and Co-Head of
Construction & Engineering Practice
at Allen & Gledhill (Singapore)

Mr. HARJEET KUMAR JAGGI

Independent Consultant, Arbitrator
and Dispute Resolution Expert

Mr. AJIT KUMAR MISHRA

Board member as Director (Works) in
IRCON International Ltd

Ms. HAZEL TANG

Managing Partner
Hui Zhong Law Firm (Singapore)

Mr. MATTHEW KOH

Partner
Rajah & Tann (Singapore)

Mr. BILLY DESMOULINS

Director at Accuracy

Ms. NAY YEE LYNN

Advocate and Executive Committee
Member, International Relations
Division, Myanmar International
Arbitration Centre

Mr. TRAN THE NHAN

Quantum Expert
DLS Consultant

Mr. LE MINH SANG

PhD candidate
Lumière University Lyon 2

Ms. NGUYEN THI THANH MINH

Special Counsel and Head of
Dispute Resolution Practice
of ACSV Legal

Assoc. Prof. DAI QINGKANG

Associate Professor of
Southeast University Law School
(Nanjing, China)

Mr. TRAN PHAM HOANG TUNG

Partner
CNC Counsel (Vietnam)

Mr. ANIL CHANGAROTH

Managing Director
of ChangAroth Chambers LLC
and ChangAroth InterNational
Consultancy, Singapore

Dr. LE NET

Partner in charge of
Singapore office LNT & Partners,
VIAC's Listed Arbitrator

MAIN EVENT

GENERAL SESSION

Opportunities & Challenges in Construction Dispute Resolution: Global and Viet Nam Perspectives

08:30 AM – 12:00 AM, Morning 9th April, 2026
Lotus Ballroom, Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward

TIME		CONTENT
Section P1 – Opportunities & Challenges in Construction Dispute Resolution: Viet Nam Perspectives		
08:30 AM – 10:00 AM	Moderator	**Mr. Vu Anh Duong** – *Permanent Vice President cum General Secretary, Vietnam International Arbitration Centre (VIAC)*
	Speaker	**New Provisions on Construction Contracts under the Construction Law and the Draft Decree Providing Detailed Regulations** **Mr. Nguyen Bac Thuy** – *Head of Economics and Construction Contracts – Department of Construction Economics – Ministry of Construction, VIAC Listed Arbitrator, Member of Executive Committee of Society of Construction Law – Viet Nam (SCLVN)*
		Vietnam's Major Projects Market: A Practitioner's Perspective on Opportunity, Legal Reform and Alignment with International Practice **Mr. Do Khoi Nguyen** - *Partner at YKVN (Singapore), Head of International Arbitration*
		Vietnam's dispute resolution ecosystem to be ready for international & complex construction disputes- an observation of VIAC **Ms. Vu Thi Hang** – *Chief of Secretariat and Member of the Scientific Council at the Viet Nam International Arbitration Centre (VIAC)*
10:00 AM – 10:30 AM		Teabreak
Section P2 – Opportunities & Challenges in Construction Dispute Resolution: Global Perspectives		
10:30 AM – 12:00 AM	Moderator	**Mr. Nguyen Nam Trung** – *Chair of SCLVN, FIDIC Certified Contract Manager/Trainer/Adjudicator*
	Speaker	**Resolving Construction Disputes: the Malaysian Experience of Specialist Construction Courts and Construction Adjudication** **Judge Lee Swee Seng** – *Federal Court Judge.*
		Opportunities and Challenges in the implementation of DAAB as of FIDIC Conditions of Contract **Prof. Sarwono Hardjomuljadi** - *President of Society of Construction Law Indonesia, FIDIC Ambassador and FIDIC Accredited Trainer*
		Mr. Ratan K. Singh – *Chairman of Society of Construction Law India*
12:00 AM		**End of the General Session**

MAIN EVENT

SECTION A

International Construction Contracts

01:30 PM - 05:00 PM, Afternoon 9th April, 2026

Lotus A, Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward

TIMELINE		CONTENT
Panel A1: Construction Contracts under Vietnam Construction Law 2025		
01:30 PM - 03:00 PM	Moderator	**Ms. Nguyen Phuong Trinh** – *Founding Partner of TNP Law/Vice chair of SCLVN*
	Speaker	**Consequential loss exclusion clauses and LD / penalty clauses in international construction contracts - are they valid in Vietnam, and relevant drafting tips** **Mr. Mino Han** – *Partner at Peter & Kim*
		Internationalization of Vietnam's Construction Contracts under the New Construction Law Framework. **Mr. Vu Le Bang** – *Co-managing partner at Nishimura & Asahi (Vietnam) Law Firm in HCMC*
		Whether the liquidated damages mechanism according to international standard forms of contract has been really adopted in the new Construction Law of 2025 of Viet Nam? **Dr. Nguyen Thi Hoa** – *Lecturer at the Ho Chi Minh City University of Law in Viet Nam*
03:00 PM - 03:30 PM		**Tea Break**
Panel A2: Alternatives for International Construction Contract		
03:30 PM - 05:00 PM	Moderator	**Mr. Nguyen Thanh Long** – *FIDIC Certified Trainer / Contract Manager, Chairman cum Managing Director at VinaQS*
	Speaker	**Programming, Risk Allocation and Time Management under NEC: Adoption, Regional Practice, and Implications for Vietnam** **Mr. Anel Idriz** – *Director & Founder at Alternative Logic*
		Modernising Construction Contracts: From Legalese to Plain Language [Global Lessons in Plain Language Drafting] **Prof. Naseem Ameer Ali** – *Associate Professor, Massey University, New Zealand*
		Ms. Joanna Seetoh – *Accredited Specialist in Building & Construction Law, Fellow of the Singapore Institute of Arbitrators*
17h00		**End of Section A**

MAIN EVENT

SECTION B

Dispute Avoidance And Resolution Mechanisms For Construction Activities

01:30 PM - 05:00 PM, Afternoon 9th April, 2026

Lotus B, Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward

TIMELINE		CONTENT
Panel B1: Dispute Avoidance during Construction		
01:30 PM - 03:00 PM	Moderator	**Dr. Ediyanto Arief** - *Founder of EA Law Firm*
	Speaker	**Dispute Avoidance and Resolution by ADR** **Mr. Tilak Kolonne** – *Dispute Board member/ Adjudicator, Arbitrator, Expert Witness*
		Whether the liquidated damages mechanism according to international standard forms of contract has been really adopted in the new Construction Law of 2025 of Viet Nam? **Ms. Nguyen Thi Thu Trang** – *Partner at Dzungsrt & Associates LLC*
		Avoiding Project Disputes - A guide to good practice **Mr. Kevin Attrill** – *Managing Director at Ankura*
		Dispute Boards in China Pakistan Economic Corridor: From Formation to Decision Enforcement **Mr. Mian Sheraz Javaid** – *Chair Society of Construction Law Pakistan*
03:00 PM - 03:30 PM		Tea Break
Panel B2: Selecting of Rule/Avenue and Managing Construction Disputes		
03:30 PM - 05:00 PM	Moderator	**Ms. Dinh Anh Tuyet** – *Founding Lawyer and Managing Partner of IDVN Lawyers*
	Speaker	**Strategic Choices in Energy Transition Disputes** **Ms. Asya Jamaludin** – *Partner at CMS*
		Construction or Commercial Arbitration Rules: Which is the Better Fit? **Dr. Nguyen Mai Linh** – *Acting Head of the Department of International Commercial Dispute Resolution, Faculty of International Law, Hanoi Law University*
		Arbitrating international construction disputes: choosing avenues for contractual claims and treaty claims **Dr. Trinh Hai Yen** – *Lecturer at International Law Faculty, Diplomatic Academy of Viet Nam, VIAC's Listed Arbitrator*
17h00		**End of Section B**

MAIN EVENT

SECTION C

Topical Issues In Construction Arbitration

09:00 AM - 12:30 PM, Morning 10th April, 2026

Lotus A, Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward

TIME		CONTENT
Panel C1: Expert Evidence in Construction Arbitration		
	Moderator	**Mr. Tran The Nhan**– *Quantum Expert at DLS Consultant*
09:00 AM – 10:30 AM	Speaker	**How to Manage Expert Evidence Effectively in Construction Arbitration** **Mr. Frédéric Gillion** – *Partner at Pinsent Masons MPillay LLP*
		Bridging the Gap: Understanding the SCL Singapore Protocol for Experts' Joint Statements **Ms. Lesley Tan** - *Partner at Wong Partnership LLP*
		Technology and Expert Evidence in Construction Disputes: Between Promise and Practicality **Ms. Tran Nguyen Thien Trang** – *Manager, Delay Expert at Secretariat*
10:30 AM – 11:00 AM		Teabreak
Section C2: Arbitration Topical Issues		
	Moderator	**Ms. Nguyen Thi Thanh Minh** – *Special Counsel and Head of Dispute Resolution Practice of ACSV Legal*
11:00 AM – 12:30 AM	Speaker	**Topical Issues in Construction Arbitration - A Regional Perspective** **Mr. Ho Chien Mien** – *Partner at Allen & Gledhill LLP*
		From Contractual and Party Fragmentation to Parallel Proceedings in Construction Arbitration **Mr. Le Minh Sang** - *PhD candidate at Lumière University Lyon 2*
		Award of Interest in Arbitration Awards – Adverse impact on Claimants when contract bars payment of Interest **Mr. Harjeet Kumar Jaggi** – *Independent Consultant, Arbitrator and Dispute Resolution Expert*
12:00 AM		**End of Section C**

MAIN EVENT

SECTION D

Regional Construction Arbitration

09:00 AM - 12:30 PM, Morning 10th April, 2026

Lotus B, Rex Hotel, 141 Nguyen Hue Boulevard, Sai Gon Ward

TIME		CONTENT
Panel D1: Updates with recent development of construction arbitration in Asia		
09:00 AM – 10:30 AM	Moderator	**Mr. Tran Pham Hoang Tung** – *Partner of CNC Counsel (Vietnam)*
	Speaker	**Beyond the Protocol: India's Divergent Approach to Delay and Disruption Analysis in Construction Arbitration** **Mr. Ajit Kumar Mishra** – *Board member as Director (Works) in IRCON International Ltd*
		The Impacts of the 2025 Amendments to China's Arbitration Law on Construction Dispute Arbitration and the Recognition and Enforcement of Arbitral Awards in China **Assoc. Prof. Dai Qingkang** - *Associate professor of Southeast University Law School, Nanjing, China*
		Drafting for Enforcement: Case Studies from Singapore, Hong Kong and Mainland China on Construction Arbitral Awards and Their Implications for Vietnam **Ms. Hazel Tang**– *Managing Partner at Hui Zhong Law Firm (Singapore)*
10:30 AM – 11:00 AM		Teabreak
Section D2: Construction dispute resolution in South East Asia		
11:00 AM – 12:30 AM	Moderator	**Dr. Le Net** – *Partner at LNT & Partners*
	Speaker	**Environmental, Social and Governance (ESG)-Driven Construction Disputes at the Crossroads: Practical Dispute Avoidance and Restorative Resolution Mechanisms** **Mr. Anil Changaroth** – *Managing Director of ChangAroth Chambers LLC and ChangAroth InterNational Consultancy, Singapore*
		Continuing development of construction arbitration in Southeast Asia **Mr. Matthew Koh** - *Partner at Rajah & Tann (Singapore)*
		From Critical Path to Tribunal Persuasion: Why Technically Sound Delay Analyses Often Fail in Regional Arbitration **Mr. Billy Desmoulins** – *Director at Accuracy*
		Construction Dispute Resolution in Myanmar: Institutional, Legal, and Regional Perspectives **Ms. Nay Yee Lynn** – *Advocate and Executive Committee Member, International Relations Division, Myanmar International Arbitration Centre (MIAC)*
12:30 AM		**End of Section D**

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Ankura Consulting is an independent global expert services and advisory firm that delivers end-to-end solutions to help clients at critical inflection points related to conflict, crisis, performance, risk, strategy, and transformation. The Ankura team consists of more than 2,000+ professionals serving 3000+ clients across 72 countries who are leaders in their respective fields and areas of expertise. In our Asia-Pacific regional offices based in Singapore, Hong Kong, Sydney, Melbourne, Perth, Brisbane, Hong Kong and Singapore we have over 20 testifying experts who can opine on issues involving Forensic Accounting, Construction Delay and Quantum as well as Forensic Risk and Compliance. We also have teams specialising in Turnaround and Restructuring as well as Cybersecurity, Data and Technology. Our Asia based Construction Delay and Quantum Experts have been involved in numerous projects in Vietnam including on-offshore Oil & Gas facilities, Energy, Rail, Process Plant, Infrastructure, Civil Engineering, Building as well as wind & solar plants projects.

See more information here: **https://ankura.com/**

CMS INTERNATIONAL LAW FIRM

With more than 90 offices in over 50 countries and over 7,200 lawyers worldwide, CMS offers deep local market knowledge with a global perspective, giving us the ability to deliver legal solutions that are grounded in real world market dynamics and aligned with global trends. CMS is a Future Facing organisation of independent law firms, pushing boundaries in a fast-moving world. Technology is redefining what's possible, unlocking new industries, markets, and opportunities. We work side by side with our clients, crafting smart, forward-thinking strategies and supporting them every step of the way.

Across Asia Pacific, CMS advises leading developers, contractors, investors and lenders on complex infrastructure, construction and energy projects. Our multidisciplinary teams combine transactional, regulatory and disputes expertise to support clients throughout the entire lifecycle of their projects. We guide clients through procurement, contract strategy, project delivery, risk management, and dispute resolution, including international arbitration. Whether navigating complex contractor relationships, regulatory requirements, or high value disputes, we help clients manage time, cost, and quality risks to ensure successful outcomes. The CMS APAC Infrastructure, Construction & Energy team—co-led by Partners Kelvin Aw and Lynette Chew—has advised on some of Asia Pacific's most complex and high-profile developments. The team regularly works on major projects across Southeast Asia, including Vietnam, Indonesia, Thailand, the Philippines and Malaysia.

With extensive experience across transport, energy, utilities, industrial developments, and large scale infrastructure projects, CMS is a trusted partner for organisations seeking clarity, confidence, and practical solutions in a rapidly evolving regional landscape.

See more information here: **https://cms.law/en/int/**

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DZUNGSRT & ASSOCIATES

Dzungsrt & Associates is one of the leading law firms in Vietnam, recognized for their comprehensive and top-tier legal services to businesses, organizations, and individuals. With over 20 years of profound development in Vietnam, Dzungsrt & Associates is proud to be a reliable partner for numerous clients, both domestic and international. The firm boasts expertise in various sectors, including Finance & Banking, Trade & Commerce, Real Estate, Maritime, Logistics & Supply Chains, Investment, Insurance & Reinsurance, Infrastructure & Construction, Energy & Natural Resources. Dzungsrt & Associates' team is renowned for their deep expertise and commitment, consistently delivering optimal legal solutions to effectively resolve complex issues. According to the Legal 500 rankings, Dzungsrt & Associates lawyers are commended for their "professional and deep knowledge of the sector" and "flexible solution for client". Additionally, they are also regularly invited to deliver tailored lectures and conduct in-depth training sessions on Dispute Resolution for organizations, businesses, and academic law institutions throughout Vietnam. With an unwavering commitment to enhancing service quality and maintaining transparency, Dzungsrt & Associates remains the top choice for businesses and organizations seeking credible law firm in Vietnam.

See more information here: **https://dzungsrt.com/**

MASIN

Masin is a global business advisory and expert witness firm, trusted by leading organisations across industries to navigate complexity, manage risk, and resolve high-stakes disputes. Recognised among the top firms in the prestigious GAR Power 100, Masin has built a reputation for delivering independent, credible, and commercially grounded expertise in some of the world's most challenging matters.

With over 15 years of experience, a presence across nine key jurisdictions, and a team of more than 200 experts, Masin brings together deep technical knowledge, analytical rigour, and practical insight. The firm supports clients across a wide spectrum of services, including claims management, arbitration support, expert witness services, and strategic advisory—ensuring clarity and confidence in critical decision-making. Masin has been involved in over 200 arbitrations across leading international forums such as the ICC, LCIA, SIAC, DIAC, and ADGM, with disputes collectively exceeding USD 30 billion in value. Its experts are regularly appointed to provide independent analysis and testimony, offering clear, well-substantiated opinions that stand up to scrutiny in complex legal and commercial environments.

Beyond disputes, Masin works closely with clients to proactively identify risks, strengthen contractual positions, and enhance project and commercial outcomes. Its multidisciplinary approach allows the firm to tailor solutions across sectors, combining technical expertise with a nuanced understanding of legal, financial, and operational considerations. The firm's professionals are widely recognised in leading industry directories, including Lexology Index, Chambers & Partners, and The Legal 500, reflecting both individual excellence and the strength of Masin's collective expertise. Known for its integrity, independence, and precision, Masin is a trusted partner to corporates, law firms, and institutions worldwide. Whether advising on complex disputes or supporting strategic initiatives, Masin delivers solutions defined by clarity, credibility, and impact—helping clients move forward with confidence in an increasingly complex global landscape. Xem thêm thông tin về đơn vị: **https://masinproject.com/**

AGENDA
CHƯƠNG TRÌNH

GENERAL SESSION
PHIÊN TOÀN THỂ

MODERATOR/ĐIỀU PHỐI VIÊN

Mr./Ông **VŨ ÁNH DƯƠNG**

Permanent Vice President cum General Secretary,
Vietnam International Arbitration Centre (VIAC)
Phó Chủ tịch Thường trực kiêm Tổng Thư ký
Trung tâm Trọng tài Quốc tế Việt Nam (VIAC)

08:30PM - 10:00PM

SESSION P1
Opportunities & Challenges in Construction Dispute Resolution: Viet Nam Perspectives

PHIÊN P1
Cơ hội và thách thức trong giải quyết tranh chấp xây dựng: góc nhìn Việt Nam

SPEAKER/DIỄN GIẢ

Mr./Ông **NGUYỄN BẮC THUỶ**

Head of Economics and Construction Contracts
– Department of Construction Economics –
Ministry of Construction,
Trưởng phòng Kinh tế và hợp đồng xây dựng
Cục Kinh tế xây dựng – Bộ Xây dựng,

Presentation 01
New Provisions on Construction Contracts under the Construction Law and the Draft Decree Providing Detailed Regulations

Tham luận 01
Những nội dung mới về hợp đồng xây dựng tại Luật xây dựng và dự thảo Nghị định quy định chi tiết

Mr./Ông **ĐỖ KHÔI NGUYÊN**

Partner, YKVN;
Head of International Arbitration
Luật sư thành viên, YKVN;
Trưởng nhóm Trọng tài Quốc tế

Presentation 02
Vietnam's Major Projects Market: A Practitioner's Perspective on Opportunity, Legal Reform, and Alignment with International Practice

Tham luận 02
Thị trường các dự án quy mô lớn tại Việt Nam: Góc nhìn thực tiễn của chuyên gia về cơ hội, cải cách pháp lý và sự hài hòa với thông lệ quốc tế trong lĩnh vực xây dựng

Ms./Bà **VŨ THỊ HẰNG**

Chief of Secretariat,
Member of the Scientific Council, VIAC
Trưởng Ban Thư ký Tổ tụng,
Thành viên Hội đồng Khoa học, VIAC

Presentation 03
Vietnam's dispute resolution ecosystem to be ready for international & complex construction disputes- an observation of VIAC

Tham luận 03
Cơ chế Giải quyết tranh chấp của Việt Nam trước yêu cầu sẵn sàng cho các tranh chấp xây dựng quốc tế phức tạp – Từ quan sát của Trung tâm Trọng tài Quốc tế Việt Nam (VIAC)

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

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HICAC 2026

NEW PROVISIONS ON CONSTRUCTION CONTRACTS UNDER THE CONSTRUCTION LAW AND THE DRAFT DECREE PROVIDING DETAILED REGULATIONS

Presented by: Nguyễn Bắc Thủy

Head of Economics and Construction Contracts – Department of Construction Economics – Ministry of Construction,
VIAC Listed Arbitrator, Member of Executive Committee of Society of Construction Law – Viet Nam (SCLVN)

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CONTENTS

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REGULATIONS ON CONSTRUCTION CONTRACTS IN THE 2025 LAW ON CONSTRUCTION ARE PROVIDED IN THE FOLLOWING ARTICLES:

Article 80: General provisions on construction contracts;

Article 81: Validity and legal enforceability of construction contracts;

Article 82: Classification, contents, and documentation of construction contracts;

Article 83: Security for the performance of obligations under construction contracts;

Article 84: Amendments to construction contracts;

Article 85: Suspension and termination of construction contracts;

Article 86: Bonuses and penalties in construction contracts, compensation for damages due to breaches, and dispute resolution;

Article 87: Payment, final settlement, and liquidation of construction contracts.

SOCIETY OF CONSTRUCTION LAW - VIETNAM (SCLVN) VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

KEY NEW POINTS ON CONSTRUCTION CONTRACTS IN THE CONSTRUCTION LAW 2025

- Amendments to ensure consistency and alignment with the Law on Procurement and the Civil Code, including provisions on authority to decide on contract amendments, terminology, and contract types.
- Revisions and additions to clarify provisions and ensure equality among contracting parties, as well as practical feasibility, including security for the performance of contractual obligations and the validity and legal enforceability of construction contracts.
- Introduction of regulations on contract management in cases of force majeure and fundamental change of circumstances in construction investment activities, such as contract amendments, suspension, and termination.
- Introduction of regulations on contract management in cases of force majeure and fundamental change of circumstances in construction investment activities, such as contract amendments, suspension, and termination.
- Revisions and additions on dispute resolution methods

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09 – 10 April 2026 Ho Chi Minh City, Vietnam
HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

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KEY NEW POINTS ON CONSTRUCTION CONTRACTS IN THE GOVERNMENT'S DRAFT DECREE PROVIDING DETAILED REGULATIONS ON CONSTRUCTION CONTRACTS

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ON THE STRUCTURE OF THE DRAFT DECREE

Chapter 1: General provisions
- Expected to consist of **5 articles regulating general matters** such as scope of regulation, subjects of application, interpretation of terms, principles for contract conclusion and management of contract performance, and bases for entering into construction contracts.

Chapter 2: Specific provisions
- Expected to consist of **26 articles, divided into 4 sections**. This chapter provides key regulations on types of construction contracts and various aspects of contract formation and management of contract performance.

Chapter 3: Implementation provisions
- **Expected to consist of 3 articles**. This chapter mainly sets out provisions on effectiveness, implementation, and transitional arrangements of the Decree.

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APPROACH TO DEVELOPING THE DRAFT DECREE

01

Inheritance with adjustments in terminology for provisions that have been stably applied and have not raised difficulties or obstacles under Decree No. 37.

02

Amendment, supplementation, and revision of certain provisions to ensure consistency with the new regulations of the Construction Law 2025, other relevant laws, and practical requirements.

03

Removal of provisions that have already been incorporated into the Construction Law 2025 or are regulated in other relevant legal documents.

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INHERITED CONTENTS FROM DECREE NO. 37

01

Principles and bases for entering into and managing the performance of construction contracts

02

Information on construction contracts

03

Contents and scope of work under construction contracts

04

Requirements on quality, technical standards, acceptance, and handover of construction contract deliverables

05

Construction contract price and its scope of application

06

Security measures, including advance payment guarantees, performance security, and warranty security

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REMOVED CONTENTS

1. Principles for the performance of construction contracts; validity and legal enforceability of construction contracts; applicable law and language of construction contracts; payment security for construction contracts; currency and payment methods; contract adjustments; principles for contract adjustment; contract bonuses and penalties; liability for breach of construction contracts.
2. Occupational safety, environmental protection, and fire prevention and fighting; electricity, water supply, and site security; transportation of technological equipment.

1. These contents have already been provided in the Construction Law 2025.

2. These contents have already been regulated in other relevant legal documents.

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KEY NEW POINTS ON CONSTRUCTION CONTRACTS IN THE DRAFT DECREE

01 **Scpoe of refulation:**
It is proposed to cover all construction contracts, not limited to those under public investment projects and PPP projects.

02 **Addition and clarification of time-related provisions:**
Introduction of the concept of the contract execution period; amendments and clarifications on the effective time of construction contracts and the schedule for contract performance to ensure alignment with practical implementation and the relevant legal regulations.

03 **Amendments and additions on contract contents and performance:**
Revision and supplementation of concepts, contents, and scope of work, including the obligation to prepare detailed schedules for each type of work under EC, EP, and PC contracts; addition of concepts, conditions for application, payment methods, and payment documentary for output-based contracts to address practical difficulties and issues reported by various entities in recent years.

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Thank you for your attention!

Mr NGUYEN BAC THUY

Department of Economics and Construction Contracts

Department of Construction Economics – Construction Investment Management Authority, Ministry of Construction

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

HICAC 2026

NHỮNG NỘI DUNG MỚI VỀ HỢP ĐỒNG XÂY DỰNG TẠI LUẬT XÂY DỰNG VÀ DỰ THẢO NGHỊ ĐỊNH QUY ĐỊNH CHI TIẾT

Trình bày: Nguyễn Bắc Thủy

Trưởng phòng Kinh tế và hợp đồng xây dựng – Cục Kinh tế xây dựng – Bộ Xây dựng,
Trọng tài viên VIAC, Ủy viên Ban chấp hành Hội pháp luật xây dựng Việt Nam (SCLVN)

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

NỘI DUNG

01

GIỚI THIỆU SƠ LƯỢC CÁC QUY ĐỊNH VỀ HĐXD TẠI LUẬT XÂY DỰNG 2025

02

GIỚI SƠ LƯỢC CÁC NỘI DUNG VỀ HĐXD TẠI DỰ THẢO NGHỊ ĐỊNH

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

QUY ĐỊNH VỀ HỢP ĐỒNG XÂY DỰNG TẠI LUẬT XÂY DỰNG 2025 ĐƯỢC QUY ĐỊNH TẠI CÁC ĐIỀU:

Điều 80: Quy định chung về hợp đồng xây dựng;

Điều 81: Hiệu lực và tính pháp lý của hợp đồng xây dựng;

Điều 82: Phân loại, nội dung và hồ sơ hợp đồng xây dựng;

Điều 83: Bảo đảm thực hiện các nghĩa vụ trong hợp đồng xây dựng;

Điều 84: Sửa đổi hợp đồng xây dựng;

Điều 85: Tạm dừng và chấm dứt hợp đồng xây dựng;

Điều 86: Thưởng, phạt hợp đồng xây dựng, bồi thường thiệt hại do vi phạm và giải quyết tranh chấp hợp đồng xây dựng;

Điều 87: Thanh toán, quyết toán và thanh lý hợp đồng xây dựng.

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

NHỮNG ĐIỂM MỚI CHỦ YẾU VỀ HỢP ĐỒNG XÂY DỰNG TẠI LXD2025

- Điều chỉnh quy định nhằm đảm bảo tính thống nhất, đồng bộ với quy định của Luật Đấu thầu, Bộ Luật Dân sự như: thẩm quyền quyết định sửa đổi hợp đồng xây dựng, một số thuật ngữ, loại hợp đồng.
- Điều chỉnh, bổ sung một số nội dung nhằm làm rõ, đảm bảo tính bình đẳng giữa các chủ thể tham gia hợp đồng, đảm bảo tính khả thi trên thực tiễn như: bảo đảm thực hiện các nghĩa vụ trong hợp đồng xây dựng; hiệu lực và tính pháp lý của hợp đồng xây dựng.
- Bổ sung quy định quản lý hợp đồng xây dựng trong trường hợp bất khả kháng và hoàn cảnh thay đổi cơ bản trong hoạt động đầu tư xây dựng như: sửa đổi hợp đồng xây dựng; tạm dừng và chấm dứt hợp đồng.
- Điều chỉnh, bổ sung quy định về bồi thường thiệt hại do vi phạm các nghĩa vụ của hợp đồng, trong đó bổ sung bồi thường thiệt hại định trước.
- Điều chỉnh, bổ sung quy định về phương thức giải quyết tranh chấp

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HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

NHỮNG ĐIỂM MỚI CHỦ YẾU VỀ HỢP ĐỒNG XÂY DỰNG TẠI DỰ THẢO NGHỊ ĐỊNH CỦA CHÍNH PHỦ QUY ĐỊNH CHI TIẾT VỀ HỢP ĐỒNG XÂY DỰNG

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VỀ KẾT CẤU CỦA DỰ THẢO NGHỊ ĐỊNH

Chương I

- Những quy định chung: dự kiến gồm **5 Điều quy định những vấn đề chung** như: phạm vi điều chỉnh, đối tượng áp dụng, giải thích từ ngữ, nguyên tắc giao kết và quản lý thực hiện hợp đồng, căn cứ giao kết hợp đồng XD

Chương II

- Những quy định cụ thể: dự kiến **gồm 26 Điều và được chia thành 4 mục**. Chương này quy định những nội dung chủ yếu về các loại hợp đồng xây dựng, các khía cạnh trong xác lập và quản lý thực hiện hợp đồng

Chương III

- Điều khoản thi hành: **dự kiến gồm 3 điều**. Chương này chủ yếu là điều khoản để quy định hiệu lực, tổ chức thực hiện và chuyển tiếp của Nghị định

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CÁCH TIẾP CẬN ĐỂ XÂY DỰNG DỰ THẢO NĐ

01

Kế thừa có điều chỉnh về từ ngữ đối với các quy định đã được áp dụng ổn định, không có phản ánh vướng mắc, khó khan của NĐ 37

02

Sửa đổi, bổ sung, điều chỉnh một số quy định cho phù hợp với quy định mới trong Luật XD 2025, các luật có liên quan và thực tiễn

03

Lược bỏ một số quy định đã được đưa lên Luật XD 2025 và đã được quy định tại các văn bản có liên quan khác

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

NHỮNG NỘI DUNG KẾ THỪA TỪ NGHỊ ĐỊNH 37

01

Nguyên tắc, căn cứ giao kết và quản lý thực hiện hợp đồng xây dựng

02

Thông tin về hợp đồng xây dựng

03

Nội dung và khối lượng công việc của hợp đồng xây dựng

04

Yêu cầu về chất lượng, kỹ thuật, nghiệm thu và bàn giao sản phẩm của hợp đồng xây dựng

05

Giá hợp đồng xây dựng và phạm vi áp dụng

06

Các biện pháp bảo đảm gồm: bảo lãnh tạm ứng, bảo đảm thực hiện hợp đồng xây dựng, bảo đảm bảo hành

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VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

NHỮNG NỘI DUNG LƯỢC BỎ

1. Nguyên tắc thực hiện hợp đồng xây dựng; hiệu lực và tính pháp lý của hợp đồng xây dựng; luật áp dụng và ngôn ngữ sử dụng cho hợp đồng xây dựng; bảo đảm thanh toán hợp đồng xây dựng; đồng tiền và hình thức thanh toán hợp đồng xây dựng; điều chỉnh hợp đồng xây dựng; nguyên tắc điều chỉnh hợp đồng xây dựng; thưởng hợp đồng, phạt vi phạm hợp đồng; trách nhiệm do vi phạm hợp đồng xây dựng
2. An toàn lao động, bảo vệ môi trường và phòng chống cháy nổ; Điện, nước và an ninh công trường; Vận chuyển thiết bị công nghệ

1. Do đã được quy định tại LXD2025

2. Do đã được quy định tại các văn bản khác có liên quan

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

NHỮNG ĐIỂM MỚI CHỦ YẾU VỀ HỢP ĐỒNG XÂY DỰNG TẠI DỰ THẢO NGHỊ ĐỊNH

01 Phạm vi điều chỉnh: Dự kiến điều chỉnh tất cả các hợp đồng xây dựng, không chỉ đối với các hợp đồng xây dựng thuộc các dự án đầu tư công và dự án PPP.

02 Bổ sung khái niệm về thời gian thực hiện hợp đồng xây dựng; Sửa đổi, làm rõ một số quy định về: Thời gian có hiệu lực của hợp đồng xây dựng; Tiến độ thực hiện hợp đồng xây dựng để đảm bảo phù hợp với thực tiễn và quy định của pháp luật có liên quan

03 Sửa đổi, bổ sung khái niệm, nội dung và khối lượng công việc, nghĩa vụ phải lập tiến độ cho từng loại công việc đối với hợp đồng EC, EP, PC; Bổ sung khái niệm, điều kiện áp dụng việc thanh toán và hồ sơ thanh toán đối với hợp đồng theo kết quả đầu ra nhằm khắc phục một số khó khăn, vướng mắc trong thực tiễn thực hiện theo phản ánh của một số đơn vị trong thời gian qua

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Trân trọng Cảm ơn

ÔNG NGUYỄN BẮC THỦY

Trưởng phòng Kinh tế và hợp đồng xây dựng
Cục Kinh tế xây dựng – Bộ Xây dựng,
Trọng tài viên VIAC, Ủy viên Ban chấp hành
Hội pháp luật xây dựng Việt Nam (SCLVN)

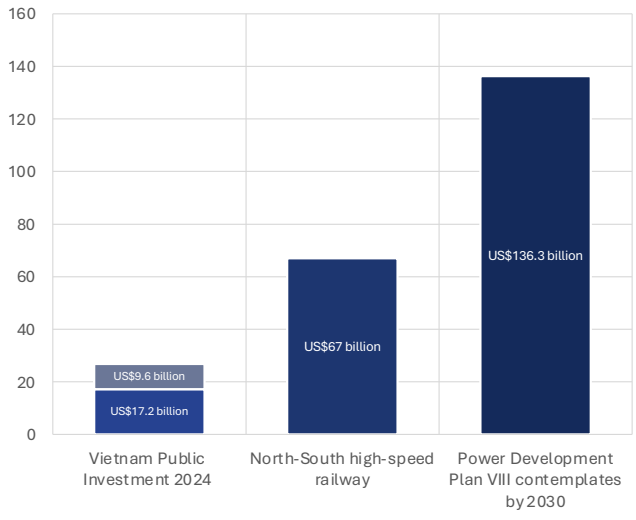
Vietnam's Major Projects Market:
A Practitioner's Perspective on Opportunity, Legal Reform, and Alignment with International Practice

Do Khoi Nguyen
YKVN, Head of International Arbitration

Ho Chi Minh City, 9 April 2026

Part 1: **Opportunity**

- In 2024, the Government allocated about US$26.8 billion for public investment, of which about **US$17.2 billion was for transport infrastructure.**
- Vietnam has approved the North-South high-speed railway at about **US$67 billion**.
- In the power sector, the adjusted Power Development Plan VIII contemplates about **US$136.3 billion** of investment by 2030.



Part 2: **Legal Reform**

1. **Clearer order of legal application**

   Start with the Construction Law first. Only if it does not regulate the issue specifically do we move to the Tender Law, the PPP Law, and the Civil Code.

2. **Clearer and fairer contract framework**

   The law improves the framework on security, validity, and legal effect of construction contracts.

3. **Express framework for force majeure and fundamental change of circumstances**

   The law now gives an express basis for amendment, suspension, and termination in these situations...

4. **Damages reform**

   The law now expressly recognizes pre-agreed damages, not only actual loss.

5. **Dispute resolution reform**

   The law now recognizes a broader menu, including dispute-handling models used in international practice.

Part 3: **Alignment with International Practice**

"The direction of travel is real, but the alignment is not unconditional"

"Vietnam is moving closer to international practice, but still on supervised Vietnamese terms"

Pre-agreed Damages	Force majeure or fundamental changes of circumstances	Dispute resolution

Pre-agreed Damages

Điều 86.2 – Luật Xây dựng 2025

Việc bồi thường thiệt hại được xác định theo thiệt hại thực tế, **các mức thiệt hại định trước tương ứng** với các nghĩa vụ hợp đồng xây dựng bị vi phạm, mức độ vi phạm.

Article 86(2) - Law on Construction (2025)

Compensation shall be determined according to actual damages [or] **pre-agreed levels of damages corresponding** to the breached contractual obligations, the degree of violation.

- **Alignment:** this provides a clearer statutory basis for LD-style risk allocation (relevant to FIDIC delay damages).
- **Watch-out:** "corresponding" invites proportionality arguments (moderation vs enforceability as risk allocation).
- **Drafting move:** keep a light rationale file for the LD number and cap (financing, standby, revenue, interfaces).

5

Force majeure or fundamental changes of circumstances

What is new?

Construction Law 2014 did not expressly define force majeure or fundamental change of circumstances in construction activities.

Article 13 of Construction Law 2025 now does so.

It identifies examples of:

- **force majeure**, such as natural disasters, environmental disasters, fire, epidemic, emergency situations, strikes, embargoes, sieges, and archaeological discoveries
- **fundamental change of circumstances**, including changes in **State policy or law** and **unforeseeable abnormal geological conditions**

However, Article 13 also makes clear that these events must still satisfy the conditions under **civil law** on force majeure and performance of contracts in fundamentally changed circumstances.

Alignment: This makes the framework more familiar to international users of major project contracts, especially on force majeure, change in law, hardship-type risk allocation.

6

Dispute resolution

Điều 86.5 – Luật Xây dựng 2025

Phương thức giải quyết tranh chấp hợp đồng xây dựng:

a) Việc xử lý tranh chấp được thực hiện thông qua tự thương lượng, hòa giải, **áp dụng các mô hình xử lý tranh chấp theo thông lệ quốc tế**, trọng tài hoặc Tòa án;

b) Đối với **dự án đầu tư công, dự án PPP**, trường hợp sử dụng trọng tài để xử lý tranh chấp thì **ưu tiên các tổ chức trọng tài trong nước**; việc áp dụng các mô hình giải quyết tranh chấp theo thông lệ quốc tế thực hiện theo yêu cầu của điều ước quốc tế hoặc phải được **người quyết định đầu tư cho phép** và phải được **các bên thỏa thuận trong hợp đồng xây dựng**. **Chi phí giải quyết tranh chấp của chủ đầu tư** (nếu có) **được tính vào tổng mức đầu tư của dự án**.

Article 86(5) – Law on Construction (2025)

Dispute resolution methods for construction contracts:

a) Dispute handling may be carried out through negotiation, mediation, **application of dispute-handling models used in international practice**, arbitration, or the courts.

b) For **public investment projects and PPP projects**, where arbitration is used to resolve disputes, **priority should be given to domestic arbitral institutions**; the application of dispute-resolution models used in international practice shall follow the requirements of an international treaty or must **be approved by the investment decision-maker** and must be **agreed in the construction contract**. **The dispute-resolution costs of the project owner** (if any) **shall be included in the total investment of the project**.

7

Dispute resolution (Cont.)

- **Alignment:** Construction Law 2025 now recognizes dispute-handling models used in international practice. This creates statutory space for dispute boards / DAB / DAAB-type escalation and layered dispute management before final arbitration or court.
- **Watch-outs:** For public investment and PPP projects:
  - use of international-practice models still depends on approval / treaty basis / contract wording
  - the law shows a policy preference for domestic arbitral institutions
- **Operational point:** dispute costs can be budgeted into total investment, so the dispute clause becomes a governance item.
- **Takeaway:** Design the dispute clause early.

8

CONCLUSION

Vietnam's major projects market is commercially attractive, legally reforming, and increasingly internationally legible, but still on supervised Vietnamese terms.

THANK YOU!

Nguyen (Wynn) Do
Partner, Head of International Arbitration

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

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Vietnam's Dispute Resolution to be Ready for International Complex Construction Disputes

- An Observation of Vietnam International Arbitration Centre (VIAC)

MS. VU THI HANG
Chief of Secretariat, Member of the Scientific Council,
Vietnam International Arbitration Centre (VIAC)

Where there are "mega projects", there will be "mega disputes"

- **VIETNAM CONTEXT**
  - Entering a phase of accelerated development in infrastructure and energy projects
  - Driven by public investment, PPP structures, and ODA-funded programs
- **TYPICAL CONSTRUCTION DISPUTES**
  - Delay / schedule non-compliance;
  - Cost overruns / additional costs (cost escalation)
  - Liquidated damages
  - Contract termination

Large-scale infrastructure and energy projects, particularly key national projects, always come with dispute risks => effective dispute management and resolution mechanisms.

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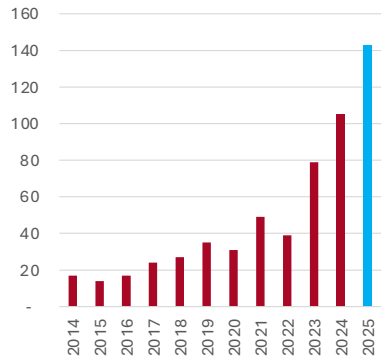
Statistics on Dispute Resolution Activities at VIAC



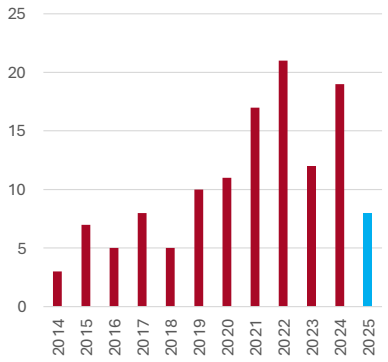
Total Value of Construction Dispute

~35,250 billion VND

Average value of Construction Disputes

~81,2 billion VND

Statistics on Construction Disputes at VIAC (2014–2025)



Total Value of Energy Dispute

~8.190 billion VND

Average value of Energy Disputes

~94.2 billion VND

Statistics on Energy Disputes at VIAC (2014–2025)

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VIAC's Observation: Nature of Construction Dispute in Vietnam

Disputes are becoming more technical

- Delay analysis
- Quantum

--> Expert-heavy proceedings

Multiparty disputes are becoming more common

- EPC + Subcontractors;
- Design vs. Construction liability; Insurance layer

Increasing "stress points"

- Material Costs *(post-COVID; policitc-economy (tax); war in Middle East – petro & freights)*
- Cashflow, insolvency risks, stress on Arbitration & ADR proceedings

HICAC 2026
09 – 10 April 2026 Ho Chi Minh City, Vietnam
HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

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What Vietnam has already had for construction disputes?

Dispute resolution is now "built into contract governance", no longer an afterthought

- Art. 86 Law on Construction recognised the following dispute resolution methods: **Negotiation, ADR/International models, Arbitration OR Court**
- This demonstrates a recognition of international dispute resolution mechanisms (including DB, DAB, DAAB), even though they are not explicitly named, thereby demonstrating a significant alignment with the FIDIC framework.

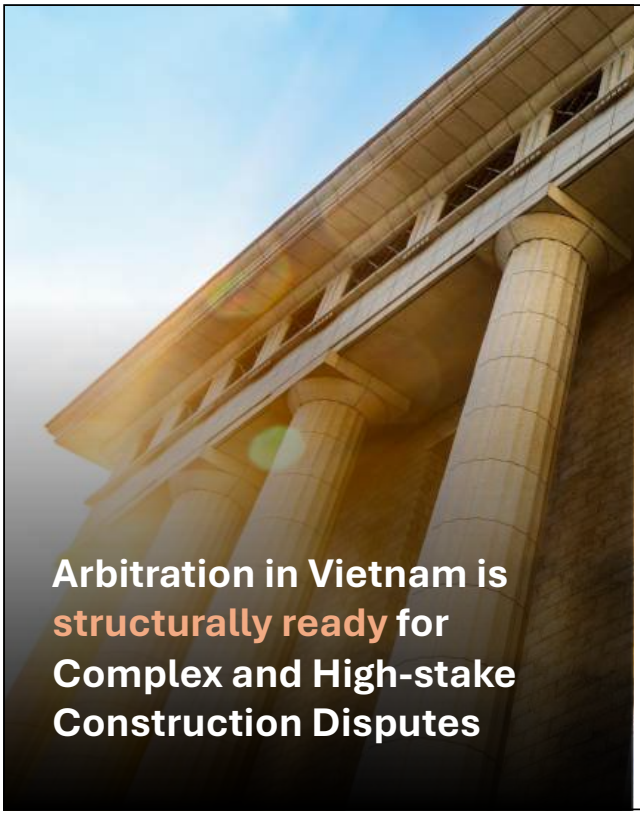
Emphasis on domestic arbitration

The current regulatory framework permits the use of arbitration and international dispute resolution mechanisms, while at the same time imposing certain requirements:

- (i) prior approval is required for the adoption of international mechanisms in PPP and public projects; and
- (ii) a preference to prioritise domestic arbitration.

This approach is consistent with that of several other Asian jurisdictions:

- **Indonesia:** state entities are required to obtain prior approval before agreeing to foreign arbitration.
- **China:** where two Chinese entities (including those with foreign investment) entered into a "non-international related transaction", they are not permitted to choose a foreign arbitral seat; only a limited number of foreign arbitral institutions (such as ICC, LCIA, etc.) are allowed to administer arbitration within mainland China.



Arbitration in Vietnam is structurally ready for Complex and High-stake Construction Disputes

01

Vietnam has developed an arbitration market structure **capable of handling** complex, multi-tier, and high-value construction disputes, as evidenced by the following factors:

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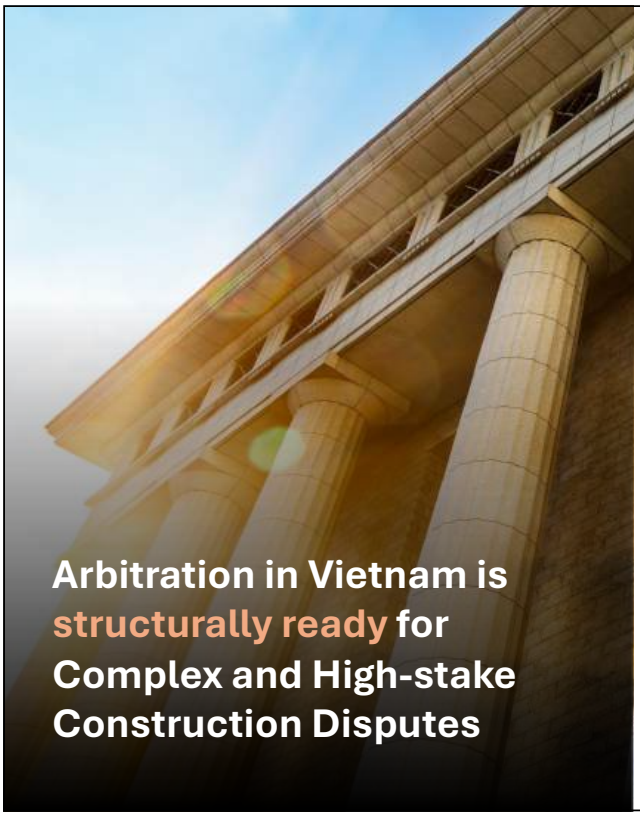
- The presence of an established institutional and legal framework for arbitration that has been consistently implemented in Vietnam.
- VIAC is a leading arbitration institution in Vietnam, with a long-standing track record, well-established reputation, and extensive practical experience.
- Arbitral procedures at VIAC are increasingly refined toward greater professionalism and alignment with international standards.
- Dispute resolution activities at VIAC are diverse in terms of sectors, complexity, values, and the nationalities of the parties involved.

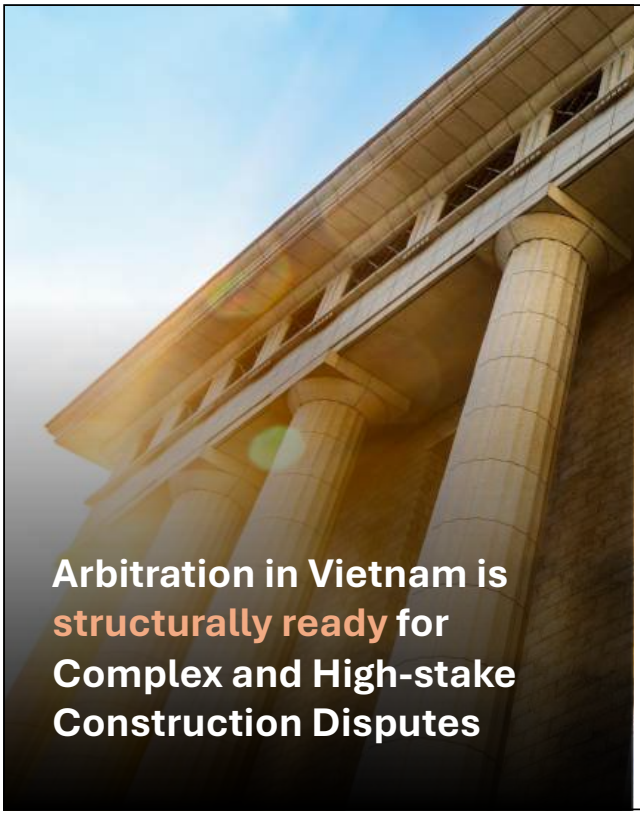


02

Under Resolution No. 81/2025/UBTVQH15 *(effective from 1 July 2025):*

The authority to resolve applications for setting aside domestic arbitral awards is vested in three provincial-level People's Courts: **Hanoi, Da Nang, and Ho Chi Minh City.**

⇒ *This is a significant step toward consistency, predictability, and professionalism in the judiciary's oversight of arbitration*
⇒ *This is pro-arbitration architecture at the court level.*



03

The "fast-lane" mechanism for arbitration with in the Vietnam International Finance Center (VIFC):

Parties **can waive set-aside rights for arbitral awards** rendered by the IFC's arbitration centre (seated in Vietnam), enabling immediate enforcement, but it does not bypass the enforcement process for foreign awards through the Vietnamese court system.

⇒ *Although not equivalent to similar mechanisms in France, Belgium or Sweden, this reform is expected to enhance the efficiency and finality of arbitration.*

⇒ *It appears that this approach is currently applied only within the scope of arbitral institutions under the IFC framework (with the seat of arbitration in Vietnam).*

⇒ *Further observation is needed; if proven effective, it could be proposed for incorporation into future amendments to Vietnam's Law on Commercial Arbitration.*

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BUT still, where do CHALLENGES lie?

- **From Law to Practice**: ADR methods in the Construction sector (consisting of DB/DAB/DAAB and mediation) are not practically ready
- **Evidence & Expertise Gap**: A lack of. organizations and experts providing services in accordance with international standards => a bottleneck in construction disputes involving highly technical and quantitative issues.
- **Multi-tier dispute resolution clauses:** Difficulties in drafting and implementing such clauses; limitations arising from short limitation periods; risk of parallel dispute resolution proceedings.
- **Multi-party arbitration:** Complex procedural mechanisms requiring experienced counsel and arbitrators; risks related to "fundamental principles" during court review of applications to set aside arbitral awards.

Things to be done...

- **For VIAC to play its part:**
  - Continue to strengthen and enhance the quality of arbitral proceedings professionally and internationally;
  - Finalise the new VIAC Rules, aiming to affirm VIAC's role in arbitral proceedings as: A Gatekeeper – A Guardian - A Guider;
  - Establish an International Advisory Board to support the improvement of procedural quality and alignment with international best practices;
  - Promulgate a Code of Ethics and Professional Conduct for Arbitrators (Arbitration is only as good as the arbitrators);
  - Enhance case management through technology (VIAC eCase) to improve dispute administration efficiency, while continuing to research and further develop the platform;
- **For law-makers and other stakeholders:**
  - Promote ADR as a substantive and effectively functioning mechanism, rather than one that exists merely in form;
  - Develop a comprehensive dispute resolution ecosystem aligned with international standards and principles (*including reference to the London Principles*);
  - Strategically position Vietnam on the regional and international dispute resolution landscape.

HICAC 2026

Vietnam is no longer just a place where projects happen - it is becoming a place where disputes are resolved.

Thank you for your attention

MS. VU THI HANG

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Kim lien ward, Hanoi

Phone number 02:4 3 574 4001
024 3 574 6916

Email: hang.vu@viac.org.vn

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

HICACO 2026

Cơ chế Giải quyết tranh chấp của Việt Nam trước yêu cầu sẵn sàng cho các tranh chấp xây dựng quốc tế phức tạp

– Từ quan sát của Trung tâm Trọng tài Quốc tế Việt Nam (VIAC)

BÀ VŨ THỊ HẰNG
Trưởng Ban Thư ký Tố tụng, Thành viên Hội đồng Khoa học
Trung tâm Trọng tài Quốc tế Việt Nam

Ở đâu có "siêu dự án", ở đó có "đại tranh chấp"

BỐI CẢNH VIỆT NAM

- Bước vào giai đoạn phát triển mạnh mẽ các dự án hạ tầng và năng lượng
- Động lực từ đầu tư công, PPP và ODA

TRANH CHẤP XÂY DỰNG ĐIỂN HÌNH

- Vi phạm tiến độ; Phát sinh chi phí;
- Bồi thường thiệt hại định trước;
- Chấm dứt hợp đồng

Phát triển hạ tầng, năng lượng - dự án lớn, trọng điểm, luôn đi cùng rủi ro tranh chấp
=> quản lý tranh chấp & giải quyết tranh chấp hiệu quả

HICACO 2026

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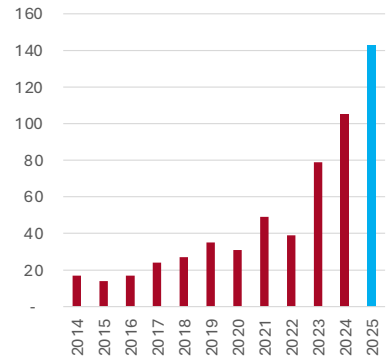
Thống kê Hoạt động Giải quyết tranh chấp tại VIAC



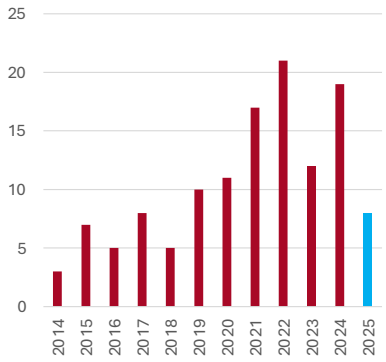
Tổng trị giá tranh chấp xây dựng

~35.250 tỷ VND

Trị giá tranh chấp xây dựng trung bình

~81.2 tỷ VND

Thống kê tranh chấp xây dựng tại VIAC (2014 – 2025)



Tổng trị giá tranh chấp Năng lượng

~8.190 tỷ VND

Trị giá tranh chấp Năng lượng trung bình

~94.2 tỷ VND

Thống kê tranh chấp Năng lượng tại VIAC (2014 – 2025)

HICAC 2026

09 – 10/04/2026 Tp. Hồ Chí Minh

HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ THÀNH PHỐ HỒ CHÍ MINH

Cơ hội và thách thức trong giải quyết tranh chấp xây dựng: góc nhìn Việt Nam và Quốc tế

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

Quan sát của VIAC: Đặc điểm Tranh chấp Xây dựng tại Việt Nam

Tranh chấp ngày càng thiên về kỹ thuật

- Delay analysis
- Quantum

--> Expert-heavy proceedings

Tranh chấp đa bên, đa hợp đồng ngày càng phổ biến

- EPC + Subcontractors;
- Design vs. Construction liability; Insurance layer

Gia tăng các "điểm gây áp lực" ("stress points")

- Giá vật liệu xây dựng *(post-COVID; polictic-economy (tax); war in Middle East – petro & freights)*
- Cashflow, insolvency risks, stress on Arbitration & ADR proceedings

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HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ THÀNH PHỐ HỒ CHÍ MINH

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HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

Việt Nam đã có gì để giải quyết tranh chấp xây dựng?

Giải quyết tranh chấp hiện đã được "tích hợp" trong quản trị hợp đồng, chứ không còn là vấn đề chỉ được đặt ra sau khi tranh chấp phát sinh

- Điều 86 Luật Xây dựng ghi nhận các phương thức: **thương lượng, ADR/mô hình thông lệ quốc tế, trọng tài hoặc Tòa án**.
- Quy định này cũng cho thấy sự ghi nhận các mô hình giải quyết tranh chấp quốc tế (bao gồm **DB, DAB, DAAB)** dù không được liệt kê đích danh => qua đó thể hiện mức độ tiệm cận với cơ chế trong FIDIC.

Ưu tiên Trọng tài trong nước

Quy định hiện hành cho phép áp dụng trọng tài và các mô hình quốc tế, nhưng đồng thời đặt ra các yêu cầu sau:
- (i) cần có chấp thuận của người quyết định đầu tư đối với các cơ chế GQTC quốc tế trong các dự án PPP/dự án công; và,
- (ii) có xu hướng ưu tiên trọng tài trong nước.

Cách tiếp cận này nhìn chung tương đồng với một số quốc gia châu Á khác:
- **Indonesia**: các chủ thể nhà nước phải có phê duyệt trước khi thỏa thuận trọng tài nước ngoài.
- **Trung Quốc**: nếu hai chủ thể Trung Quốc (kể cả có vốn đầu tư nước ngoài) tham gia một giao dịch không "có yếu tố nước ngoài", thì không được lựa chọn địa điểm trọng tài ở nước ngoài; mới chỉ có một số trung tâm trọng tài nước ngoài được phép cung cấp dịch vụ trọng tài tại Trung Quốc đại lục (ICC, LCIA, v.v.)

Trọng tài tại Việt Nam có nền tảng thể chế sẵn sàng cho các tranh chấp xây dựng phức tạp, giá trị lớn

01

Việt Nam đã hình thành một cấu trúc thị trường trọng tài **đủ khả năng tiếp nhận và xử lý** các tranh chấp xây dựng phức tạp, đa tầng và có giá trị lớn, thể hiện qua các yếu tố sau:

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- Sự hiện diện của một khung thể chế, khung pháp lý trọng tài đã được định hình và đi vào thực thi ổn định tại Việt Nam.
- VIAC là tổ chức trọng tài hàng đầu tại Việt Nam, có bề dày hoạt động, uy tín được khẳng định và thực tiễn phong phú.
- Thủ tục tố tụng tại VIAC ngày càng được hoàn thiện theo hướng chuyên nghiệp và tiệm cận quốc tế.
- Hoạt động Giải quyết tranh chấp tại VIAC có sự đa dạng về lĩnh vực tranh chấp, mức độ phức tạp, trị giá tranh chấp, quốc tịch các bên tranh chấp.

02

Theo Nghị quyết số 81/2025/UBTVQH15 *(có hiệu lực kể từ ngày 01/07/2025):*

Việc giải quyết yêu cầu hủy phán quyết trọng tài trong nước thuộc thẩm quyền của 03 (ba) Tòa án nhân dân cấp tỉnh: **Hà Nội, Đà Nẵng và TP. Hồ Chí Minh.**

⇒ *Việc tập trung thẩm quyền này cho thấy xu hướng tăng cường tính thống nhất, khả năng dự liệu và tính chuyên môn hóa trong hoạt động giám sát tư pháp đối với trọng tài.*
⇒ *This is pro-arbitration architecture at the court level.*

03

Cơ chế làn nhanh "fast-lane" cho trọng tài trong Trung tâm Tài chính Quốc tế Việt Nam (VIFC):

Cho phép các bên, trên cơ sở thỏa thuận, **từ bỏ quyền yêu cầu tòa án hủy phán quyết trọng tài**. , cho phép thi hành ngay nhưng không làm bỏ qua thủ tục công nhận và cho thi hành đối với phán quyết trọng tài nước ngoài thông qua hệ thống Tòa án Việt Nam.

⇒ *Cải cách này tuy không giống với cơ chế cho phép từ bỏ quyền yêu cầu Tòa án xem xét hủy PQTT đã có tại Pháp, Bỉ, Thụy Điển nhưng đang được kỳ vọng sẽ nâng cao hiệu quả và tính chung thẩm của Trọng tài.*

⇒ *Có vẻ như chỉ được áp dụng trong phạm vi hoạt động của TTTT thuộc IFC (với địa điểm trọng tài tại Việt Nam)*

⇒ *Tiếp tục quan sát, nếu đây là thử nghiệm tốt thì có thể đề xuất đưa vào những sửa đổi sắp tới của Luật Trọng tài Việt Nam.*

HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

VIAC TRUNG TÂM TRỌNG TÀI QUỐC TẾ VIỆT NAM

Tuy vậy, vẫn có những THÁCH THỨC ở đâu?

- **Từ quy định đến thực tiễn**: Các phương thức GQTC thay thế (ADR) trong lĩnh vực Xây dựng (gồm DB/DAB/DAAB) vẫn chưa thực sự sẵn sàng trong thực tiễn.
- **Chứng cứ và Chuyên gia**: Thiếu tổ chức và chuyên gia cung cấp dịch vụ expert theo chuẩn quốc tế => điểm nghẽn trong các tranh chấp xây dựng có yếu tố kỹ thuật và định lượng cao.
- **Điều khoản giải quyết tranh chấp đa tầng**: Khó khăn trong thiết kế và vận hành điều khoản; Hạn chế do thời hiệu khởi kiện ngắn; Nguy cơ phát sinh song song nhiều thủ tục GQTC.
- **Trọng tài đa bên**: Cơ chế trọng tài phức tạp, yêu cầu luật sư và trọng tài viên có kinh nghiệm; rủi ro liên quan đến "nguyên tắc cơ bản" trong quá trình xem xét của Tòa án đối với yêu cầu hủy.

VICAC 2026

09 – 10/04/2026 Tp. Hồ Chí Minh

HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ THÀNH PHỐ HỒ CHÍ MINH

Cơ hội và thách thức trong giải quyết tranh chấp xây dựng: góc nhìn Việt Nam và Quốc tế

Những việc tiếp theo cần làm
Things to be done

Đối với VIAC: Tiếp tục phát huy vai trò của mình

- Tiếp tục củng cố và nâng cao chất lượng tố tụng trọng tài ngày càng chuyên nghiệp và quốc tế hóa;
- Hoàn thiện bộ Quy tắc mới, hướng tới đưa vai trò VIAC trong một thủ tục tố tụng trọng tài: A Gatekeeper/Người gác cổng – A Guardian/Người bảo vệ - A Guider/Người hướng dẫn;
- Thành lập Ban Cố vấn quốc tế, nhằm hỗ trợ nâng cao chất lượng tố tụng và tiệm cận thông lệ quốc tế;
- Ban hành Bộ Quy tắc đạo đức và ứng xử nghề nghiệp của Trọng tài viên (Arbitration is as good as arbitrator – Trọng tài chỉ tốt khi Trọng tài viên tốt)
- Tăng cường quản lý vụ việc trên nền tảng công nghệ (VIAC eCase) nhằm nâng cao hiệu quả quản trị vụ tranh chấp; tiếp tục nghiên cứu và phát triển VIAC eCase.

Đối với Nhà làm luật và các chủ thể liên quan

- Xây dựng ADR thành một cơ chế vận hành thực chất, thay vì chỉ tồn tại trên danh nghĩa;
- Xây dựng hệ sinh thái giải quyết tranh chấp và phát triển hệ sinh thái này theo hướng đồng bộ với các chuẩn mực và nguyên tắc quốc tế *(có thể tham chiếu bộ 10 nguyên tắc thiên niên kỷ London);*
- Định vị Việt Nam một cách thông minh trong bản đồ giải quyết tranh chấp khu vực và quốc tế.

VICAC 2026

Việt Nam không còn chỉ là nơi các dự án được triển khai, mà còn đang dần trở thành nơi các tranh chấp được giải quyết.

HICAC 2025

Trân trọng Cảm ơn

BÀ VŨ THỊ HẰNG

Trưởng Ban Thư ký Tổ tụng, Thành viên Hội đồng Khoa học
Trung tâm Trọng tài Quốc tế Việt Nam

Address: Số 9 Đào Duy Anh
P. Kim Liên, Hà Nội

Phone number 02:4 3 574 4001
024 3 574 6916

Email: hang.vu@viac.org.vn

AGENDA
CHƯƠNG TRÌNH

GENERAL SESSION
PHIÊN TOÀN THỂ

MODERATOR/ĐIỀU PHỐI VIÊN

Mr./Ông **NGUYỄN NAM TRUNG**

Chair of Society of Construction Law – Vietnam (SCLVN),
FIDIC Certified Contract Manager/Trainer/Adjudicator
Chủ tịch Hội Pháp luật Xây dựng Việt Nam (SCLVN),
Giảng viên và Người phân xử FIDIC

SPEAKER/DIỄN GIẢ

Judge/Thẩm phán
LEE SWEE SENG

Federal Court Judge, Federal Court of Malaysia
Thẩm phán tòa án liên bang,
Tòa án liên bang Malaysia

Prof./GS.
SARWONO HARDJOMULJADI

FIDIC Ambassador and FIDIC Accredited Trainer;
Dispute Avoidance and Adjudication Board
Đại sứ FIDIC, Giảng viên được FIDIC công nhận;
Chuyên gia Hội đồng Giải quyết Tranh chấp (DAAB)

Mr./Ông **RATAN SINGH**

Chairman of Society of
Construction Law – SCL India
Chủ tịch Hội pháp luật xây dựng Ấn Độ

08:30PM - 10:00PM

SESSION P2
Opportunities & Challenges in Construction Dispute Resolution: Global Perspectives

PHIÊN P2
Cơ hội và thách thức trong giải quyết tranh chấp xây dựng: Góc nhìn Quốc tế

Presentation 01
Resolving Construction Disputes: the Malaysian Experience of Specialist Construction Courts and Construction Adjudication

Tham luận 01
Kinh nghiệm Malaysia trong việc xây dựng Tòa án chuyên biệt về xây dựng và cơ chế Người phân xử để giải quyết tranh chấp xây dựng

Presentation 02
Opportunities and Challenges in the implementation of DAAB as of FIDIC Conditions of Contract

Tham luận 02
Cơ hội và thách thức trong việc áp dụng DAAB theo điều khoản hợp đồng FIDIC

Presentation 03
Opportunities & Challenges in Construction Dispute Resolution: Practical Insights from India

Tham luận 03
Cơ hội và thách thức trong giải quyết tranh chấp xây dựng: Chia sẻ thực tiễn tại Ấn Độ

2026 HO CHI MINH CITY
INTERNATIONAL CONSTRUCTION
ARBITRATION CONFERENCE

OPPORTUNITIES & CHALLENGES IN
CONSTRUCTION DISPUTE RESOLUTION:
NATIONAL & GLOBAL PERSPECTIVES

RESOLVING CONSTRUCTION DISPUTES: THE MALAYSIA EXPERIENCE OF SPECIALIST CONSTRUCTION COURTS & CONSTRUCTION ADJUDICATION

By: JUSTICE LEE SWEE SENG, FCJ

Brief History of the Construction Court in Malaysia

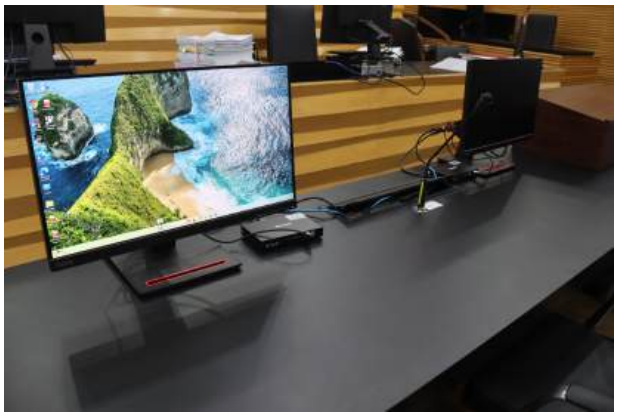
- Specialist Courts have their merits - familiarity with subject matter; speedy disposal and consistency.
- Inaugurated pursuant to the Chief Registrar's Circular No. 2 Year 2013 as a specialist court
- On 1.4.2023, 2 Construction Courts began their operations in Kuala Lumpur and Shah Alam, Selangor
- Officiated by the 7th Chief Justice of Malaysia, Tun Arifin bin Zakaria on 14 April 2014, which is a day before the Construction Industry Payment and Adjudication (CIPAA) Act 2012 came into force on 15 April 2014
- Currently, there are 2 Construction Courts at the Kuala Lumpur High Court Complex, known as Construction Court 1 and Construction Court 2

Structure of the Construction Court in Malaysia

The layout of the Construction Court in Malaysia is more user friendly and less sombre. The long tables are designed to cater for the many documents often in the form of drawings of different sizes that may need to be referred to.

The proceedings are conducted in open court, with a public gallery provided to ensure transparency and public access.

Structure of the Construction Court in Malaysia



Litigating parties are provided with desktops, connection and charging ports to facilitate the projection and presentation of their materials onto the screen during proceedings.

A wide screen with an integrated sound system is provided to ensure that the projected materials can be clearly viewed and followed by all persons present in the courtroom.

Structure of the Construction Court in Malaysia

Tables are provided in the Construction Court to facilitate hot-tubbing sessions where experts from both sides are seated together.

Another feature of the construction court is that the witness in the witness stand can have access to the desktop and a longer table to refer to the documents.

Jurisdiction of the Construction Court

Business of Construction Court pursuant to Chief Registrar's Circular No. 2 of 2013:

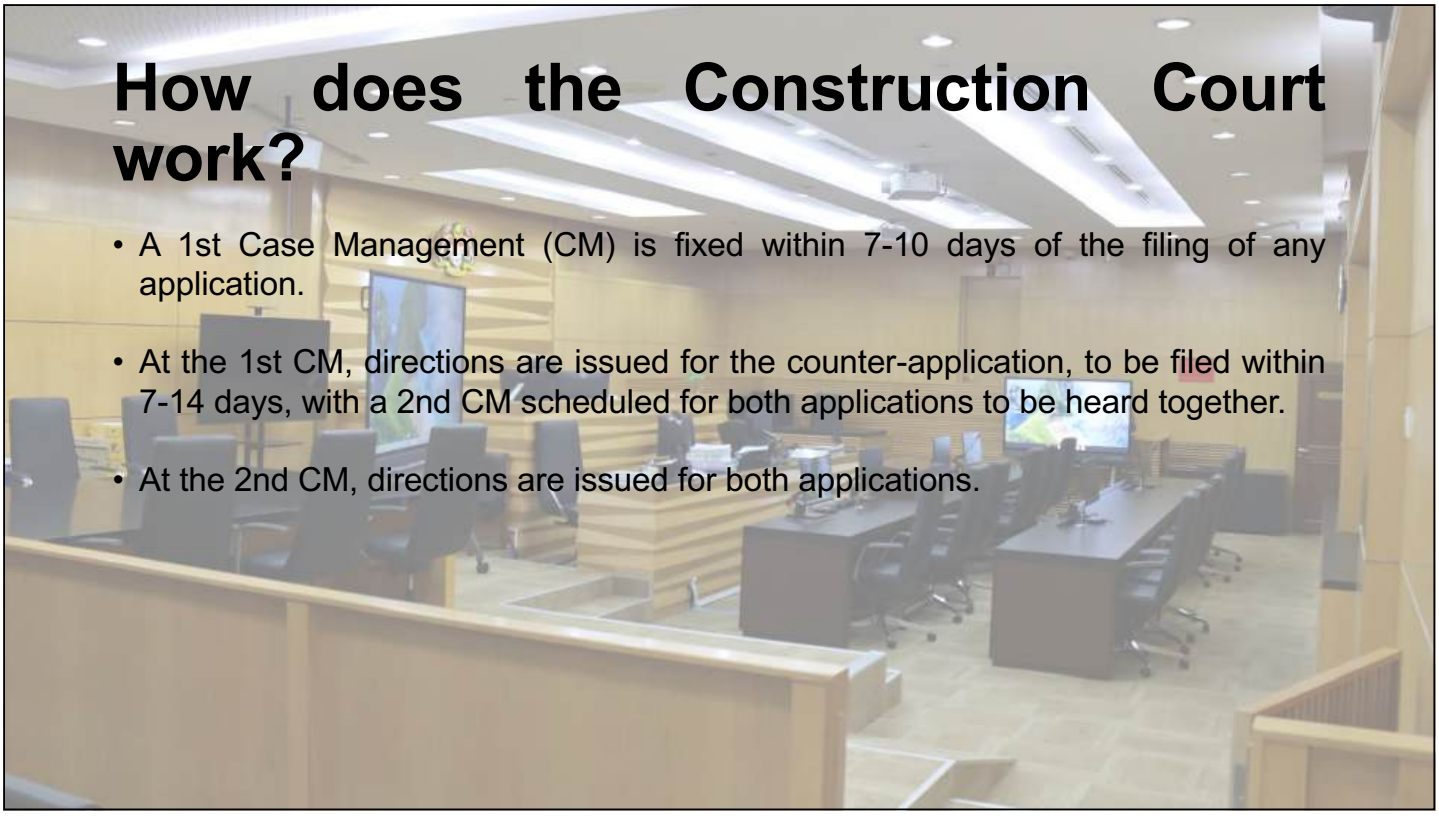
(a) building, engineering or other construction disputes including:
  (i) claims in accordance with the CIPAA 2012;
  (ii) claims concerning performance bond, guarantees or insurance;
  (iii) claims concerning the environment (for example, environmental pollution cases).
(b) claims by and against engineers, architects, surveyors, accountants, consultants and other expert advisors in relation to services rendered;
(c) claims by and against local authorities in relation to their statutory duties concerning land development and building construction;
(d) arbitration proceedings, including challenging the award of the arbitrator; and
(e) appeals from the subordinate courts.

Court's powers under the CIPAA Act 2012

- Under four sections of CIPAA Act 2012
- After an Adjudication Decision (AD) has been made
  - Section 15
    - Applications to set an AD aside
  - Section 16
    - Applications to stay an AD
  - Section 28
    - Applications to enforce an AD
  - Section 30
    - Applications to recover adjudicated amounts under an AD from a principal

How does the Construction Court work?

- The Construction Court in Kuala Lumpur started off with one judge in 2013 and later increase as the number of cases increased.
- By the year of 2020 onwards, there were 2 judges assigned.
- The Construction Court is vested with both original and appellate jurisdiction over construction-related matters arising from all parts of Malaysia.
- It aims (i) to dispose of contested applications within 3-4 months of filing and (ii) to dispose of uncontested applications within 4-6 weeks of filing.



How does the Construction Court work?

- A 1st Case Management (CM) is fixed within 7-10 days of the filing of any application.
- At the 1st CM, directions are issued for the counter-application, to be filed within 7-14 days, with a 2nd CM scheduled for both applications to be heard together.
- At the 2nd CM, directions are issued for both applications.

How does the Construction Court work?

- The Affidavit in Reply shall be filed within 3 weeks under Order 28 rule 3C(3) of Rules of Court 2012 (ROC).
- The Affidavit in Response to the Reply to be filed within 2 weeks under O. 28 r. 3C (4) of ROC.
- Written Submissions are to be filed within 2 weeks, followed by the Reply Written Submissions which is to be filed within 2 weeks.
- The decision is to be given within 3 weeks after the Reply Written Submissions.

Moving Forward: Virtual Hearing in Construction Court

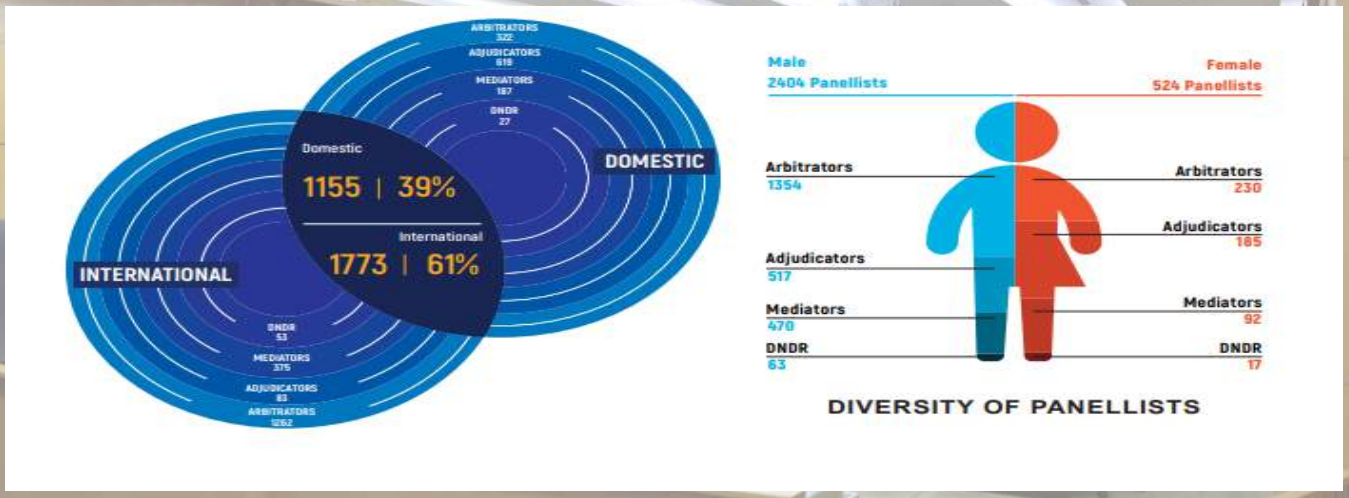
- Preliminary Matters:
  - Court to issue order and directions for virtual hearing
  - Court interpreter will conduct virtual meeting with all counsels before hearing for further instructions.
  - Court to decide the venue for the witness to testify online
  - Witness may give evidence in:
    - Office of solicitors of party who calls the witness to testify;
    - Office of the party who calls the witness or
    - "Independent" venue

- Conduct of Virtual Trial
  - 3 rooms are virtually available:
    - Counsel's room
    - Holding room
    - Witness room
  - All parties should log in at least 15 minutes before scheduled time to commence virtual trial.
  - After the introduction of all parties, only the Judge, the submitting party and witness may turn on the camera and microphone.
  - The proceedings will be recorded by the court.

Adjudication in Construction Courts & Its Effectiveness

- Statutory adjudication is provided for under the CIPAA Act 2012, to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.
- Until the end of 2023, the AIAC has registered 5,079 CIPAA adjudication cases and the construction courts have registered 2,255 cases in consequence of the adjudication decisions that were made.
- Amongst them, there are in excess of 400 decisions on CIPAA cases published by the Malaysian law reports.
  (Source: Reforming the CIPAA: A Few Thoughts by Justice Dato' Lim Chong Fong, July [2024] JMJ pp 11-35, para [8] & [9])
- Assuming that the 2,255 cases comprise of enforcement, setting aside and stay and they came in triplets, we take ⅓ from the figure (752) to divide by 5,079, we can conclude that around 85% of the construction adjudication is successful and treated as final.

Number of Adjudicators Empanelled by the AIAC as of 2025



SOURCE: AIAC - AALCO REPORT 2025

Note: The latest published figure by the AIAC is 702 number of adjudicators as at June 2025.

Registration and Disposal of Construction Cases in 2025 at the Kuala Lumpur High Court

TRACKING CHART
HIGH COURT IN MALAYA AT KUALA LUMPUR
JUDGE : GLOBAL CONSTRUCTION COURTS
AS AT 31 DISEMBER 2025

ANNEXURE HC (1)
COURT : GLOBAL HIGH COURTS CONSTRUCTION

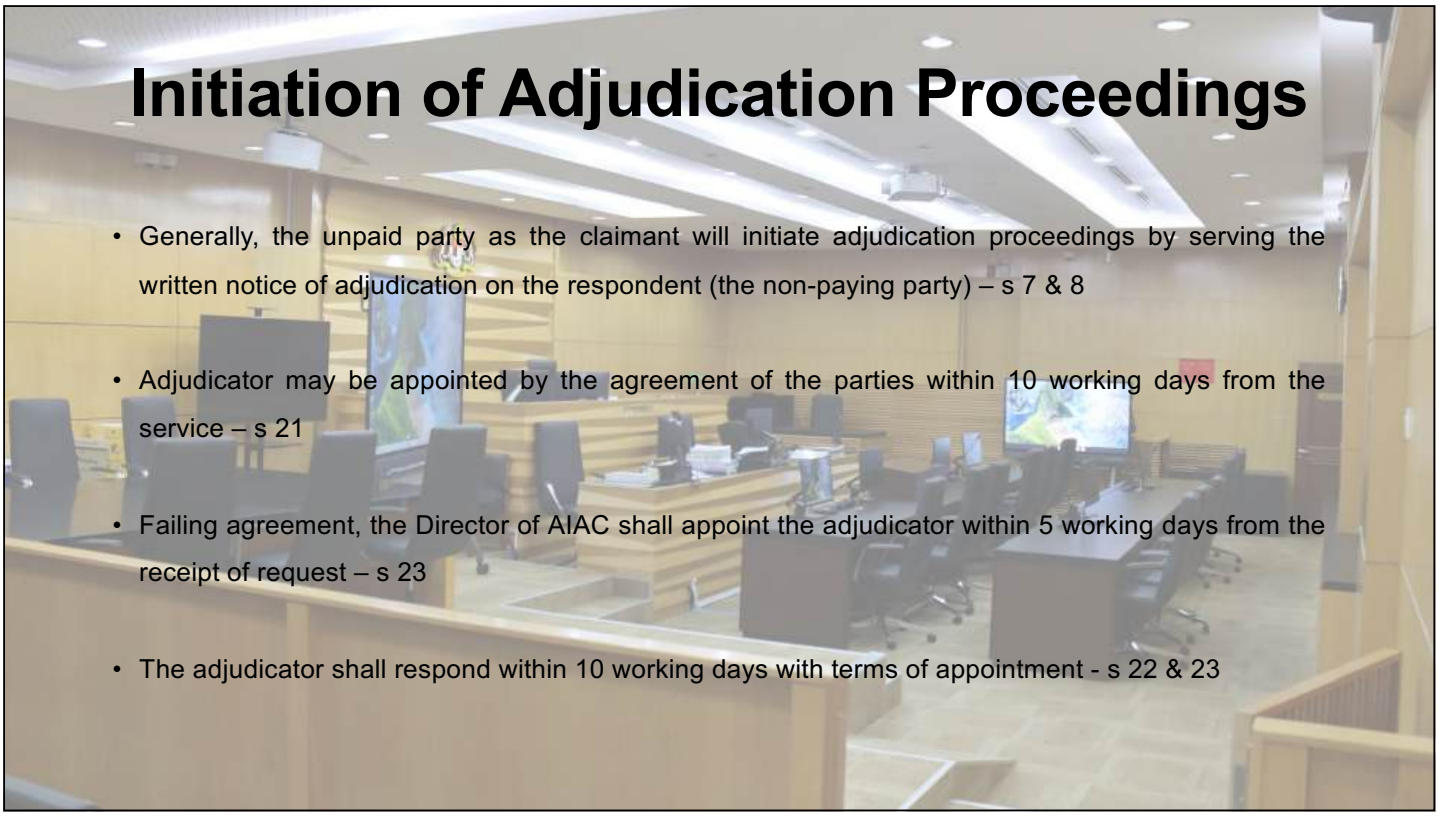
MONTH	BALANCE LAST MONTH	REGISTRATION	DISPOSAL	PERCENTAGE OF DISPOSAL(%)
Jan 2025	261	45	41	15%
Feb	253	26	34	12%
Mar	268	46	51	10%
Apr	267	34	35	12%
May	271	38	35	11%
Jun	282	37	26	8%
Jul	274	32	40	13%
Aug	256	28	48	17%
Sep	250	25	36	14%
Oct	244	42	52	18%
Nov	234	31	46	17%
Dec	219	49	18	7%
Jan 2026	250			

- The total number of registered cases from January 2025 to December 2025 is 431.
- The total number of cases disposed from January 2025 to December 2025 is 444.

Source: from Construction 1 & 2 of Construction Court

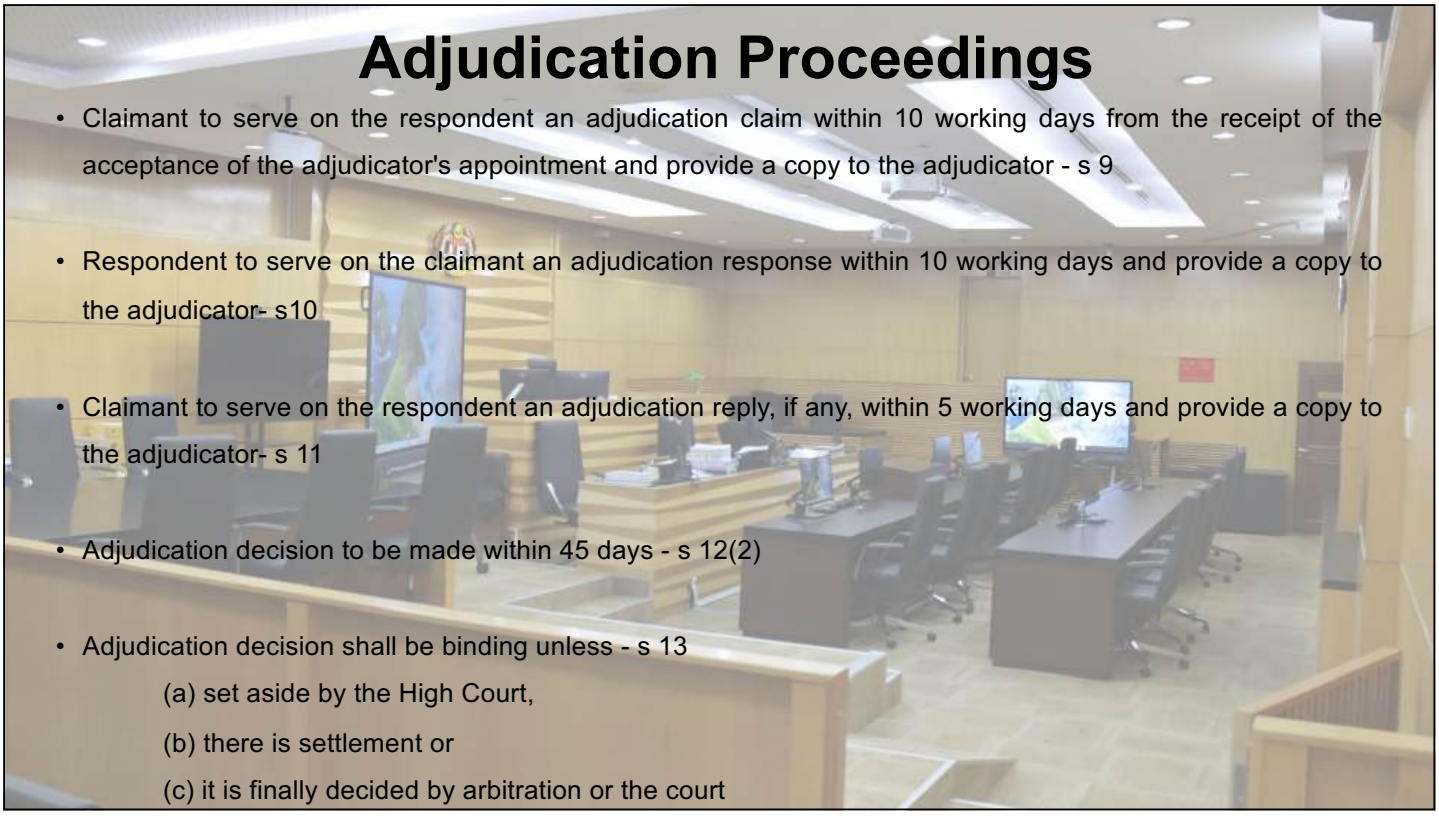
Payment Claim & Payment Response

- Applies to all construction contracts entered into after the coming into force of CIPAA Act 2012
- The key features are (i) serving of payment claim - section 5, (ii) payment response - s 6, (iii) notice of adjudication – s 8, (iv) appointment of adjudicator - s 21, (iv) adjudication claim - s 9, (v) adjudication response - s 10, (vi) adjudication reply - s 11 and (vi) adjudication decision - s 12.
- The Act provides a strict time frame for the adjudication of payment disputes.
- The unpaid party to serve payment claim on non-paying party within the limitation period - s 5
- The non-paying party shall serve on the unpaid party a payment response within 10 working days of the receipt – s 6



Initiation of Adjudication Proceedings

- Generally, the unpaid party as the claimant will initiate adjudication proceedings by serving the written notice of adjudication on the respondent (the non-paying party) – s 7 & 8
- Adjudicator may be appointed by the agreement of the parties within 10 working days from the service – s 21
- Failing agreement, the Director of AIAC shall appoint the adjudicator within 5 working days from the receipt of request – s 23
- The adjudicator shall respond within 10 working days with terms of appointment - s 22 & 23



Adjudication Proceedings

- Claimant to serve on the respondent an adjudication claim within 10 working days from the receipt of the acceptance of the adjudicator's appointment and provide a copy to the adjudicator - s 9
- Respondent to serve on the claimant an adjudication response within 10 working days and provide a copy to the adjudicator- s10
- Claimant to serve on the respondent an adjudication reply, if any, within 5 working days and provide a copy to the adjudicator- s 11
- Adjudication decision to be made within 45 days - s 12(2)
- Adjudication decision shall be binding unless - s 13
  - (a) set aside by the High Court,
  - (b) there is settlement or
  - (c) it is finally decided by arbitration or the court

Setting Aside & Stay of Adjudication Decision

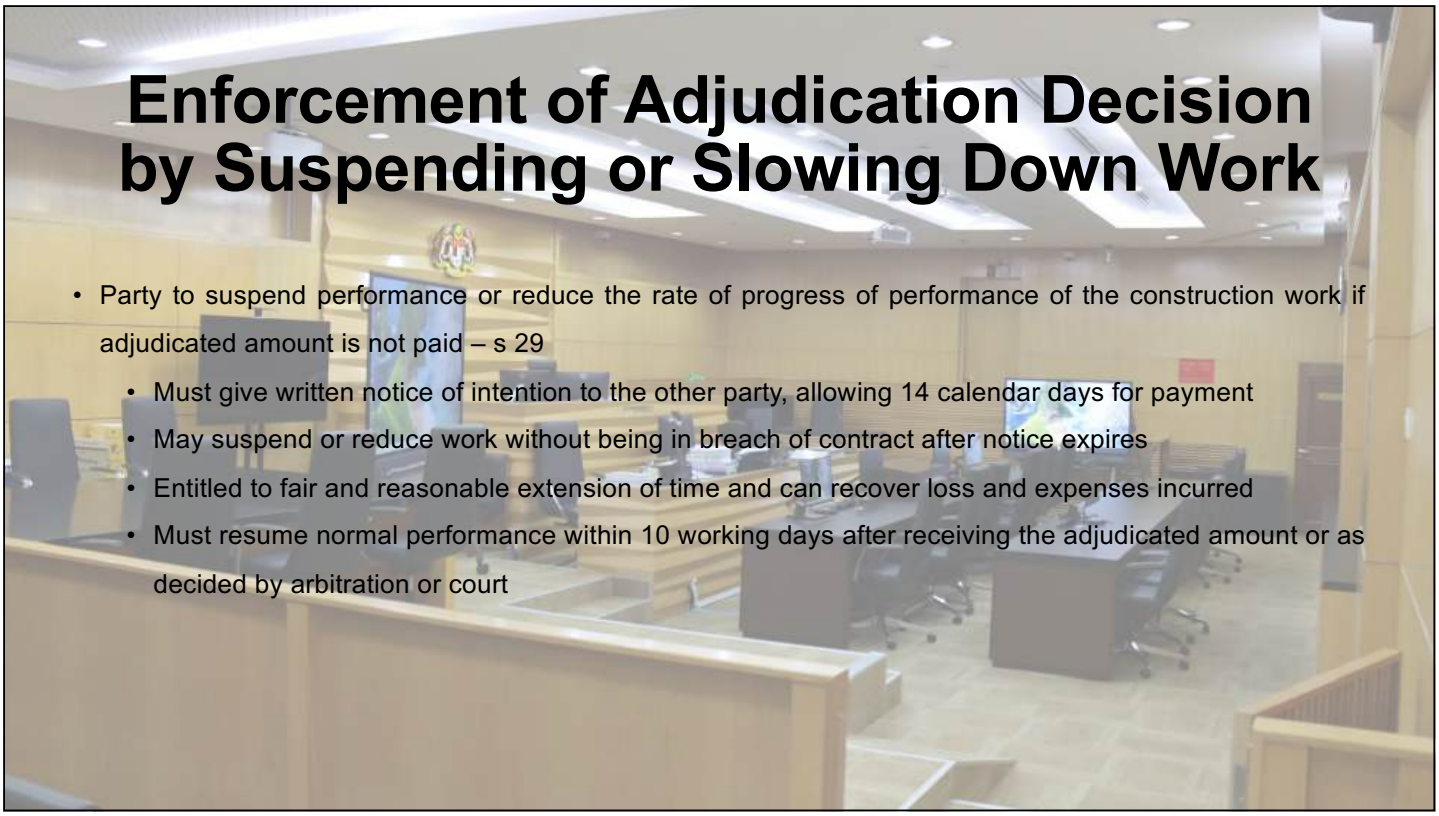
- Adjudication decision may be set aside under 4 grounds: - s 15
  - (a) it is improperly procured through fraud or bribery
  - (b) there is denial of natural justice
  - (c) the adjudicator has not acted independently or impartially
  - (d) the adjudicator has acted in excess of his jurisdictions

- Adjudication decision may also be stayed: - s 16
  - pending hearing of setting aside application
  - pending final determination by the arbitration or the court
  - if there is a clear and unequivocal error of the adjudication decision

Enforcement of Adjudication Decision as a Judgment of the Court

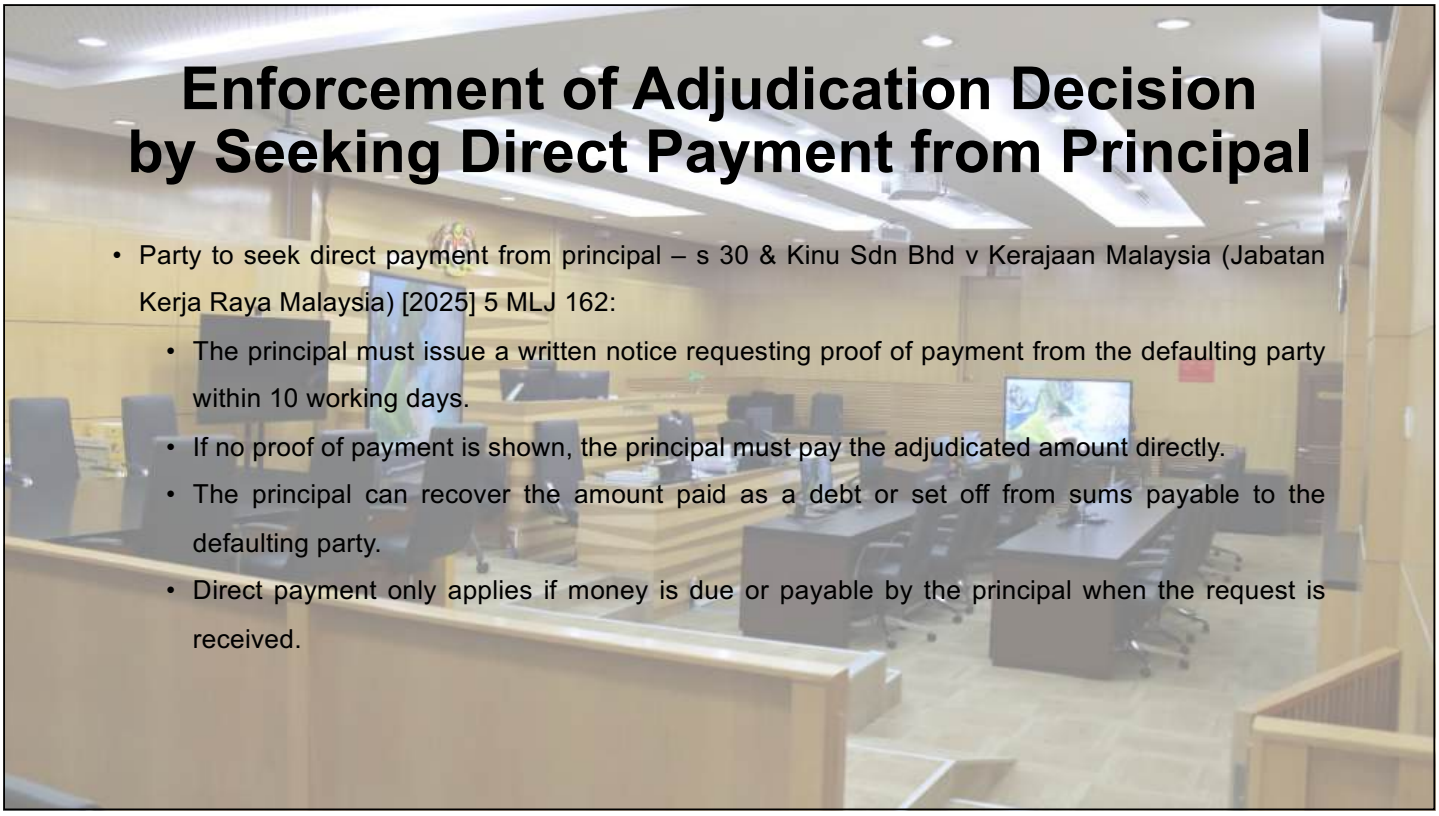
- Parties may enforce the adjudication decision as if it is an order of the High Court issued under the Rules of Court 2012 – s 28
  - Writ of seizure & sale
  - Garnishee action
  - Charging order
  - Bankruptcy action

- Winding up proceedings may be conducted if the adjudicated amount is not paid:
  - Whether the adjudicated sum in the adjudicated decision is a debt that cannot be bona fide disputed - Likas Bay Precinct Sdn Bhd v ASM Development (KL) Sdn Bhd and another appeal [2024] 3 MLJ 157 (COA) & Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd and another appeal [2024] 3 MLJ 157 (FC)



Enforcement of Adjudication Decision by Suspending or Slowing Down Work

- Party to suspend performance or reduce the rate of progress of performance of the construction work if adjudicated amount is not paid – s 29
  - Must give written notice of intention to the other party, allowing 14 calendar days for payment
  - May suspend or reduce work without being in breach of contract after notice expires
  - Entitled to fair and reasonable extension of time and can recover loss and expenses incurred
  - Must resume normal performance within 10 working days after receiving the adjudicated amount or as decided by arbitration or court



Enforcement of Adjudication Decision by Seeking Direct Payment from Principal

- Party to seek direct payment from principal – s 30 & Kinu Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia) [2025] 5 MLJ 162:
  - The principal must issue a written notice requesting proof of payment from the defaulting party within 10 working days.
  - If no proof of payment is shown, the principal must pay the adjudicated amount directly.
  - The principal can recover the amount paid as a debt or set off from sums payable to the defaulting party.
  - Direct payment only applies if money is due or payable by the principal when the request is received.

Conditional Payment and Concurrent Remedies & Proceedings

- Conditional payment such as “pay-when-paid” or “pay-if-paid” clause is prohibited – s 35
- Party may exercise all or any of the remedies under s 28, 29 and 30 concurrently – s 31
- Dispute in respect of payment may be referred to adjudication, arbitration or the court concurrently – s 37

Additional material:

Keynote Address for the CIPAA Conference Day in Conjunction with AIAC's Asia ADR Week 2022 [2023] January JMJ 53 by Justice Dato' Lee Swee Seng

https://drive.google.com/file/d/12PBH50Meugi6M5wBshQS7ILOVHYUF1IQ/view?usp=drive_link

The End & Thank You.

Acknowledgement:
- Mr. Muhammad Iskandar bin Zainol (Research Officer)
- Ms. Tan Chia Yuan
- (Research Officer)

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Gerente General

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www.sclindonesia.id

www.unikal.ac.id

Opportunities and Challenges in the implementation of Dispute Avoidance and Adjudication Board as of FIDIC CC in Indonesia (*as a reference for SEA)*

Prof. Sarwono Hardjomuljadi
Universitas Pekalongan
sarwonohm2@yahoo.co.id

HICAC 2026 | SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN) | VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

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Sarwono is Director of Region 2 of Dispute Resolution Board Foundation-DRBF (2019-now); Country Representative for Indonesia-DRBF (2016-now)

He was Board of Director of Fédération Internationale des Ingénieurs-Conseils-FIDIC (2019-2023);

Recently he is President, **Society of Construction Law Indonesia Chapter - (SCLIndonesia)** - www.sclindonesia.id; FIDIC Affiliate Member ; FIDIC Accredited Trainer; President and Fellow of Institute of Dispute Board for Construction (PADSK); Executive Member and Fellow of Indonesian Institute of Arbitrator (IArbI); Singapore International Arbitration Court Reserve Panel (SIAC); He is involve in some International Projects in Indonesia and abroad as Dispute Avoidance and Adjudication Board (2006-now)

The Winner of FIDIC Trainer of the Year 2024 Award.
Handed by Catherine Karakatsanis, FIDIC President
London, 03 December 2024

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Formerly he worked as Special Adviser to the Minister of Public Works (2010-2022); Deputy Director and then Vice President of State Electricity Corporation, Project Manager and Project Director of some HEPPs.

Involve as FIDIC Board Liaison to Contract Committee, reviewer of FIDIC Rainbow Series, Red-Yellow-Silver (2nd Edition 2017 reprinted 2022); The Short Form of Contract, Green Book (2nd Edition 2021); FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts (2nd Edition 2022); and he is translator of the Rainbow Series 1999 and 2017 reprinted 2022; MDB Harmonised 2010; Client/Consultant Model Services Agreement , White Book (5th Edition 2017) into Bahasa Indonesia (under FIDIC license).

FIDIC Asia Pacific Envoy of Exellence Leader Award

Handed by Dr.Sudir Dhawan, President of FIDIC ASPAC

Kathmandu, Nepal, 19 November 2024

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He is lecturer in Construction Contract, Claim and Dispute Resolution, as well as Construction Law in some Universities; Board Member of Universitas Pekalongan.
Writer at some Journals, one of his notable publication is (2020) "Use of Dispute Avoidance and Adjudication Board", awarded as the Most Downloaded Paper 2021 at Journal of Legal Affairs and Dispute Resolution of American Society of Civil Engineers; a reviewer of LADR-ASCE and several international journals as well as national journal i.e. Journal of Sustainable Construction and Konstruksia; (2021), he is awarded **the Al Mathews Award for Dispute Board Excellence** (www.drb.org); On 28 November 2023 in London, he is awarded "**FIDIC Trainer of The Year 2023, Merit Award**" of FIDIC Contracts, and on 19 November 2024 in Kathmandu, Nepal "**FIDIC Asia Pacific Envoy of Exellence Leader Award**" and on 4th December awarded "**The Winner of FIDIC Trainer of the Year 2024 Award"** (www.fidic.org).

Al Mathews Award for Dispute Board Excellence

Handed by Nicholas Gould, President of Dispute Resolution Board Foundation.

London, 07 May 2022

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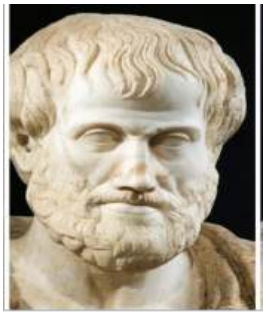

Human behavior flows from three main sources: Desires, emotions and knowledge (Plato, 428-348 BC)

The greatest enemy of knowledge is not ignorance, but the illusion that we already know everything (Stephen Hawking,1942-2018)

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WHY — **BEFORE** — **FIND THE CAUSES**

WHAT — **NOW** — **WHAT HAPPENS**

HOW — **FUTURE** — **IMPROVE IT**

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The main considerations in choosing a method of dispute resolution are to fulfill the criteria of legal certainty, cost, time, and maintaining relationships

Challenge In the use of Arbitration.
Arbitration is the choice because of fulfil the criteria of (1) legal certainty, (2) cost, (3) time, and (4) maintain relationship where the result is final and binding, and also its confidentiality, but recently it has become a last resort because most arbitration tribunal decisions can be filed again to the courts.

Challenge in the use of Litigation:
Using litigation, which formerly was the first choice because of legal certainty not fulfil the above criteria anymore, the unsatisfied plaintiff will challenge the decision for the judicial review after district court, high court and supreme court as the final decision.

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In conducting this study, the author using the criteria reference to previous study (Hardjomuljadi 2017), that is, (1) cost, (2) time, (3) legal certainty, and (4) good relationship from expectation of the employer and the contractor regarding dispute resolution in construction services. The results showed that the contractor's expectations start from (1) legal certainty, (2) time, (3) cost, and (4) the most expected is to maintain good relationships. In the contrary, the employer's expectations start with (1) good relationships, (2) cost, (3) time, and (4) the most expected is legal certainty.

	RII	
Requirements	Employer	Contractor
Cost	0,820	0,920
Time	0,860	0,840
Legal certainty	0,940	0,680
Good relationship	0,660	0,940

Fig. 15. RII for criteria good dispute resolution methods.

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Number	Code	Variable	RII
1	H	Lack of understanding the function of DB	0.871
2	E	Hesitation to have earlier expenses before dispute occurred	0.846
3	A	Cost of DB considered expensive	0.833
4	G	No "legal shelter" or Law stating about DB	0.796
5	L	Decision by the DB is not final, and mostly challenge to arbitration	0.775
6	B	User thought that the decision is not binding	0.767
7	F	The difficulties to execute the decision of DB	0.750
8	I	The Employer and the Contractor are more familiar with the arbitration	0.746
9	J	Candidate for DB who have the engineering education background mostly have lack of knowledge on law and legal aspect	0.733
10	M	For small scale and low cost project, both the employer and the contractor of the opinion that DB is not needed	0.717
11	N	Based on Indonesian custom, the parties prefer negotiation or mutual understanding and/or agreement	0.692
12	O	Money have been spent if there are no dispute	0.679
13	P	Decision by the arbitration also brought to court for judicial review	0.621
14	K	The parties eager to solve the problem and reach the agreement by their own, not decided by third party	0.613
15	C	Difficulties to appoint DB with relevant expertise	0.596
16	Q	Independent DB member is hard to be found and the term of independency create difficulties to appoint the DB	0.575
17	D	Difficulties to appoint the Board in terms of language capability	0.567

Fig. 16. RII for reluctance to use dispute boards for ADR in Indonesia (2017) (for study 2017 it is not divided between ei

Sarwono Hardjomuljadi (2020): "Use of Dispute Avoidance and Adjudication Board, ASEC-LADR Jpurnal of Legal Affair and Dispute Resolution", Nov. 2020 (Most Read Paper in ASCE-LADR , more than 8,085 times).

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Number	Code	Variable	RII
1	R	Lack of trustable and respectable person to be appointed as DB	0.83
2	S	Doubtfulness on the impartiality of the person to be appointed as DB	0.80
3	W	The problem which may occurred with National auditor	0.76
4	Y	Difficult to find the DB candidate who have the construction contract knowledge	0.76
5	A	Cost of DB considered expensive	0.76
6	U	Lack of qualified Indonesian DB to be appointed.	0.68
7	H	Lack of understanding the function of DB	0.67
8	B	User thought that the decision is not binding	0.66
9	C	Difficulties to appoint DB with relevant expertise	0.64
10	V	Lack of dissemination about DB	0.64
11	J	Candidate for DB who have the engineering education background mostly have lack of knowledge on law and legal aspect	0.62
12	X	Employer need the the legal certainty	0.62
13	E	Hesitation to have earlier expenses before dispute occurred	0.62
14	D	Difficulties to appoint the Board in terms of language capability	0.62
15	L	Decision by the DB is not final, and mostly challenge to arbitration	0.58
16	Q	Independent DB member is hard to be found and the term of independency create difficulties to appoint the DB	0.58
17	M	For small scale and low cost project, both the employer and the contractor of the opinion that DB is not needed	0.58
18	T	Government policies	0.58
19	P	Decision by the arbitration also brought to court for judicial review	0.58
20	O	Money have been spent if there are no dispute	0.62
21	N	Based on Indonesian custom, the parties prefer negotiation or mutual understanding and/or agreement	0.58
22	K	The parties eager to solve the problem and reach the agreement by their own, not decided by third party	0.58
23	F	The difficulties to execute the decision of DB	0.56
24	G	No "legal shelter" or Law stating about DB	0.56
25	I	The Employer and the Contractor are more familiar with the arbitration	0.54
26	Z	Law is just launched in 2017	0.52

Fig. 17. RII for employer reluctance to use dispute boards for ADR in Indonesia (2020).

Sarwono Hardjomuljadi (2020): "Use of Dispute Avoidance and Adjudication Board, ASEC-LADR Jpurnal of Legal Affair and Dispute Resolution", Nov. 2020 (Most Read Paper in ASCE-LADR , more than 8,085 times).

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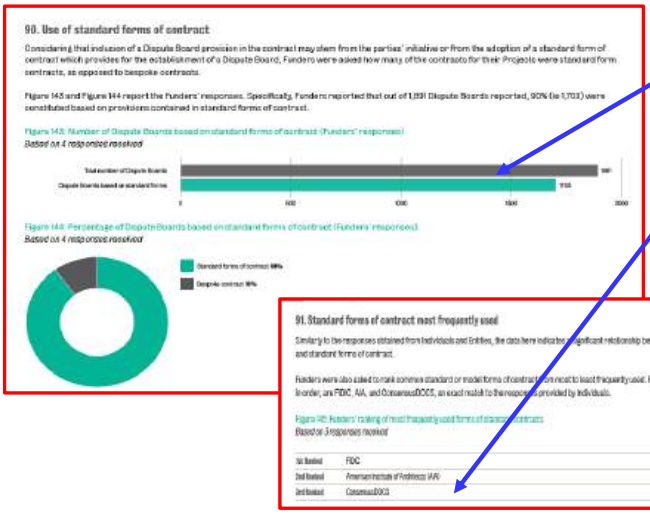
Number	Code	Variable	RII
1	A	Cost of DB considered expensive	0.80
2	R	Lack of trustable and respectable person to be appointed as DB	0.74
3	S	Doubtfulness on the impartiality of the person to be appointed as DB	0.72
4	E	Hesitation to have earlier expenses before dispute occurred	0.70
5	V	Lack of dissemination about DB	0.66
6	W	The problem which may occurred with National auditor	0.66
7	U	Lack of qualified Indonesian people to be appointed as DB	0.65
8	X	Lack of trained or certified Indonesian people to be appointed as DB	0.64
9	O	Money have been spent if there are no dispute	0.62
10	H	Lack of understanding the function of DB	0.62
11	Q	Independent DB member is hard to be found and the term of independency create difficulties to appoint the DB	0.62
12	B	User thought that the decision is not binding	0.58
13	C	Difficulties to appoint DB with relevant expertise	0.58
14	M	For small scale and low cost project, both the employer and the contractor of the opinion that DB is not needed	0.58
15	F	The difficulties to execute the decision of DB	0.58
16	J	Candidate for DB who have the engineering education background mostly have lack of knowledge on law and legal aspect	0.58
17	G	No "legal shelter" or Law stating about DB	0.56
18	I	The Employer and the Contractor are more familiar with the arbitration	0.52
19	L	Decision by the DB is not final, and mostly challenge to arbitration	0.50
20	Y	Difficult to find the DB candidate who have the construction contract knowledge	0.50
21	P	Decision by the arbitration also brought to court for judicial review	0.48
22	K	The parties eager to solve the problem and reach the agreement by their own, not decided by third party	0.46
23	N	Based on Indonesian custom, the parties prefer negotiation or mutual understanding and/or agreement	0.46
24	T	Government policies	0.46
25	D	Difficulties to appoint the Board in term of language capability	0.46
26	Z	Law is just launched in 2017	0.42

Fig. 18. RII for contractor reluctance to use dispute boards for ADR in Indonesia (2020).

Sarwono Hardjomuljadi (2020): "Use of Dispute Avoidance and Adjudication Board, ASEC-LADR Jpurnal of Legal Affair and Dispute Resolution", Nov. 2020 (Most Read Paper in ASCE-LADR , more than 8,085 times).



Provision of DB **mostly based on standard form of Contract.**

Standard forms of Contract most frequently used **is FIDIC Contracts**.

From: Renato Nazzini, Raquel Macedo Mareira (2024), "2024 Dispute Boards International Survey;", King's College, London, U.K.

Entities' reasons for deciding against the inclusion of Dispute Board in the contract are:

(2024)

(1) Cost of the DB,
(2) Unfamiliarity with the DB function,
(3) Lack of enforceability of DB findings,
(4) Lack of availability of DB members,
(5) Time related concerns,
(6) Complexity of DB mechanism.

Recommendations: JICA's possible actions

- **Knowledge sharing seminar:** Organize seminar for project owners and relevant government agencies to share good practices (i.e. dispute avoidance mechanism, use of Informal Opinion).
- **DB provision:** Consider changes to facilitate early establishment of S. DB (i.e. set realistic deadline, nominate DB members at bidding stage)
- **DB members:** Closely work with DRBF representatives (i.e. Dr. Castro and Dr. Hardjomuljadi) to increase the number of potential DB members who understand local regulations/context and facilitate early project completion and to prepare a potential member list.

→ **JICA continues to promote Standing DB establishment with close cooperation with DRBF!**

Major obstacle in the use of DB: Appointment and approval of DB members.

Action needed to support the use of DBs are:

1. ***Dissemination of FIDIC Contract is a must***
2. ***Provision on Avoidance function of S.DB needed.***
3. ***Country List of Potential Member of DB needed***

From: Yoko Takebayashi (2025):
"The State of Disputes, Interim Findings of JICA's Survey on DB", DRBF 24th Annual International Conference, Cape Town, 13-14 May 2025.

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The main considerations in choosing a method of dispute resolution are to fulfill the criteria of legal certainty, cost, time, and maintaining relationships

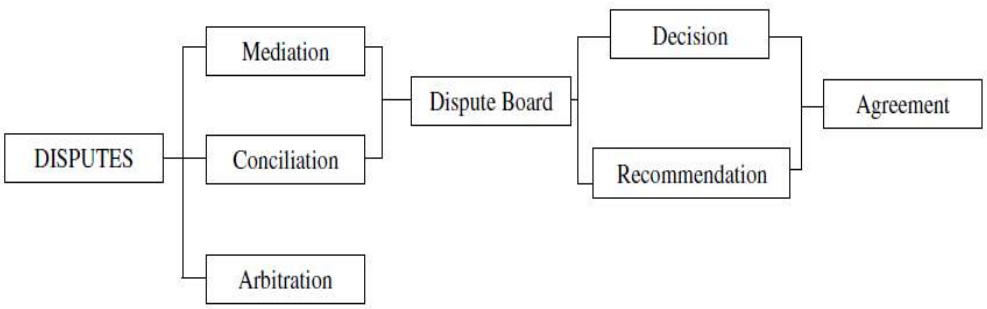

Fig. 4. Dispute resolution for construction (based on Indonesian Law No. 2/2017).

Sarwono Hardjomuljadi (2020): "Use of Dispute Avoidance and Adjudication Board, ASEC-LADR Jpurnal of Legal Affair and Dispute Resolution", Nov. 2020 (Most Read Paper in ASCE-LADR , more than 8,085 times).

Idea of Law

Gustav Radbruch
(1878 – 1949)

Gustav Radbruch (1878–1949) was a German legal philosopher who argued that the idea of law must reconcile three core values:

1. **justice** (philosophical),
2. **legal certainty** (juridical), and
3. **expediency** (sociological)

Inspiring lesson

His idea inspired me to explore deeply:
The relationship between justice and legal certainty versus expediency, leading me to conclude that a Construction Contract is determined not only by the ***expressed terms*** written but also by the ***implied terms*** that are not expressly stated. Developing his idea, I suggested the ***"avoidance"*** function and support the idea to change the of *Dispute Adjudication Board* (FIDIC 1999, 2010) become ***Dispute Avoidance and Adjudication Board*** (FIDIC 2017 and updated 2022) as superiority of so called "Eastern Way of thinking".
To know Gustav more, please read "***Five minutes of Legal Phylosophy by Gustav Radbruch (1945)"***

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Inspiring lesson

Sarwono & Gordon at DRBF International Conference, Tokyo, Japan, 23rd – 25th May 2018 (unforgettable last physical meeting with Gordon)

- Inspiring by **Gordon L. Jaynes**' paper titling ***"Dispute Board, East vs West"*** at Dispute Resolution Board Foundation (DRBF) Magazine, Forum Volume 16, Issue 4, November 2012
- He is ***DRBF Al Mathews Lifetime Award recipient*** in **2002**, before Sarwono in **2022** (as the second Asian after Toshihiko Omoto **2012**).
- First meeting with him was 1982 in Indonesia, Saguling HEPP Power Project and he always remind me every time we met after, in 2012 (Manila), in 2014 (Singapore) and 2017 (Madrid), that ***Eastern Way of thinking prioritizing "avoidance" is driving efficiency more than Western Way of thinking***, before Gordon the beloved husband of Lyle Lawson departed this earth on 4 December 2022.

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February 2017
Republic of Indonesia Law No 02 Year 2017
Re Construction Services stipulated in Article 88
The first time that the use of Dewan Sengketa (Dispute Board) mention in the Law, with the spirit of dispute avoidance, as Indonesia culture, **"Musyawarah"** = reach an agreement through a process of in-depth deliberation to reach consensus.

AFFILIATE MEMBER

MERIT AWARD
FIDIC Trainer of the Year
London, 2023

Al MATHEWS AWARD
DRBF Dispute Board Excellence
London, 2022

WINNER AWARD,
FIDIC Trainer of the Year
London, 2024

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The Construction Dispute Resolution Practices
(*FIDIC Conditions of Contract 2nd EDITION 2017)*

Prof. Sarwono Hardjomuljadi
Guru Besar Magister Hukum Konstruksi
Universitas Pekalongan

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Based on the study by Jaynes (Jaynes 2012) there are three principal problem areas which are restraining a more successful use of Dispute Boards in the East, that are:

Education, Costs and Philosophy

The summaries shown that the main factor affecting people with regard to making the decision to use a dispute board is **education**; that is, the dissemination and training should be given to reach a good understanding of their function, to be clear regarding the **costs** involved and how the parties can pay, and to make the parties understand their **philosophy,** that the goal of the dispute resolution process is not a win–lose but a win–win solution. In the flow of dispute resolution based on FIDIC

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Dispute Resolution as of FIDIC Conditions of Contracts 2nd Edition 2017 reprinted 2022 with amendment.

ENGINEER DETERMINATION

↓

DISPUTE AVOIDANCE AND ADJUDICATION BOARD

↓

AMICABLE SETTLEMENT

↓

ARBITRATION

FIDIC Asia-Pacific Contract Users' Conference

Hong Kong, 25-26 June 2019

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LAW NO.2 2017

Article 88

(1) disputes relating to construction services may be settled with the principle of negotiation to reach the agreement.

(2) in case the agreement between parties as referred to paragraph (1) can not be reached, the parties can chose for the alternative dispute resolution as stated in the construction contract.

(3) if no dispute resolution stated in the contract as referred to in paragraph (2) (*pactum de compromittendo*) the disputing parties can make a written agreement on how the dispute will be settled (*compromise act*).

(4) stages on the dispute resolution as referred to in paragraph (2) covering:
a. mediation; b. conciliation; and c. arbitration.

(5) other than dispute resolution as referred to in paragraph (4) number a. and b, the parties can utilise the dispute board.

(6) in the event of dispute resolution utilizing Dispute Board as referred to in paragraph (5), the member of the board can be selected with the principle of professionalism and impartiality

(7) other requirements and procedure on the dispute resolution as referred to in paragraph (1) will be governed further by the government regulation.

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1 ENGINEER DETERMINATION

Sub-clause 3.7 Agreement or Determination

When carrying out his/her duties under this Sub-Clause, ***the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer***.

Sub-clause 3.7.1 Consultation to reach agreement

The Engineer shall consult with both Parties jointly and/or separately, and shall encourage discussion between the Parties in an endeavour to reach agreement.

Unless otherwise prthe Engineer and agreed by both Parties, the Engineer shall provide both Parties with oposed by a record of the consultation.

1

ENGINEER DETERMINATION

Sub-clause 3.7.2 Engineer's Determination

The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances.

Within the time limit for determination under Sub-Clause 3.7.3 [*Time limits*], the Engineer shall give a Notice to both Parties of his/her determination.

Sub-clause 3.7.4 Effect of the agreement or determination

Each agreement or determination shall be binding on both Parties (and shall be complied with by the Engineer) unless and until corrected under this Sub-Clause or, in the case of a determination, it is revised under Clause 21 [Disputes and Arbitration].

Sub-clause 3.7.5 Dissatisfaction with Engineer's determination

If either Party is dissatisfied with a determination of the Engineer:

(a) ***the dissatisfied Party may give a NOD to the other Party, with a copy to the Engineer;***

(d) thereafter, either Party may proceed under Sub-Clause 21.4 [*Obtaining DAAB's Decision*].

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2

DISPUTE AVOIDANCE AND ADJUDICATION BOARD

Sub-clause 21.1 Constitution of the DAAB

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [*Obtaining DAAB's Decision*]. The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance.

,,,

If the DAAB is to comprise three members, ***each Party shall select one member for the agreement of the other Party***. The Parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

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2 DISPUTE AVOIDANCE AND ADJUDICATION BOARD

Sub-clause 21.3 Avoidance of Disputes

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to ***provide assistance and/or informally discuss*** and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. ***If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.***

Successful projects using DB with "avoidance" function as of FIDIC Conditions of Contracts

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1-4 December 2025
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JICA DB MANUAL 2019, Appendix 5.2

The key to a successful DB is that DB members obtain respect from the Parties. In this consideration, it is a common practice that each of the Parties nominates **a respectful candidate** for a DB member **from the same nationality whom they think as competent and reliable**. This is a reasonable practice as far as the other Party approves and in this case the Chairperson must be someone from different nationalities of the Parties and the Engineer.

TRUSTED AND RESPECTED




From: Sarwono Hardjomuljadi (2025): Collaboration of stakeholders to enhance the DAAB's "avoidance" function as the spirit of FIDIC Contracts to achieve a successful construction project, PADSK-SCLI International Conference 2025, Jakarta 7-8 August 2025.

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POWER PLANT PROJECT
(under World Bank Loan).
Contract:MDB Harmonised 2010
Employer, Indonesia; Contractor, China;
Engineer, Japan.
Standing DB: **Japan, China, Indonesia**

PORT PROJECT
(under JICA loan)
Contract: MDB Harmonised 2010
Employer, Indonesia; Contractor, Japan;
Engineer, Japan.
Standing DB: **Canada, Japan, Indonesia**.

“Audi et alteram partem"

From: Sarwono Hardjomuljadi (2025): Collaboration of stakeholders to enhance the DAAB’s “avoidance” function as the spirit of FIDIC Contracts to achieve a successful construction project, PADSK-SCLI International Conference 2025, Universitas Pekalongan, Indonesia.

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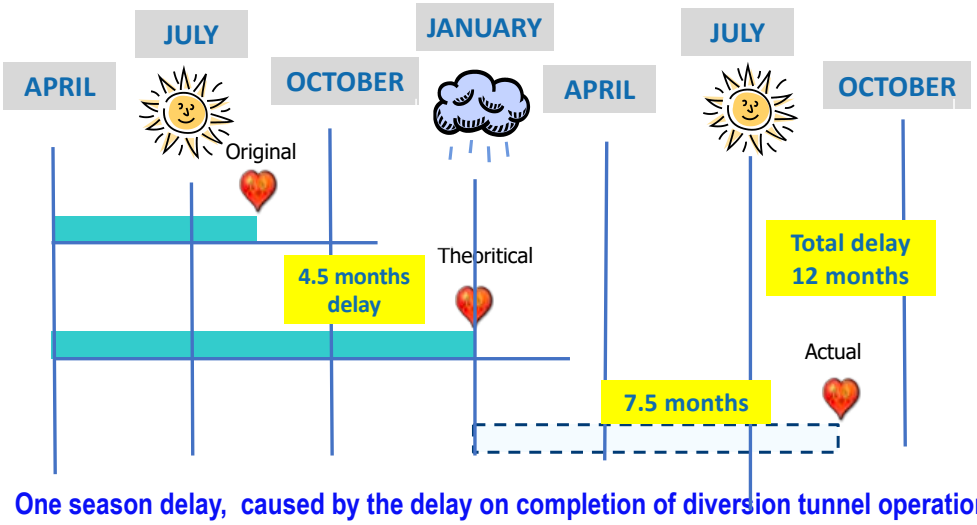
ENGINEERING EXPERIENCE & COMPETENCE



One season delay, caused by the delay on completion of diversion tunnel operation.

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2 DISPUTE AVOIDANCE AND ADJUDICATION BOARD

Sub-clause 21.4 Obtaining DAAB's Decision

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [Avoidance of Disputes]).

Sub-clause 21.4.3 The DAAB's decision

The DAAB shall complete and give its decision within:
(a) 84 days after receiving the reference; or
(b) such period as may be proposed by the DAAB and agreed by both Parties.

Sub-clause 21.4.4 Dissatisfaction with DAAB's decision

If either Party is dissatisfied with the DAAB's decision:
(a) ***such Party may give a NOD to the other Party***, with a copy to the DAAB and to the Engineer;

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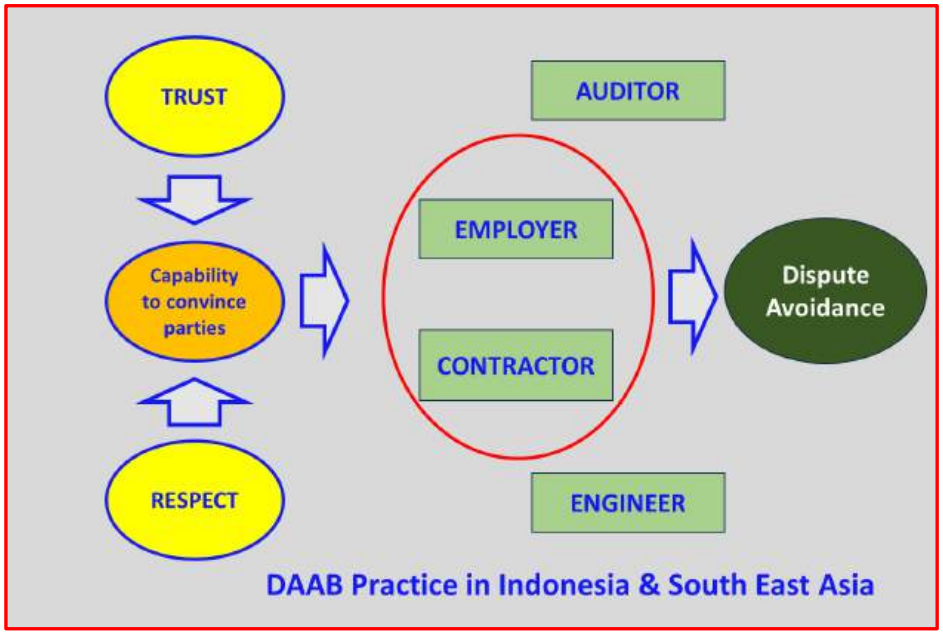

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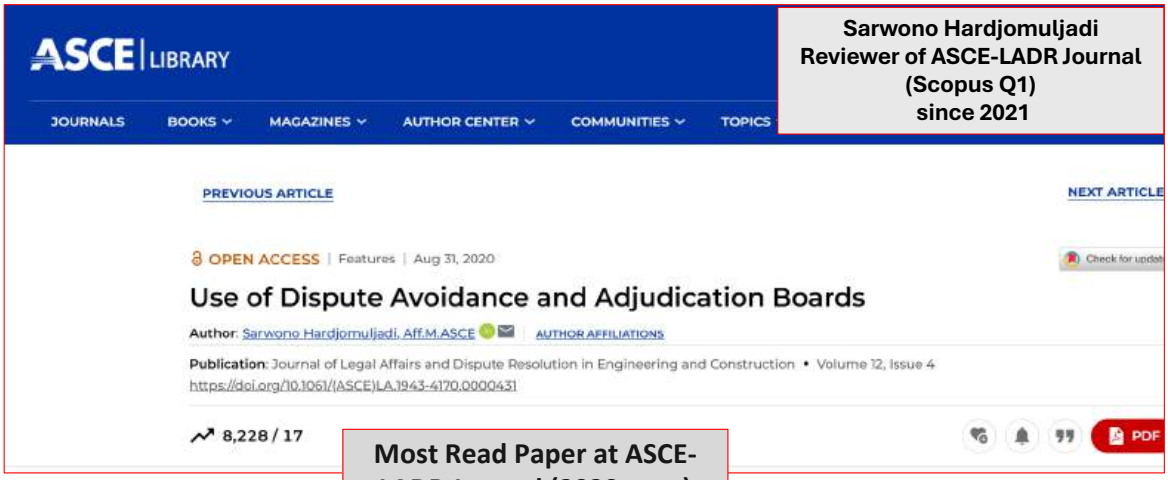
Sarwono Hardjomuljadi
Reviewer of ASCE-LADR Journal (Scopus Q1) since 2021



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Continuing Dissemination of Dispute Avoidance as of FIDIC Contracts for Younger Generations/Future Leaders

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Launching in 2023
Master of Construction Law Programme
with FIDIC Contracts as one of the basic of lecture and thesis
at Universitas Pekalongan

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Conferences Opening/Closing Remarks:
FIDIC President
Ms. Catherine Karakatsanis
DRBF Executive Director
Ms. Ann Russo
Director General of Construction Development
Mr. Boby Ali Azhari
Judge of Constitutional Court of Indonesia
H.E. Dr. Arsul Sani

In collaboration:
Universitas Pekalongan,
Society of Construction Law Indonesia (SCLI)
and
Indonesia Institute of Dispute Board for Construction (PADSK).

#F

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Continuing Dissemination of Dispute Avoidance as of FIDIC Contracts

Action to Disseminate the "Dispute Avoidance" as of FIDIC Contracts

3 AMICABLE SETTLEMENT

Sub-clause 21.5 Amicable Settlement

Where a NOD has been given under Sub-Clause 21.4 [Obtaining DAAB's Decision], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.

4 ARBITRATION

Sub-clause 21.6 Arbitration

The arbitrator(s) ***shall have full power to open up, review and revise*** any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute.

Nothing shall disqualify ***the Engineer from being called as a witness and giving evidence*** before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [Obtaining DAAB's Decision]. ***Any decision of the DAAB shall be admissible in evidence in the arbitration.***

TERIMA KASIH

THANK YOU

AGENDA
CHƯƠNG TRÌNH

SECTION A – International Construction Contracts
PHẦN A – Hợp đồng Xây dựng Quốc tế

MODERATOR/ĐIỀU PHỐI VIÊN

Ms./Bà **NGUYỄN PHƯƠNG TRINH**

Founding Partner of TNP Law/Vice chair of SCLVN
Luật sư thành lập công ty Luật TNP Law, Phó chủ tịch SCLVN

01:30PM -03:00PM

SESSION A1
Construction Contracts under Vietnam Construction Law 2025

PHIÊN A1
Hợp đồng Xây dựng theo Luật Xây dựng năm 2025 (Việt Nam)

SPEAKER/DIỄN GIẢ

Mr./Ông **MINO HAN**

Partner at Peter & Kim
Luật sư thành viên Peter & Kim

Presentation 01
Consequential loss exclusion clauses and LD / penalty clauses in international construction contracts – are they valid in Vietnam, and relevant drafting tips

Tham luận 01
Các điều khoản loại trừ thiệt hại gián tiếp và điều khoản bồi thường thiệt hại định trước / phạt vi phạm trong hợp đồng xây dựng quốc tế – liệu có hợp lệ tại Việt Nam không, và các lưu ý khi soạn thảo

Mr./Ông **VŨ LÊ BẰNG**

Co-managing partner at Nishimura & Asahi (Vietnam) Law Firm in HCMC
Đồng Quản lý Điều hành tại Nishimura & Asahi (Văn phòng Việt Nam) tại TP. HCM

Presentation 02
Internationalization of Vietnam's Construction Contracts under the New Construction Law Framework

Tham luận 02
Quốc tế hóa các hợp đồng xây dựng của Việt Nam trong khuôn khổ pháp luật xây dựng mới

Dr./TS. **NGUYỄN THỊ HOA**

Lecturer at the Ho Chi Minh City University of Law in Viet Nam
Giảng viên tại Đại học Luật TP. Hồ Chí Minh

Presentation 03
Whether the liquidated damages mechanism according to international standard forms of contract has been really adopted in the new Construction Law of 2025 of Viet Nam?

Tham luận 03
Liệu cơ chế bồi thường thiệt hại định trước theo các mẫu hợp đồng tiêu chuẩn quốc tế đã thực sự được tiếp thu trong Luật Xây dựng mới năm 2025 của Việt Nam?

25 March 2026

"Consequential loss exclusion clauses and LD / penalty clauses in international construction contracts – review from a civil law perspective

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1. Introduction

The scope of liability of a contracting party arising from a breach of contract can be difficult to estimate and remedies available for the recovery of damages arising out of contractual breaches are different under civil law and common law traditions. Taking English law as an example, (1) ordinary damages, which are damages that arose naturally, according to the usual course of things, from the breach of contract itself, and (2) consequential damages, which are damages that arise from special circumstances, are claimable by the aggrieved party. Regarding consequential damages, these are only claimable if the special circumstances were reasonably within the contemplation of both parties at the time of contracting. Adopting an international standard form contract with provisions based on this principle (or any other principles on damages that are rooted in a common law tradition) in a civil law context would inherently create a level of uncertainty and increase risk exposure, because the scope of 'damages that arise from special circumstances' is not clear cut when applying specific facts or types of losses to this legal test from a civil law perspective.

To manage this risk, contracting parties in the construction sector therefore set out mechanisms to limit their liability, such as an exclusion clause or a liability cap. It is common in construction contracts to include a ‘consequential loss’ exclusion clause in which certain types of losses are agreed to be *non-recoverable*. The FIDIC Standard Forms include such exclusion clause, and they operate seamlessly when the governing law of the contract is English law or any other laws from a common law jurisdiction.

However, what if the parties have agreed to apply civil law to a construction contract? Take for example Vietnamese law. Do the limitation of liability clauses (such as an exclusion clause or liability caps) still withhold scrutiny? Are such clauses still fully enforceable? If not, how would they be applied and interpreted?

Likewise, how should an alternative mechanism to cap liability by way of pre-estimated damages – known as liquidated damages (LD) under common law – be dealt with from a

civil law perspective? These concepts operate well under English law, but how are these viewed and dealt with through the lens of Vietnamese law or Korean law? If the concept of LD is not fully aligned with Vietnamese law, is there a way to reconcile the two? Would the enactment of the recently amended Vietnamese Construction law, which has an express statutory provision on pre-estimated loss, offer a satisfactory solution to this friction, or does uncertainty still remain?

The authors will review and discuss these issues, followed by practical contract drafting tips to minimize legal uncertainties and ensure that the limitation clause agreed between the parties is held valid, effective and enforceable to the extent possible.

2. Exclusion clauses under Vietnamese law and Korean law

A. Vietnamese law

(1) Regime on damages (under the Vietnamese Civil Code)

The starting point for damages arising from a breach of contract under Vietnamese law is the Vietnamese Civil Code. Articles 13 and 363 of the Vietnamese 2015 Civil Code ("the Civil Code") states as follows:

Article 13 and Article 363 of the Vietnamese Civil Code (2015)

Article 13 Compensation for loss or damage
Individuals and legal entities whose civil rights are violated shall be compensated for all loss or damage, except where otherwise agreed by the parties or otherwise prescribed by law.

Article 363 Compensation for loss and damage due to fault of aggrieved party
Where there is a breach of an obligation and loss and damage is partially caused by the fault of the aggrieved party, the defaulting party is only required to compensate for the loss and damage which corresponds to the extent of its fault.

[Underline added.]

According to Article 13 of the Civil Code, the aggrieved party whose rights are infringed is entitled to seek recovery of all loss and damages *unless otherwise agreed or prescribed*

by law. The extent of recoverable loss is set out in Article 363, which states that the defaulting party is only required to compensate for ***the loss and damage which corresponds 'to the extent of its fault'***. In other words, the starting point is compensation for '*actual loss', and there must be a causal link between the loss and the corresponding fault/breach*. Notably, there is *no cap on the liability* set out in the Civil Code provided that actual loss is proven by the aggrieved party.

What are the types of recoverable losses under Vietnamese law? Article 361 sets out the losses recoverable as a result of a breach of contract, and states as follows:

> ***Article 361 Loss and damage caused by breach of obligations***
> *1. Loss and damage* caused by a breach *of an obligation comprises physical damage and spiritual damage.*
> *2. Physical damage is* ***actual physical losses*** *which can be determined, comprising loss of property,* ***reasonable expenses to prevent, mitigate*** *or* ***restore damage****, and the* ***actual loss or reduction of income***.
> *3. Spiritual damage is spiritual losses caused by harming life, health, honor, dignity, reputation and other personal interests of a subject.*
>
> [Emphasis added.]

There is no mention of 'consequential loss' or 'special loss' in this provision. What then is 'consequential loss', in general terms? Under English law, 'consequential loss' is understood to refer to losses or damages that do not arise directly from a breach of contract, but from special circumstances. Such losses are recoverable under English law if they were foreseeable by the parties at the time of contract execution.

However, Vietnamese law neither specifies nor provides for a definition of the legal concept of 'consequential loss'. From the observation hereunder, it appears that no equivalent concept to the common law notion of "consequential loss" exists within the statutory framework of Vietnam. Instead, the Vietnamese 2015 Civil Code adopts a closed and exhaustive approach, setting out a finite list of losses/damages that are claimable and recoverable. On a strict and conservative interpretation, any type of loss or damage falling outside the categories specified in Article 361 of the Civil Code is excluded from recovery.

According to Article 361 of the Civil Code, Loss and damage caused by a breach of an

obligation comprises (i) physical damage and (ii) spiritual damage. Physical damage refers to **actual physical losses** which can **be determined**. It includes (a) loss of property, (b) reasonable expenses to prevent, mitigate or restore damage, and (c) the ***actual*** loss or reduction of income.

Would 'reduction of income' be something equivalent to or similar to 'consequential loss' under English law? Not quite. 'Reduction of income' appears to be a direct or natural consequence arising from or out of the actual physical loss and/or damage caused by the defaulting party, through its breaches of an obligation. This reflects the overarching premise of Article 361 of the Civil Code.

This observation is derived from: (a) the language and structure of the relevant provisions of the Vietnamese 2015 Civil Code (in particular, Articles 13, 361, and 363), with emphasis on **(i)** ***the "actual" nature of the loss***— the test for which relies on whether such loss can be proven, determined, or quantified—and (ii) ***the requirement of a causal link between the loss and the relevant breach or fault;*** and (b) the interaction between the 2015 Civil Code and other relevant legislation, including the Vietnamese 2005 Commercial Law ("**Commercial Law**").

In light of the above analysis, a 'reduction of income' may, depending on circumstances, fall within different classifications. On the one hand, it may constitute a recoverable/claimable consequential loss under the common law definition (where such loss arises from special circumstances and is foreseeable at the time of contracting). On the other hand, a 'reduction of income', in certain contexts can be characterized as a direct loss (as understood under English law).

There may also be other forms of consequential loss that do not fall within the specific categories of loss under Article 361 of the Vietnamese Civil Code. Even if such losses could be characterized as recoverable consequential losses under English law, on the basis of foreseeability at the time of contracting, they are unlikely to be recoverable under Vietnamese law from the outset.

In summary, the Vietnamese 2015 Civil Code adopts an approach in which the "actual" element of loss is central in determining recoverability. This applies irrespective of whether the damage involves physical harm to property or a quantifiable reduction of or loss of income resulting from a breach. In practice, Vietnamese courts and practitioners tend to adopt a literal and categorical interpretation of the Civil Code, whereby losses expressly provided for are recoverable, while those not specifically provided for in the

legislation shall be excluded. This narrow and conservative approach may in turn constrain the broader principle of freedom of contract, despite it being expressly recognized under Vietnamese law.

(2) Exclusion clauses under Vietnamese law (in light of the Civil Code)

Are exclusion clauses permitted under Vietnamese law? Article 13 of the Civil Code states “except where agreed otherwise by the parties” which suggests that exclusion clauses can be validly agreed upon under Vietnamese law.

For an exclusion clause to be held valid and enforceable, it is important to determine which types of losses can be contractually excluded from the parties' liability.

In the context of 'consequential loss' exclusion clause, given the ambiguity of this legal concept under Vietnamese law, such an exclusion clause can cause confusion and uncertainty.

Depending on how “consequential loss” is defined or understood by the parties, a 'consequential loss' exclusion clause may be deemed redundant if it attempts to exclude losses that are not recoverable under Vietnamese law in any event. On the other hand, such a clause may be challenged if it seeks to exclude loss of income/profit or reasonable mitigation expenses, which are otherwise recognized as recoverable damages under the Vietnamese 2015 Civil Code.

What is advisable for parties when drafting a consequential loss exclusion clause governed by Vietnamese law?

In principle, a broadly/generally drafted ‘consequential loss’ exclusion clause might still be deemed enforceable under the principle of freedom of contract, provided the parties clearly and expressly waive their rights to claim those recoverable losses. Careful drafting is therefore essential to ensure that such an exclusion clause achieves its intended effect and synchronizes well with Vietnamese law.

Speaking of synchronization, one could consider expressly excluding liability only for ‘actual loss or reduction of income’ to align with the language of Article 361 of the Civil Code. Would such a clause be considered valid and enforceable under Vietnamese law? Taking one step back, under the Vietnamese 2015 Civil Code, only ‘actual’ (proven, determined/quantifiable) losses are recoverable; prospective or hypothetical (not proven to be actual) loss or reduction of income are not recoverable from the outset.

(3) Exclusion clauses under Vietnamese law (Commercial Law)

One interesting dynamic under Vietnamese law is the interaction between the Civil Code and Commercial Law. Taking one relevant example, the recovery of damages is slightly different under the Commercial Law (should it apply) when compared to damages under the Civil Code. Articles 302 and 303 of the Commercial Law state as follows:

2005 Commercial Law

Article 302 Damages

1. Damages means a remedy whereby the breaching party pays compensation for the loss caused by a contract-breaching act to the aggrieved party.

2. The value of damages covers the value of the material ***and direct loss suffered*** *by* ***the aggrieved party due to the breach of the breaching party*** *and* ***the direct profit which the aggrieved party would have earned if such breach had not been committed.***

Article 303 Grounds for liability to pay damages

Except for cases of liability exemption specified in Article 294 of this Law, liability to pay damages shall arise upon existence of all of the following elements:

1. Breach of the contract;

2. Material loss;

3. Act of breaching the contract is the direct cause of the loss.

[Emphasis added.]

Article 302 of the Vietnamese 2005 Commercial Law introduces the concept of ***direct*** profit or income that the aggrieved party would *have benefited from had the breach not been committed*. Notably, the recoverable loss here must be proven as "direct loss" derived directly and primarily from the breach of contractual obligation and should be the (actual and entire) loss that the aggrieved party would have benefited otherwise.

In other words, 'direct profit that the aggrieved party would have benefited from' is recoverable as damages.

To avoid exposure to excessive and unlimited damages, parties tend to insert an exclusion clause of consequential loss that is defined to omit loss of profit. In principle, such a clause may be argued to be grounded under the principle of freedom of contract and on a clear and express waiver of rights to claim loss of profit. Theoretically, this

rationale sounds convincing specially where such exclusion clause is drafted in clear and unequivocal terms indicating an intentional waiver of statutory entitlements.

However, it is ***not*** recommended to exclude such statutory rights to recoverable damages, especially where the rights to "direct (and proven) profit" are fully aligned with and supported by the legal philosophy behind the compensatory damages which aims at restoring loss/damages.

In particular, the entitlement to "direct (and proven) profit" reflects the compensatory rationale underpinning Vietnamese contract law, namely, the restoration of the aggrieved party to the position it would have been in but for the breach. More importantly, this entitlement, codified under Article 302 of the Commercial Law, is consistent with, and reinforced by, the foundational principles of liability and damages established under the Civil Code.

Accordingly, a contractual provision purporting to exclude recovery of such "direct profit" may be subject to challenge on the basis that it undermines core legal principles governing contractual remedies. From this perspective, while possible in theory, the exclusion of such loss is likely to face substantial legal risk in practice.

Importantly, Article 419.2 of the 2015 Vietnamese Civil Code further provides for the legal philosophy behind the compensatory damages. Article 419.2 states as follows:

> "An obligee may demand compensation for loss and damage in respect of benefits from the contract which the obligee would have enjoyed. The obligee may also request the obligor to pay any fee arising from failure to fulfil contractual obligations without overlapping with the amount of compensation for loss and damage in respect of the benefits from the contract."

The principle set out in Article 419.2 of the Civil Code allows the parties to be awarded all benefit that it should have enjoyed but for the breach. Such benefit would extend beyond the direct and actual profit and is broader than the concept specified in Article 302 of the Vietnamese 2005 Commercial Law.

That said, Article 302 of the Commercial Law is not limited to direct damages but also includes other types of damages, and distinctions remain between the two regimes. Under the Commercial Law, the direct nature of profit is required, whereas in the Civil Code, there is only the requirement to prove actual (determined and quantified) loss of income. As a whole, Article 419.2 of the Civil Code and other relevant provisions (Articles 13, 361, 363) of the Civil Code seem to be consistent, and represent a principle of

compensation – (i) compensation for all (entire) and actual damages and (ii) no statutory cap unless otherwise agreed by parties.

Such divergence between the Commercial Law and Civil Code both governing recoverable type of loss/damages potentially could create confusion for users.

With the above legal regime in mind, care needs to be taken when drafting a 'loss of profit' exclusion clause – defining the meaning and scope of loss of profit so that it is aligned with the relevant laws would be prudent.

In this regard, one related issue is whether the Commercial Law applies to contracts in the construction sector, which is a subject that has been long debated in Vietnam. The revised Construction Law now bring clarity to this long-standing debate, as it states that the Civil Code will be the foundation for all civil obligations and rights.

In short, the Construction Law would likely not alter the dynamics between exclusion clauses under the Commercial Law and the Civil Code.

(4) Practical suggestions on drafting exclusion clauses

Taking the above considerations into account, and in order to prevent ambiguity and avoid long reach of compensation for a remote or loosely connected loss of profit, the authors suggest the following two drafting tips.

First, instead of inserting a broad exclusion clause that excludes all loss of profit, the parties should seek to limit exposure to excessive risks and unlimited liability of loss of profit by clearly defining what constitutes recoverable loss of the profit (or the loss of income). The suggested wording of a contractual provision dealing with liability and damages should be in line with the languages of Article 361 of the Civil Code emphasizing ***the actual nature*** of the loss/reduction of income or even include a stricter requirement of **"direct" nature of the (proven) loss of profit** that corresponds with the breach as set out in Article 302 of the Vietnamese 2005 Commercial Law.

To be recoverable, the loss of profit must be actual and derived from the actual loss or damages resulting from the breach, with a clear proven causal connection that links the loss or reduction of profit and the actual loss caused by the breach.

Second, it would be prudent to define 'loss of profit' to the effect that it excludes excessive loss and/or loss that is loosely or hypothetically connected to the actual damages caused by the breach or the breach itself, bearing in mind that these losses are not recoverable anyway under the Vietnam law.

B. Korean law

Party autonomy is highly respected under Korean law, i.e., the Korean Civil Code. As such, exclusion of liability clauses is, in principle, valid under Korean law (unless the rights and obligations of a party are restricted excessively violating the principles of good faith, which is however only accepted exceptionally).

As to 'consequential loss' exclusion clauses, strictly speaking, the concept ‘consequential loss’ does not exist under Korean law. In other words, it is not featured in the Korean Civil Code, nor in any case law.

However, Article 393 of the Korean Civil Code allows for the recovery of ordinary damages and special damages as a result of a breach of contract. Article 393 states as follows:

Article 393 (Scope of Compensation for Damages)
(1) The compensation for damages arising from the non-performance of an obligation shall be limited to ordinary damages.
(2) The obligor is responsible for reparation for damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.

Here, the term ‘special loss’ or 'damages that have arisen through special circumstances' is set out. It begs the question what the meaning of 'special loss' is and whether and to what extent it overlaps with the meaning of consequential loss under English law (as established in the Hadley v Baxendale case). Although there is no express Korean case law addressing this issue, given the history of this clause, it is likely that 'special loss' would be construed as essentially the same legal concept as consequential loss under English law. That is because the direct loss / consequential loss divide was adopted by the Japanese in its Civil Code (Article 416(1) and (2)), which traces back to the ordinary loss/consequential loss divide under Hadley v Baxendale. This Japanese Civil Code provision, in turn, found its way into and was adopted by Korea when enacting its Civil Code (Articles 393(1) and (2)).

Accordingly, a 'consequential loss' exclusion clause is likely given the effect under Korean law as is understood under English law or in any other common law jurisdictions. In this regard, even though Korean law comes from a civil law tradition, the treatment of

exclusion clauses, especially consequential loss exclusion clauses, under Korean law and that under Vietnamese law is not identical.

3. Liquidated damages under Vietnamese law and Korean law

A. Vietnamese law

Under Vietnamese law, the aggrieved party is generally entitled to recover all proven physical loss or damage, unless otherwise agreed by the parties. That said, is a party permitted to contractually agree liquidated damages? On one hand, the Civil Code suggests that the parties may and could 'agree otherwise'. On the other hand, one might question whether pre-agreed liquidated damages would go against the fundamental principle that 'actual' and “all” physical loss or damage has to be proven to seek compensation for these damages.

On this issue, in the past, Vietnamese courts have taken inconsistent and potentially conflicting approaches as to the permissibility of pre-determined damages (i.e., liquidated damages):

Some courts have refused to recognize liquidated damages clauses, on the basis that they do not satisfy the requirement of actual or material damages under the Vietnamese 2015 Civil Code or the Vietnamese 2005 Commercial Law.

In contrast, other courts have recognized the agreed amount, but treated it as a contractual penalty (see Cassation Review Decision No. 15/2016/KDTM-GDT dated 7 September 2016 of the Supreme People’s Court), subject to statutory caps of (i) 12% for civil transactions; and (ii) 8% for commercial transactions. Notably, Articles 300 and 301 of the Commercial Law state as follows.

Article 300 Penalty for breach

Fine for breach means a remedy whereby the aggrieved party requests the breaching party to pay an amount of fine for its breach of a contract, if so agreed in the contract, except for cases of liability exemption specified in Article 294 of this Law.

Article 301 Penalty level

The fine level for a breach of a contractual obligation or the aggregate fine level for more than one breach shall be agreed upon in the contract by the parties but must

not exceed 8% of the value of the breached contractual obligation portion, except for cases specified in Article 266 of this Law.

In a more recent decision, the Ho Chi Minh City People's Court of Appeal recognized a pre-estimated damages clause on the basis of freedom of contract, while stating that it does not fully align with statutory framework. The appellate court also exercised discretion to assess the reasonableness of the pre-estimated amount, particularly where it exceeds the actual loss suffered by the aggrieved party (Court Judgment No. 660/2022/KDTM-PT).

Recently, the Vietnamese Construction Law has been amended and will be taking effect as of 1 July 2026. It is noted that Article 86.2 of the Construction Law 2025 provides as follows:

> "Compensation for damages shall be determined on the basis of actual damages, predetermined damages corresponding to obligations under the construction contracts that are breached and the extent of such breaches."

There are several potential issues arising from this new statutory provision.

First, what is the meaning and scope of 'pre-determined damages'? This concept has been introduced for the first time. To date, there is no known prior statute or judicial interpretation in Vietnam referencing or developing this concept, nor does the Construction Law itself provide definition of 'pre-determined damages'. Accordingly, it remains unclear whether liquidated damages (such as, for instance, those provided for in clause 8.8 of the 2017 FIDIC standard forms Red Book) fall within the scope of ***'pre-determined damages' concept under Article 86.2 of the Vietnamese 2025 Construction Law.***

This issue is not merely semantic; it raises substantive issues of legal characterization, which require clarification or authoritative determination by the Vietnamese courts if this issue arises in practice and brought to the court for trial.

Second, by its nature, the concept of liquidated damages represents a genuine pre-estimate of loss in circumstances where actual damages are difficult to quantify, or where the assessment of such damages (particularly in cases of delay) would be complex, time-consuming, and resource intensive. The function of liquidated damages is therefore to dispense with the need to prove actual loss, provided that the agreed amount

constitutes a reasonable estimate and is not excessive by reference to industry standards.

The concept of "pre-determined damages" under the Vietnamese 2025 Construction Law does *not*, on its face, appear to serve the same function. The statutory wordings such damages to be "corresponding to obligations under the construction contract that are breached and the extent of such breaches". This suggests that both (i) a *breach and a (demonstrable) causal connection* must exist between the breach and the pre-determined damages. The precise implications of this requirement remain uncertain. It is unclear whether this approach would diminish the practicality of a liquidated damages clause by reintroducing, at least in part, the need to establish loss and causation. This issue, again, is likely to depend on future judicial interpretation in Vietnam.

B. Korean law

Under Korean law, liquidated damages clauses are enforceable in principle. They are widely used in the Korean construction industry, and can be found in various Korean standard form contracts. It is common industry practice to agree on a cap for these liquidated (delay) damages, generally between 10% and 20% of the full contract price. The utility of such a clause is that the owner of the project will not need to prove the amount of loss suffered.

Can the contractor resist liability if it establishes that the delay has occurred due to circumstances outside its control, and hence there is no negligence on the contractor's part for any such delays? There has been differing views on this issue in academia. However, the Korean courts have held that a liquidated damages provision is also subject to the general 'fault principle' - therefore, a contractor can seek exemption from liability if and to the extent it proves that it had no fault in the delays. The liquidated damages amount would then be reduced for the days when and to the extent the contractor is found to have no fault.

Notably, Article 398(2) of the Korean Civil Code states that if the amount of pre-determined loss is deemed unduly excessive (without providing a test for 'unduly excessive' – this is subject to court discretion), a court may reduce the amount of pre-determined loss (or liquidated damages) as deemed appropriate. In practice, this provision is invoked by arbitral tribunals to reduce the amount of liquidated damages when considered "unduly excessive" under Korean law. Where the amount of liquidated

damages is capped, it would be challenging to prove that the amount of liquidated damages levied is "unduly excessive". In those instances, Korean courts have been reluctant to exercise their power to reduce liquidated damages under Article 398(2) of the Korean Civil Code.

4. Conclusion

FIDIC standard forms synchronize well with 'English law'. Many common law lawyers have been involved in the drafting of these standard forms, and their input has influenced the language of these forms. Hence, when agreeing on a governing law from a civil law tradition, one has to be careful that the terms in these standard forms have the intended effect as written, or if not ensure that certain terms are adequately defined or modified to be held valid and enforceable under the chosen governing law.

Even amongst the civil law jurisdictions, there is a noticeable degree of divergence. For instance, Vietnamese law (both its statutes and judicial interpretation) takes different approaches on a variety of issues, such as exclusion clauses and liquidated damages clauses, when compared to Korean law. Parties to a construction contract are therefore advised to thoroughly review in advance the implications of the governing law on the contract terms, so that the contract can be properly administered and enforced throughout the project.

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Consequential Loss Exclusion Clauses and LD/Penalty Clauses in International Construction Contracts – Review from a Civil Law Perspective

9 April 2026

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Based on paper co-authored by **Mino Han** and **Trinh Nguyen FCIarb**

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FIDIC Construction Contract 2nd Ed (2017 Red Book)

1.15 Limitation of Liability

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under:

(a) Sub-Clause 8.8 [*Delay Damages*];
(b) sub-paragraph (c) of Sub-Clause 13.3.1 [*Variation by Instruction*];
(c) Sub-Clause 15.7 [*Payment after Termination for Employer's Convenience*];
(d) Sub-Clause 16.4 [*Payment after Termination by Contractor*];
(e) Sub-Clause 17.3 [*Intellectual and Industrial Property Rights*];
(f) the first paragraph of Sub-Clause 17.4 [*Indemnities by Contractor*];

and

(g) Sub-Clause 17.5 [*Indemnities by Employer*].

The total liability of the Contractor to the Employer under or in connection with the Contract, other than:

(i) under Sub-Clause 2.6 [*Employer-Supplied Materials and Employer's Equipment*];
(ii) under Sub-Clause 4.19 [*Temporary Utilities*];
(iii) under Sub-Clause 17.3 [*Intellectual and Industrial Property Rights*]; and
(iv) under the first paragraph of Sub-Clause 17.4 [*Indemnities by Contractor*],

shall not exceed the sum stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount.

This Sub-Clause shall not limit liability in any case of fraud, gross negligence, deliberate default or reckless misconduct by the defaulting Party.

8.8 Delay Damages

If the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*], the Employer shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to payment of Delay Damages by the Contractor for this default. Delay Damages shall be the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the relevant Time for Completion and the relevant Date of Completion of the Works or Section. The total amount due under this Sub-Clause shall not exceed the maximum amount of Delay Damages (if any) stated in the Contract Data.

These Delay Damages shall be the only damages due from the Contractor for the Contractor's failure to comply with Sub-Clause 8.2 [*Time for Completion*], other than in the event of termination under Sub-Clause 15.2 [*Termination for Contractor's Default*] before completion of the Works. These Delay Damages shall not relieve the Contractor from the obligation to complete the Works, or from any other duties, obligations or responsibilities which the Contractor may have under or in connection with the Contract.

This Sub-Clause shall not limit the Contractor's liability for Delay Damages in any case of fraud, gross negligence, deliberate default or reckless misconduct by the Contractor.

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What if Vietnamese law (or Korean law) is applied to those provisions?

1. Are **limitation clauses** (exclusion clauses) enforceable under **Vietnamese law**, and if so to what extent?

2. Are **LD clauses** enforceable under **Vietnamese law**, and if so to what extent?

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Article 13 and Article 363 of the 2015 Vietnamese Civil Code

Article 13 Compensation for loss or damage	Article 363 Compensation for loss and damage due to fault of aggrieved party
Individuals and legal entities whose civil rights are violated shall be compensated for all loss or damage, except where **otherwise agreed by the parties** or otherwise prescribed by law on loss or damage.	Where there is a breach of an obligation and loss and damage is partially caused by the fault of the aggrieved party, the defaulting party is only required to compensate for the loss and damage which corresponds to the extent of its fault.

- The aggrieved party whose rights are infringed shall be entitled to ***all loss and damages unless otherwise agreed*** or prescribed by law. The starting point is compensation of 'actual loss'.
- Accordingly, **there is no cap on the liability provided that is proven as actual loss.**

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Article 13 and Article 363 of the 2015 Vietnamese Civil Code

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- However, Article 13 also states "except where agreed otherwise by the parties".
- Hence, there is ***room for parties' agreement on an estimated amount of compensation*** which is close to the concept of Liquidated Damages.

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What are the recoverable losses under Vietnamese law?

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- There is ***no mention of 'consequential loss'*** or 'special loss'.

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What is 'consequential loss' under English law?

- Consequential loss, or indirect loss, refers to damages that ***do not arise directly from a breach of contract, but from special circumstances.***
- It is recoverable under English law ***if they were foreseeable by the parties at the time of contract execution.***

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Not entirely clear whether:

"the actual loss/damages or reduction of income derived from the breach" under Article 361 of the 2015 Vietnamese Civil Code

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'consequential loss' under English law.

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Starting point: It should be loss or reduction of an income/profit that the aggrieved party should have benefited should the breach had not occurred.

- Article 361 of the Vietnamese 2015 Civil Code sets out recovery of actual derived loss/damages of income **or reduction of income.**
  - ➢ This is understood to mean ***direct or natural consequence or result/outcome*** arisen from or out of the actual physical loss and/or damages caused by the default party through its breaches of an obligation.
- Hence, if the loss of income or profit derived from the breach is deemed as consequential loss, then **that type** of consequential loss within that context will be recovered under Vietnamese law.

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- However, beyond the **types of losses expressly recognised under Article 361**, other categories of loss typically described as **consequential loss in common law systems** are **unlikely to be recoverable under Vietnamese law from the outset**.
- Accordingly, depending on how **"consequential loss"** is defined:
  - an exclusion clause may be **redundant** if it excludes losses that are not recoverable under Vietnamese law in any event; or
  - it may be **subject to challenge** if it seeks to exclude **loss of income/profit or reasonable mitigation expenses**, which are otherwise recognised as recoverable damages.
- How can a party mitigate risks?
  - ➢ In principle, a narrow type of 'consequential loss' exclusion clause might still be deemed enforceable under the **freedom of contract**, provided the parties **clearly and expressly waive their rights** to claim those recoverable losses.

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What if the parties agree in the contract to exclude recovery of *'actual loss or reduction of income'*?

- ➢ It has to be 'actual'(proven) loss of income or 'actual' reduction of income in order to be claimable.
- ➢ Hence, under the Vietnamese Civil Code, any prospective or hypothetical (not proven to be actual) loss or reduction of income would not be recoverable from the outset.

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But *would it be different when the*

Vietnamese Commercial Law *would come into play?*

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2005 Vietnamese Commercial Law

Article 300 Penalty for breach	Article 301 Penalty level
Fine for breach means a remedy whereby the aggrieved party requests the breaching party to pay an amount of fine for its breach of a contract, if so agreed in the contract, except for cases of liability exemption specified in Article 294 of this Law.	The fine level for a breach of a contractual obligation or the aggregate fine level for more than one breach shall be agreed upon in the contract by the parties but must not exceed 8% of the value of the breached contractual obligation portion, except for cases specified in Article 266 of this Law.

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2005 Vietnamese Commercial Law

Article 302 Damages	Article 303 Grounds for liability to pay damages
1. Damages means a remedy whereby the breaching party pays compensation for the loss caused by a contract-breaching act to the aggrieved party. 2. The value of damages covers the value of the material **and direct loss suffered** by **the aggrieved party due to the breach of the breaching party** and ***the direct profit which the aggrieved party would have earned if such breach had not been committed.***	Except for cases of liability exemption specified in Article 294 of this Law, liability to pay damages shall arise upon existence of all of the following elements: 1. Breach of the contract; 2. Material loss; 3. Act of breaching the contract is the direct cause of the loss.

2005 Vietnamese Commercial Law

- The Commercial law introduces the concept of **direct profit/income that the aggrieved party would have benefited** from had the breach not been committed.
- The loss needs to be **actual as required by the Civil Code.**
- However, the recoverable loss under Article 302 of the 2005 Vietnam Commercial Law **must be proven as "direct loss"** ***derived directly and primarily*** from the breach of contractual obligation.

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Under Vietnamese law, can you contractually exclude liability for 'loss of profit'?

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Under Vietnamese law, can you contractually exclude liability for 'loss of profit'?

Yes, you can, in theory,

especially when it is in line with the Commercial Law which requires the (proven) direct element of the loss of profit.

- 'Direct profit/income that that the aggrieved party would have benefited' is recoverable under the Vietnamese Commercial law, provided that it is proven that the loss arose directly and primarily from the breach of contract.

However..

- The Civil Code paves the foundation for the principle of remedies.

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- Article 419.2 further provides the legal philosophy behind the compensatory damages.

  "An obligee may request compensation for loss and damage in respect of benefits from the contract which the obligee would have enjoyed. The obligee may also request the obligor to pay any fee arising from failure to fulfil contractual obligations without overlapping with the amount of compensation for loss and damage in respect of the benefits from the contract."

- This principle set out in Article 419.2 indicates that compensation aims at restoring the benefits the aggrieved party should have enjoyed if the breach had not occurred.

- Such benefit goes beyond the actual and direct damages caused by the breach.

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- Given the different approaches taken by the Civil Code and Commercial law, it has been long debated which law shall apply to the construction sector.

  - The new **Construction Law** provides clarity for a long debate topic pointing out that the **Civil Code** will be foundation for all civil obligations and rights.

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Drafting tip:

- To prevent ambiguity and avoid long reach of compensation for a remote or loosely connected loss of profit, **instead of** simply inserting an exclusion clause that exclude the loss of profit, it would be prudent to:
  - ✓ **Clarify** that the loss of the profit (or the loss of income) must be actual and derived from the actual loss /damages resulted from the breach with a clear proven causal connection that links the loss or reduction of profit and the actual loss caused by the breach.
- It is prudent to **define 'loss of profit'** to the effect that it **excludes** excessive loss and/or loss that is loosely or hypothetically connected to the actual damages caused by the breach or the breach itself.
  - ✓ These losses are not recoverable anyway!

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What if Korean law applies?

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Exclusion clauses are, in principle, **valid under Korean law**

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What is 'consequential loss' under Korean law?

- The concept 'consequential loss' does not exist.
- However, the term 'special loss' exists, which is equivalent to consequential loss under Hadley v Baxendale.
- That is because the direct loss / consequential loss was adopted by the Japanese in its Civil Code (Article 416(1) and (2). This, in turn, was adopted by Korea when enacting its Civil Code (Article 393(1) and (2)).

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Liquidated Damages (LD)

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Liquidated Damages

- Under Vietnamese law, the aggrieved party is generally entitled to recover all proven physical loss or damage, unless otherwise agreed by the parties.

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Can the parties agree 'otherwise' – to have liquidated damages clauses?

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Can the parties agree 'otherwise' – to have liquidated damages clauses?

Vietnamese courts have taken **inconsistent approaches** to pre-determined damages (i.e., liquidated damages):

- [1] Some courts **refused to recognize LD clauses**, on the basis that they do not satisfy the requirement of **actual or material damages** under the Civil Code 2015 or the Commercial Law 2005.

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Can the parties agree 'otherwise' – to have liquidated damages clauses?

Vietnamese courts have taken **inconsistent approaches** to pre-determined damages (i.e., liquidated damages):

- [2] Other courts **recognized the agreed amount, but treated it as a contractual penalty** (see **Cassation Review Decision No. 15/2016/KDTM-GDT dated 7 September2016 of the Supreme People's Court**.), subject to statutory caps of:
  - **12%** for civil transactions; and
  - **8%** for commercial transactions.

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Can the parties agree 'otherwise' – to have liquidated damages clauses?

Vietnamese courts have taken **inconsistent approaches** to pre-determined damages (i.e., liquidated damages):

- [3] In a more recent decision, the **Ho Chi Minh City People's Court of Appeal** recognized a pre-estimated damages clause on the basis of**freedom of contract**, while stating that it does not fully align with statutory framework.

- The appellate court also exercised discretion to **assess the reasonableness of the pre-estimated amount**, particularly where it exceeds the actual loss suffered by the aggrieved party (Court Judgment No. 660/2022/KDTM-PT).

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Amended Vietnamese Construction Law – Implications on the treatment of Liquidated Damages

Article 86.2 of the Construction Law 2025 provides:

Compensation for damages shall be determined on the basis of actual damages, **predetermined damages corresponding to** obligations under the construction contracts that are breached and the extent of such breaches.

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Amended Vietnamese Construction Law – Implications on the treatment of Liquidated Damages

- For the first time, **"pre-determined damages" are expressly recognised in Vietnamese statutory law** as a lawful remedy alongside actual damages.
  - ✓ 'predetermined damages' = LDs?
  - Unclear.
  - The **Construction Law does not define "pre-determined damages."**
- Also, the wording **"corresponding to obligations under the construction contract that are breached and the extent of such breaches"** suggests that a **breach and a causal connection** must exist between the breach and the pre-determined damages.

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Liquidated Damages - Korean law

- LD clauses are enforceable in principle.
- No need to prove genuine estimate of loss.
- Under Article 398(2) of the Korean Civil Code, the court has the power to reduce the amount of pre-determined losses if the amount is considered unduly excessive.
- However, it would be difficult to reduce the amount of LDs if it is reasonably capped (10-20% of the contract price).

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FIDIC standard forms sync well with 'English law'.

Hence, know in advance what happens to standard contract terms if:

(i) Vietnamese law is plugged in, or

(ii) Korean law is plugged in, or

(iii) any other laws are applied.

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Thank you for your attention!

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INTERNATIONALIZATION OF VIETNAM'S CONSTRUCTION CONTRACTS UNDER THE NEW CONSTRUCTION LAW FRAMEWORK

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Abstract

Vietnam's adoption of the new Law on Construction No. 135/2025/QH15 ("**New LOC**") makes a significant shift toward internationalizing its construction contract regime. This reflects a positive policy move to harmonize domestic infrastructure governance with global contracting standards. The new framework firstly enhances transactional certainty in cross-border projects. It reduces interpretative risk in disputes involving foreign investors and contractors by expressly permitting the use of foreign languages as the prevailing language and bilingual construction contracts. This reform aligns with internationally accepted drafting practices embedded in standard forms such as the International Federation of Consulting Engineers (FIDIC) and New Engineering Contract (NEC), which are widely used in international construction projects and typically structured for multilingual applications.

Beyond language flexibility, the New LOC adopts core civil law principles that support liquidated damages, performance security, and contractual risk allocation mechanisms recognized in international construction practice. These mechanisms correspond with established doctrines under Vietnam's Civil Code 2015, particularly the recognition of agreed damages and contractual security instruments. They thus ensure doctrinal continuity of Vietnam's civil law while expanding compatibility with global construction norms. The reform, therefore, facilitates the operational use of internationally recognized risk-allocation models characteristic of FIDIC-based contractual frameworks.

Notably, the new regime promotes the use of international dispute-resolution mechanisms, including multi-tier mechanisms that could, in turn, integrate dispute boards or commercial

mediation and arbitration as sequential processes. Such models closely resemble the Dispute Avoidance/Adjudication Board (DAAB) and arbitration structure found in the FIDIC 2017 Suite, as well as the institutional arbitration rules applied in Vietnam and internationally, including the VIAC and SIAC Rules of Arbitration. This alignment advances enforceability and predictability, particularly in light of Vietnam's obligations under the 1958 New York Convention, to which it has been a contracting state since 1995.

This paper thus concludes that the New LOC represents not only a substantial transplantation of foreign legal models but also a calibrated integration of international construction norms into Vietnam's civil law framework. Vietnam has chosen to retain key fundamental civil law principles while adopting globally familiar contractual and dispute-resolution tools, rather than abandoning its domestic legal foundations. This balanced and structured approach furthermore enhances Vietnam's reputation as a trustworthy jurisdiction for sophisticated infrastructure projects and international construction arbitration.

Key words: Vietnam Construction Law 2025; Construction Contract Reform; Internationalization of Construction Contract; Risk Allocation; FIDIC Contracts; NEC, Alternative Dispute Resolution.

1. Introduction

Vietnam has recently undertaken significant legislative reforms in construction law through the promulgation of the Law on Construction No. 135/2025/QH15 (the "**New LOC**"), adopted by the National Assembly on 10 December 2025.[1] The New LOC is scheduled to enter into force on 1 July 2026, while several specific provisions will take effect earlier, from 1 January 2026.[2] This new issuance arises against the backdrop that, in recent years, Vietnam has witnessed the growth of large-scale infrastructure projects involving foreign participation across the real estate, engineering, procurement, and processing and manufacturing industries.[3] As a result, the contractual frameworks governing construction projects increasingly require compliance with internationally recognized contracting practices, such as the FIDIC and NEC suites of contracts, as well as other internationally accepted templates. Accordingly, the adoption of this new legal framework constitutes a significant advancement in Vietnam's regulation of construction activities. It aims to ensure both flexibility and legal certainty in domestic law for construction contracts involving foreign elements, among other considerations, thereby enhancing Vietnam's attractiveness as a jurisdiction for international construction projects.[4]

In detail, the New LOC introduces several reforms that collectively demonstrate a gradual internationalization of Vietnam's construction contract regime. These reforms seek to harmonize domestic legal rules with global contracting standards while preserving the fundamental principles of Vietnam's civil law system.[5]

This paper explores several key aspects of this reform, including:

- The new language regime applicable to construction contracts involving foreign

[1] National Assembly of Vietnam, *Law on Construction*, 135/2025/QH15 (2025).

[2] *Id.* at 94.2.

[3] *Quick Report on the Situation of Attracting Foreign Investment in Vietnam and Vietnam's Outward Investment Abroad in the 12 Months of 2025*, (Jan. 1, 2026), https://fdi.gov.vn/Pages/chitiettin.aspx?idTin=185&idcm=9.

[4] Ministry of Construction of Vietnam, *Summary Submission on the Draft Law on Construction (Replacement)*, (2025).

[5] *Id.*

elements

- Clarification of the applicable law under the civil law framework
- Contractual risk allocation mechanisms, such as liquidated damages and performance security
- Recognition of international dispute-resolution mechanisms commonly used in international construction contracts

This analysis shows that, although the paper argues that the New LOC represents a calibrated integration of international construction practices into Vietnam's domestic legal framework, its practical application warrants further exploration.

2. Language Regime Reform in Contracts involving Foreign Parties

One notable reform introduced by the New LOC concerns the language regime for construction contracts involving foreign parties.[6] The New LOC permits contracting parties to agree that a foreign language may be adopted as the prevailing language of the contract, provided that a Vietnamese version of the contract is also executed.[7,8] By contrast, the current Law on Construction No. 50/2014/QH13, as amended by Law No. 62/2020/QH14 (the "**Current LOC**"), only provides that construction contracts must be made in Vietnamese and may additionally be drafted in another language where a foreign party is involved.[9] However, the Current LOC remains silent on the issue of the prevailing language in such circumstances. This new provision in the New LOC, therefore, represents a significant shift from the previously rigid regulatory approach, which effectively implied the predominance of Vietnamese in contractual documentation.

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[6] Quang Tuyen Nguyen & Tra My Dao, *Key Contents of the 2025 Amended Construction Law and Regulations on Construction Contracts* (2026).

[7] National Assembly of Vietnam, *supra* note 1 at 80.3.

[8] Le Bang Vu, Tran Nghia Cao & Thi Tuyet Diem Nguyen, *Key Changes in the New Law on Construction (Vietnam) | N&A Newsletters | Knowledge*, NISHIMURA & ASAHI (Jan. 7, 2026), https://www.nishimura.com/en/knowledge/newsletters/construction_infrastructure_asia_260107.

[9] Office of the National Assembly of Vietnam, *Law on Construction*, 154/VBHN-VPQH 138.4 (2025).

In international construction projects, contracts are often drafted in English. Standard forms, such as the FIDIC and NEC contracts, are also typically prepared in English for international use. However, the provisions of the Current LOC create the impression that the Vietnamese version, as the mandatory version, would prevail over the foreign language version. When discrepancies arise between the two language versions, they may create difficulties in interpreting the contract and resolving disputes. By expressly recognizing the possibility of a foreign language serving as the prevailing language of the contract, the New LOC, in theory, significantly enhances transactional certainty in cross-border construction projects. Parties can now rely on internationally standardized contractual wording without the risk that a Vietnamese translation might prevail in the event of misunderstandings or disputes. Furthermore, this new regulation is compatible with the preceding language involving a foreign party as regulated under the Law on Commercial Arbitration and Decree 22/2016/ND-CP on Commercial Mediation of the Government dated 24 February 2017.[10,11]

At the same time, notably, the requirement that a Vietnamese version must still be executed ensures that the domestic legal system maintains accessibility and regulatory oversight. This provision is also consistent with litigation regulations, as Vietnamese is the mandatory language for civil proceedings in Vietnamese courts.[12] In addition, certain specific legal regimes further illustrate this trend toward controlled flexibility in language use. For instance, under the framework governing specialized courts at International Financial Centers, English must be used as the primary language, either on its own or accompanied by a Vietnamese translation.[13] Judgments and decisions issued by such courts may likewise be rendered in English, with or

[10] National Assembly of Vietnam, *Law on Commercial Arbitration*, 54/2010/QH12 10 (2010).

[11] Government of Vietnam, *Decree on Commercial Mediation*, 22/2017/ND-CP (2017).

[12] National Assembly of Vietnam, *Civil Procedure Code*, 92/2015/QH13 20 (2015).

[13] National Assembly of Vietnam, *Law on the Specialized Court at International Financial Centers*, 150/2025/QH15 14 (2025).

without a corresponding Vietnamese version.[14] This shows a broader legislative effort to accommodate international practices while maintaining a necessary degree of alignment with domestic legal requirements.[15] Thus, this reform reflects a balanced approach, promoting compatibility with international contracting practices while preserving the practical requirements of domestic legal administration.

3. Application Law in Construction Contracts

Another significant development under the New LOC is the clarification of the applicable legal framework governing construction contracts. The New LOC expressly recognizes that the Civil Code governs construction contracts,[16] except where the construction legislation contains specific provisions that take precedence.[17] By contrast, the Current LOC does not explicitly regulate the application of the Civil Code or other relevant laws in cases where the Civil Code or other relevant laws contain no provisions governing specific construction matters.[18] Instead, the Current LOC merely defines a construction contract as a civil contract established in writing between the employer and the contractor for the performance, in whole or in part, of works within construction investment activities.[19]

Under Vietnam's legal system, construction contracts have traditionally been regulated by a combination of construction legislation and the Civil Code. However, the application of these two legal regimes occasionally generated interpretative uncertainty. In addition, in certain cases, Vietnamese courts have applied the Law on Commerce rather than the Civil Code, leading to

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[14] *Id.*

[15] Le Hung, *The Law on Specialized Courts in International Financial Centers and the Transformation of Vietnam's Judicial Model in the Context of Global Integration*, (Mar. 17, 2026), https://phaply.net.vn/luat-toa-an-chuyen-biet-tai-trung-tam-tai-chinh-quoc-te-va-su-chuyen-doi-mo-hinh-tu-phap-viet-nam-trong-boi-canh-hoi-nhap-toan-cau-a261258.html.

[16] National Assembly of Vietnam, *Civil Code*, 91/2015/QH13 (2015).

[17] National Assembly of Vietnam, *supra* note 1 at 4.2.

[18] Office of the National Assembly of Vietnam, *supra* note 9 at 2.

[19] *Id.* at 138.1.

inconsistencies in interpreting laws and resolving construction disputes.[20,21,22] To better illustrate the impact of the new principle under the New LOC, we examine two notable unclear matters that have arisen under contracts governed by the Current LOC, the Civil Code, and the Law on Commerce. In practice, conflicting interpretations have persisted not only among legal scholars and practitioners but also in court and arbitration decisions.[23] This has created significant uncertainty regarding the governing law for construction contracts, particularly in matters not expressly addressed by the Current LOC. Accordingly, it has significantly hindered the internationalization of construction contracting by undermining legal certainty, complicating risk allocation, and weakening alignment with international standards such as FIDIC/NEC frameworks.[24,25]

3.1 Statute of Limitations

One of the most debated issues concerns the statute of limitations for initiating legal proceedings in construction disputes. The Current LOC does not directly stipulate a statute of limitations for filing lawsuits. Instead, it refers to Decree No. 37/2015/ND-CP of the Government dated 22 April 2015, as amended, detailing regulations on construction contracts ("**Decree 37**"), which is a legal document applicable to construction contracts for projects with State capital.[26] Under Decree 37, the statute of limitations for initiating arbitration or court proceedings to resolve

[20] Government Office of Vietnam, *Law on Commerce*, 113/VBHN-VPQH (2025).

[21] National Assembly of Vietnam, *supra* note 16.

[22] TNTP Law, *supra* note 28.

[23] Pham Hoang Tung Tran & Nguyen, *Precedent No. 06/2024 – Applicable Law for Construction Contract*, (June 7, 2024), https://cnccounsel.com/insights/construction-and-infrastructure/precedent-no-06-2024-applicable-law-for-construction-contract.

[24] Gillion Frédéric & Neng Chan Yong, *Vietnam's New Construction Law Introduces Clearer Rules and Reduced Administrative Burdens*, (Feb. 11, 2026), https://www.pinsentmasons.com/out-law/news/vietnam-construction-law.

[25] Giles Cooper, Ha Le & Thu Hien Nguyen, *Positive Changes under Vietnam's New Law on Construction: Simplified Procedures*, (Jan. 15, 2026), https://www.allens.com.au/insights-news/insights/2026/01/positive-changes-under-vietnams-new-law-on-construction-simplified-procedures-and-contract-innovations/.

[26] Ministry of Construction of Vietnam, *Decree detailing Regulations on Construction Contracts*, 07/VBHN-BXD 1 (2023).

construction contract disputes shall be determined in accordance with relevant laws.[27] Consequently, in practice, the courts must rely on the Civil Code or the Law on Commerce to determine the applicable limitation period. However, these two laws provide different limitation periods. The Civil Code stipulates a statute of limitations of three years from the date on which the claimant knows or should have known that their lawful rights and interests were infringed.[28] By contrast, the Law on Commerce provides a limitation period of two years from the time the lawful rights and interests were violated.[29, 30] Besides, arbitral tribunals also consider the limitation under the Law on Commercial Arbitration, under which, unless otherwise provided by specialized laws, the statute of limitations for arbitral procedures is two years from the time of infringement of lawful rights and interests.[31]

According to the principle that the Civil Code applies in the absence of regulations under the New LOC and given that construction disputes are civil in nature, some arbitral tribunals may argue that the applicable statute of limitations should be determined in accordance with the Civil Code. By contrast, some arbitral tribunals have held that the relevant specialized law is construction law. As construction law does not directly stipulate a statute of limitations, these tribunals apply the two-year limitation period under the Law on Commercial Arbitration.

3.2 Contractual Penalty

In addition to the issue of limitation periods in construction disputes, another area of legal uncertainty concerns the applicable rules on penalties under construction contracts.[32] Accordingly, the Current LOC only prescribes a penalty cap for construction projects using State

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[27] *Id.* at 45.3.

[28] National Assembly of Vietnam, *supra* note 16 at 429.

[29] Government Office of Vietnam, *supra* note 20 at 319.

[30] TNTP Law, *supra* note 22.

[31] National Assembly of Vietnam, *supra* note 10 at 33.

[32] Kazuhide Ohya, Tran Nghia Cao & Bao Linh Nguyen, *Penalties in Construction Contracts : An Unclear Question | N&A Newsletters | Knowledge*, (Mar. 13, 2023), https://www.nishimura.com/en/knowledge/newsletters/20230313-94481.

capital, limiting penalties to 12% of the value of the breached obligation.[33] However, it provides no guidance for construction contracts that do not involve State capital. In such cases, the Civil Code would allow the parties to determine the penalty amount freely,[34] whereas the Law on Commerce imposes a cap of 8% of the value of the breached obligation.[35,36]

One possible interpretation is that the Law on Commerce should govern penalty clauses in construction contracts, on the basis that construction activities may be regarded as commercial activities, which are defined as activities for the purpose of generating profits.[37] This view draws support from the hierarchy of applicable laws, which prioritizes the Law on Commerce for commercial activities.[38] As a result, the Law on Commerce may serve as the primary legal framework for determining the maximum penalty limits.

However, this interpretation remains debated. The Law on Commerce itself provides that commercial activities within a specific sector should be governed by the law applicable to that sector, while the Civil Code states that matters not regulated by specialized legislation fall under its general framework.[39] Accordingly, some scholars and authorities argue that, where the Current LOC does not regulate a particular issue, the Civil Code, rather than the Law on Commerce, should apply. This latter view has been reflected in certain official opinions.[40] The New LOC retains the 12% penalty cap for construction projects using State capital and remains silent on penalty limits for private-sector construction contracts.[41] Nevertheless, given the express clarification that the Civil Code applies where the New LOC does not provide specific regulation, it appears likely that

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[33] Office of the National Assembly of Vietnam, *supra* note 9 at 146.2.

[34] National Assembly of Vietnam, *supra* note 16 at 418.2.

[35] Government Office of Vietnam, *supra* note 20 at 301.

[36] TNTP Law, *supra* note 22.

[37] Government Office of Vietnam, *supra* note 20 at 3.1.

[38] *Id.* at 4.

[39] Ohya, Cao, and Nguyen, *supra* note 32.

[40] *Id.*

[41] National Assembly of Vietnam, *supra* note 1 at 86.3.

penalty clauses in private construction contracts will fall under the Civil Code, thereby allowing the parties greater freedom to determine the level of contractual penalties.

Thus, by explicitly confirming the application of civil law principles, the New LOC reinforces the doctrinal continuity of Vietnam's contract law framework. Key civil law principles, such as statute of limitations for initiating a lawsuit or penalty for contractual breach, now clearly apply to construction contracts unless construction legislation provides otherwise. This clarification is particularly important for international contractors and investors, who often rely on sophisticated contractual mechanisms to manage legal and commercial risks. The explicit recognition of civil law principles, therefore, enhances legal predictability and reduces interpretative ambiguity in the regulation of construction contracts in Vietnam.

4. Contractual Risk Allocation under the New LOC

Risk allocation is a fundamental element of construction contracts. International construction projects typically involve complex risk-sharing mechanisms designed to allocate responsibility for delays, defects, and unforeseen circumstances.[42] The New LOC incorporates several provisions that facilitate the use of such contractual risk-allocation mechanisms, bringing Vietnam's legal framework closer to internationally accepted standards.

4.1 Liquidated Damages

Liquidated damages generally refer to a sum agreed in advance by the contracting parties as compensation for potential breaches of contract.[43] In the construction industry, such clauses are commonly used to address delays in completion or failures to meet contractual specifications. Rather than serving as a penalty, liquidated damages are typically intended to represent a

[42] Adra Randa et al., *Allocation of Risk in Construction Contracts*, (Aug. 12, 2025), https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/sixth-edition/article/allocation-of-risk-in-construction-contracts.

[43] Gowling WLG-Mike Stewart & Mary Lindsay, *Back to Basics: How to Use Liquidated Damages Clauses Effectively*, LEXOLOGY (Nov. 7, 2023), https://www.lexology.com/library/detail.aspx?g=d93ee9e4-8c2d-4e33-b927-82b60b637eea.

reasonable pre-estimate of the losses that may arise from a breach.[44]

Historically, Vietnamese law recognized only two forms of monetary remedies for breach of contract: (i) compensation for damages and (ii) contractual penalties, without any explicit recognition of liquidated damages. Compensation for damages was required to be calculated based on the actual and direct losses suffered by the non-breaching party as a consequence of the breach.[45,46,47] By contrast, a penalty clause primarily served to secure contractual performance and lacked a compensatory purpose.[48,49,50] Notwithstanding, judicial practice has generally reflected this traditional approach. Vietnamese courts have often declined to enforce damages that were estimated in advance by the contracting parties and have dismissed claims based on such pre-agreed amounts.[51,52] Nevertheless, courts have occasionally demonstrated some flexibility.[53]

Furthermore, the executive branch had taken certain steps to introduce mechanisms resembling liquidated damages. Specifically, the Ministry of Construction, through its guidance on the public-funded construction contract template under Circular No. 02/2023/TT-BXD of the Ministry of Construction dated 03 March 2023 guiding several contents of construction contracts, provided two alternative methods for determining compensation: (i) compensation based on the

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[44] Reed Smith LLP-J. Frank McKenna, *Liquidated Damages and Penalty Clauses:A Civil Law versus Common Law Comparison*, LEXOLOGY (May 12, 2008), https://www.lexology.com/library/detail.aspx?g=d413e9e1-6489-439e-82b9-246779648efb.

[45] National Assembly of Vietnam, *supra* note 16 at 360, 361.2, and 419.

[46] Government Office of Vietnam, *supra* note 20 at 292.3 and 302.

[47] National Assembly of Vietnam, *supra* note 1 at 146.5.

[48] National Assembly of Vietnam, *supra* note 16 at 418.

[49] Government Office of Vietnam, *supra* note 20 at 300.

[50] National Assembly of Vietnam, *supra* note 1 at 146.1.

[51] Thu Thanh, *Identifying the Legal Characterization of Goods Distribution Contracts in Commercial Disputes: A Proposal for Case Law Development*, https://www.toaan.gov.vn/webcenter/ShowProperty?nodeId=/UCMServer/TAND198581.

[52] Judgment No. 26/2018/KDTM-PT dated November 5, 2018, on a Dispute over a Service Contract (People's Court of Dong Nai province), https://thuvienphapluat.vn/banan/ban-an/ban-an-262018kdtmpt-ngay-05112018-ve-tranh-chap-hop-dong-dich-vu-60648 (last visited Mar. 19, 2026).

[53] Judgment No. 660/2022/KDTM-PT Concerning a Dispute Arising from a Construction Works Contract (People Court of Ho Chi Minh city), https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-tranh-chap-hop-dong-thi-cong-xay-dung-cong-trinh-so-6602022kdtmpt-338824 (last visited Mar. 19, 2026).

actual loss incurred, or (ii) compensation determined according to a pre-agreed fixed amount.[54,55] However, the regulation did not contain detailed guidance on the scope, conditions, or methodology for applying such predetermined amounts. As a result, this provision remained somewhat isolated within the broader legal framework, and its practical applicability remained uncertain.

Unlike the previous legislative and judicial practice mentioned above, the New LOC introduces an important development by recognizing the concept of predetermined damages in construction contracts. Under the New LOC, compensation for damage is determined by three elements: (1) the actual damage incurred, (2) the rate of predetermined damages corresponding to the breached contractual obligation, and (3) the degree of breach.[56] While this provision represents a significant step toward acknowledging liquidated damages in Vietnamese construction law, several interpretative issues remain.

First, although the New LOC recognizes pre-determined damages, it requires that such damages correspond to the "degree of breach." However, the legislation does not provide any clear guidance on how the degree of breach should be assessed. The absence of a clear definition may allow courts or arbitral tribunals to review or adjust the agreed amount of damages, potentially weakening the certainty that liquidated damages clauses are intended to provide.

Second, the New LOC suggests that compensation must be subject to not only (i) a pre-determined amount agreed by the parties but also (ii) actual loss/damage incurred. Accordingly, the mechanism is classified as hybrid, as previously discussed: liquidated damages are recognized, yet actual damages are also evaluated for compensation purposes.

Third, while Vietnamese law generally allows contractual penalties and damages

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[54] Ministry of Construction of Vietnam, *Circular on Guidance of a Number of Contents of Construction Contracts*, 02/2023/TT-BXD (2023).

[55] *Id.* at III.

[56] National Assembly of Vietnam, *supra* note 1 at 86.1 and 86.3.

compensation to be applied concurrently where the parties so agree, the New LOC does not clarify whether pre-determined damages may operate alongside penalties or traditional damages.

Despite these uncertainties, the recognition of pre-determined damages under the New LOC marks a notable shift in the legal treatment of contractual remedies in the construction sector. The concept of liquidated damages under the New LOC closely resembles the widely used doctrine in international construction contracts, providing predictable financial consequences for delay or non-performance. By incorporating this concept into construction legislation, the New LOC strengthens the legal basis for such mechanisms in construction contracts.

In practice, this reform may facilitate the use of internationally recognized contractual frameworks such as FIDIC contracts. Under these forms, provisions on liquidated damages for delay typically do not limit the contractor's liability in circumstances involving fraud, gross negligence, willful default, or reckless misconduct. As a result, once the agreed cap on delay damages has been reached, a contractor cannot intentionally prolong the works without exposing itself to the risk of uncapped liability.[57] A similar but not identical approach can be observed under NEC contracts. While these contracts also provide for delay damages in cases of late completion, they do not expressly characterize such damages as the employer's sole and exclusive remedy for delay. Furthermore, NEC forms contain a specific mechanism that, if the completion date is subsequently extended after delay damages have been paid, requires any overpayment to be reimbursed to the contractor together with interest.[58] Future guidance, as well as judicial and arbitral practice, will likely play an important role in clarifying the practical application of these provisions.

4.2 Performance Security

Performance security for construction contracts is currently regulated by Decree 37, which

[57] Randa et al., *supra* note 42.

[58] *Id.*

adopts a relatively restrictive approach to its formulation and implementation.[59] In particular, Decree 37 limits the permissible forms of performance security to three instruments, which are (i) deposit, (ii) escrow, or (iii) guarantee, with no further structured guidance for those applications.[60] Although the parties may agree on certain parameters, such as the security amount, applicable currency, type of instruments, timing of submission, and the template for the performance security, the security amount and applicable instruments must be predetermined in the bidding documents or request-for-proposal documentation.[61] Furthermore, Decree 37 imposes fixed statutory thresholds on the value of performance security, ranging from 2% to 10% of the contract price, or up to 30%, subject to approval by the investment decision-maker based on heightened risk considerations.[62] When compared with the more flexible regime under Sub-clause 4.2 of the FIDIC 2017, these statutory thresholds significantly constrain party autonomy in structuring performance security arrangements, particularly in large-scale or complex projects where risk allocation may justify bespoke security mechanisms.[63]

Notably, Decree 37 does not provide a clear legal basis for adjusting (i.e., increasing or reducing) performance security in response to substantial variations in the contract price. As a result, employers' requests, especially those seeking increased security, are often unclear and confusing because they lack sufficient legal grounds.[64] Another problem is that Decree 37 also fails to clearly delineate the events or breaches that would trigger a call on, or the return of, the performance security, thereby creating a broad grey area for the parties to be addressed through

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[59] Ministry of Construction of Vietnam, *supra* note 26 at 16.

[60] *Id.* at 16.1.

[61] *Id.* at 16.2 and 16.3.

[62] *Id.* at 16.4.

[63] CONDITIONS OF CONTRACT FOR CONSTRUCTION: GENERAL CONDITIONS, GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS AND ANNEXES, FORMS OF SECURITIES, FORMS OF LETTER OF TENDER, LETTER OF ACCEPTANCE, CONTRACT AGREEMENT AND DISPUTE ADJUDICATION/AVOIDANCE AGREEMENT 4.2 (International Federation of Consulting Engineers ed., Second edition ed. 2017).

[64] *Does an Increase in the Value of a Construction Contract Require a Corresponding Increase in Contract Security?*, BAOCHINHPHU.VN (Dec. 13, 2025), https://baochinhphu.vn/tang-gia-tri-hop-dong-xay-dung-co-phai-tang-bao-dam-hop-dong-102251213111523631.htm.

contractual negotiation. By contrast, FIDIC 2017 adopts a more balanced and predictable approach, under which the employer is generally prohibited from making a call on performance security except in exhaustively defined circumstances.[65] Any wrongful or excessive call gives rise to a mandatory obligation to indemnify the contractor for all resulting losses and damages incurred from such wrongdoing. This comparative disparity underscores the more interventionist and prescriptive nature of Decree 37, as opposed to the contract-driven, risk-sensitive framework embodied in international standard forms such as FIDIC.

Besides removing the said rigid statutory thresholds imposed under Decree 37, the New LOC exhibits a clear convergence with internationally accepted risk-allocation principles by adopting more flexible treatment of performance security, aligning conceptually with Sub-clause 4.2 of FIDIC 2017, in which the establishment, validity, and adjustment of performance security are largely determined mutually by the parties, subject to defined contractual safeguards.[66] At the same time, the New LOC expressly allows the contractor to request that the employer prove its financial capacity and provide payment security.[67] Thus, this development enhances contractual equilibrium and risk allocation, particularly in private-sector projects, by addressing the asymmetry inherent in performance security regimes that traditionally focus solely on securing the contractor's obligations.

4.3 Contractual Risk-Allocation Mechanisms

Another notable development in the regulatory framework governing construction contracts is the shift from a statutory enumeration of liabilities to a more flexible system of contractual risk allocation. Under the Current LOC, contractual liability was largely allocated through detailed legislative provisions specifying the circumstances under which either the

[65] CONDITIONS OF CONTRACT FOR CONSTRUCTION, *supra* note 63 at 4.2.2.

[66] National Assembly of Vietnam, *supra* note 1 at 83.1.

[67] *Id.* at 83.3.

contractor or the employer would be required to compensate the other party.[68] The law expressly lists various situations in which the contractor would bear liability, such as failure to ensure the agreed quality of the works, delays in completion caused by the contractor's fault, or damages occurring during the warranty period due to the contractor's actions.[69] Correspondingly, the law also enumerated circumstances in which the employer would be liable to the contractor, including interruptions to the performance of the works caused by the employer, the provision of inaccurate design documents or construction conditions, delayed supply of materials or equipment where the employer assumed such obligations, and late payment.[70]

By contrast, the revised framework under the New LOC adopts a more principle-based approach, placing greater emphasis on party autonomy. Rather than prescribing specific situations in which each party must bear liability, the new law primarily requires that matters relating to contractual rewards, penalties, and compensation for damages be agreed upon by the contracting parties and expressly incorporated into the construction contract.[71] This approach provides greater flexibility for adopting internationally recognized contractual models, including standard forms such as FIDIC, where risk allocation is extensively regulated through contractual provisions rather than mandatory statutory rules.

5. Recognition of Internationalized Dispute-Resolution Mechanisms

Except for public investment projects and PPP projects, the New LOC introduces dispute-resolution mechanisms aligned with international practice, including the DAAB and arbitration models under the FIDIC 2017 Suite, as well as institutional arbitration under the VIAC and SIAC Rules.[72,73]

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[68] Office of the National Assembly of Vietnam, *supra* note 9 at 146.

[69] *Id.* at 146.3.

[70] *Id.* at 146.4.

[71] National Assembly of Vietnam, *supra* note 1 at 86.1 and 86.2.

[72] *Id.* at 86.5.(b).

[73] Vu, Cao, and Nguyen, *supra* note 8.

5.1 Former Dispute Resolution Mechanism and Its Divergence from FIDIC 2017

Under Vietnam's former legislative framework, the Current LOC imposed amicable negotiation as a compulsory precondition, and only upon failure of negotiation could the parties proceed to mediation, commercial arbitration, or court litigation in compliance with certain regulatory principles.[74] However, this statutory hierarchy significantly constrained party autonomy and limited the effectiveness of multi-tier dispute-resolution mechanisms commonly used in international construction practice, where speed, continuity of performance, and cash flow stability were prioritized.[75]

Against that background, Decree 37 introduced a notable development by allowing the parties to agree to resolve disputes through mediation by an organization or expert individual(s), collectively referred to as a dispute resolution board ("**DAB**").[76] Pursuant to Decree 37, a DAB may either be provided for in the contract at the time of its execution or constituted after a dispute has arisen. The number of DAB members is subject to the parties' agreement. Members of the DAB must possess qualifications appropriate to the subject matter of the dispute, demonstrate experience in resolving contractual disputes, and have knowledge of the legal framework governing construction contracts.[77] Once the DAB issues its mediation conclusion, the parties have twenty-eight (28) days to object. If either party objects within this period, the dispute is referred to arbitration or to court, as required by law. If no party objects within the said time limit, the mediation conclusion shall be deemed accepted by the parties, who shall thereafter be obliged to comply.[78] This mechanism has often been regarded as resembling the Dispute Adjudication Board/Dispute Avoidance and Adjudication Board ("**DAAB**") framework under the FIDIC 2017.

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[74] National Assembly of Vietnam, *supra* note 1 at 146.8.

[75] Huy Quang Chau et al., *Dispute Resolution and Liquidated Damages under Article 86 of Vietnam's Construction Law 2025: Alignment with International Practice*, LEXOLOGY (Jan. 23, 2026), https://www.lexology.com/library/detail.aspx?g=ed8c49a9-0a36-4f03-857e-2e9f47eae434.

[76] Ministry of Construction of Vietnam, *supra* note 26 at 45.2.

[77] *Id.* at 45.2.(a).

[78] *Id.* at 45.2.(b).

However, material differences remain. In particular, Decree 37 does not provide a clear statutory basis for the establishment, authority, and operation of DAB; lack of basis for "pay now, argue later" principle central to FIDIC 2017, nor basis for early involvement or for the issuance of dispute avoidance recommendations; and it also confuses between DAB's adjudicative function as it considered DAB as for mediation.[79] As a result, mediation in the form of a DAB, as regulated under Decree 37, falls short of alignment with internationally recognized DAAB models, including those reflected in FIDIC 2017.[80]

5.2 Internationalization of Dispute Resolution under the New LOC

The New LOC adopts an open and flexible approach to dispute resolution by listing applicable dispute-resolution methods, including negotiation, mediation, application of international dispute-resolution models, arbitration, and court proceedings, without making negotiation mandatory. This explicit recognition of international dispute resolution models creates clearer statutory space for adopting popular structured mechanisms under international practice, such as the DAAB, and arbitration structure found in the FIDIC 2017 Suite, as well as institutional arbitration rules applied in Vietnam and internationally, including the VIAC Rules of Arbitration and the SIAC Rules of Arbitration. Although the implementing decree guiding the LOC is still under drafting and refinement, it is anticipated that the decree will not introduce additional conditions, procedural requirements, or other regulatory constraints that would undermine or restrict the application of international dispute resolution models, as expressly recognized under the New LOC. In this regard, the legislative intent reflected in the New LOC appears to favor preserving party autonomy and maintaining an open statutory framework for the adoption of international dispute resolution mechanisms, rather than reintroducing rigid hierarchies or

[79] *DAB UNDER THE FIDIC CONTRACT 1999 - IS IT MANDATORY OR OPTIONAL?*, CNC VIETNAM LAW FIRM (Dec. 21, 2023), https://cnccounsel.com/latest-news/dab-under-the-fidic-contract-1999-is-it-mandatory-or-optional.

[80] Cougnaud Christophe & Tam Do, *Dispute Boards (DAB/DAAB) in Vietnam: Toward International Standards*.

mandatory preconditions through subordinate legislation.[81]

On the other hand, the application of international dispute-resolution models to public investment and PPP projects is treated more cautiously. Such an application must be grounded in the requirements of specific international treaties, or approved by the investment decision-maker and agreed upon in the construction contract. Costs incurred from the dispute resolution process (if any) shall be included in the project's total investment capital.[82]

From an international arbitration perspective, the New LOC marks a clear step toward the internationalization of Vietnam's construction contracts by expressly embracing institutional arbitration and internationally recognized dispute-resolution mechanisms, thereby enhancing predictability and bringing Vietnam's construction law closer to global contractual standards. Furthermore, this alignment strengthens the enforceability and predictability of international dispute resolution methods, particularly given Vietnam's commitments under the 1958 New York Convention, to which Vietnam has been a party since 1995.[83]

6. Conclusion

Thus, the New LOC signifies not only a major transplantation of foreign legal models but also a careful integration of international construction norms into Vietnam's civil law framework. Vietnam has chosen to preserve key fundamental civil law principles while adopting globally recognized contractual and dispute-resolution tools, rather than abandoning its domestic legal foundations. This reform itself makes construction contracts under the New LOC more internationalized, featuring main elements adopted from international construction contract

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[81] *Id.*

[82] National Assembly of Vietnam, *supra* note 1 at 86.5.(b).

[83] Thuyet Tran, *The 1958 New York Convention and Challenges for the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam*, BLAWYERS VIETNAM | INTERNATIONAL LAW FIRM (Nov. 21, 2024), https://www.blawyersvn.com/the-1958-new-york-convention-and-challenges-for-the-recognition-and-enforcement-of-foreign-arbitral-awards-in-vietnam/
The 1958 New York Convention and challenges for the recognition and enforcement of foreign arbitral awards in Vietnam
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standards such as FIDIC and NEC. Undoubtedly, this balanced and structured approach further boosts Vietnam's reputation as a reliable jurisdiction for complex infrastructure projects and international construction arbitration.

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SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

HICAC 2026

INTERNATIONALIZATION OF VIETNAM'S CONSTRUCTION CONTRACTS UNDER THE NEW CONSTRUCTION LAW FRAMEWORK

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SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

NISHIMURA & ASAHI

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6. Conclusion

HICAC 2026

09– 10 April 2026 Ho Chi Minh City, Vietnam

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

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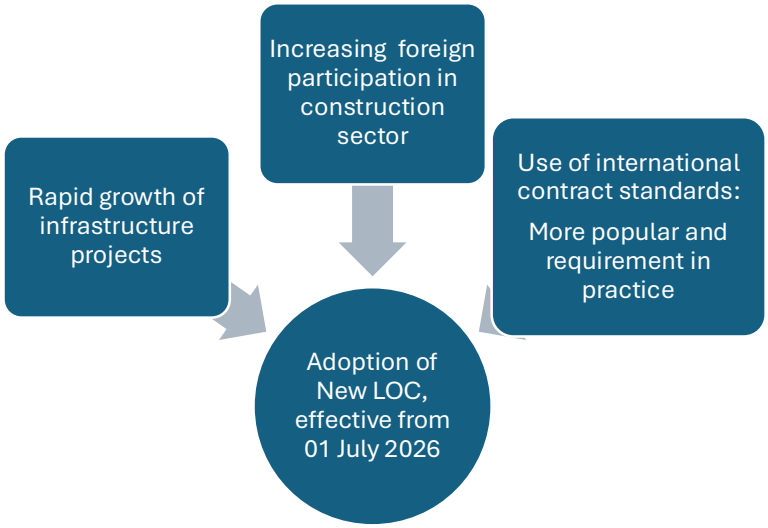
1. Introduction

Reform of the New Law on Construction



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1. Intr

Key Reforms & Significance

Key reforms

- Language regime for construction contracts with foreign elements
- Clarification of applicable law in construction
- Risk allocation mechanisms (liquidated damages, performance security)
- Recognition of international dispute resolution

Significance

- Gradual internationalization of Vietnam's construction contract regime
- Practical implementation remains to be o

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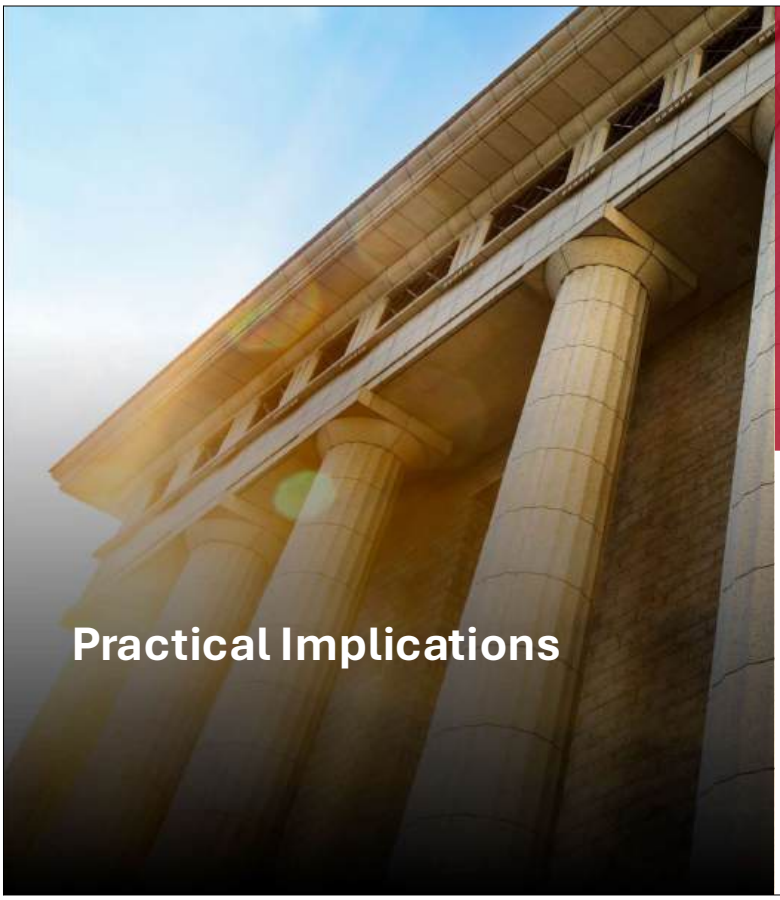
2. Language Regime Reform in Contracts involving Foreign Parties

Language Regime Reform

Reform under the New LOC:	Change from the Current LOC:
1. Parties may agree that a **foreign language is the prevailing language** of t contract.	1. Contracts must be in Vietnamese.
2. Vietnamese version still required.	2. Additional foreign language allowe
	3. No rule on prevailing language.



Practical Implications

International construction contracts are commonly drafted in English.

Standard forms widely international use such as FIDIC contracts are also typically prepared in English.

Under the Current LOC, the Vietnamese version was often assumed to prevail over the foreig language version.

Risk of interpretation disputes arises when inconsistencies arise between language versions.

2. Language Regime Reform in Contracts involving Foreign Parties (Cont.)

Significance of the Reform

A foreign language is recognized as the prevailing language.

To improve transactional certainty.

A foreign language is recognized as the prevailing language.

To enable reliance on internationally standardized contract wording.

Balanced approach:

Between international compatibility and domestic legal control

Vietnamese version requirement

To ensure regulatory oversight and legal accessibility.

Vietnamese version requirement

To be consistent with Vietnamese – langu requirement in court proceedings.

3. Application Law in Construction Contracts

Clarification of Applicable law

- The New OC expressly confirms t **construction contracts are governed by the Civil** unless construction legislation provides specific rules.
- This clarification was absent under the Current LOC (i.e., the Current OC merely defines a construction contract as a civi
- Previously, the relationship between construction law and civil law was not clearly leading to interpretative uncer

Key implication: The New LOC establishes **a clear hierarchy of applicable laws** for construction contracts

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3. Application Law in Construction Contracts (Cont.)

Practical Uncertainty under the Current Framework

In practice, courts and arbitral tribunals have relied on different legal when resolving construction disputes:

1. Civil Code – treating construction contracts as
2. Law on Commerce – treating the relationship as a commercial transaction.
3. Law on Commercial Arbitration – applying arbitration procedural

The Current LOC does not clarify the governing law, different authorities may apply different statutes, resulting in inconsistent interpretations and dispute out comes.

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3. Application Law in Construction Contracts (Cont.)

Uncertainty Concerns of Applicable Law under the Curr OC: Statute of Limitation

The construction law itself does not directly regulate limitation periods, and Decree 37/2015/ND-CP (only applicable to projects with State capital) merely refers to "relevant law"

Different laws therefore provide different time limits

- **Civil Code**: 3 years from the date the claimant becomes aware of the infringement.*
- **Law on Commerce**: 2 years from the date the rights are violated.**
- **Law on Commercial Arbitration**: 2 years unless otherwise provided by specialized law..***

As a result, courts and arbitral tribunal have adopted different approaches in practice.

Impact of the New LOC: By confirming the Civil Code as the default governing law, the New LOC aims to reduce legal uncertainty in construction disputes

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3. Application Law in Construction Contracts (Cont.

Uncertainty concerns of Applicable Law under the Current LOC: Penalty

LOC does not comprehensively regulate penalty cap, leading to reliance on different laws:

1. Current LOC: 12% of the value of the breached obligation (only for State-funded pr
2. Civil Code: no cap (subject to partial agreement)
3. Law on Commerce: 8% of the value of the breached obligation

=> Different legal bases have resulted in inconsistent approaches in practice

Impact of the New LOC:

1. To retain 12% cap for State-funded project
2. To be silent on private contracts.
3. To confirm that the Civil Code applies where construction law is silent

=> To allow the parties greater freedom to determine the level of contractual penalties upon ground that penalty clauses in private construction contracts will fall under the Civil Code.

4. Contractual Risk Allocation under the New LOC

Legal and Practical Uncertainties regarding Liquidated Damages

No clear guidance on "degree of breach".

Requirement for both actual loss and pre agreed damages.

To create a hybrid mechanism.

Unclear whether liquidated damages can apply together with penaltie

Risk of judicial/arbitral adjustment of agreed amounts.

4. Contractual Risk Allocation under the New LOC (Cont.)

4.1 Introduction of Liquidated Damages

New LOC recognizes pre-determined damage (liquidate damages)*

Compensation based on: (i) actual loss, (ii) pre-agreed amount, and (iii) degree of breach

Significance:

- To shift from traditional model which only includes actual damage and penalties.
- To align with international practices (e.g., FIDIC contracts, NEC).

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4. Contractual Risk Allocation under the New LOC (Cont.

Overall Impact

- To strengthen legal basis for risk allocation mechanisms.
- To enhance compatibility with international construction contracts.
- To improve predictability but not fully resolved.

Key takeaway:

- Reform is progressive but not complete.
- Practical application depends on future guidance and case law.

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4. Contractual Risk Allocation under the New LOC (Cont.)

4.2 Changes on Performance Security

Under Decree 37:

- Performance security is strictly regulated and limited, including its forms (deposit, escrow, or guarantee) , value thresholds of 2%–10% of contract price (up to 30% with special approval).
- Lack of clear regulations on adjustment of performan security.
- Unclear triggers for calling or returning performance security.

Shifts under New LOC:

- **Removes rigid statutory thres** .
- Align conceptually with Sub clause 4.2 of FIDIC 2017, in which the establishment, validity, and adjustment of performance security are largely determined mutually by the parties.
- Allow the contractor to request employer prove its financial capacity and provide payment securi

4. Contractual Risk Allocation under the New LOC (Cont.)

4.3 Contractual Risk-Allocation Mechanisms

Previous Statutory Liability

Old regulations strictly defined contractor and employer liabilities through detailed statutory provisions, limiting flexibility.

The New LOC emphasizes negotiated contracts **allowing tailored risk allocation** aligned with project needs and commercial realities.

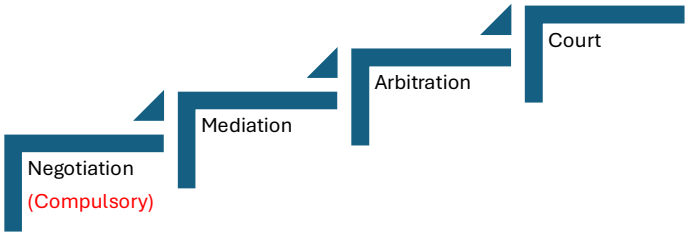
Impact:

Greater flexibility for adopting internationally recognized contractual models, including standard forms such as FIDIC, where risk allocation is extensively regulated through contractual provisions rather than mandatory statutory rules.

5. Recognition of Internationalized Dispute-Resoluti Mechanisms

Former Dispute Resolution Mechanism and Its Divergence from FIDIC 2017

Dispute Resolution Mechanism under the Cu OC:



Decree 37 introduced dispute resolution board **DAB**")

1. DAB and its members must be provided fo in the contract data
2. Members of the DAB must possess relevant qualifications, experience and legal knowledge
3. If no objection is raised within 28 days after the DAB issues its mediation conclusion, the conclusion becomes binding; otherwise, t dispute proceeds to arbitration or court.

5. Recognition of Internationalized Dispute-Resolution Mechanisms (Cont.)

Dispute Resolution under the New LOC

- Negotiation is no longer mandatory.
- Explicit recognition of application of international dispute-resolution models (e.g., the DAAB, and arbitration structure found in the FIDIC 2017 Suite, the VIAC Rules of Arbitration and the SIAC Rules of Arbitration, etc.)
  *Vietnam has been a party of the 1958 New York Convention since 1995

Impact:

- Internationalization of Vietnam's construction contracts by expressly embracing institutional arbitration and internationally recognized dispute-resolution mechanisms.
- Enhance predictability and bringing Vietnam's construction law closer to global contractual standards
- Strengthens the enforceability and predictability of international dispute resolution me

6. Conclusion

New LOC signifies (1) major transplantation of foreign legal models and (2) integration of international construction norms into Vietnam's civil law framework

Preserving key fundamental civil law principles while adopting globally recognized contractual and dispute-resolution tools

Thus, making construction contracts under the New LOC more internationalized, featuring main elements adopted from international construction contract standards such as FIDIC and NEC

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Thank you for your attention!

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Whether the liquidated damages mechanism according to international standard forms of contract has been really adopted in the new Construction Law of 2025 of Viet Nam?

Dr. Nguyen Thi Hoa[1]

Introduction. The international construction sector is known to be complex and risky, largely due to its involvement in large-scale projects requiring significant capital, advanced technology, and long durations. Therefore, establishing and executing international construction contracts inherently involves many risks, as it's often impossible to foresee all potential problems, especially given the significant fluctuations in the economic, political, social, and environmental landscape we've witnessed in recent years. Understanding the complexity of international construction, professional organizations in many countries strive to develop standard construction contract models to balance the interests of all parties involved. The well-known models are the FIDIC (Fédération International des Ingénieurs Conseils) templates. In Vietnam, research indicates that "*FIDIC model contracts are commonly used in construction projects in Vietnam for two main reasons. Firstly, infrastructure construction projects in Vietnam funded by official development assistance (ODA) must use FIDIC model contracts as agreed upon between ODA donors (e.g., the World Bank, the Asian Development Bank (ADB), the Japan International Cooperation Agency (JICA), etc.) and the Vietnamese Government*". [2]

Regarding the application of FIDIC model contracts, they are drafted by international entities and in English and thus, there are many discrepancies compared with Vietnamese law, including clauses for monetary remedy for breach of contract. Specifically, before the 2025 Construction Law, applying liquidated damages clauses of the above model contracts in Vietnam stirred debate about its legal nature - should this

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[2] Lưu Tiến Dũng, Đặng Khải Minh và Đỗ Khôi Nguyên, "Giải thích, áp dụng điều khoản thiệt hại do chậm trễ trong hợp đồng mẫu FIDIC Quyển đỏ theo luật Việt Nam", Tạp chí Toà án nhân dân, https://tapchitoaan.vn/giai-thich-ap-dung-dieu-khoan-thiet-hai-do-cham-tre-trong-hop-dong-mau-fidic-quyen-do-theo-luat-viet-nam8877.html, truy cập ngày 26/3/2026.

clause be understood as an agreement for compensation for damages or a penalty for breach of contract? This question has not yet a unified response in practice. Therefore, the question arises whether the new 2025 Construction Law of Vietnam has provided a clear answer to this situation. To find an answer to the above question, it is necessary to understand the context of Vietnamese construction law before and after the amendment of the 2025 Construction Law.

1. The context of Vietnamese construction law before and after the enactment of the 2025 Construction Law

In Vietnam, prior to the enactment of the 2025 Construction Law, regulations on penalties or compensation for damages due to breaches of construction contracts were applied in various ways. Specifically, numerous documents governed the issue of compensation for damages and penalties for breaches. For instance, Article 142, Clause 2 of the 2014 Construction Law stipulates that "*for construction projects using state capital, the penalty shall not exceed 12% of the value of the breached portion of the contract. In addition to the agreed penalty, the breaching party must also compensate the other party and any third parties (if applicable) for damages in accordance with this Law and other relevant laws*." Therefore, for projects not using state capital, the aforementioned 12% limit does not apply. This leads to two possible scenarios. Firstly, if applying the 2005 Commercial Law, Article 301 stipulates that "*the penalty for breach of contractual obligations or the total penalty for multiple breaches shall be agreed upon by the parties to the contract, but shall not exceed 8% of the value of the breached contractual obligation*..."; in addition, the 2015 Civil Code also provides that "*the penalty for breach shall be agreed upon by the parties, except where relevant laws provide otherwise*." Why are there two possible applications of these two different legal documents?

This stems from the provision in Clause 1, Article 138 of the 2014 Construction Law, which stipulates that "construction contracts are civil contracts...". By affirming the "civil" nature of construction contracts, some argued that penalties for violations in the construction sector, if not stipulated in the Construction Law, should be applied according

to the Civil Code, which does not set limits on the penalty amount. If this is the case, then applying the pre-determined compensation clause of the FIDIC model contract would not pose any difficulties. However, in practice, some argued that affirming construction contracts as "civil contracts" merely affirms the equality of the parties involved in the transaction in general. Therefore, if commercial entities are involved, the Commercial Law shall apply, and penalties for violations have to respect the scope of 8% of the value of the breached contractual obligation.[3]

In response to this situation, in 2025, Vietnam enacted a new Construction Law at Article 4 which still affirms the civil nature of construction contracts and adds specific regulations on the order of application as follows: "*For matters concerning construction contracts not specifically regulated in this Law, the provisions on contracts in the Law on Bidding, the Law on Investment in the Public-Private Partnership Method, and the Civil Code shall apply*." With the above provision, the possibility of applying the Commercial Law for construction contract is no longer possible. However, if the Civil Code is applied, can the pre-determined compensation clause or liquidated damages in international model contracts be understood as a clause for compensation for damages or a clause for penalties for breach of contract? The answer to this question will be found in the below development.

2. Liquidated damages is a mechanism of compensation for damages under the 2025 Construction Law

Regarding compensation for damages, the 2025 Construction Law specifically stipulates in Clause 2, Article 86 that "c*ompensation for damages shall be determined on the basic of actual damages, predetermined damage levels corresponding to the breached construction contract obligations, and the degree of breach*." With the above provision, a pre-determined compensation agreement is considered an agreement on "compensation for damages" mechanism. However, questions arising from this provision is that can pre-determined damages be applied simultaneously with ordinary compensation for damages

[3] Quyết định số 05/2015/KDTM-ST ngày 28/7/2017 của Toà án quận Nam Từ Liêm Hà Nội

mechanism? And when applying pre-determined compensation, is the obligation of providing "evidence of actual damages" required by general compensation for damages mechanism necessary?

The above issues arises because the practice of application of compensation for damages and an liquidated damages clauses. Specifically, the parties had two clauses regarding monetary compensation for breach of contract at Section 3 of Appendix A02 of the contract as follows[4]: "*According to the contract, if the Subcontractor fails to complete the entire Project or a specific Project item within the agreed timeframe, the Subcontractor shall pay the Contractor a penalty calculated at 0.2% of the total contract value (excluding VAT) for each day of delay, with a maximum of 10% of the contract value. In addition, if Party B [Subcontractor] is late in completing the project according to the committed schedule of March 10, 2017, Party B will be fined VND 300,000,000 for each day of delay*."

Regarding the aforementioned agreement, the Court determined that the nature of the two above penalty amounts are different. Regarding the 0.2% figure, the Court determined that it is a penalty; while regarding the fine amount of "300,000,000 VND for one day of delay," for the Court, it is a predetermined compensation amount. Nevertheless, when applying this predetermined compensation clause, the Court applied Articles 301 and 302 of the Vietnamese Commercial Law to interpret it as follows:

"*Compensation for damages is the obligation of the party whose breach of contract directly causes actual damages to the injured party to compensate for the losses incurred. Therefore, compensation for damages is a fundamental and inherent right of the injured party against the breaching party, regardless of whether the parties have agreed on compensation for damages (including pre-calculated compensation) in the contract. ... The fundamental difference between pre-calculated compensation for damages (not yet regulated by law) and compensation for damages as stipulated by current law is that the injured party does not have to prove actual damages and that the breach of contract was*

[4] Quyết định số 05/2015/KDTM-ST ngày 28/7/2017 của Toà án quận Nam Từ Liêm Hà Nội, (Decision No. 05/2015/KDTM-ST dated July 28, 2017, of the Nam Tu Liem District Court, Hanoi).

the direct cause of that actual damages. The nature of pre-calculated compensation for damages is that the parties agree on the basis of implicitly assuming that the breach will cause damages to the injured party, anticipating the potential level of damages to determine the specific method for determining future damages and exempting the injured party from the burden of proving damages."

Although the Court understood the difference between the pre-determined compensation mechanism and the ordinary compensation mechanism under Vietnamese Commercial Law, the Court still argued as follows: "*Considering that the current legal provisions requiring the aggrieved party to prove actual damages and that the breach of contract was the direct cause of that actual damages ensure that compensation is commensurate with the actual damages, preventing the breaching party from having to compensate for no damage or an amount that is disproportionate to the actual damages."* With this argument, the Court explains that *"the amount of pre-determined compensation agreed upon by the parties will be reviewed if it is excessively greater than the defendant's actual damages, in order to protect the plaintiff's legitimate rights*." The argument that "*the predetermined amount of damages... will be reviewed if it is excessively greater than actual damages... is to ensure the legitimate rights of the plaintiff*" appears to show that the court still needs to seek and compare the agreed-upon amount with actual damages. In the case at hand, actual damages suffered by one party were proven to be significantly greater than the amount of damages agreed upon by the parties. However, the court only awards the injured party the predetermined amount of damages, not the entire amount of actual damages. This case highlights issues on "proving actual damages", "determining the amount of damages to be compensated," and the imposibility to simultaneously claim both the predetermined amount of damages and the portion of actual damages exceeding the predetermined amount.

Firstly, the court in the above case applied the Commercial Law to affirm that considering actual damages was necessary. However, with the appearance of the new Construction Law in 2025, the Commercial Law will no longer be applicable, and instead,

the Civil Code will be used. Therefore, the question arises: according to the Civil Code, is it necessary to prove the existence of actual damages for compensation? Regarding this issue, Clause 1 of Article 419 of the Civil Code stipulates: "*Damages to be compensated for breach of contractual obligations shall be determined according to the provisions of Clause 2 of this Article, Article 13, and Article 360 of this Code*." Article 360 of the Civil Code stipulates that "*in case of damages caused by breach of obligations, the breaching party must compensate for all damages, unless otherwise agreed or provided for by law."* The phrase *"damage caused by breach of obligation*..." is interpreted that the conditions for claiming compensation for damages are: a breach of contract, actual damages, and a causal relationship between the breach and actual damages. [5] Thus, the theory regarding the conditions for claiming compensation for damages due to breach of contractual obligations under the Civil Code is quite similar to the provisions of the Commercial Law mentioned above. Looking at the provisions of the 2025 Construction Law, Clause 2, Article 86 stipulates that "*compensation for damages shall be determined according to actual damages, predetermined damages levels corresponding to the breached construction contract obligations, and the degree of breach*." The question arises whether the necessary conditions for claiming general compensation for damages under the Civil Code are still applicable for liquidated damages clause. This could be an issue that the Supreme People's Court may need to, in the future, establish a precedent to further clarify.

Secondly, regarding the simultaneous claim for both "predetermined damages" and compensation for actual damages, or the difference between actual and predetermined damages, how will these issues be resolved under the new Construction Law of 2025? In other words, should the comma in the phrase "*compensation for damages is determined according to actual damages, predetermined damage levels*..." in Clause 2, Article 86 above be interpreted as "or" or "and"? This is also an issue that needs further clarification in the future.

[5] Đỗ Văn Đại, *Luật hợp đồng Việt Nam - Bản án và bình luận bản án*, NXB Đại học quốc gia TP. Hồ Chí Minh, Tập 2, tái bản lần thứ tám, 2020, tr. 509-514.

To provide Vietnamese state agencies with a basis for interpreting and applying the pre-determined compensation mechanism, consulting foreign legal systems regarding the application of liquidated damages clause is also important to find a suitable solution for Vietnam. In this regard, studying the Common Law system and the origins of pre-determined compensation clauses will help to better understand this provision. Firstly, in England, a pre-determined compensation clause (liquidated for damages) is a promise where the obligated party pledges to pay the entitled party a sum of money if a promise between them is not fulfilled. Since the 17th century, this clause has been regarded as compensation for damages and thus, it would be unreasonable if the compensated party receives benefits exceeding the amount of damages. [6] Therefore, if the pre-determined amount is considered excessive, it will be considered a penalty for breach of contract and declared invalid. [7] Today, Hong Kong also has a similar understanding and therefore, its courts will examine the appropriateness of the predetermined compensation clause and, if deemed excessively unreasonable, will declare it invalid. Thus, it can be seen that both the UK and Hong Kong only accept one monetary remedy mechanism for breach of contract with the aim of ensuring that the injured party receives reasonable compensation.[8]

Regarding a civil law country like France, the French Court d'Appel of Amiens–RG No. 23/01841 on June 25, 2024 judged that "*traditionally, the purpose of a penalty clause is to exert pressure on the debtor and to compensate the creditor for any potential non-performance. In principle, therefore, a penalty clause cannot be combined with the award of additional damages since the compensation has been set at a fixed amount by the parties… However, case law considers that it remains possible to request, in addition to the execution of the penalty clause, damages, provided that these damages are independent of the damages that the penalty clause is intended to repair (Civ.1e, February 12, 1964: Bull. civ. I, n°82, in the case of a penalty clause sanctioning delay), or intended to repair*

[6] Thi Hoa, N., Leong, H., Yeng Hoe, A. H., & Rosenberg, K. (2026). Monetary Remedy for Breach of Contract in a Construction Sector: Solution for Practitioners. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, *18*(2), 03726002.
[7] Ibid.
[8] Ibid.

"damages distinct from that repaired by the penalty clause, with the burden on the person requesting them to provide proof of the distinct nature (Com. July 12, 2011, n° 10-18.326 for material costs incurred in vain for the purpose of the assignment)."[9] Thus, according to French law, that the nature of a penalty agreement is to compensate for damages arising frm the breach of contract, and therefore, in principle, it can not be combined with additional compensation. Nevertheless, the court may still apply supplementary compensation if the claimant can prove that the claimed damages were not included in or foreseen within the predetermined amount.

From the above practices, it can be seen that most countries only accept one mechanism of monetary remedy for damages when a violation occurs, regardless of the name of the remedy. France, however, accepts the simultaneous application of penalties and compensation if it can be proven that the damages for which compensation is requested have not been remedied by the penalty.

Looking back at Vietnamese law and the previously analyzed case, we have simultaneously applied both sanctions: penalties for breach of contract and predetermined compensation. Notably, in the case of Decision No. 05/2015/KDTM-ST dated July 28, 2017, of the Nam Tu Liem District Court in Hanoi, the Court explained that the nature of a penalty agreement under the Vietnamese Civil Code also has two functions: punishment and remediation of damages. Therefore, the Court only accepted the aggrieved party's claim for predetermined compensation and the penalty for breach of contract, but did not accept the claim for full amount of compensation for damages (exceeding the predetermined amount in the contract). However, with the enactment of the 2025 Construction Law, the Court's interpretation may become the subject of future debate.

Conclusion. From the above analysis, it can be seen that the new regulation in the 2025 Vietnamese Construction Law regarding the acceptance of pre-determined

[9] Thi Hoa, N., Leong, H., Yeng Hoe, A. H., & Rosenberg, K. (2026). Monetary Remedy for Breach of Contract in a Construction Sector: Solution for Practitioners. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, *18*(2), 03726002.

compensation sanctions is a step forward in line with practical realities in the construction sector. However, with the current provisions of the Law, the application of this mechanism in practice in relation to ordinary compensation for damages remains a question that requires further clarification from the competent state authorities.

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3. Quyết định số 05/2015/KDTM-ST ngày 28/7/2017 của Toà án quận Nam Từ Liêm Hà Nội

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6. Thi Hoa, N., Leong, H., Yeng Hoe, A. H., & Rosenberg, K. (2026). Monetary Remedy for Breach of Contract in a Construction Sector: Solution for Practitioners. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, *18*(2), 03726002.

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Whether the liquidated damages mechanism according to international standard forms of contract has been really adopted in the new Construction Law of 2025 of Viet Nam?

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SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

Whether the liquidated damages mechanism according to international standard forms of contract has been really adopted in the new Construction Law of 2025 of Viet Nam?

1. The context of Vietnamese construction law before and after the enactment of the 2025 Construction Law

2. Liquidated damages clause is a mechanism of compensation for damages under the 2025 Construction Law

3. How can a liquidated damages clause be applied under the 2025 Construction Law

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The context of Vietnamese construction law before and after the enactment of the 2025 Construction Law

2014

Construction Law

Construction contract is a civil contract
- ➢Either Civil Code or Commercial Law can be applied

2020

Construction Law

Construction contract is a civil contract
- ➢Either Civil Code or Commercial Law can be applied

2025

Construction Law

- Construction contract is a civil contract;
- The Civil Code governs issues that are not addressed by the Construction Law

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2. Liquidated damages clause is a mechanism of compensation for damages under the 2025 Construction Law

The 2025 Construction Law specifically stipulates in Clause 2, Article 86 that:

"Compensation for damages shall be determined on the basis of actual damages, predetermined damage levels corresponding to the breached construction contract obligations, and the degree of breach."

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN) VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

3. How to apply a liquidated damages clause under the 2025 Construction Law

❖ Decision No. 05/2015/KDTM-ST dated July 28, 2017, of the Nam Tu Liem District Court, Hanoi

"According to the contract, if the Subcontractor fails to complete the entire Project or a specific Project item within the agreed timeframe, the Subcontractor shall pay the Contractor ***a penalty calculated at 0.2% of*** *the total contract value (excluding VAT) for each day of delay, with a maximum of 10% of the contract value. In addition, if Party B [Subcontractor] is late in completing the project according to the committed schedule of March 10, 2017,* ***Party B will be fined VND 300,000,000 for each day of delay****".*

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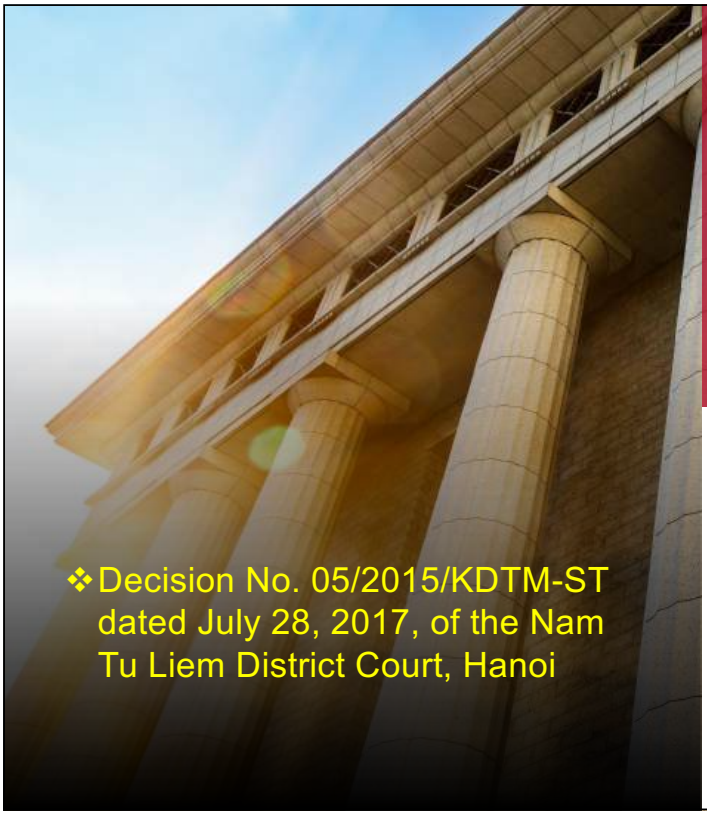

❖ Decision No. 05/2015/KDTM-ST dated July 28, 2017, of the Nam Tu Liem District Court, Hanoi

The penalty calculated at 0.2% of *the total contract value is acceptable*

The amount of ***VND 300,000,000 for each day of delay is also accepted***

"the amount of pre-determined compensation agreed upon by the parties will be reviewed if it is excessively greater than the defendant's actual damages.

The amount of actual damages greater than the pre-estimatd amount is not accepted.

Question arising from 2025 Vietnamese Construction Law

Can a LD clause be applied in addition to **Compensation for damages?**

Need to further clarify.

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❖ Foreign experiences

UK applies only LD Clause having compensation nature

The Hong Kong applies only one LD Clause having compensation nature

France considers a LD clause as penalty having compensation nature and thus, compensation for damages is only applied if breached party proves that claimed damages fall outside the scope of the LD clause clause

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Thank you for your attention!

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AGENDA
CHƯƠNG TRÌNH

SECTION A - International Construction Contracts
PHẦN A - Hợp đồng Xây dựng Quốc tế

MODERATOR/ĐIỀU PHỐI VIÊN

Mr./Ông **NGUYỄN THÀNH LONG**

FIDIC Certified Trainer / Contract Manager, Chairman cum Managing Director at VinaQS
Giảng viên & Người quản lý hợp đồng được FIDIC chứng nhận; Chủ tịch HĐTV và Giám đốc Điều hành VinaQS

15:30PM -17:00PM

SESSION A2
Alternatives for International Construction Contract

PHIÊN A2
Các lựa chọn cho Mẫu hợp đồng Xây dựng quốc tế

SPEAKER/DIỄN GIẢ

Mr./Ông **ANEL IDRIZ**

Directior & Founder at Alternative Logic
Giám đốc và Nhà sáng lập, Alternative Logic

Presentation 01
Programming, Risk Allocation and Time Management under NEC: Adoption, Regional Practice, and Implications for Vietnam

Tham luận 01
Tiến độ, phân bố rủi ro và quản lý thời gian theo Hợp đồng NEC: Tiếp nhận, Thực tiễn khu vực và hàm ý cho Việt Nam

Ms./PGS **NASEEM AMEER ALI**

Associate Professor,
Massey University, New Zealand
Phó Giáo sư, Đại học Massey (New Zealand)

Presentation 01
Modernising Construction Contracts: From Legalese to Plain Language [Global Lessons in Plain Language Drafting]

Tham luận 02
Hiện đại hoá Hợp đồng Xây dựng: Từ Ngôn ngữ pháp lý đến Ngôn ngữ đơn giản [Bài học toàn cầu về kỹ năng soạn thảo với ngôn ngữ đơn giản]

Ms./Bà **JOANNA SEETOH**

Accredited Specialist in Building & Construction Law, Fellow of the Singapore Institute of Arbitrators
Chuyên gia được công nhận trong lĩnh vực Luật Xây dựng, Hội viên của Viện Trọng tài Singapore,

Presentation 03
The Owner's Perspective: Selecting and Managing International Construction Contracts for Major Infrastructure Projects

Tham luận 03
Kinh nghiệm của Chủ đầu tư dự án quy mô lớn trong việc lựa chọn và quản lý Hợp đồng xây dựng quốc tế

Programming, Risk Allocation and Time Management under NEC: Adoption, Regional Practice and Strategic Implications for Vietnam

By Anel Idriz
Programming & Delay Expert, Alternative Logic

1 Introduction

Across Asia-Pacific, infrastructure projects are increasing in scale, technical complexity and financial exposure. Airports, metro systems, highways, energy facilities and mixed-use developments now involve multinational funding, layered supply chains and intricate regulatory interfaces. In such environments, time risk is no longer a secondary commercial issue; it is central to project viability.

Delay remains one of the most persistent sources of dispute in construction. Under traditional contract frameworks, extension of time claims are frequently assessed retrospectively — sometimes years after completion — through forensic reconstruction of events. This retrospective model often produces:

- Hindsight bias
- Concurrency disputes
- Escalating prolongation claims
- Significant commercial uncertainty

The NEC suite of contracts represents a structural departure from this model. Developed by the Institution of Civil Engineers in the United Kingdom, NEC is widely used internationally across infrastructure, engineering and public works projects. It is often described as collaborative, flexible and written in plain English. Those features are real — but they are not its most significant contribution.

From a programming and delay perspective, NEC alters three core elements of construction time governance:

1. The contractual status of the programme
2. The timing and method of delay assessment
3. The allocation and management of time-related risk

This paper examines those structural shifts, considers regional adoption across Hong Kong, Singapore, Australia and New Zealand, and explores the strategic implications for Vietnam as it expands its infrastructure sector.

2 Why Time Governance Matters in Emerging Infrastructure Economies

Traditional forms such as FIDIC have shaped international construction for decades. While they provide robust frameworks for risk allocation, delay analysis under such contracts is frequently performed retrospectively. The critical question typically becomes: *What actually happened?*

Experts reconstruct events using as-built data, windows analysis, collapsed as-built modelling or other retrospective methodologies. Although technically sophisticated, this approach presents inherent limitations:

- It relies on historic records that may be incomplete or strategically curated.
- It invites reinterpretation of past events with the benefit of hindsight.
- It often escalates into complex concurrency arguments.
- It may crystallise disputes long after commercial relationships have deteriorated.

In emerging infrastructure economies, these limitations are amplified by several factors:

- Rapid project mobilisation before full design maturity
- Compressed procurement timelines
- Institutional capacity constraints
- Limited culture of structured programme governance

When disputes are resolved years later, the financial consequences may already have destabilised contractors, supply chains or public budgets. Investors increasingly view time governance as an indicator of systemic maturity. Transparent and predictable time adjustment mechanisms influence not only dispute risk but also financing costs and bid pricing behaviour.

The central question is not whether NEC drafting is clearer than other standard forms. The question is whether NEC produces better time outcomes in practice by embedding delay assessment into live project management and shifting the behavioural incentives of project participants.

3 Comparative Perspective: NEC and FIDIC on Time

To understand the structural shift introduced by NEC, it is useful to contrast its approach with the more widely used FIDIC framework.

Under FIDIC:

- The programme is required but does not necessarily attain equivalent contractual centrality.
- Extensions of time are assessed based on delay to completion, often with significant discretion.
- Concurrency analysis frequently depends on jurisprudential interpretation.
- Retrospective expert analysis is common in formal dispute resolution.

Under NEC:

- The Accepted Programme is the reference instrument for time assessment.
- Compensation events are assessed prospectively.
- Time and cost are adjusted through structured administrative mechanisms.
- Strict time bars incentivise early notification.

This difference alters project behaviour. Under a retrospective model, parties may delay crystallising claims, accumulating them strategically. Under NEC, entitlement may be lost if procedures are not followed within defined timescales. The administrative architecture therefore changes risk management incentives.

This does not mean NEC is universally superior. It means it represents a different governance philosophy — one that privileges contemporaneous modelling over retrospective adjudication.

4 The Contractual Status of the Programme under NEC

Under NEC, the programme is not merely a planning document. It is a core contractual management tool.

This is a fundamental shift. In many traditional forms, the programme is important but often treated as evidential rather than determinative. Under NEC Engineering and Construction Contract (ECC), the programme occupies a central operational role.

The programme:

- Shows how the Contractor plans to undertake the works.
- Identifies key dates and completion milestones.
- Demonstrates when the Contractor requires information, access or actions from the Client and Others.
- Illustrates float and sequencing assumptions.
- Forms the basis for assessing the impact of compensation events.

- Becomes, once accepted, the reference framework for delay and entitlement assessment.

The preparation and regular updating of the programme is not optional administration. It is a contractual obligation. The Contractor submits a programme for acceptance. The Project Manager reviews it. Once accepted, it becomes the operative baseline for assessing future events.

Crucially, acceptance of the programme does not transfer delivery risk to the Employer. Responsibility for achieving Completion remains with the Contractor. However, the accepted programme establishes the structured logic against which time impacts are measured.

This creates several consequences:

- Programme quality directly affects entitlement.
- Logic integrity becomes critical.
- Artificial or unrealistic sequencing exposes vulnerability.
- Administrative discipline becomes central to risk protection.
- Failure to maintain an accepted programme may undermine compensation event assessment.

In practice, NEC rewards disciplined forecasting and exposes weak programming. A poorly constructed programme is not merely a technical weakness; it becomes a contractual liability.

5 The Programme at the Heart of Compensation Events

NEC contains a defined and time-bound process for managing compensation events — the contractual mechanism through which changes to time and cost are assessed.

The process typically involves:

- Early warning notification
- Formal notification of compensation events
- Project Manager confirmation or instruction
- Contractor submission of quotation
- Programme impact modelling
- Project Manager acceptance, rejection or own assessment

The assessment is based on the forecast effect of the compensation event on Completion and any Key Dates.

If no Accepted Programme exists, the assessment becomes inherently problematic. Without a reliable baseline logic model, the forecast impact cannot be objectively measured. In that scenario, the system risks reverting to retrospective debate.

This dependency reinforces the centrality of programme governance. Scope, obligations, constraints and compensation events all intersect through the programme model. The programme is therefore both an operational tool and a risk allocation mechanism.

6 Prospective Time Management and Behavioural Change

Perhaps the most significant shift introduced by NEC is methodological.

Traditional delay analysis asks:

- What actually happened?

NEC asks:

- What is the forecast impact on Completion at the time of the event?

This is prospective time assessment.

When a compensation event occurs, its impact is assessed based on the forecast effect on the Accepted Programme at that point in time. The parties evaluate how the event is predicted to affect Completion, not how events ultimately unfolded with the benefit of hindsight.

This approach produces several structural effects:

1. Delay assessment becomes contemporaneous.
2. Hindsight bias is reduced.
3. Programme integrity becomes paramount.
4. Claims are crystallised earlier.
5. Commercial positions are clarified sooner.

However, it also increases technical demands. To function effectively, the system requires:

- A logic-linked baseline programme.
- Regular updates reflecting actual progress.
- Transparent modelling of event impacts.
- Competent programme administration.
- An engaged Project Manager capable of independent assessment.

If the programme is unrealistic or administratively neglected, entitlement becomes vulnerable. NEC therefore narrows the margin for technical weakness.

It also alters behavioural incentives. Contractors are incentivised to notify early. Employers are incentivised to respond within prescribed timeframes. Silence or delay may carry contractual consequences.

7 Risk Allocation: Float and Concurrency

7.1 Float

NEC does not allocate float ownership explicitly to either party. An extension of time is granted only if Completion is forecast to be delayed.

Float therefore operates as a shared project resource. If a compensation event consumes available float but does not delay Completion, no extension is awarded. This simplifies doctrinal debates about float ownership and reframes the discussion in functional terms: does Completion move?

However, this simplicity depends entirely on programme integrity. Artificial float creation or suppression may distort outcomes. Transparency in logic modelling is therefore essential.

7.2 Concurrency

Under many traditional frameworks, concurrency is treated as a legal doctrine. Parties debate whether delays are “true concurrent,” “dominant,” or “apportionable.” Jurisprudence varies across jurisdictions.
NEC shifts concurrency from legal abstraction to technical modelling. The question becomes:

- Does the compensation event independently delay Completion on the Accepted Programme?

If the forecast impact of the compensation event, when modelled against the programme, does not move Completion, no extension arises — regardless of parallel Contractor delay. This reframing moves disputes away from legal categorisation and toward programme analysis. However, it places significant weight on the accuracy of the model itself.

8 Regional Practice in Asia-Pacific

8.1 Hong Kong

Hong Kong's structured adoption of NEC across public works provides the clearest regional case study.

Benefits observed include:

- Cultural normalisation of early warnings
- Real-time adjustment of Completion Dates
- Improved documentation discipline
- Reduction in large, end-of-project extension claims

Challenges included:

- Inconsistent programme standards across contractors
- Learning curves for Project Managers
- Initial resistance to strict time bars

The lesson is clear: NEC requires institutional support and technical competence.

8.2 Singapore, Australia and New Zealand

Singapore's selective adoption reflects a cautious but capability-driven approach. Australia and New Zealand have embraced NEC within alliance and target cost environments where collaborative risk sharing is already culturally embedded.

Across all jurisdictions, the same principle emerges: NEC does not eliminate disputes; it re-distributes them into earlier administrative stages and centres them on programme quality.

9 Vietnam: Reform Pathway and Institutional Readiness

Vietnam stands at a pivotal moment in its infrastructure development trajectory. As projects grow in scale and international financing increases, time governance becomes strategically significant.

NEC adoption could offer structural benefits:

- Greater transparency for foreign investors
- Predictable and structured time adjustment

- Reduced retrospective claim accumulation
- Alignment between project management and contractual rights

However, successful integration would require a coordinated reform strategy, including:

- National guidance notes on NEC administration
- Training programmes for public sector project managers
- Certification pathways for programme governance
- Development of tribunal familiarity with prospective delay assessment
- Integration of digital programme management platforms

Without these foundations, NEC risks being perceived as procedurally burdensome rather than reformative.

Adoption must therefore be phased, supported and strategically aligned with institutional capacity building.

10 Implications for Professionals

For programming and delay specialists, NEC shifts the professional role significantly.
The traditional expert model emphasises retrospective forensic reconstruction. Under NEC, emphasis moves toward:

- Real-time predictive modelling
- Continuous programme governance
- Strategic risk advisory during project execution

Programming becomes central to entitlement rather than evidential support after dispute crystallisation.
This shift demands enhanced technical discipline:

- Logic must be robust.
- Float must be transparent.
- Updates must be accurate.
- Forecasting must be defensible.

The margin for technical weakness narrows. Professionals who embrace predictive governance may find expanded relevance. Those reliant solely on retrospective reconstruction may encounter reduced demand in NEC-dominated environments.

11 Conclusion

NEC is often described as collaborative and flexible. Those attributes are visible in its drafting style and early warning mechanisms. But its deeper significance lies in its architecture.

It is a contract structured around:

- Forecast accountability
- Administrative discipline
- Programme-driven entitlement
- Embedded time governance

Its effectiveness depends entirely on competence. A well-administered NEC project can reduce hindsight bias, crystallise entitlement earlier and enhance transparency. A poorly administered NEC project may generate procedural disputes and technical confusion.

For Vietnam, NEC presents a genuine opportunity to modernise time management in infrastructure delivery. However, success will not be determined by drafting style or international trend. It will be determined by:

- The quality of the programme
- The discipline of those who manage it
- The institutional maturity supporting its operation

Time risk is no longer peripheral. In contemporary infrastructure delivery, it is structural. NEC's contribution lies in recognising that reality and embedding time governance within the contract itself.

For Vietnam, NEC presents a meaningful opportunity to modernise infrastructure time management. But reform must extend beyond documentation. It must encompass training, institutional alignment and technical rigour.

Ultimately, NEC's effectiveness will not be determined by its plain English drafting. It will be determined by the quality of the programme — and the discipline of those entrusted to manage it.

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Programming, Risk Allocation & Time Management under NEC: *Adoption, Regional Practice, and Implications for Vietnam*

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Introduction & Background

An NEC contract is a standard form construction contract developed by the Institution of Civil Engineers in the UK. It is designed to promote collaboration, proactive project management, and clear risk allocation between parties.

NEC contracts use plain English, require early warning of potential issues, and include detailed procedures for managing changes, time, and cost. They are widely used internationally across construction, engineering, and infrastructure projects.

Today I will examine NEC not simply as an alternative contract form, but as a structural shift in how time risk is governed within construction projects.

From a programming and delay perspective, NEC changes three core elements:

1. *The contractual status of the programme*
2. *The timing and method of delay assessment*
3. *The allocation and management of time-related risk*

I will briefly outline how NEC operates, examine regional adoption across Asia-Pacific, and then consider what this might mean for Vietnam.

Why this matters for Vietnam

Across Asia-Pacific, infrastructure projects are becoming larger, more complex, and more exposed to time-related risk.

Delays remain one of the primary sources of dispute. Under traditional frameworks, delay claims are frequently assessed retrospectively — often years after completion — through forensic reconstruction.

This model creates:

1. *Hindsight bias*
2. *Concurrency disputes*
3. *Escalating prolongation claims*
4. *Commercial uncertainty*

NEC attempts to change this dynamic by embedding delay assessment into live project management.
The question is not whether NEC is clearer in drafting — but whether it produces better time outcomes in practice.

The Contractual Status of the Programme under NEC

- Under NEC, the programme is not merely a planning document — it is a core contractual management tool.
- Programming is at the heart of good project management under NEC
- The preparation and acceptance of regularly revised programmes is a vital part of the ECC
- It is essential that the Contractor and PM work together to regularly produce and revise the programme which they both agree
- The programme is a joint management tool
- Shows how the Contractor plans to undertake the works
- Shows the dates by which the Contractor will need things from the Client and Others
- Shows when the Contractor is planning to complete the works and achieve the Condition required for a Key Date
- Used as the basis for assessing the effect of compensation events upon Completion and a Key Date
- Once accepted, it becomes the reference point for assessing delay, risk, and compensation events.
- The contract promotes prospective time assessment, requiring issues to be addressed in real time rather than retrospectively.
- Acceptance of the programme does not shift risk from the Contractor; responsibility for delivery remains unchanged.

Effective administration and regular updates are essential to protect entitlement and maintain transparency.

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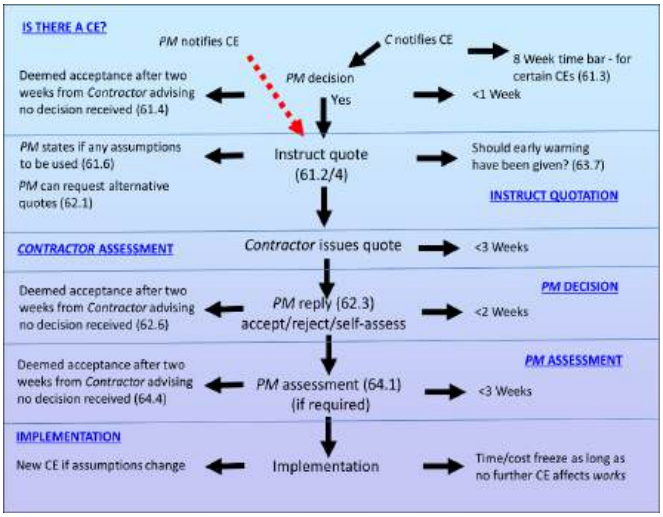
Defined process to deal with compensation events

Processes and timescales



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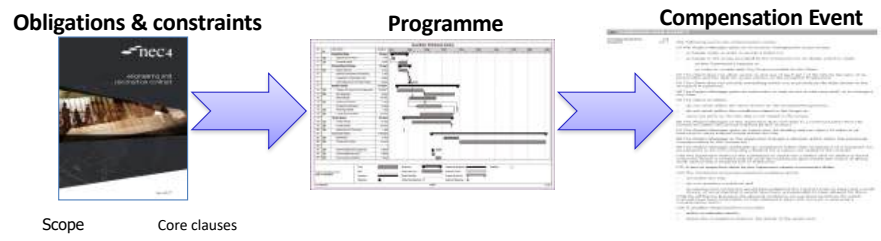
Programme at the 'heart'



The absence of an Accepted Programme will make it difficult to assess compensation events!

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Prospective Time Management

Perhaps the most significant shift is methodological.

Traditional delay analysis asks:
- What actually happened?

NEC asks:
- What is the forecast impact on Completion at the time of the event?

The contract promotes prospective time assessment, requiring issues to be addressed in real time rather than retrospectively.

This produces three consequences:
1. Delay assessment becomes contemporaneous.
2. Hindsight bias is reduced.
3. Programme integrity becomes critical.

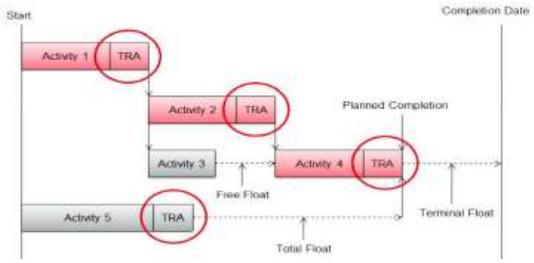
Method of Analysis	Analysis Type	Critical Path Determined	Delay Impact Determined	Requires
Impacted As-Planned Analysis	Cause & Effect	Prospectively	Prospectively	• Logic linked baseline programme • A selection of delay events to be modelled.
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	• Logic linked baseline programme • Update programmes or progress information with which to update the baseline programme • A selection of delay events to be modelled.
Time Slice Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	• Logic linked baseline programme • Update programmes or progress information with which to update the baseline programme.
As-Planned versus As-Built Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	• Baseline programme • As-built data.
Retrospective Longest Path Analysis	Effect & Cause	Retrospectively	Retrospectively	• Baseline Programme • As-built programme.
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	• Logic linked as-built programme • A selection of delay events to be modelled.

SCL Delay and Disruption Protocol 2nd Edition: February 2017

If the programme is unrealistic, entitlement becomes vulnerable. NEC therefore rewards disciplined forecasting and exposes weak programming.

Risk Allocation: Float and Concurrency

Float
NEC does not allocate float ownership to either party.
An extension of time is granted only if Completion is forecast to be delayed.
Float therefore operates as a shared project resource.



Concurrency
NEC does not rely on legal doctrines of concurrency.
Instead, concurrency becomes a technical question:

- Does the compensation event independently delay Completion on the Accepted Programme?

This shifts disputes away from legal abstraction and toward programme modelling.

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Regional Practice: Hong Kong, Singapore, Australia & New Zealand

Hong Kong

Hong Kong represents the most structured NEC adoption in Asia.
The government implemented NEC across public works as part of procurement reform.

Observed benefits include:
•Institutionalised early warnings
•Greater transparency
•Real-time time adjustment
•Reduced accumulation of unresolved EOT claims
However, challenges emerged:
•Variable programme quality
•Inconsistent logic integrity
•Administrative capability gaps

The key lesson:
NEC functions effectively within a strong institutional framework — but demands programming competence.

Australia & New Zealand

Australia and New Zealand have demonstrated growing interest in NEC, particularly in sectors already familiar with:
•Alliance contracting
•Target cost models
•Shared risk frameworks

NEC integrates well within these collaborative environments.
However, even in mature markets, success depends on:
•Programme discipline
•Capable Project Managers
•Genuine early warning engagement
NEC does not eliminate disputes.
It changes their focus.

Singapore
Singapore has adopted NEC more selectively.

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Vietnam: Current Landscape & Strategic Implications

Vietnam: Current Landscape

- Vietnam is experiencing significant infrastructure expansion.
- Projects are increasing in scale, complexity, and international participation.
- Current practice largely relies on FIDIC-based forms and retrospective delay assessment.
- Extension of time disputes often involve concurrency arguments and forensic reconstruction.
- This presents both opportunity and risk.

Strategic Implications for Vietnam

NEC adoption could offer:
- Structured early risk identification
- Real-time Completion adjustment
- Improved transparency for investors
- Reduced accumulation of unresolved time claims

However, successful adoption would require:
- Training in prospective delay modelling
- Minimum programming standards
- Capable Project Managers
- Institutional familiarity within tribunals

Without these foundations, NEC may increase procedural friction.
Adoption must be treated as system reform — not document substitution.

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Implications for Professionals & Final Reflection

Implications for Professionals

For programming and delay specialists, NEC shifts the professional role.

From:
- Retrospective forensic reconstruction

To:
- Real-time predictive modelling
- Continuous programme governance
- Strategic risk advisory

Programming becomes central to entitlement.
The margin for technical weakness narrows significantly.

Final Reflection

NEC is often described as collaborative and flexible.

But its true significance lies elsewhere.

It is a contract structured around:
- Forecast accountability
- Administrative discipline
- Programme-driven entitlement
- Embedded time governance

Its effectiveness depends entirely on competence.

For Vietnam, NEC presents a genuine opportunity to modernise time management in infrastructure delivery.

But its success will not be determined by drafting style.

It will be determined by the quality of the programme and the discipline of those who manage it.

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Thank you for your attention!

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AGENDA
CHƯƠNG TRÌNH

HICAC 2026

SECTION B – Dispute avoidance and resolution mechanisms for construction activities

PHẦN B – Các phương thức ngăn ngừa và giải quyết tranh chấp trong hoạt động xây dựng

MODERATOR/ĐIỀU PHỐI VIÊN

Dr./ÔNG **EDIYANTO ARIEF**
Founder EA Law Firm
Nhà sáng lập Công ty Luật EA

13:30PM -15:00PM

SESSION B1
Alternatives Dispute Avoidance during Construction

PHIÊN B1
Ngăn ngừa tranh chấp trong quá trình xây dựng

SPEAKER/DIỄN GIẢ

Mr./ÔNG **ANEL TILAK KOLONNE**
Dispute Board member/ Adjudicator, Arbitrator, Expert Witness
Thành viên Ban Xử lý Tranh chấp/ Người phân xử, Trọng tài viên và Nhân chứng chuyên gia

Presentation 01
Dispute Avoidance and Resolution by Alternative Dispute Resolution (ADR)

Tham luận 01
Phòng ngừa và Giải quyết tranh chấp bằng Phương thức giải quyết tranh chấp thay thế (ADR)

Ms./BÀ **NGUYỄN THỊ THU TRANG**
Partner Dzungsrt & Associates LLC
Luật sư thành viên Dzungsrt & Associates

Presentation 02
Construction dispute resolution models under international practices: International experiences and the lessons for Vietnam

Tham luận 02
Các mô hình giải quyết tranh chấp xây dựng theo thực tiễn quốc tế: Kinh nghiệm quốc tế và bài học cho Việt Nam

Mr./ÔNG **KEVIN ATTRILL**
Managing Director Ankura
Giám đốc điều hànhAnkura

Presentation 03
Avoiding Project Disputes - A guide to good practice

Tham luận 03
Phòng ngừa tranh chấp dự án - Hướng dẫn nhằm thực hành tốt

Mr./Ông **MIAN SHERAZ JAVAID**
Chair Society of Construction Law Pakistan
Chủ tịch Hội Pháp luật xây dựng Pakistan

Presentation 04
Dispute Boards in China - Pakistan Economic Corridor: From Formation to Decision Enforcement

Tham luận 04
Ban xử lý tranh chấp trong Hành lang Kinh tế Trung Quốc – Pakistan: Từ việc thành lập đến thực thi quyết định

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Theme

Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

Session Theme : Section B: Dispute avoidance and resolution mechanisms for construction activities

Tilak Kolonne
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Former Country Representative of DRBF
Colombo, Sri Lanka
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Abstract

Construction projects frequently generate disputes due to their complexity, large financial stakes, and involvement of multiple stakeholders. Effective dispute avoidance and resolution mechanisms are therefore essential for maintaining project efficiency and contractual stability given the fact that the disputes under consideration are 'commercial disputes', which essentially involve the exchange of money between parties. Vietnam has experienced rapid growth in construction and infrastructure development, particularly through international investment and large-scale projects. This paper examines the dispute avoidance and resolution mechanisms applicable to construction activities in Vietnam and analyzes how they align with international practices. The study explores mechanisms such as dispute boards, mediation, adjudication, arbitration, and litigation. Particular attention is given to the opportunities created by Vietnam's increasing integration into the global construction market and the challenges arising from legal, institutional, and contractual differences. The paper concludes by identifying key areas where Vietnamese dispute resolution frameworks can be strengthened to better support international construction projects.

Keywords

Construction disputes, dispute avoidance, dispute boards, arbitration, Vietnam construction law, international construction contracts

Disputes

Disputes in construction are generally categorized as ‘commercial disputes’ because they primarily concern financial entitlements such as payments, variations, extensions of time, damages, all of which ultimately translate into the allocation or transfer of money between the contracting parties. Consequently, when disputes arise, they typically involve determining who should pay, how much should be paid, and when payment should be made.

This character distinguishes construction disputes from other types of disputes such as defamation, family disputes, or personal injury claims, where the issues are often related to reputation, personal rights, or non-commercial interests. While such disputes are also important, they do not usually have the same direct and immediate impact on ongoing commercial operations and financial flows.

Because construction disputes concern money matters within ongoing projects, delays in resolving them can have serious consequences. Prolonged uncertainty regarding payment or financial liability may disrupt project cash flow, contractor performance, and the progress of the works, and in some cases may even lead to project delays, suspension of work, or financial distress for the parties involved. Consequently, the construction industry has long emphasized the importance of prompt and efficient dispute resolution mechanisms, typically administered by construction industry practitioners—such as engineers, quantity surveyors, and architects—who possess adequate knowledge of contract law and contractual interpretation, rather than by legal professionals.

In England, construction adjudication, which produces a decision very quickly (usually within 28 days), has sometimes been described as “quick and dirty” justice, meaning a form of “rough justice”. This reflects the intention of the system to deliver a rapid, interim decision so that project cash flow is maintained, while leaving the parties free to pursue a final determination through arbitration or litigation if necessary.

Therefore, for a variety of reasons, it is necessary to adopt alternative dispute resolution mechanisms that enable these commercial disputes to be resolved in an expedited manner, wherever possible and where the parties so prefer.

Dispute Avoidance

Dispute avoidance has nowadays become a subject which has attracted enormous popularity and emphasis. Dispute avoidance in the construction industry involves proactive management strategies to prevent disputes arising and leading up to costly and time-consuming resolution. Importance in this regard includes using standard-form contracts, fostering collaborative relationships such as ‘partnering’, early contractor involvement, diligent documentation, regular site meetings, and employing independent, third-party, or standing dispute adjudication boards with the view of avoidance and resolution.

Although FIDIC contracts provide dispute avoidance mechanisms for the post-contract construction stage, their implementation should begin at the earliest project stages—encompassing the employer’s brief, design development, and tender documentation—to minimize the risk of conflicts arising later.

The proactive role of construction professionals in dispute avoidance is another important aspect. Many ADR (Alternative Dispute Resolution) mechanisms—such as DAABs (Dispute Avoidance/ Adjudication Board)—are not limited to resolving disputes but also aim to prevent them. Board members who are familiar with the project can visit the site, attend regular meetings, and provide informal guidance before issues escalate. Their continuous involvement allows them to identify potential areas of conflict early and encourage timely resolution. This preventive function is far less prominent in traditional legal processes.

Preparing clear, comprehensive, and well-structured tender and contract documents is one of the most effective ways to prevent disputes in construction projects. Many disputes that arise during project execution can be traced back to ambiguities, omissions, or inconsistencies in these foundational documents. A well-prepared set of documents does not eliminate all risks, but it significantly reduces uncertainty, aligns expectations, and provides a reliable framework for decision-making when issues arise.

At the tender stage, the quality of documentation directly influences how bidders interpret the project requirements. If drawings, specifications, bills of quantities, and instructions to tenderers are unclear or incomplete, bidding contractors are forced to make assumptions. These assumptions vary from bidder to bidder, resulting in inconsistent pricing and, more importantly, differing understandings of scope. Such discrepancies often surface later as claims for variations, extensions of time, or additional costs. Therefore, precise definition of scope, technical

requirements, and performance standards is essential to ensure that all tenderers are pricing the same work on a common basis.

Risk allocation is another key aspect where well-prepared contract documents contribute to dispute avoidance. Construction projects inherently involve risks related to ground conditions, weather, design changes, and third-party actions. If risks are not clearly identified and fairly allocated in the contract, disagreements are almost inevitable. Ambiguous risk allocation often leads to claims and counterclaims, particularly when unforeseen events occur. By explicitly stating which party bears which risks—and under what conditions—contract documents create a balanced and predictable framework that reduces the likelihood of disputes.

The inclusion of clear procedures for variations, payment, and time management is also essential. Disputes frequently arise from disagreements over valuation of variations, delays, and certification of payments. Well-drafted provisions should outline how variations are instructed, measured, and valued, as well as the process for notifying and assessing delays. Similarly, payment mechanisms should be transparent, with defined timelines and certification procedures. When these processes are clearly articulated, they reduce misunderstandings and provide a structured approach to resolving issues before they escalate.

Another important element is the incorporation of dispute avoidance and resolution mechanisms within the contract itself.

Furthermore, the preparation of high-quality tender and contract documents is a critical investment in dispute avoidance. By ensuring clarity, consistency, fair risk allocation, and well-defined procedures, these documents establish a solid foundation for project execution. They align the expectations of all parties, reduce uncertainty, and provide mechanisms for addressing issues at an early stage. Ultimately, careful attention to documentation at the outset can save significant time, cost, and effort by preventing disputes from arising later in the project lifecycle.

Dispute Resolution

Dispute resolution processes are of two major types:

Adjudicative processes, such as litigation, arbitration or (contractual adjudication)/ dispute adjudication practice, in which a judge, jury, arbitrator or adjudicator/ dispute board determines the outcome. Adjudication itself is an adjudicative process.

Consensual processes, such as mediation, conciliation, or negotiation, in which the parties attempt to reach agreement.

Dispute resolution through ADR mechanisms by construction professionals (rather than legal professionals) —such as engineers, quantity surveyors, and architects—plays a critical role in achieving efficient, practical, and project-oriented outcomes. While legal professionals are essential in many contexts, the unique nature of construction projects often makes industry practitioners better suited to handle disputes, particularly at early or intermediate stages.

One of the primary reasons for this is the highly technical character of construction disputes. Issues frequently involve complex engineering details, measurement of quantities, interpretation of drawings and specifications, programming and delay analysis, and valuation of variations. Construction professionals possess the technical knowledge and practical experience required to understand these matters in depth. Their familiarity with site practices, industry standards, and project constraints allows them to quickly grasp the core issues without the need for extensive expert evidence, which is often required in formal legal proceedings.

Speed and efficiency are also key benefits. ADR mechanisms such as adjudication, dispute adjudication boards – in the form of DABs, DAABs - and expert determination are designed to provide timely decisions. When these processes are handled by construction professionals, the time required to understand the dispute and reach a decision is significantly reduced. This helps prevent disputes from escalating and minimizes disruptions to the project. In contrast, litigation or arbitration led primarily by legal professionals can be time-consuming and costly, often extending well beyond the project duration.

Cost-effectiveness is closely linked to efficiency. Resolving disputes through ADR with construction professionals generally involves lower costs compared to formal legal proceedings. The reduced need for extensive legal representation, expert witnesses, and prolonged hearings makes ADR a more economical option. This is particularly beneficial in construction, where margins can be tight and prolonged disputes can have serious financial implications for all parties.

However, it is also important to recognize that legal input still has its place. Complex disputes involving significant legal interpretation, contractual principles, or statutory issues may require the involvement of legal professionals. The most effective dispute resolution framework often involves a combination of technical expertise and legal support, particularly at later stages or in high-value disputes.

For these reasons, the selection of dispute resolvers should be undertaken with due care, taking into account the nature of the project and the dispute at hand. The challenges arising in such circumstances are illustrated through a real-life example experienced by the author, as set out in Exhibit 1 of Appendix A.

Alternative Dispute Resolution

To what is "alternative" dispute resolution an alternative? Usually, to litigation - but more generally, it is also an "alternative" both to allowing a dispute to drop and to resorting to violence.

The term '**Alternative Dispute Resolution'** or ADR has been coined as a generic term for these processes, in which the parties present/ argue their case in front of a third party who seeks to facilitate a settlement and, in some procedures, gives a recommendation if a settlement is not forthcoming and, in some procedures, gives a decision. These are clearly processes that enable the parties to remain in control.

ADR procedures are fast, cost effective, fair, friendly and private.

The aim of ADR is to find a commercially acceptable solution to commercial disputes. It is a move away from a win-lose situation towards a win-win result. It is suggested that ADR should be thought of as the 'Four Cs':

- Consensus – a joint objective to find a business solution.
- Continuity – a desire to find a solution in the context of an ongoing business relationship.
- Control – the ability to tailor a solution that is geared towards a business result rather than a result governed by the rule of law, which may be too restrictive or largely inappropriate.
- Confidentiality – avoiding harmful revelation of private facts to the public.

There are, however, disadvantages:

- Some forms of ADR will only work if the parties want a settlement. If either party goes into it with a closed mind, no solution will emerge.
- There is the problem of enforcement. Some forms of ADR are non-binding and so any settlement is only binding if it is the subject of an enforceable contract between the parties.

There are various methods of ADR, namely, Negotiation, Mediation, Conciliation, Early Neutral Evaluation, Expert Determination, Adjudication, Arbitration.

Negotiation is the process whereby interested parties resolve disputes, agree upon courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes which serve their mutual interests.

Given this definition, one can see negotiation occurring in almost all walks of life, from parenting to the courtroom.

Mediation is a process of alternative dispute resolution in which a neutral third party, the **mediator**, assists two or more parties in order to help them achieve an agreement, with concrete effects, on a matter of common interest.

The essence of mediation is that it is a non-binding, without-prejudice process in which both parties are brought together with an independent third party known as a mediator or neutral. There are no strict rules of evidence or procedure, and the mediator does not have the power to impose a decision on them.

Once the parties have agreed to refer the dispute to mediation, they must find a mediator who is acceptable to them both and has the right characteristics to deal with the case.

Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. The conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.

Adjudication has been described as a process that gives the parties to a dispute the opportunity to allow a third party to express a view that will in most cases produce a result that both parties can live with, without enormous costs having been incurred. Where the adjudicator really does get it wrong in the eyes of one or other of the parties, the opportunity is there to take the matter further.

UK Construction Act provides legal provisions for enforcement of Adjudicator’s decision.

Dispute boards are widely used in the construction industry as a proactive and structured method of managing and resolving disputes. Two commonly adopted forms are the Dispute Adjudication Board (DAB) and the Dispute Avoidance/Adjudication Board (DAAB).

Both DABs and DAABs are valued for their:

- speed and efficiency compared to arbitration or litigation
- technical expertise and industry familiarity
- ability to maintain working relationships between parties
- role in minimizing project delays and cost overruns

Arbitration is one of the most widely used methods of resolving disputes in the construction industry, particularly for complex and high-value projects. It is a private, formal dispute resolution process in which the parties agree to submit their dispute to one or more independent arbitrators, whose decision (the "award") is legally binding.

A key feature of construction arbitration is the appointment of arbitrators with **technical expertise**, such as engineers, quantity surveyors, or construction law specialists. Proceedings are more flexible than court litigation and can be tailored to suit the technical nature of the dispute, including the use of expert evidence and detailed document review.

Arbitration is particularly valued in the construction industry for its:

- **Confidentiality**, which protects commercial relationships
- **Neutrality**, especially in international projects involving parties from different countries
- **Finality and enforceability**, as awards are widely enforceable under instruments like the New York Convention
- **Flexibility**, allowing parties to agree on procedures, timelines, and governing rules

However, arbitration can also **be time-consuming and costly, especially** in large construction disputes involving extensive evidence and multiple parties.

Dispute Resolution Framework in Vietnam

Vietnam has developed a legal framework to regulate dispute resolution in construction projects.

Relevant mechanisms include:

- Commercial arbitration
- Court litigation
- Negotiated settlement

Vietnam has also shown increasing acceptance of international arbitration institutions such as the Singapore International Arbitration Centre for cross-border construction disputes.

However, the practical use of dispute boards and other proactive dispute avoidance tools remains limited in many domestic projects.

Opportunities & Challenges in Construction Dispute Resolution in Vietnam: National and Global Perspectives

Vietnam's construction industry has experienced rapid expansion over the past two decades, driven by urbanisation, infrastructure development, and increasing foreign direct investment. This growth has inevitably led to a rise in construction-related disputes, necessitating efficient and reliable dispute resolution mechanisms. From both national and global perspectives, Vietnam presents a dynamic landscape characterised by significant opportunities alongside persistent challenges in construction dispute resolution.

Vietnam has undertaken substantial reforms in its construction and commercial laws to facilitate dispute resolution. The legal framework increasingly recognises multiple dispute resolution methods, including negotiation, mediation, arbitration, and litigation. This pluralistic approach enhances flexibility and allows parties to select mechanisms best suited to the nature of their disputes.

Arbitration has emerged as a preferred method for resolving construction disputes in Vietnam due to its confidentiality, procedural flexibility, and enforceability. Domestic arbitration institutions, particularly the Vietnam International Arbitration Centre, have gained prominence and credibility. The increasing reliance on arbitration reflects a shift away from traditional court-based litigation.

Vietnam's construction sector is progressively adopting international standard forms such as those developed by the Fédération Internationale des Ingénieurs-Conseils. These contracts incorporate structured dispute resolution mechanisms, including Dispute Adjudication/Avoidance Boards (DAB/DAAB), which promote early dispute resolution and minimise escalation.

Alternative Dispute Resolution (ADR), particularly mediation, is gaining recognition in Vietnam. The promotion of mediation as a cost-effective and relationship-preserving mechanism offers considerable potential for resolving disputes at early stages, especially in long-term construction projects.

The growing complexity and volume of construction projects have created demand for skilled professionals, including engineers, quantity surveyors, and arbitrators. This presents an opportunity for construction practitioners to play a more prominent role in dispute resolution, particularly in technically complex cases.

Despite progress, Vietnam's dispute resolution institutions and practitioners still face limitations in experience and capacity, particularly in handling large-scale and technically complex disputes. The pool of highly trained arbitrators, adjudicators, and mediators with construction expertise remains relatively limited.

Ambiguities and inconsistencies in the interpretation and application of construction laws can lead to uncertainty in dispute outcomes. This undermines confidence in the dispute resolution system, particularly among foreign investors.

There remains a degree of reluctance among local stakeholders to adopt ADR mechanisms such as mediation and dispute boards. Traditional reliance on negotiation or litigation, combined with limited awareness of ADR benefits, constrains wider adoption.

While arbitration awards are generally enforceable, practical challenges may arise in enforcement, particularly where state-owned entities are involved. Delays and procedural complexities can reduce the effectiveness of dispute resolution mechanisms.

Vietnam's increasing participation in global construction projects has encouraged alignment with international dispute resolution practices. This includes the use of arbitration under internationally recognised rules and the incorporation of multi-tier dispute resolution clauses.

Foreign investors in Vietnam often rely on international arbitration to mitigate risks. Vietnam's participation in international treaties and trade agreements enhances the enforceability of arbitral awards and promotes investor confidence.

Collaboration with international organisations and participation in global conferences facilitate knowledge transfer and capacity building. Exposure to global best practices enhances the competence of local professionals and institutions.

The adoption of digital tools and online dispute resolution (ODR) mechanisms offers opportunities to improve efficiency, reduce costs, and enhance accessibility in dispute resolution processes.

Although Vietnam has made significant progress, full harmonisation with international standards remains incomplete. Differences in legal principles, procedural rules, and enforcement practices can create uncertainties in cross-border disputes.

International construction contracts often involve sophisticated risk allocation and dispute resolution provisions. Local stakeholders may face challenges in fully understanding and effectively implementing these mechanisms.

Vietnam competes with well-established arbitration centres such as Singapore and Hong Kong. These jurisdictions benefit from more mature legal systems, experienced practitioners, and stronger global reputations.

Cross-border disputes frequently involve language barriers and differing legal and business cultures, which can complicate dispute resolution processes and increase costs.

In conclusion, Vietnam's construction dispute resolution landscape is undergoing a significant transformation, characterised by increasing alignment with international practices and growing reliance on arbitration and ADR mechanisms. From a national perspective, legal reforms, institutional development, and industry growth provide substantial opportunities. From a global perspective, integration into international markets and exposure to best practices further strengthen the dispute resolution framework.

However, challenges remain in terms of institutional capacity, legal consistency, enforcement, and harmonisation with global standards. Addressing these challenges requires continued legal reform, professional training, and institutional strengthening. Ultimately, the effective development of dispute resolution mechanisms in Vietnam will play a crucial role in sustaining investor confidence and supporting the long-term growth of the construction industry.

Discussion

Vietnam's integration into the global construction industry requires dispute management systems that align with international best practices. The adoption of dispute boards, mediation, and arbitration mechanisms can significantly reduce project risks and improve project outcomes.

Capacity building, institutional strengthening, and increased awareness among construction professionals are essential to enhance the effectiveness of dispute avoidance and resolution mechanisms.

Conclusions

Dispute avoidance and resolution mechanisms are essential components of modern construction project management. Vietnam's rapidly expanding construction sector presents both opportunities and challenges for implementing internationally recognized dispute management practices.

While arbitration and litigation frameworks exist, greater adoption of proactive dispute avoidance tools such as dispute boards and mediation could significantly improve dispute management in construction projects. Continued development of legal frameworks, professional expertise, and institutional capacity will be crucial in supporting Vietnam's growing role in international construction activities.

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Appendix

Lessons learned from the challenges of appointing most appropriate members to a DAB

Constitution of DAB – an exchange of emails communication between the two appointed members (Member 1 and Member 2) for the appointment of a construction industry practitioner over a legal professional as the chairman of the board

Email 1

Dear Mr Member 1

This is regarding the appointment of the members and the chairman for the proposed DAB for the above contract. I have received the relevant communication (attached herewith) regarding appointment by the parties of yourself and myself as the members of the DAB. Now, both the appointed members and the parties need to agree on a third member to act as the chairman.

I propose Mr QS whom I know for a long time as a partitioner in the area of construction dispute resolution.

Please find attached his CV for your consideration/ consent.

Thank you.
Member 2

Email 2

Dear Mr. Member2
,
Thank you very much for your email. I truly look forward to working with you as a member of the DAB.

I have also carefully considered the CV of Mr QS whom you have proposed. I observed that his expertise and experience was somewhat similar to yours. Therefore, as you already add such considerable experience and expertise to the DAB as a quantity surveyor, I think as a DAB we would truly benefit if the Chairman of the DAB adds a unique skills set which is different and would enrich our decision making process as a DAB.

I would therefore like to propose the name of Justice …, President's Counsel, a former Judge of the Supreme Court as Chairman of the DAB. Justice … was the senior most Judge of the Supreme Court at the time of his retirement and served on the Supreme Court for nearly a decade. He was a part of several landmark judgments and was at the forefront of several famous commercial and arbitration judgments. His Judgments in arbitration and commercial law have in fact settled the law of Sri Lanka. He is therefore widely regarded as one of the most efficient and pragmatic judges in the recent decade and is a highly respected arbitrator. I therefore believe that his Lordship's wealth of experience as a Judge of the Highest Court in Sri Lanka and also in … together with his wealth of knowledge and experience as a President's Counsel and arbitrator would lend greater depth, breadth and deeper insight to our adjudication process.

I have accordingly attached a copy of Justice … CV for your consideration and consent.

Thank you.
Kind regards,
…. Member 1
Attorney-at-Law

Email 3

Dear Mr Member1,

Thank you for your email and for proposing another name as the third member.

Prior to agreeing to serve as a member of the proposed DAB, I formally obtained from the party who proposed my name certain information regarding the nature of the dispute at hand. In view of this, I am of the opinion that the third member also should be a professional with expertise in construction activities and in the preparation of Bills of Quantities, particularly in relation to Prime Cost and Provisional Sums.

Accordingly, appointing another quantity surveyor as the third member would be beneficial to the process, especially as you already possess sufficient legal background to contribute to the Board's deliberations.

With all due respect to you and to the name you have proposed, and bearing in mind that this is a construction DAB process rather than arbitration or litigation, my considered view is that a more technically oriented and objective approach would be appropriate, given the inherent nature of the matter at hand.

Therefore, in light of the information I obtained from the party who proposed my name, I would kindly and earnestly request that you reconsider naming a construction industry practitioner. Alternatively, we may allow the parties to follow the relevant provisions of the contract to make a suitable appointment for the third member.

Thank you.

Member2

Email 4

Dear Mr. Member2,

Thank you for your prompt response. As requested by you to consider naming a construction industry practitioner, I am happy to propose the name of Senior Engineer Mr. Engr, who counts over four decades of construction industry experience to be the Chairman of the DAB. Mr. Engr experience and expertise ranges from contract administration to dispute resolution and he has extensive experience as an arbitrator and adjudicator. His CV is attached for your consideration and consent.

Thank you.
Kind regards,
Member 1
Attorney-at-Law

Email 5

Dear Mr Member 1,

Thank you for your prompt response. I agree to propose Mr Engr to the parties, although he lacks academic exposure in the subject area of the dispute in comparison to Mr. QS
.
In the circumstances, as I am not convinced by the reasons why Mr. QS is considered unsuitable, given his academic qualifications and practical experience directly connected to the dispute at hand, and in order to be fair, I propose sending both names to the parties so that they may choose one.

Thankyou.
Member 2

Email 6

Dear Mr. Member 2,

Thank you once again for your email. In terms of the letter issued to us on behalf of the Parties dated 6th March 2026, we are to agree on the proposed name for Chairman and submit it to the parties for their consideration.

I deeply respect your views and your basis for proposing the name of Mr. QS based on what you have learnt from the party proposing your name as likely to be the matters in dispute. However, I believe that as we do not have full visibility to the claim at this stage, it would be presumptuous on our part to appoint a Chairman whose expertise lies in Quantity Surveying based on what one of the parties has mentioned to you, when the disputes in actual fact could extend to a multitude of issues including interpretation of the Contract and admissibility of claims. It is therefore important that we keep an open mind at this stage. This is not to think any lesser of Mr. QS, but it is to ensure that the Chairman of the DAB has a much broader experience in Engineering and dispute adjudication which goes above and beyond issues involving preparation of the BOQ, Prime Cost and Provisional Sums. I therefore, most respectfully wish to inform you that I do not agree to the nomination of Mr. QS as Chairman.

As you have indicated your agreement to propose the name of Mr. Engr, I kindly request you to propose his name to the parties as our proposed nominee for Chairman along with his CV in keeping with the request of the Parties dated 6th March 2026.

Thanking you.

Sincerely,
Member 1

Email 7

Dear Mr Member1,

Thank you for your explanation which I accept. Accordingly, as you indicated, I agree to send Mr Engr's CV to the parties.

Thankyou.
Member 1

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Construction disputes - commercial disputes
In contrast with other types of disputes
Prompt and efficient dispute resolution - 'Rough Justice'
Dispute administration by industry practitioners
Legal professionals

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- Dispute avoidance - proactive management strategies to prevent disputes
- Using standard-form contracts such as FIDIC contracts
- Collaborative relationships such as 'partnering'
- Early contractor involvement

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- Diligent documentation, regular site meetings, and employing independent, third-party, or standing DABs
- Dispute avoidance should begin at the earliest project stages-employer's brief, design development, tender documentation
- Ambiguities, omissions, or inconsistencies in these foundational documents

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- Well-structured tender and contract documents
- Discrepancies result in claims for variations, extensions of time, or additional costs
- Risk allocation
- Dispute avoidance and resolution mechanisms within the contract itself.

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- Dispute Resolution – two processes
- Adjudicative processes, such as litigation, arbitration
- Consensual processes such as such as mediation, conciliation, or negotiation
- Parties attempt to reach agreement

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- Dispute Resolution
- Construction professionals (rather than legal professionals)
- Highly technical character of construction disputes
- Time required is significantly reduced
- Important to recognize that legal input still has its place

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- Alternative Dispute Resolution (ADR)
- Alternative to litigation
- Alternative to dispute to drop and to resorting to violence
- Four Cs
- Consensus, Continuity, Control, Confidentiality

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- Alternative Dispute Resolution (ADR)
- Negotiation, Mediation, Conciliation, Adjudication/ Dispute Boards, Expert Determination. Early Neutral Evaluation
- Arbitration – confidentiality, neutrality, finality & enforceability, flexibility

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Dispute Resolution Framework in Vietnam

- Mechanisms include:
- Commercial arbitration
- Court litigation
- Negotiated settlement

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Opportunities & Challenges in Construction Dispute Resolution in Vietnam: National and Global Perspectives

- Rapid expansion in construction activities
- Rise in construction-related disputes
- Efficient and reliable dispute resolution mechanisms
- Arbitration has emerged as a preferred method progressively adopting DAB/ DAAB practices

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Opportunities & Challenges in Construction Dispute Resolution in Vietnam: National and Global Perspectives

- Demand for skilled professionals
- Opportunity for dispute resolution
- Degree of reluctance to Mediation and DAB
- International collaboration – knowledge transfer and capacity building, ODR

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Conclusion

- Rapidly expanding construction sector
- Dispute avoidance and resolution mechanisms
- Presents challenges and opportunities for …
  - ➢ Internationally recognized dispute management practices
  - ➢ Arbitration and litigation frameworks exists…
  - ➢ Greater adoption of proactive dispute avoidance tools such as dispute boards and mediation
- Finally, for sustainable development - continued development of legal frameworks, professional expertise, and institutional capacity

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Thank you for your attention!

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CONSTRUCTION DISPUTE RESOLUTION MODELS UNDER INTERNATIONAL PRACTICES: INTERNATIONAL EXPERIENCES AND THE LESSONS FOR VIETNAM

Abstract:

Vietnam's construction sector has experienced rapid growth in recent decades, leading to a significant increase in construction disputes. Recent legal reforms, including the Law on Construction reforms adopted in 2025, recognize modern dispute resolution mechanisms consistent with international practice. However, the practical implementation of these mechanisms remains limited.

This article examines major construction dispute resolution models adopted in several jurisdictions, including the United Kingdom, Singapore, Hong Kong, and China. These systems demonstrate that specialized ADR mechanisms, supported by clear legal frameworks and judicial enforcement, can significantly improve the efficiency of construction dispute resolution.

Drawing on these experiences, the article identifies key lessons for Vietnam in developing effective dispute resolution models following recent reforms in construction law, with the aim of enhancing efficiency, reducing litigation, and promoting sustainable development in the construction sector.

Introduction:

The rapid expansion of Vietnam's construction sector has been accompanied by a parallel surge in high-value and technically complex disputes. According to recent statistic, the total construction dispute value in Vietnam is approximately 28,708 billion VND, with an average value exceeding 65 billion VND per case.[1] This indicates that construction disputes account for a large share of total dispute value, reflecting high financial stakes and complexity.[2] Against this backdrop, the limitations of traditional dispute resolution mechanisms—particularly litigation and, to some extent, arbitration—have become increasingly apparent in terms of cost, duration, and their inability to preserve commercial relationships.

In response, Article 86 of the Law on Construction 2025 marks a significant legislative shift by formally recognizing modern dispute resolution mechanisms widely adopted in international practice, including adjudication, dispute boards, and expert determination. However, the mere recognition of these mechanisms does not guarantee their effective implementation. In practice, Vietnamese stakeholders remain largely reliant on traditional methods, while alternative dispute resolution ("**ADR**") mechanisms continue to face legal uncertainty, limited institutional support, and a lack of professional capacity.

[1] Lien Thuong, 'Nganh xay dung o Viet Nam 'ton' hon 28.700 ty dong vi tranh chap phap ly' (Nha Dau tu, 12/04/2025) https://nhadautu.vn/nganh-xay-dung-o-viet-nam-ton-hon-28700-ty-dong-vi-tranh-chap-phap-ly-d95246.html accessed 27/03/2026

[2] VIAC, 'Thong ke hoat dong giai quyet tranh chap nam 2024' (VIAC, 2024) https://www.viac.vn/thong-ke/thong-ke-hoat-dong-giai-quyet-tranh-chap-nam-2024-s45.html accessed 27/03/2026

This article critically examines how leading jurisdictions—namely the United Kingdom, Singapore, Hong Kong, and China—have developed coherent legal and institutional frameworks to support construction-specific ADR mechanisms. By identifying the structural features underpinning their effectiveness, the article seeks to derive practical and context-sensitive lessons for Vietnam in operationalizing its recent legal reforms. Due to the length limits, this study is limited to the expert determination, adjudication, and DB methods.

1. Construction dispute resolution models under international practices and the practical challenges within Vietnam's current legal framework

The construction sector is distinguished by its substantial capital requirements, extended project lifecycles, and the involvement of a diverse range of stakeholders,[3] such as developers, consultants, architects, contractors, and subcontractors. Due to the nature of construction projects, disputes are inevitable.[4]

However, resolving these issues through traditional court systems is notoriously expensive; furthermore, opting for litigation often results in significant delays and financial burdens.[5] Arbitration, in many cases, is not a speedy and economical process as expected.[6] As a result, the construction contracts often provide for a dispute resolution ladder i.e., a multi-tier dispute resolution clause with other ADR means such as adjudication, mediation, negotiation, dispute review board, etc., to reduce the chance of disputes going to arbitration or litigation.[7] The preference for these mechanisms reflects the industry's need for speed, technical expertise, cost-efficiency, and minimal disruption to project execution. As noted in Keating on Construction Contracts, ADR processes such as adjudication and dispute boards are designed to provide swift and commercially practical solutions that align with the realities of construction projects.[8]

In Vietnam, surveys and statistics from the Ministry of Justice indicate that the most prevalent ADR methods in Vietnam currently include negotiation, mediation, and arbitration.[9] The current legal framework for arbitration in Vietnam is quite comprehensive. In particular, the arbitration conducted in Vietnam will be governed by the 2010 Law on Commercial Arbitration, relevant provisions of the Civil Procedure Code, and their bylaws. In case parties agree to settle

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[3] Khoa Dang Vo, Phong Thanh Nguyen and Quyen Le Hoang Thuy To Nguyen, *Disputes in Managing Projects: A Case Study of Construction Industry in Vietnam* (2020) 1, para 1

[4] Amila N.K.K. Gamage, Suresh Kumar, *Causes of Disputes in Construction Projects* (2024) 42

[5] ibid 43

[6] Harmon, Kathleen. (2003). Resolution of Construction Disputes: A Review of Current Methodologies. Leadership and Management in Engineering. 3. 10.1061/(ASCE)1532-6748(2003)3:4(187).

[7] UNCITRAL, Legal guide on Drawing Up International Contract for the Construction of Industrial Works, A/CN.9/SER.BI2, 1998, 306-320; Murray, C., Holloway, D., Timson-Hunt, D., & Dixon, G. (2012). *Schmitthoff: The Law and Practice of International Trade* (12th ed.). Sweet & Maxwell, para. 25-038

[8] Stephen Furst and Sir Vivian Ramsey (eds), *Keating on Construction Contracts* (11th edn, Sweet & Maxwell 2021) paras 20-001, 20-004

[9] Anh Le, 'Som sua doi Luat Trong tai Thuong mai 2010: Dap ung yeu cau hoi nhap va phat trien' https://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=67942 (2022) accessed 27/03/2026

the dispute by foreign arbitration, the foreign arbitral award could also be recognized and enforced in Vietnam in accordance with the 1958 New York Convention on recognition and enforcement of foreign arbitral awards and the Civil Procedure Code.

Similarly, for the mediation, the dispute resolution by commercial mediation in Vietnam is primarily regulated by Decree No. 22/2017/ND-CP. Notably, under Decree 22/2017/ND-CP, a successful mediated agreement may be recognized and subsequently, requested for coercive enforcement as a binding court decision.

Regarding the implementation of DBs, this method was only guided by Decree No. 37/2015/ND-CP (issued under the Law on Construction 2014). However, the scope of application of Decree No. 37 is restricted to construction contracts utilizing public investment capital, state capital outside of public investment, and PPP projects.[10] For other project types, the application of these regulations is merely encouraged. To date, the equivalent guiding decrees for the Law on Construction 2025 have not yet been promulgated.

Whereas other ADR methods, like adjudication or expert determination, are not explicitly regulated by a specific statute under Vietnamese law. Rather, it is only recognized through party autonomy in contracts. Technical experts are only engaged as consultants within arbitral proceedings under Article 19.4 of the VIAC Rules.

As a result, Vietnam's laws currently lack specific guiding regulations on these ADRs and are not synchronized across legal instruments, hindering practical application. This poses concerns about the quality and enforceability of decisions rendered by adjudicators, DABs and technical experts. Besides, other factors include limited resources and a lack of awareness within the business community, also affect the efficiency of these methods. In fact, most enterprises remain focused on “dispute resolution” rather than “dispute avoidance”. And when the dispute arises, the pool of technical experts or adjudicators who have qualified knowledge and experience in Vietnam is quite small. There are no professional ADR service providers offer the services related to appointment of experts or adjudicators. Finally, the cost of ADRs remains a significant consideration, particularly when international experts are engaged, leading to relatively high expenditures.

Whereas ADR methods such as adjudication and expert determination are extensively utilized in many jurisdictions. For example, in the UK, between 05/2023 and 04/2024, there were 2,264 adjudication cases, with a high rate of enforcement reported.[11] A 1994 study by the US National Transportation Board on dispute resolution methods found that 22% of State transportation departments had incorporated dispute review boards and 70% “empowered” field personnel (such as engineers or experts) to handle disputes.[12]

[10] Decree No 37/2015/ND-CP, art 1
[11] Nazzni Reneto, Godhe Aleksander, *2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform* (2024) 9
[12] Pena-Mora, F., Sosa, C. E., & McCone, D. S.. *Introduction to construction dispute resolution*. Pearson Education Inc. (2003)

Building upon these observations, the next section will examine how these international dispute resolution models are effectively regulated in the UK, Singapore, Hong Kong, and China. The legal certainty provided by the frameworks in these jurisdictions has driven the increased adoption of ADR by enterprises, as evidenced by the aforementioned statistics. From this analysis, relevant lessons can be drawn for Vietnam to develop a compatible legal system that promotes the adoption of these international ADR models.

2. International experience in ensuring the efficiency of dispute resolution models

a) Expert Determination Method

Expert Determination is a versatile dispute resolution method applicable across numerous sectors. It is most appropriate for cases where the crux of the dispute requires an independent technical assessment. [13] Based on the principle of party autonomy, the parties appoint a technical specialist whose decision becomes a binding contractual term, enforceable through subsequent legal proceedings.

The expert determination method can be adopted under FIDIC standard form contracts in the form of an "engineer's determination", particularly in the FIDIC Red Book (2017). Under this edition, the Engineer, which can be a legal entity or a natural person, is appointed by the Employer.[14] However, when carrying out a determination, the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer.[15] The Engineer shall make a fair determination within 42 days or such other time as may be agreed by the Parties.[16] The determination shall be binding on both Parties until it is revised by a Dispute Avoidance/Adjudication Board (DAAB) or through an arbitration process.[17] The Engineer's determination becomes final and binding unless a dissatisfied Party gives a Notice of dissatisfaction to the other Party and the Engineer within 28 days after receiving the Engineer's determination.[18]

In the UK, the expert determination method is not specifically regulated by statute but is established based on the principle of party autonomy. The parties can mutually agree to select a qualified person as an expert or provide that a nominating body will appoint one on their behalf. For instance, the Royal Institution of Chartered Surveyors (RICS) provides expert appointment services for expert determination and always maintains a list of experts.[19]

In the event that a party fails to comply with the expert's decision, the other party may initiate a lawsuit in court for breach of the contractual agreement to be bound by the decision. The court could grant summary judgment based on Civil Procedure Regulation Part 24 to enforce the

[13] Edwin H W Chan, *Disputology in the International Construction Industry* (2003)
[14] FIDIC Red book (2017) cl 3.1 para 1
[15] FIDIC Red book (2017) cl 3.7 para 1
[16] FIDIC Red book (2017) cl 3.7.1, 3.7.2
[17] FIDIC Red book (2017) cl 3.7.4
[18] FIDIC Red book (2017) cl 3.7.5
[19] RICS, 'Court approved alternative dispute resolution (ADR) service', https://www.rics.org/dispute-resolution-service/drs-services/mediation-services/court-approved-alternative-dispute-resolution-service accessed 29/03/2026

expert determination. The summary judgment is a result of a procedure by which the court may decide a claim or issue without a trial.

Expert determination is normally agreed by the parties to be set aside if there are factors such as: manifest error, fraud, bias, etc. In the case of WH Holding Limited v E20 Stadium LLP EWHC[20], the High Court held that parties were not bound by an expert determination, relying on a clause in the contract which allowed the determination to be set aside if it contained a manifest error. The Court considered previous decisions on the meaning of manifest error and concluded that the test was whether the error was "*so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*".

In Hong Kong, the parties may refer to the Guidelines and Procedures for Nomination of Expert of the Building Affairs Expert Determination Centre (the BAEDC Expert Nomination Guidelines) under the Hong Kong Institute of Surveyors. The BAEDC is a platform designed to promote the use of expert determination as an additional alternative dispute resolution system. The BAEDC is currently operating as a pilot version and only applies to technical issues or disputes relating to water seepage, decoration or fitting-out works, and repair and maintenance works for existing buildings. [21]

A party may request expert determination by submitting an application to the BAEDC. Upon receiving an application, the BAEDC will nominate an expert from the relevant area under its List of Experts.[22] However, the BAEDC shall decline an application if the parties have instituted parallel litigation, arbitration, and/or other alternative dispute resolution proceedings.[23] In the event that a nominated expert has a potential conflict of interest with the parties, the expert must send a notice to the parties and shall not be allowed to act as an expert in the matter.[24]

To assure the expert's quality, the experts in the List of the BAEDC must satisfiy several conditions, including being a member of the HKIS, having professional and/or academic qualification in relation to dispute resolution, having a minimum of at least ten (10) years post-qualification experience in the Building Surveying Division, complete all the expert determination courses offered by the BAEDC, etc..[25]

The expert determination shall, in the absence of manifest error, be final and conclusive in relation to the building-related technical issues or disputes between the parties to the disputes and binding on the parties.[26]

In conclusion, although expert determination is not explicitly governed by statute in jurisdictions such as the UK and Hong Kong, it functions as a robust and legally binding ADR

[20] *WH Holding Ltd v E20 Stadium LLP* [2018] EWHC 2784 (Ch)
[21] BAEDC Expert Nomination Guidelines (2022) cl 1 para 1
[22] BAEDC Expert Nomination Guidelines (2022) cl 4
[23] BAEDC Expert Nomination Guidelines (2022) cl 3.2
[24] BAEDC Expert Nomination Guidelines (2022) cl 5.1
[25] BAEDC Guidelines and Procedures for Inclusion in the List of Experts
[26] BAEDC Nomination Guidelines, Introduction section.

mechanism rooted in the principle of party autonomy. Supported by standard contractual frameworks like FIDIC and institutional guidelines from professional bodies such as RICS and the BAEDC, it provides an efficient procedural pathway for resolving technical disputes. Courts strictly enforce compliance with these agreed mechanisms and uphold the finality of expert decisions, generally intervening only in exceptional circumstances such as manifest error, fraud, or bias.

b) ***Adjudication***

Adjudication provides an efficient and economical means of resolving conflicts, wherein a neutral third party delivers a decision on the matters at hand.[27] Key features of adjudication are that it is carried out within a strictly limited timeframe and is therefore relatively inexpensive, and it does not alter or finally determine the parties' contractual rights.[28] In certain jurisdictions, adjudication is codified as a statutory right. This method is also integrated into standard contract forms such as the NEC3 and NEC4 issued by the Institution of Civil Engineers.

In the UK, adjudication is governed by the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996). Accordingly, a party to a construction contract has the right to refer a dispute arising under the contract for adjudication at any time.[29] The contents that the parties must agree upon in the contract include, among other things, a timetable ensuring the appointment of the adjudicator and referral of the dispute to him within 7 days; the time limit within which the adjudicator must make a decision is 28 days from the date of receipt of the request dossier; and the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings.[30] If the contract fails to provide for the statutory contents regarding adjudication, the parties still have the right to request adjudication, and in this case, the Scheme for Construction Contracts – a legislative "fallback" framework – shall apply default.[31]

Regarding the adjudicator's qualifications, the HGCRA 1996 does not prescribe specific professional criteria but strictly requires that the adjudicator acts impartially and is not a party with a vested interest in the disputed contract.[32] While the Act does not dictate the exact mechanism for selection, it mandates that parties provide a timetable to finalize the appointment within 7 days of the Notice of Adjudication.[33] Consequently, parties may nominate an adjudicator at the time of contract execution or after a dispute has surfaced, provided the statutory window is respected. In instances where the contract is silent on appointment procedures—or if the designated adjudicator is unable or unwilling to act—the referring party must request an adjudicator nominating body (ANB) to select a suitable individual.[34]

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[27] Aryal S, Dahal RK, *A Review of Causes and Effects of Dispute in the Construction Projects of Nepal* (2018) 144
[28] Charrett Donald, *Special Topic: Adjudication and Dispute Boards: The Next Wave in ADR* (2010)
[29] HGCRA 1996 s 108 (1)
[30] HGCRA 1996 s 108 (2)
[31] HGCRA 1996 s 108 (5)
[32] HGCRA 1996 s 108 (2) (e)
[33] HGCRA 1996 s 108 (2) (b)
[34] The Scheme for construction contracts 1998 s (2) (c)

ANBs recognized for resolving construction disputes in the UK include: the Construction Industry Council (CIC), the Royal Institution of Chartered Surveyors (RICS), and the Technology and Construction Solicitors Association (TCSA). Notably, some ANBs offer specialized services tailored for smaller contractors who find dispute resolution unaffordable. For instance, the Summary Adjudication of RICS provides a qualified adjudicator who delivers a brief decision and reasons within 14 days, a process without site visits and a cost cap of £1000.[35]

An adjudicator's award can be enforceable in court, specifically the Technology and Construction Court (TCC). To ensure the efficacy of the 28-day adjudication cycle, the TCC provides a "fast-track" enforcement procedure for adjudicator awards.[36] The grounds for challenging enforceability of adjudication are limited with courts refusing enforcement only when the adjudicator has exceeded their jurisdiction or committed a significant breach of natural justice.[37]

The "pay first, argue later" principle is a cornerstone of this system, particularly in monetary disputes. This is typically demonstrated in the case of VMA Ltd v Project One Ltd [2024]. The dispute arose under a JCT D&B Sub-Contract 2016, where the subcontractor (VMA) submitted an interim payment application that subsequently became the "Notified Sum" due to the main contractor's (Project One) failure to serve a valid Payment Notice or Pay Less Notice within the statutory timeframe. Although Project One attempted to circumvent this obligation by initiating a "true value" adjudication, the adjudicator—and subsequently the Court—dismissed this approach, holding that the Notified Sum must be discharged in full regardless of the underlying valuation dispute.[38]

In Singapore, the adjudication method is regulated by the Building and Construction Industry Security of Payment Act 2004 (SOPA 2004). Accordingly, a party to a construction contract can request adjudication if it fails to receive payment by the due date of the response amount which the claimant has accepted in writing, or fails to provide a payment response.[39]

To commence the process, the claimant must notify the respondent of their intent and lodge an application with the ANB. This application must be filed within 7 days after the claimant's entitlement to do so first arises.[40] In cases of disputes over the payment amount, the parties must undergo a dispute settlement period before requesting adjudication.[41]

[35] RICS, 'Summary adjudication for construction claims', Summary Adjudication for Construction Claims | RICS accessed 27/03/2026
[36] Technology and Construction Court Guide (2022) para 9.1.3
[37] James Pickavance, *A Practical Guide to Construction Adjudication* (Wiley Blackwell 2016)
[38] *VMA Ltd v Project One Ltd* [2024] EWHC 1815 (TCC) [28].
[39] SOPA 2004 s 12 (1) – (2)
[40] SOPA 2004 s 13 (1) – (3)
[41] SOPA 2004 s 12 (2)

Accordingly, under SOPA 2004, the parties must appoint an adjudicator through an ANB, currently the Singapore Mediation Centre (SMC). The process of nominating an adjudicator must be conducted by the SMC within 7 days after receiving the adjudication application.[42]

Adjudicators are those registered in the list compiled by the SMC.[43] SOPA or SMC does not establish specific conditions for become an adjudicator; but only defines an adjudicator as a person who has qualifications, expertise or experience in the field of the dispute and requires them not to have interests with a party in the contract.[44] During the adjudication, they are legally obligated to act independently, impartially, and in a timely manner, while adhering to the principles of natural justice.[45] In addition, the adjudicator must comply with a separate code of conduct issued by the SMC (SMC Adjudication Rules 10th Edition) and must participate in training sessions.

In the event that a party fails to pay or only partially pays in accordance with the adjudication determination, the other party has the right to request the Court to enforce the determination and demand payment of the shortfall.[46] Notably, if a party applies to set aside an adjudication determination, that party must provide security to the Court equal to the outstanding portion of the adjudicated amount for which they are liable.[47]

In Hong Kong, the adjudication method is governed by the Security of Payment (SOP) Ordinance. Adjudication in Hong Kong is only applicable to payment disputes, and the value of the disputed contract must be at least HK$5 million for a main contract for construction works and HK$500,000 for a main contract for the supply of goods and services that relate to construction works.[48]

To initiate adjudication, a party must serve an adjudication notice on the respondent and the ANB within 28 days of a payment dispute arising.[49] Notably, within this 28-day window, if a claimant withdraws a proceeding, they retain the right to re-initiate it.[50] Furthermore, if proceedings are terminated due to a failure in the appointment process—such as an adjudicator's resignation or ineligibility—the claimant is granted a "grace period" of 28 days from the date of termination to re-initiate the claim.[51]

Similar to Singapore, adjudicator appointments in Hong Kong must be facilitated by an ANB. Parties should specify at least one ANB in their contract; failing this, the claimant proposes two options from which the respondent must select one.[52] The designated ANB is then required to

[42] SOPA 2004 s 14 (3)
[43] SOPA 2004 s 28 (4) (a)
[44] SOPA 2004 s 29 (1) – (2)
[45] SOPA 2004 s 16 (5)
[46] SOPA 2004 s 27 (1)
[47] SOPA 2004 s 27 (5)
[48] SOP Ordinance s 7, sch 4
[49] SOP Ordinance s 24, s 25 (1), (3)
[50] SOP Ordinance s 25 (5)
[51] SOP Ordinance s 25 (6)
[52] SOP Ordinance s 27

appoint an adjudicator within 7 working days of the notice being served.[53] Recognized ANBs include the Hong Kong International Arbitration Centre (HKIAC), Hong Kong Institute of Surveyors (HKIS), and AALCO Hong Kong Regional Arbitration Centre (AALCO – HKRAC). While the Ordinance does not set rigid professional criteria, it prohibits appointments where a conflict of interest exists or where there are justifiable doubts regarding the individual's independence.[54]

Article 44 of the SOP Ordinance states that a determination is binding on the parties unless being set aside by the Court or settled by a written agreement between the parties or determined in any court or arbitration. If a party fails to comply with the determination and no set-aside application has been filed, a party may file an enforcement application to request enforcement.

From the above, it suggests that statutory adjudication is an indispensable legal tool for the construction industry. The overarching success of these jurisdictions lies in the strict legislative codification of the "pay first, argue later" principle, which safeguards the industry's lifeblood—cash flow. By imposing rigid time bars, mandating the use of ANBs and providing fast-track court enforcement mechanisms, these frameworks aim to prevent procedural delays from being weaponized in payment disputes.

c) Dispute Board or Dispute Adjudication Board (collectively referred as DB)

DB is designed to involve suitably qualified individuals who, through their own direct observations, maintain a comprehensive understanding of the project's real-time progress.[55] DB can be found through various general contract templates, such as FIDIC (Red, Yellow, and Silver Books or the World Bank's Standard Bidding Documents.[56] Depending on the applicable version, a DB may be constituted at the project's inception or after a dispute arises.

In the UK, according to the 2024 study of King's College London, up to 65% of the reported Dispute Boards were constituted based on provisions contained in standard forms of contract.[57] Parties may opt to utilize a DB by adopting standard form contracts, such as the FIDIC 1999 Red Book or the Dispute Adjudication Board Documentation 2024 issued by the Joint Contracts Tribunal (JCT). Generally, dispute boards are not prevalent in the UK due to the robust availability of statutory adjudication.[58] Nevertheless, alternative models, such as the Independent

[53] SOP Ordinance s 26 (2)
[54] SOP Ordinance s 28
[55] Carole Murray, David Holloway and Daren Timon-Hunt, *the Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) 669
[56] Machaidze Otar, *Dispute Adjudication Board: Innovation in Georgia's Alternative Dispute Resolution System* (2024)
[57] Nazzini, R & Macedo Moreira, R 2024, 2024 Dispute Boards International Survey: A Study on the Worldwide Use of Dispute Boards over the Past Six Years. King's College London (2024) https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf accessed 30 March 2026
[58] Charles Blamire-Brown and Sofia Parra Martínez, 'Using Dispute Boards to Avoid and Resolve Construction Disputes' (Pinsent Masons, 09/12/2021) https://www.pinsentmasons.com/out-law/guides/using-dispute-boards-to-avoid-and-resolve-construction-disputes accessed 30 March 2026.

Dispute Avoidance Panel (IDAP), can be implemented in parallel with statutory adjudication, allowing the two mechanisms to complement each other effectively.

A notable example is the 2012 London Olympic and Paralympic Games project, where the dispute resolution provisions established a multi-tiered process featuring two distinct boards: an IDAP and an adjudication panel. Reports indicate that this dual-board process functioned exceptionally well, serving as an effective vehicle for avoiding the majority of potential disputes. Consequently, only two disputes escalated to adjudication, no court actions were commenced, and overall, the Olympic venues were delivered to specification, ahead of schedule, and within budget.[59]

Similarly, **in Singapore**, the DB mechanism is employed in construction projects through the adoption of standard forms such as the FIDIC 1999 Red Book. Furthermore, in 2018, the Ministry of Law of Singapore launched a new Singapore Infrastructure Dispute-Management Protocol ("the 2018 SIDP") to minimize cost and time overruns in large infrastructure projects by facilitating early dispute avoidance. Accordingly, the 2018 SIDP allows an appointing authority (the Singapore International Mediation Centre or Singapore Mediation Centre) to appoint members of the DB upon the request of a party or parties jointly. The Protocol also grants broad powers to the DB, for instance, order measures to protect trade secrets and confidential information, order the production of documents, and examine the Parties, their representatives and witnesses, determine any application for interim or provisional relief in respect of any matters relating to the Contract.[60] The 2018 SIDP however, only applies where the Parties have agreed to establish the DB in accordance with the Protocol.[61]

In addition, beyond formal dispute resolution, parties may jointly refer a matter to the DB for an informal opinion during the project's execution.[62] When a dispute is formally referred, the DB's decision is binding on both parties unless and until it is revised through an amicable settlement or an arbitral award.[63] If neither party issues a Notice of Dissatisfaction (NOD) within 28 days of the decision being rendered, it becomes final and binding.[64] Should a party fail to comply with a final and binding decision, the other party may refer that non-compliance directly to arbitration.[65]

A landmark lesson in the enforcement of DB decisions can be found in the 2010 Singapore High Court case of PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation.[66] In this

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[58] Andrew Stephenson and Harrison Frith, 'Dispute Boards and the Olympic Games: A Tried and Tested Method of Dispute Avoidance' (Lexology, 02/03/2024) https://www.lexology.com/library/detail.aspx?g=1b373520-b7df-4b79-b755-670ee78b5ee4 accessed 30 March 2026

[60] The 2018 SIDP, Clause 13.2
[61] The 2018 SIDP, Clause 2.1
[62] FIDIC Red Book (1999) cl 20.2 para 7
[63] FIDIC Red Book (1999) cl 20.4 para 4
[64] FIDIC Red Book (1999) cl 20.4 para 7
[65] FIDIC Red Book (1999) cl 20.4 para 4
[66] *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202

case, the Court set aside an arbitral award because of a failure to distinguish between the enforcement mechanisms under Clauses 20.6 and 20.7 of the FIDIC Red Book. The ruling established that the appropriate enforcement route depends entirely on whether a valid NOD has been issued. If no valid NOD is submitted, the decision becomes "final and binding", and enforcement must be sought under Clause 20.7, where the tribunal enforces the award without reviewing the underlying merits. Conversely, if a valid NOD is issued, the decision remains merely "binding", and enforcement must proceed under Clause 20.6, which requires the tribunal to review and potentially revise the merits of the dispute.

In China, alongside adopting the DB mechanism via FIDIC guidelines, parties may alternatively choose to apply the Construction Project Disputes Review Rules (CPDR Rules) of the China International Economic and Trade Arbitration Commission (CIETAC). These rules become binding once the parties agree to their application; however, they are not subject to a stringent application. Instead, the CPDR Rules provide flexibility, allowing parties to modify certain contents by mutual agreement to better suit their specific contractual context.[67]

With the stated aim of allowing parties to "*prevent, reduce and promptly resolve construction disputes by means of dispute review*",[68] the CIETAC CPDR Rules stipulate two distinct forms of DB: the standing DB, established at the commencement of the project, and the ad hoc DB, constituted only after a dispute has arisen.[69] Further, CIETAC maintains a recommended List of Experts for Construction Dispute Review to assist parties in appointing DB members; nevertheless, parties retain the autonomy to appoint individuals outside of this roster.[70] In the event that the parties fail to mutually agree on a DB appointment within the prescribed timeframe, a sole DB member shall be appointed by the President of the Arbitration Court of CIETAC upon the written request of any party.[71]

The CIETAC CPDR Rules introduce several unique provisions to the DB mechanism. Notably, among other powers, the DB is granted the authority to inquire into its own jurisdiction over the dispute and define the scope of its review, effectively bypassing the need to wait for a preliminary court ruling.[72] Furthermore, upon the request of the DB, the Rules permit CIETAC to review and provide advisory opinions on draft determinations. In such instances, CIETAC may draw the DB's attention to specific issues within the draft, provided that this intervention does not compromise the DB's independence in issuing the final determination. [73]

Overall, the DB is a globally recognized dispute resolution mechanism, predominantly utilized in large-scale construction projects governed by FIDIC contracts. A defining characteristic of the standing DB is its proactive focus on "dispute avoidance" rather than merely reactive dispute

[67] CIETAC CPDR Rules (2015) art 3
[68] CIETAC CPDR Rules (2015) art 1
[69] CIETAC CPDR Rules (2015) art 4
[70] CIETAC CPDR Rules (2015) art 7
[71] CIETAC CPDR Rules (2015) art 8
[72] CIETAC CPDR Rules (2015) art 27
[73] CIETAC CPDR Rules (2015) art 36

resolution. Integrating the DB with other dispute resolution mechanisms (e.g., arbitration or adjudication) will create a powerful legal tool that helps the project to be completed on schedule and optimally.

3. Lessons for Vietnam

The above international experience demonstrates that an effective construction dispute resolution system requires a comprehensive ecosystem encompassing legal certainty, institutional support, professional expertise, and a proactive industry mindset. Drawing from the approaches and legal frameworks governing construction dispute resolution models in the aforementioned jurisdictions, several critical lessons emerge for Vietnam as it develops its own legal system to adopt international dispute resolution models in the construction sector.

Firstly, a key lesson lies in the necessity of a clear and codified legal framework. In leading jurisdictions, adjudication is established as a statutory right, supported by detailed procedural rules and fallback mechanisms where contractual provisions are absent. This legislative clarity enhances predictability and reduces procedural disputes. By contrast, Vietnamese law does not yet expressly regulate adjudication or expert determination, resulting in uncertainty regarding their legal status and enforceability. For those reasons, Vietnam should consider introducing explicit statutory provisions or amendments to formally recognize these mechanisms, while ensuring consistency across relevant legal instruments. For example, the right to adjudication should be codified under the law, mirroring the approaches successfully implemented in the UK, Singapore, and Hong Kong.

In addition, effective enforcement mechanisms are central to the credibility of ADR. International experience shows that ADR decisions—particularly adjudication outcomes—are supported by expedited court enforcement procedures and limited grounds for judicial review. Mechanisms such as fast-track enforcement and the "pay first, argue later" principle play a critical role in maintaining cash flow in construction projects and preventing tactical delays. In Vietnam, although arbitration and mediated settlements benefit from relatively clear enforcement regimes, similar mechanisms are lacking for other ADR forms. Strengthening judicial support through streamlined enforcement procedures and narrowly defined grounds for refusal would significantly enhance the effectiveness of ADR in practice. Accordingly, the law could clarify that failure to comply with a decision rendered by adjudicators/ DB would constitute a material breach of parties' agreement. Following the Civil Procedure Regulation Part 24 of the UK, Vietnam should allow for "summary judgment" to enforce these decisions without a full trial or recognize the binding nature of ADR outcomes subject to limited exceptions, such as manifest error or procedural irregularity.

Secondly, Vietnam should transition from a reactive "dispute resolution" mindset to a proactive "dispute avoidance" approach. Mechanisms such as standing dispute boards are designed to intervene early, monitor project performance, and prevent disputes from escalating. The

experience of large-scale projects, such as the 2012 London Olympic and Paralympic Games, illustrates the effectiveness of proactive dispute management in minimizing formal proceedings and ensuring timely project delivery. Similarly, the standing DB model in FIDIC and CIETAC CPDR Rules focuses on preventing and reducing disputes from the project's outset.

As a result, Vietnam should promote the use of dispute boards, particularly in complex infrastructure projects, to encourage early intervention and reduce the incidence of formal disputes. Integrating such mechanisms into multi-tier dispute resolution clauses would further enhance their effectiveness. Vietnam should promote contract forms that emphasize "teamwork and partnership" to resolve issues before they become formal legal battles.

Thirdly, the importance of professional capacity and technical expertise should be taken into account. ADR mechanisms such as adjudication, expert determination, and dispute boards rely heavily on the competence and impartiality of decision-makers. Jurisdictions like Hong Kong impose rigorous qualification requirements and training obligations to ensure the quality of experts and adjudicators. In Vietnam, however, the pool of professionals with both technical and dispute resolution expertise remains limited. Addressing this gap requires the development of structured training and certification programs, as well as the promotion of interdisciplinary skills combining legal, engineering, and project management knowledge. International cooperation may also facilitate knowledge transfer and capacity building. Vietnam can mirror the standards set by Singapore, where adjudicators must not only possess relevant expertise but are also legally mandated to participate in training sessions and strictly adhere to a specialized code of conduct.

Fourth, the development of institutional infrastructure is essential. In jurisdictions such as the UK and Singapore, specialized bodies—including the Royal Institution of Chartered Surveyors and the Singapore Mediation Centre—play a pivotal role in appointing adjudicators, maintaining professional standards, and administering proceedings. These institutions contribute to both the efficiency and credibility of ADR processes. Vietnam currently lacks comparable appointing authorities or dedicated expert panels for adjudication and dispute boards. As such, Vietnam should have policies to encourage the existing organizations such as arbitration/ mediation centers, or other relevant organizations to perform these functions, including maintaining accredited lists of qualified professionals.

Finally, awareness and market confidence play a decisive role in the effectiveness of ADR systems. In jurisdictions where ADR is widely used, its success is supported by a high level of familiarity and trust among industry participants. In Vietnam, however, many enterprises continue to rely on traditional dispute resolution methods due to limited awareness of ADR mechanisms. Efforts to promote education, training, and the dissemination of best practices are therefore essential. Encouraging the inclusion of ADR clauses in standard construction contracts would also contribute to normalizing their use.

Conclusion

In conclusion, it is observed that the effectiveness of construction dispute resolution does not depend on the mere availability of multiple mechanisms, but rather on the existence of a

coherent ecosystem that integrates legal certainty, procedural efficiency, institutional support, and industry acceptance. In jurisdictions such as the United Kingdom, Singapore, Hong Kong, and China, construction-specific ADR mechanisms—particularly adjudication, dispute boards, and expert determination—are not only recognized, but are embedded within a broader framework that ensures their practical enforceability and commercial relevance.

For Vietnam, the challenge is not simply to replicate foreign models, but to adapt these underlying principles in a manner consistent with its legal and institutional context. Without detailed implementing regulations, strengthened enforcement mechanisms, and investment in professional capacity, the reforms introduced under the Law on Construction 2025 risk remaining largely symbolic. A calibrated and phased approach to reform will therefore be essential to transform legislative recognition into practical effectiveness.

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AGENDA
CHƯƠNG TRÌNH

SECTION B - Dispute avoidance and resolution mechanisms for construction activities
PHẦN B - Các phương thức ngăn ngừa và giải quyết tranh chấp trong hoạt động xây dựng

MODERATOR/ĐIỀU PHỐI VIÊN

Ms./Bà **ĐINH ÁNH TUYẾT**

Founding Lawyer and
Managing Partner of IDVN Lawyers
Luật sư sáng lập kiêm
Trưởng Văn phòng Luật sư IDVN

15:30PM - 17:00PM

SESSION B2
Selecting of Rule/Avenue and Managing Construction Disputes

PHIÊN B2
Lựa chọn Quy tắc,/Phương thức và Quản lý tranh chấp xây dựng

SPEAKER/DIỄN GIẢ

Ms./Bà **ASYA JAMALUDIN**

Partner at CMS Singapore
Luật sư thành viên tại CMS Singapore

Presentation 01
Strategic Choices in Energy Transition Disputes

Tham luận 01
Lựa chọn chiến lược trong các tranh chấp chuyển dịch năng lượng

Dr./TS. **NGUYỄN MAI LINH**

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Quyền Trưởng Bộ môn Giải quyết Tranh chấp Thương mại Quốc tế, Khoa Pháp luật Quốc tế, Trường Đại học Luật Hà Nội

Presentation 02
Construction or Commercial Arbitration Rules: Which is the Better Fit?

Tham luận 02
Quy tắc trọng tài xây dựng hay trọng tài thương mại: Lựa chọn nào phù hợp hơn?

Dr./TS. **Trịnh HẢI YẾN**

Senior Lecturer at International Law Faculty, Diplomatic Academy of Viet Nam
Giảng viên cao cấp, Khoa Luật Quốc tế - Học viện Ngoại giao

Presentation 03
Arbitrating international construction disputes: choosing avenues for contractual claims and treaty claims

Tham luận 03
Trọng tài trong tranh chấp xây dựng quốc tế: Lựa chọn lộ trình yêu cầu theo hợp đồng và yêu cầu theo Điều ước quốc tế

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Strategic Choices in Energy Transition Disputes

Asya Jamaludin, Partner, CMS Singapore
9 April 2026

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Context & Relevance

- Southeast Asia's energy transition is accelerating
- Surge in renewable and low-carbon infrastructure projects
- Construction disputes are increasingly shaped by the choice of rules and forum
- Selecting the right arbitral rules and managing the process is critical to effective dispute resolution

Energy Transition Project Landscape

- Solar, wind, LNG-to-power, battery storage, grid upgrades
- Complex, capital-intensive, often cross-border
- Involvement of SOEs, PPPs, and international financiers
- ESG and sustainability-linked obligations increasingly embedded

Key Dispute Triggers

- Interface failures between new and legacy infrastructure
- Delays from permitting, land acquisition, or regulatory shifts
- Performance shortfalls in emerging technologies
- Force majeure / change-in-law claims
- ESG compliance and community engagement disputes

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Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

Procedural & Evidentiary Challenges

- Technical complexity: need for specialised expert evidence
- Evolving standards and performance metrics
- Confidentiality vs. public interest in ESG-linked disputes
- Role of international frameworks (e.g., FIDIC, IFC, Equator Principles)

Selecting the Right Rules and Forum

- SIAC 2025 Rules: streamlined procedures, ESG-aligned practices
- VIAC: local expertise, cost-effective for Vietnam-based projects
- ICC: preferred for cross-border, high-value energy infrastructure disputes
- Considerations: seat of arbitration, language, governing law, enforcement landscape

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Managing Energy Transition Disputes Effectively

- Early identification of dispute triggers (e.g., regulatory change, ESG compliance)
- Use of tiered dispute resolution clauses (negotiation → mediation → arbitration)
- Consider early neutral evaluation or dispute boards for technical issues
- Importance of digital case management
- Aligning procedural strategy with project realities and stakeholder sensitivities

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Contractual Risk Allocation

- Drafting for regulatory and technology risk
- Clear ESG obligations: measurable, enforceable, aligned with local law
- Dispute resolution clauses: mediation, expert determination, arbitration
- Consider institutional rules that support fast-track or hybrid procedures

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Practical Guidance for Stakeholders

For Lawyers:

- Match dispute resolution clauses to project profile and risk appetite
- Understand institutional rules and procedural tools (e.g., emergency arbitration, consolidation)

For Contractors & Employers:

- Choose forums that balance neutrality, cost, and enforceability
- Engage early with counsel to manage disputes proactively
- Maintain digital records to support efficient case preparation

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Dispute Scenarios Shaped by Rule Selection

Each of these scenarios may be better suited to different rules or forums depending on complexity, technical content, and enforcement needs

Interface Failures	Regulatory & Permitting Delays	Technology Performance Disputes	Change in Law / Force Majeure	ESG & Community Engagement Disputes
Grid integration & Interface Failures	**Delays from Permitting & Regulatory Shifts**	**Underperformance of Emerging Technologies**	**Legal & Policy Shifts Impacting Delivery**	**ESG Compliance & Social Licence to Operate**
Disputes arise when new energy infrastructure (e.g., solar or wind) fails to integrate smoothly with existing grid systems.	Projects are delayed or disrupted due to evolving environmental regulations or slow permitting processes.	Disputes over whether new technologies meet contractual performance guarantees.	Contractors seek relief for cost or time impacts due to new laws or unforeseen events.	Disputes emerge from failure to meet ESG obligations or manage local stakeholder expectations.
A hybrid solar-diesel project experienced delays due to misaligned technical specifications between the new solar array and the legacy grid infrastructure, leading to claims over commissioning delays and additional costs.	A wind farm was delayed after new EIA requirements were introduced mid-project, resulting in contractor claims for extension of time and costs.	A battery storage system failed to meet its guaranteed discharge capacity, triggering a dispute over performance liquidated damages and the validity of the performance testing methodology.	A carbon pricing mechanism introduced during construction of an LNG terminal led to increased compliance costs, prompting a change-in-law claim under the EPC contract.	A solar project faced community protests over land use and environmental impact, resulting in project suspension and arbitration over termination and liability.

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Looking Ahead

- Energy transition will continue to drive construction disputes
- Arbitration must remain agile and responsive
- Capacity building for practitioners and tribunals is essential
- Opportunity to lead in shaping sustainable dispute resolution

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Conclusion

- Clean energy projects bring complex legal and technical risks
- Selecting the right rules and managing the process is key to effective resolution
- Arbitration can support sustainable infrastructure if strategically structured

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Thank you for your attention!

Q & A

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Construction or Commercial Arbitration Rules: Which is the Better Fit?

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Abstract: Resolving major construction disputes require a process that combines legal standards with technical expertise. While Commercial Arbitration rules provide established, flexible, and universally recognized platform for business disputes, they often lack the specific mechanisms required to address the multi-party, multi-layered complexities inherent in modern construction projects. This study evaluates whether specialized Construction or Commercial Arbitration Rules provide more effective dispute resolution for construction projects. This paper argues that Construction Arbitration Rules are a better fit for disputes involving technical performance, delays, or multi-party liability. For purely financial disputes - such as equity buyouts or simple payment breaches without technical issues, the Commercial Arbitration approach is often more cost-effective and legally focused. Choosing the right rules is not just a formality; it is a strategic decision that directly affects the efficiency of the outcome.

Keywords: *Commercial Arbitration Rules, Construction Arbitration Rules, Construction Disputes*

1. Introduction

In the construction industry, disputes are virtually inevitable given the sector's inherent complexity, extended timelines, and the involvement of multiple parties. Commercial arbitration has emerged as the preferred dispute resolution mechanism, valued for its confidentiality and procedural flexibility. However, a critical question often arises during the contract dispute settlement stage: Should parties adopt specialized Construction Arbitration Rules or stick to Commercial Arbitration Rules? Commercial arbitration rules are applied to resolve commercial disputes, including those arising from construction projects. In contrast, construction arbitration rules are specifically formulated to address the unique complexities of construction disputes, reflecting a trend toward specialization in dispute resolution and the specific demand of the construction industry. This paper offers a comprehensive examination of the fundamental distinctions between these two regulatory frameworks, ranging from the appointment of arbitrators with technical expertise to the management of multi-party claims. By examining these variables, the study aims to evaluate which set of rules delivers optimal efficiency in terms of time, cost-effectiveness, and enforceability for

parties within the industry. The article is divided into four sections: after Part 1 is introduction, part 2 discusses the nature of construction dispute. Part 3 clarifies the theory of construction arbitration rule. Part 4 provides a comprehensive examination of construction arbitration rules in comparison to their commercial counterparts. Part 5 then offers a critical appraisal of which rules are most appropriate depending on the specific nature of the construction dispute. Finally, in Part 6, this article shall make some closing remarks.

2. Construction Disputes

In the construction industry, a perfect project is delivered on time, under budget, and without conflict - is the ideal, but rarely the reality. Construction projects are defined by their inherent complexity, involving multi-tiered supply chains, long-term performance periods, and volatile economic environments. Consequently, the construction contract serves as the primary instrument for managing uncertainty. It appears that risks and disputes are unavoidable in construction contracts. According to the 2019 Global Construction Disputes Report by Arcadis, the average value of disputes in the global construction and engineering industry was $43.4 million in 2017, and between $30.7 million and $33 million in 2018 and 2019.[1] In 2020, the impact of the global COVID-19 pandemic led to an increase in the average dispute value to $54.3 million, followed by $52.6 million in 2021.[2] By 2022, the global construction industry witnessed skyrocketing commodity prices, supply chain disruptions, and significant inflationary pressures resurfacing due to the outbreak of war in Europe. These factors have led to projections that global construction dispute values will continue to rise throughout 2023–2024.

There are three common construction dispute categories: (i) the time/schedule of the implementation; (ii) delayed payments; (iii) quality of work.

(i) Time-related disputes in construction contracts may include Extension of Time (EOT), Concurrent Delay, Liquidated Damages (LDs) - the most complex due to the "ripple effect" of delays.

An Extension of Time (EOT) refers to a situation in which a construction contract permits the extension of the work period due to delays caused by neutral risks rather than the contractor’s actions. However, the contractor must demonstrate the conditions for extending the contract execution time. A potential dispute is disagreements over whether a delay was excusable (e.g., force majeure) or non-excusable.

[1] Arcadis (2019), Global Construction Disputes Report, https://www.arcadis.com/en/united-states/our-perspectives/2019/global-construction-disputes-report-2019/, Accessed on March 15, 2026.
[2] Arcadis (2022), Global Construction Disputes Report: Successfully navigating through turbulent times.

Concurrent Delay is situations where both the employer and the contractor cause delays simultaneously. In such cases, the primary challenge lies in determining the legal entitlement to an EOT and prolongation costs.

Liquidated Damages (LDs) are disputes over the assessment and enforceability of late completion penalties. Liquidated damages are pre-agreed contractual amounts payable by a party that breaches a contract, commonly used when actual damages are hard to calculate, such as project delays. They provide certainty, covering estimated losses without needing to prove actual damages, provided they are not deemed punitive.

(ii) In the construction industry, payment is a key factor that directly affects project progress, construction quality, and the financial performance of all parties involved. However, payment disputes remain one of the most common and complex issues. Payment disputes in construction often focus on the following key issues: valuation of variations, non-payment/under-payment, retention money.

Variation is defined as "*any change to the Works, which is instructed as a variation under Clause 13 [Variations and Adjustments]*".[3] In other words, according to the definition in FIDIC Red Book 2017, an issue is considered a Variation if it meets two criteria: (a) it results in a change to the Works as originally agreed by the parties; and (b) it originates from the instructions of the Engineer in accordance with the procedures specified Clause 13 [Variations and Adjustments]. Disputes may arise over the cost of "extra work" or changes to the original scope. The issue is that the parties need to valuate of Variations. Many contracts set out how variations are to be valued or priced. If there is no mechanism in the contract which sets out how a variation is to be valued or priced, the contractor would still be entitled to be paid a reasonable sum for the variation works. What is reasonable depends on the circumstances. However, where a contractor is entitled to a contractually agreed rate, the question of whether or not that rate is reasonable does not arise.

Non-payment comes in different guises, including late payment, underpayment and no payment at all. The primary obligation of an employer under a construction contract is to provide timely payment for the work. This process is usually managed through an intermediary, often referred to as the Engineer or Project Manager. Standard forms of contracts, such as FIDIC, NEC, or JCT state clear timelines and procedures for certifying and releasing interim payments. Failure to hold to these timelines can lead to major financial and operational consequences for contractors,

[3] Sub-Clause 1.1.86 FIDIC Red Book 2017.

potentially causing delays, disruption, or even cessation of work.[4] Disputes may arise regarding interim certificates and final account settlements.

Retention money dispute is conflicts over the release of funds held to ensure defect rectification. These disputes frequently arise during the transition from project completion to the defects liability period when there are differences in opinion between the employer and the contractor. While the contractor wants early payment to maintain cash flow, the employer tends to withhold this amount as a last resort against delayed technical defects.

(iii) Quality of work disputes focus on the physical output of the project and adherence to technical specifications, including: defective workmanship, design liability, latent vs. patent defects. A reasonable definition of a defect is a fault; an aspect of the work, materials or design which is in some respect not in accordance with the requirements of the contract – or which renders the works as a whole unfit for their reasonably intended purpose.[5]

Workmanship defects are flaws in the building process. They are more common than design defects and can occur due to site conditions or a lack of skill in a particular area. Some examples of defective workmanship may include: failure to follow protocol, improper installation, failure to follow industry standards, using inferior materials, failure to complete necessary work, who is to blame for defective workmanship? The contractor or subcontractor may be held responsible for the cost of correcting the problem.

Design defects refer to flaws in the design of a construction project. Designs are usually checked extensively for problems before construction starts, but potential problems can still be overlooked. If this happens, it can result in serious issues with the functionality of the construction project. Design defects may include the following, structural deficiencies, foundation problems, water intrusion, fire safety, electrical systems… [6]

Patent and latent defects many disputes concerning defects turn on whether a defect was patent or latent at a given point in time – the distinction is often important in determining liability for defects and in the context of settlement agreements. A patent defect is one that is detectable by reasonable inspection. Patent defects are plain to see or at least that is the theory. By contrast, a latent defect is one that, by definition,

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[4] Contractor Rights and Claims Arising from Delayed Payments under Construction Contracts, https://planningengineer.net/contractor-rights-and-claims-arising-from-delayed-payments-under-construction-contracts/, Accessed on March 15, 2026.

[5] Defective work in construction projects, https://www.pinsentmasons.com/out-law/guides/defective-work-in-construction-projects

[6] Design defects vs. Workmanship defects, HTTPS://WWW.FLORIDAHARDHATLAW.COM/DESIGN-DEFECTS-VS-WORKMANSHIP-DEFECTS/, Accessed on March 15, 2026.

is not visible in the works and may not become apparent for many years. A latent defect has been described as a "concealed flaw" that would not be discovered during the kind of inspection reasonably to be expected for the work in question. Disputes will turn on the facts and consideration of whether the particular defects could have been discovered or not.

Upon the emergence of the aforementioned construction disputes, both the parties and the dispute resolution bodies are frequently confronted with the following challenges:

(i) Complex technical issues: Identifying construction disputes often involves complex technical issues. This complexity is inherent in the nature of construction projects, which often feature unique, bespoke designs or utilize specialized techniques and technologies. Furthermore, identifying the origins of a dispute - particularly regarding structural quality - requires specialized methodologies and tools to quantify the extent of defects and non-compliance, as well as to establish causation. Consequently, experts or professional organizations must conduct the assessment of these technical elements with certified expertise in construction and forensic inspection.

(ii) The large volume of documentation: Distinguished from general commercial contract, documentation in construction contract typically encompasses both legal documents and technical documents. Legal documents define the contractor's scope of work, required quality standards, completion milestones, and payment terms. Technical documents ensure adherence to design specifications, scope, timelines, costs, and project quality. The sheer diversity of contract documents often leads to inconsistencies - an almost inevitable occurrence in construction contracts.[7] Therefore, when a dispute arises, the parties and the dispute resolution bodies must analyze an immense volume of records to identify contractual breaches, legal grounds, and the root causes of the conflict. Additionally, they must reconcile inconsistencies between documents, a common challenge within the comprehensive adjustment systems of construction projects.

(iii) The large value of disputes and the long duration of disputes in construction contracts seem to be an inherent characteristic of the global construction industry. According to a 2022 report by the global consulting firm HKA, in approximately 1600 construction projects across 106 countries analyzed with a total value of US$2.247 billion, the value of claims and disputes amounted to more than US$80 billion and caused delays in project handover measured at a cumulative level of

[7] Gail S. Kelley (2013), *Construction Law: An Introduction for Engineers, Architects, and Contractors*, John Wiley & Sons, Inc, USA, pp. 54.

840 years. The average dispute cost was US$100 million, equivalent to more than one-third (33.6%) of the capital cost. Projects faced greater losses with an average claims extension period of 16.5 months – equivalent to 68.6% of the project's original planned duration.[8]

3. The Rise of Specialized Arbitration in Construction Dispute Resolution

3.1. The theory of specialization in dispute resolution

The theory of dispute resolution originates from and has been developed across various disciplines, including sociology, psychology, and law. Early 19th-century social scientists, such as Emile Durkheim, Georg Simmel, and Karl Marx, studied widespread social and political conflicts to understand their origins, trajectories, and societal impacts. Sociologists focused on the integration of disputes within broader contexts or patterns of conflict and social relations.

Meanwhile, from a legal perspective, scholars and practitioners of the "Legal Realism" school were concerned with how disputes are formed and resolved in specific contexts. This led to the emergence of the "jurisprudence of dispute resolution" and its associated institutions. While legal realists were skeptical that doctrine and the rule of law alone could adequately resolve social, economic, and political issues, they remained optimistic that legal institutions-when studied and reformed through the lens of "law in action" could be utilized to address significant human concerns. This research facilitated the development of new legal bodies and a broader recognition of the diversity of legal institutions managing disputes.[9]

By the 1950s, Harvard Law Professor Lon Fuller recognized as an "ADR theorist" and associated with the legal realist school contributed to the formation of the Legal Process approach. Fuller relied on "process pluralism" to assert that every dispute resolution method and procedure (mediation, arbitration, adjudication, litigation etc.) serves a distinct purpose. He argued they should not be conflated, as each possesses its own moral standards and functional integrity. Fuller emphasized that every dispute resolution process is unique, characterized by its own inherent purpose and moral foundation; thus, maintaining the boundaries and distinct integrity of these processes is of paramount importance.

In support of Fuller's view, a pivotal event in the modern era of dispute resolution theory and practice was the 1976 speech by Frank Sander, another Harvard

[8] https://www.hka.com/crux-insight-fifth-edition-battling-the-headwinds/, Accessed on March 15, 2026.

[9] Carrie Menkel-Meadow (2005), Chapter 2: Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution, *The Handbook of Dispute Resolution*, A Publication of the Program on Negotiation at Harvard Law School, Jossey-Bass, pp. 14-17.

Law Professor. Sander proposed the "multi-door courthouse."[10] According to this concept, rather than all cases being resolved through a single "litigation door," disputes could be addressed through various processes, including mediation, arbitration, fact-finding, or ombudsman services.

So, the legal theory of dispute resolution encompasses various legal mechanisms designed to resolve disputes effectively, balancing the needs for justice, efficiency, and social order.

In the context of construction disputes, the resolution of such conflicts has raised theoretical questions regarding the specialization of dispute resolution methods. Given the distinct characteristics of construction disputes, the primary objective is to select a resolution mechanism that is both efficient and cost-effective. The rationale for time-saving and cost-efficient resolution can be traced back to the idiom “A stitch in time saves nine” (a timely intervention prevents more significant issues later)[11] “*better to be rough and ready than slow and elaborate*”[12] and Consequently, the parties in the construction industry have proactively developed innovative procedural and litigation frameworks aimed at reducing the scope, duration, and costs of resolving construction disputes. This innovation aligns with the trend of judicial specialization. Specialization in adjudication and dispute resolution - particularly in complex legal fields such as construction which is an inevitable outcome sought by many nations and international organizations. Driven by the evolution of specialized sectors, the need for enhanced judicial efficiency, and the demands of global integration, there is a clear imperative for specialized dispute resolution methods tailored to the construction industry.

Specializing dispute resolution methods requires a multidisciplinary approach, integrating legal expertise with construction industry knowledge and international commercial practices. The degree of specialization for construction dispute resolution focuses on two levels: (i) Institutional specialization, where dispute resolution bodies possess deep expertise in construction disputes. (ii) Procedural flexibility, featuring tailored litigation procedures specifically designed for construction disputes. The

[10] Frank Sander (1976), Varieties of Dispute Processing, The Pound Conference: Perspectives on Justice in the Future (Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice), 70 F.R.D. 111.

[11] This idiom implies that repairing a small tear with one stitch means the tear is less likely to become larger and require more stitches—or nine stitches. In a more abstract sense, it means taking the time and effort to address a problem now rather than waiting until later, when the problem might become worse and take longer to resolve. This idiom has been used in English since before the eighteenth century and was first recorded in Thomas Fuller's 1732 book, *Gnomologia: A Collection of the Proverbs, Maxims and Adages That Inspired Benjamin Franklin and Poor Richard’s Almanack*.

[12] Michael Patchett-Joyce (2017), “Specialist Techniques for Construction Dispute Resolution: How Many Ways Can the Cat Be Skinned?”, *BCDR International Arbitration Review*, Kluwer Law International, Volume 4, Issue 1, pp 73 - 98.

specialization of construction dispute resolution methods not only facilitates superior outcomes by optimizing time, reducing litigation costs, and improving the quality of awards/decisions but also promotes sustainable development and transparency within the global construction industry.

3.2. The Emergence of Construction Arbitration

Since the late 19th century, arbitration has emerged as a prevalent and superior mechanism for resolving construction disputes.[13] The adoption of arbitration for construction dispute resolution has been further accelerated as leading international standard forms of contract, such as FIDIC, NEC, and JCT, began incorporating multi-tiered dispute resolution clauses that include arbitration. Coupled with the globalization of the construction industry, an increasing number of international contractors are entering into long-term construction contracts with partners across various nations and have prioritized international arbitration over national courts.[14] Driven by these benefits and demands, the arbitration method has been integrated into the construction industry in a most natural progression.

The jurisdiction of commercial arbitration over construction disputes is determined by the nature of the dispute and the existence of an arbitration agreement between the parties. National laws may vary regarding the types of disputes eligible for resolution through commercial arbitration. Construction disputes fall within the scope of commercial arbitration.

Theoretically, the inherent flexibility of arbitral procedures allows the disputing parties and the arbitral tribunal to establish or amend procedural rules by mutual agreement. This ensures that the procedures are tailored to the unique characteristics of construction disputes while maintaining cost-efficiency and effective outcomes.[15] The flexibility of arbitral procedure is ideal for construction disputes, provided that the arbitral tribunal is granted sufficient authority to proactively manage the proceedings through procedural rules and national arbitration laws. Currently, several arbitration rules have been amended to enhance efficiency and address the specific needs of the construction industry. These amendments are based on the general principle of allowing the Tribunal to "conduct the arbitration in such manner as the Tribunal

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[13] Philip Loots, Donald Charrett (2022), *Contracts for Infrastructure Projects: an International Guide to Application,* Informa Law from Routledge, New York. pp. 565.

[14] Pricewaterhouse Coopers (PwC) (2013), *Corporate Choices in International Arbitration: Industry Perspectives,* https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf, Accessed on March 15, 2026.

[15] David Kiefer (2021), Suitability of Arbitration Rules for Construction disputes, *The Guide to Construction Arbitration*, Global Arbitration Review, Law Business Research, London, pp 146.

considers appropriate"[16] or empowering the parties and the tribunal to "conduct the arbitration in an expedited and cost-effective manner."[17] Consequently, commercial arbitration rules remain fundamentally suitable for construction disputes.[18]

Nevertheless, not all commercial arbitration rules are appropriate for large-scale construction disputes that involve high levels of technical complexity or international factor. These disputes involve specific procedural requirements, such as the consolidation of cases, multi-party participation, procedures for evaluating vast volumes of documents, evidence, and witnesses, as well as the need for rigorous time management.[19] Each step of the arbitration process in construction disputes must be carefully defined and focused on critical issues to prevent prolonged dispute resolution. Consequently, construction arbitration rules have been developed based on commercial arbitration frameworks, integrated with the unique characteristics of construction disputes. These rules provide flexible procedures that correspond to the complexity of the dispute ranging from simple to sophisticated, while ensuring technical accuracy in arbitral awards. Each set of rules is uniquely designed to accommodate the specific needs and development of construction disputes within a given jurisdiction. Construction arbitration rules are primarily established by arbitration institutions - acting as facilitators and coordinators of the resolution process or, in certain countries, by state agencies at the government's request.

Thus, the emergence and evolution of construction arbitration rules are an inevitable outcome of the demand from disputing parties and arbitration institutions for faster and more efficient resolution services. Construction disputes possess distinct characteristics that necessitate specialized construction arbitration rules to meet developmental needs. From a theoretical perspective, the formation of these rules aligns with legal doctrines of dispute resolution, which advocate for diverse legal mechanisms tailored to specific types of disputes to ensure efficiency and a balance between the demands for justice, effectiveness, and social order.

The arbitration institutions have undertaken the specialization of construction dispute resolution through various mechanisms: (i) construction arbitration rules; (ii)

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[16] Article 17.1 of the Cairo Regional International Commercial Arbitration Centre Rules (CRCICA); Article 17.1 of the Qatar International Arbitration and Mediation Centre (QICCA); Article 18.2 of the Saudi Arabian Commercial Arbitration Centre Rules (SCCA).

[17] Article 22.1 ICC Arbitration Rule 2021.

[18] David Kiefer (2021), tlđd, pp. 140-146; Eoin Moynihan (2022), *Procedural creativity in international construction arbitrations: a comparative analysis of institutional innovations in the US, Singapore and France*, International Bar Association, London, https://www.ibanet.org/procedural-creativity-international-construction-arbitrations, Accessed on March 15, 2026.

[19] Richard Anthony Harding (2017), "*The Unique World of Construction Arbitration: A Middle East Perspective*", *BCDR International Arbitration Review*, Kluwer Law International, Volume 4 Issue 1, pp. 3-10.

expedited construction arbitration rules, (iii) list of arbitrators with specialized expertise in the construction sector.

First, Construction Arbitration Rules

Currently, many Arbitration Institutions with a high volume of construction dispute cases have recognized the rapid growth in both the quantity and the unique nature of construction disputes compared to other commercial disputes. Consequently, they have proactively refined their construction arbitration rules or issued specific guidelines for resolving such disputes. Globally, there are seven sets of construction arbitration rules:

1. Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association (US)
2. Engineering and Construction Arbitration Rules & Procedures of Judicial Arbitration and Mediation Services, Inc – JAMS (US)
3. Rules of Arbitration Procedure for Disputes Relating to Building and Construction of Danish Building and Construction Arbitration Board
4. Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK)
5. Rules of Procedures Governing Construction Arbitration of the Construction Industry Arbitration Commission in Philippines
6. Rules for Mediation and Arbitration of Construction Disputes of the Canadian Construction Documents Committee - CCDC.
7. Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC).

Secondly, Expedited Construction Arbitration Rules

The advancement of expedited arbitration procedures within the construction sector has been increasingly observed across numerous jurisdictions; notably, arbitration institutions in the United States have developed a variety of expedited procedural rules. There are four Expedited Construction Arbitration Rules.

1. Rules for Expedited Arbitration of Construction Disputes of the International Institute for Conflict Prevention & Resolution – CPR (US)
2. The Fast Track Procedures (Section F) in the AAA Construction Arbitration Rules (US)
3. The JAMS Engineering and Construction Arbitration Rules & Procedures for Expedited Arbitration (US)
4. Expedited Construction Arbitration rules of The Arbitration Foundation of Southern Africa (AFSA)

Thirdly, the list of arbitrators with expertise in construction

To facilitate the outstanding development of construction arbitration rules, arbitration institutions must cultivate a list of arbitrators with deep expertise in the construction industry.

American Arbitration Association have 1,800 highly qualified professionals who are architects, engineers, contractors, construction managers, construction attorneys, and other industry specialists.[20]

JAMS provides high-quality construction dispute resolution services through its JAMS Global Engineering and Construction Group (JAMS GEC), which comprises 38 members experienced in construction disputes. While JAMS arbitrators were initially primarily retired judges, the qualification standards have since expanded to include a broader range of experts. These professionals play a critical role in ensuring the effective management and cost-efficiency of the entire arbitral proceeding—from the filing stage and hearings to the issuance of the final award. These experts efficiently resolve construction disputes, including the most complex issues, by employing early intervention methods, strategic negotiation, neutral third-party evaluations, initial determinations, mediation-to-arbitration, and Dispute Boards. Supplemental rules have been established or amended to clarify and enhance the authority of these arbitrators.

In Denmark, the Construction Arbitration Board consists of 11 members, most of who are appointed by key stakeholders in the construction industry through the Danish Ministry of Transport and Construction, based on recommendations from the Danish Construction Association. The 2010 Construction Arbitration Rules stipulate that the Arbitral Tribunal shall consist of 03 members, including a Chairman, a Vice-Chairman, and one other member supported by 17 alternates, all of who are court judges.[21]

4. Construction and Commercial Arbitration Rules: Comparative Analysis

The primary assertion is that the established construction arbitration rules are derived from the foundational principles of commercial arbitration. Therefore, this study examines the distinct characteristics of sector-specific arbitration rules in contrast to those governing commercial arbitration disputes. This study evaluates the procedural distinctions between construction arbitration rules and the framework standards established by the UNCITRAL Arbitration Rules and ICC Arbitration Rules that are applied in many international construction disputes.

4.1. Construction arbitration rules offer various procedures

[20] Philip L. Bruner, Albert Bates JR (2014), Chapter 3: Arbitration Providers, *Construction ADR,* American Bar Association, https://www.duanemorris.com/articles/static/bates_abaforum_013114.pdf, pp. 45.

[21] Article 4 Rules of Arbitration Procedure for Disputes Relating to Building and Construction of Danish Building and Construction Arbitration Board.

Construction arbitration procedural rules typically provide three types of proceedings: regular dispute resolution procedures, document procedures, and expedited or emergency procedures. The selection of the appropriate construction procedure depends on the stipulated value of the dispute or the decision of the Arbitral Tribunal. By offering a variety of proceedings, these rules allow parties to align the chosen procedure with the specific nature of their case, ensuring a more expeditious and cost-effective resolution. While commercial arbitration rules often adopt a uniform procedural approach, which does not categorize cases according to claim value or the complexity of the dispute.

(i) The American Arbitration Association (AAA) offers four distinct construction arbitration procedures base on the scale and complexity of construction disputes:

Regular Track Procedures (Section R): The standard procedure for construction disputes valued between $100,000 and $1,000,000.

Procedures for the Resolution of Disputes through Document Submission (Section D): A technology-driven, simplified process designed to resolve disputes without an in-person oral hearing. Applicable to disputes of any scale upon mutual agreement by the parties. A preliminary hearing (via conference call) is required within 14 days of the arbitrator's appointment. The arbitrator must issue an award within 14 days after the submission of written arguments is deemed closed.[22]

Fast Track Procedures (Section F): Applied to disputes involving claims between two parties that do not exceed $100,000 (exclusive of interest, legal fees, and arbitration costs).[23]

Procedures for Large, Complex Construction Disputes (Section L): Applied to construction disputes valued at $1,000,000 or more (exclusive of interest, legal fees, arbitration costs, and other expenses).[24]

(ii) Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK) also offers three distinct construction arbitration procedures:

Document procedure is appropriate where there is to be no hearing, for instance, because the issues do not require oral evidence, or because the sums in dispute do nit warrant the cost of a hearing.[25]

Short procedure is appropriate where the matters in dispute are to be determined principally by the arbitrator inspecting work, materials, machinery or the like.[26]

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[22] D4 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[23] F1 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[24] L1 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[25] Rules 8 Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK).

Full procedure is applied where neither the Documents Only nor the Short procedure is appropriate, subject to such modification as is appropriate to the particular matters in issue.[27]

(iii) Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) provides three alternative arbitration tracks such as Documents-only Arbitration, Fast Track Arbitration, Full arbitration. Their application is predicated upon party autonomy rather than the monetary value or the category of the dispute.[28]

(iv) Rules of Procedures Governing Construction Arbitration of the Construction Industry Arbitration Commission in Philippines also established procedure for small-claims disputes. Small Claims - Cases where the claim does not exceed P1 million shall be categorized as a small claim thereby entitled to special procedures of disposition and reduced fees. A small claims case shall be handled by a sole arbitrator whose fees shall be at a fixed rate of 3% of the claim but not less than P 10,000.00 or as may be prescribed by CIAC. All prescribed periods under normal procedure shall whenever practicable, be abbreviated to fifty percent (50%) of that required.[29]

4.2. Qualification and Appointment of Arbitrators

While commercial arbitration rules often prioritize the procedural mechanisms for appointing tribunals, frequently omitting specific professional qualifications for the arbitrators, the construction sector adopts a more stringent approach. Given the technical complexity of industry disputes, bodies such as the CIAC of the Philippines and the AAA mandate that arbitrators possess not only legal expertise but also deep sectoral knowledge. Appointing arbitrators with a background in construction enhances the integrity of technical dispute resolutions, drawing upon their practical insights and industry-specific knowledge. This approach emphasizes a multidisciplinary tribunal to ensure disputes are resolved with both technical competence and equity.

Arbitrators are drawn from diverse fields, including engineering, architects, construction managers, engineering consultants, and businessmen familiar with the

[26] Rule 7 Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK).
[27] Rule 9 Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK).
[28] Rule 37 Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC).
[29] Rule 20 Rules of Procedures Governing Construction Arbitration of the Construction Industry Arbitration Commission in Philippines.

construction industry and lawyers who are experienced in construction disputes.[30] A key regulatory constraint is that only CIAC-accredited practitioners may be nominated or appointed. [31] In cases involving foreign entities, the framework permits the appointment of a neutral foreign arbitrator (non-national to either party) to serve as a co-arbitrator or chairperson, thereby ensuring impartiality.[32]

The AAA maintains a National Construction Panel composed of individuals vetted by regional advisory committees and industry stakeholders. The majority of the panel consists of active industry professionals. Notably, attorney-arbitrators are generally required to dedicate at least 50% of their practice to construction-related matters. The AAA has default Appointment Mechanisms - if parties fail to agree on a selection method, the AAA appoints arbitrators directly from National Construction Panel. For cases involving joinder, consolidation, The AAA shall maintain a panel of construction attorneys who have experience with consolidation or joinder issues.[33] For cases involving large, complex construction case, the AAA shall appoint the arbitrators from the Large, Complex Construction Case Panel, in the manner provided in the Regular Construction Industry Arbitration Rules.[34]

4.3. Consolidation or Joinder procedures

In construction projects, disputes rarely involve just two parties. Because a single project typically includes an employer, a main contractor, multiple subcontractors, and various consultants (architects, engineers), a single delay or defect can trigger a "chain reaction" of liability. Consolidation and Joinder are the two primary procedural mechanisms used in arbitration to manage these multi-party complexities, ensuring efficiency and avoiding conflicting outcomes. Whereas construction arbitration rules almost invariably incorporate consolidation and joinder, certain commercial rules - most notably the UNCITRAL Arbitration Rules do not explicitly provide for these procedures.

(i) Under the AAA Construction Arbitration Rules, if parties cannot agree on consolidating related cases or joining new parties, the AAA appoints a specialized R-7 Arbitrator. This arbitrator is selected from a dedicated panel of construction attorneys and is strictly limited to deciding these procedural issues.

To maintain impartiality, the R-7 Arbitrator cannot serve as the Merits Arbitrator (the one who decides the actual case) unless all parties agree. Requests for

[30] Rule 8.1 Rules of Procedure Governing Construction Arbitration of The Construction Industry Arbitration Commission (CIAC), Construction Industry Authority of the Philippines.
[31] Rule 8.2 Rules of Procedure Governing Construction Arbitration of The Construction Industry Arbitration Commission (CIAC), Construction Industry Authority of the Philippines.
[32] Rule 9.4 Rules of Procedure Governing Construction Arbitration of The Construction Industry Arbitration Commission (CIAC), Construction Industry Authority of the Philippines.
[33] R7(g) Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[34] L3 (c) Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.

consolidation or joinder must be filed before the Merits Arbitrator is appointed or within 90 days of satisfying administrative requirements, whichever is later. Late requests require a "good cause" justification.

Response Deadlines:

- Consolidation: Other parties have 10 days to respond to a request.
- Joinder: Parties have 14 days to respond.

Procedural Requirements:

- Consolidation: The requesting party must file a demand for arbitration, include the relevant contract provisions, and provide supporting reasons to all involved parties.
- Joinder: The requester must provide contact details for all parties and reasons for the joinder.

Inactive or non-responding parties already in the AAA construction arbitration rule are deemed to have waived their objection, whereas external parties who do not respond are deemed to have denied the request.

If the R-7 Arbitrator approves the request, they may establish the process for selecting the Merits Arbitrators for the newly consolidated case. They determine the initial allocation of arbitrator compensation (which can be reassessed in the final award). The AAA may stay (pause) ongoing arbitrations while the consolidation or joinder request is being decided.

(ii) Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK).

A notice of arbitration can cover multiple disputes if they arise from the same agreement. Furthermore, before an arbitrator is appointed, a respondent may introduce additional disputes under the same agreement to be consolidated into the existing proceeding. If different proceedings share common issues, the arbitrator with the consent of all parties may order them to be consolidated, regardless of whether the parties involved are identical. When proceedings are consolidated, the arbitrator has the authority to issue necessary directions and, unless otherwise agreed, will provide a single, final, and binding award for all parties. The arbitrator maintains flexible control, holding the power to revoke consolidation orders if separate hearings become more appropriate. Additionally, the arbitrator may exercise their procedural powers either jointly across the consolidated case or separately for specific issues.[35]

Compare with the ICC Rules that are notably sophisticated in their "open-door" approach, allowing for the joinder of additional parties before an arbitrator is

[35] Rule 3 Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK).

appointed and a tribunal may permit later joinder if the additional party accepts the existing constitution and Terms of Reference, following a careful assessment of procedural impact and jurisdiction.[36] ICC Arbitration Rule empowers the tribunal to consolidate separate pending arbitrations into one - usually the one that commenced first - provided there is party agreement, identical arbitration agreements, or compatible agreements involving the same parties and legal relationships. Furthermore, while the ICC Rules provide a broad framework for claims between multiple parties[37] and multiple contracts[38], construction-specific rules often place a heavier emphasis on the "string" of contracts (Employer-Contractor-Subcontractor). In construction disputes, specialized rules may offer more automatic joinder mechanisms to ensure that the "true" responsible party is present, whereas the ICC maintains a balance by requiring the tribunal to weigh potential conflicts of interest and the impact on the procedure before allowing a late-stage joinder. However, the ICC Rules regarding the joinder remain silent on the specific timelines for compliance, focusing instead on the substantive requirements and the respective rights and obligations of the disputing parties and the arbitral tribunal.

4.4. Interim and Emergency Measures of Protection

While standard commercial arbitration rule often focuses primarily on interim measures, construction arbitration rules typically provide a broader framework that includes emergency protective measures. These measures are designed to address urgent issues before a formal tribunal is even established. These measures highlight the distinctive nature of construction disputes, particularly regarding payment issues and technical complexities. Furthermore, they empower vulnerable parties to proactively mitigate the severe consequences arising from such disputes.

Emergency Measures (Pre-Tribunal Phase): Under the AAA rules, parties may request emergency relief prior to the constitution of the arbitral tribunal. The process is characterized by extreme speed. The AAA appoints a single emergency arbitrator within one business day of receiving the notice. To grant an interim order or award, the arbitrator must be satisfied that the requesting party will suffer immediate and irreparable loss without such relief. If directed by a judicial authority, a "Special Master" may be appointed to report on the application instead of an arbitrator.[39]

Interim Measures (Tribunal Phase): Once a tribunal is formed, it has the authority to issue interim measures to stabilize the dispute. The scope of these measures varies by jurisdiction. Under the AAA rules, the arbitral tribunal may take

[36] Artice 7,5 ICC Artbitration Rule.
[37] Artice 8 ICC Artbitration Rule.
[38] Artice 9 ICC Artbitration Rule.
[39] R39 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.

any measures deemed necessary, including injunctive relief and the protection or conservation of property (e.g., disposing of perishable goods). [40] Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK) allows for interim financial measures, such as payment of a reasonable proportion of the expected final award; payment on account for arbitration costs and other relief as claimed in the proceedings.[41] The CIAC of the Philippines provides a comprehensive list of objectives that interim orders aim to achieve to ensure the enforcement of the award; to prevent irreparable loss or injury or deterioration of property; to minimize or avoid undue delays in project or contract implementation; to provide security for the performance of any obligation; to produce or preserve any evidence; such other measures deemed by the Arbitral Tribunal to be necessary to prevent a miscarriage of justice or abuse of rights of any of the parties.[42]

Compare with the UNCITRAL Rules, it provide a comprehensive and structured framework for interim measures, the three construction-specific arbitration rules offer more specialized or flexible approaches tailored to industry needs. UNCITRAL Article 26 establishes strict procedural requirements or a high bar, such as the necessity for the requesting party to demonstrate "irreparable harm" and a "reasonable possibility of success" on the merits.

Compare with the ICC Arbitration Rules, both systems provide for emergency and interim relief, their scope and practical application differ significantly to meet the high-stakes nature of the construction sector. The ICC Rules (Articles 28 & 29) are designed to be "one size fits all." They grant the tribunal wide discretion to order any measure deemed "appropriate.". The ICC tribunal can order security for costs and maintains a similar level of rigor as UNCITRAL rules, but focuses on the "conservatory" nature of the relief. In addition, ICC Arbitration rule provide emergency relief before tribunal constitution; results in an order that is binding but can be modified by the later tribunal.[43]

4.5. Evidence

In disputes arising from construction contracts, evidence and information serve as the fundamental pillars of the arbitral process. The treatment of evidence serves as a critical junction between procedural efficiency and due process. To ensure party cooperation and prevent procedural delays, construction-specific arbitration rules have established clear and mandatory obligations regarding the provision and updating of

[40] R38 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[41] Rule 10 Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK).
[42] Rule 14.1 Rules of Procedure Governing Construction Arbitration of The Construction Industry Arbitration Commission (CIAC), Construction Industry Authority of the Philippines.
[43] Artice 29.2 ICC Artbitration Rule.

information to the Arbitral Tribunal. Furthermore, these rules grant the Tribunal broad discretionary powers in determining the admissibility, relevance, and weight of diverse evidentiary sources, while also formalizing the involvement of experts and expert witnesses.

The evidentiary regimes of the AAA Construction Arbitration Rules, the JAMS Engineering and Construction Rules, and the Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) exhibit a shared commitment to tribunal discretion while diverging in their procedural rigor and expert involvement. A primary point of convergence across all three frameworks is the Arbitral Tribunal's "comprehensive authority" over the admissibility and materiality of evidence, intentionally departing from strict judicial rules of evidence to accommodate the technical complexities of construction projects.

The AAA Construction Arbitration Rules emphasize flexibility and the "broad discretionary powers" of the arbitrator, explicitly moving away from the rigid legal technicalities found in traditional courtrooms. A distinctive feature of the AAA approach is the arbitrator's authority to exclude evidence based on a cost-benefit analysis, specifically when the "cost of inclusion outweighs its value" which reflects a pragmatic commitment to managing the high volume of documentation typical in construction projects.[44] Furthermore, the AAA provides specific mechanisms for site inspections and the handling of witness defaults, ensuring that the adversarial process remains intact even when parties are uncooperative.[45]

In contrast, the JAMS Engineering and Construction Arbitration Rules (particularly for expedited procedures) appear to adopt a more streamlined, "submissions-only" orientation. Unlike the more expansive discovery and subpoena powers outlined in the AAA rules, JAMS relies more heavily on the voluntary submissions of the parties or specific requests from the tribunal.[46] This suggests a prioritized focus on expediency and finality, which is often the primary driver for parties selecting JAMS for technical engineering disputes.

For the role of experts and expert witnesses. the AAA rules provide more granular detail regarding the physical presence of witnesses and the use of written affidavits. While the AAA allows for written declarations to ensure efficiency, it preserves the right to cross-examination; if a witness fails to appear after a request, the arbitrator may disregard their testimony entirely. While both AAA and Arbitration Rule

[44] R35 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[45] R36 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[46] Rule 20 The JAMS Engineering and Construction Arbitration Rules & Procedures for Expedited Arbitration (US).

for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) allow for written affidavits, the Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) impose stricter prerequisites, such as requiring advance notice of witness identity and prior Tribunal approval for expert witnesses. Furthermore, Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) provides a nuanced sanction for witness non-appearance, allowing the Tribunal to either reduce the weight of written evidence or exclude it entirely, whereas the AAA rules focus heavily on the right to cross-examination as a trigger for such exclusions.[47]

A defining feature of the Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) is the Tribunal's explicit right to appoint its own independent experts. Unlike the AAA or JAMS, which largely function within an adversarial framework where parties drive the expert evidence, this rule mandates party cooperation with Tribunal-appointed experts, including providing access to property for inspection.[48]

Thus, while the AAA prioritizes a balance between authority and cost-effectiveness, and JAMS focuses on procedural economy, the Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC) provide a more structured and inquisitorial framework.

In comparison with the UNCITRAL Arbitration Rules, there are certain similarities and differences. The UNCITRAL Arbitration Rules serve as the global "gold standard" for procedural neutrality, offering a flexible framework that contrasts with the more specialized, prescriptive approaches of construction-specific rules. UNCITRAL explicitly codifies the burden of proof of evidence production in Article 27.1, stating that each party must prove the facts relied upon for their claim or defense. A notable distinction lies in the definition of a witness. UNCITRAL Art. 27.2 explicitly clarify that any individual, including a party to the arbitration, may serve as

[47] Rule 38 Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC).
[48] Rule 39 Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC).

a witness. This "universal" witness eligibility is broader than the CIDC-SIAC approach, which requires advance notice and specific tribunal approval for expert witnesses. Furthermore, UNCITRAL's preference for written statement aligns with the AAA and CIDC-SIAC models, but UNCITRAL remains more "party-neutral," whereas the construction-specific rules often include stricter sanctions (like disregarding testimony entirely) if a witness fails to appear for cross-examination.

The most significant comparison arises in the appointment of independent experts. UNCITRAL provides a much more robust framework for transparency and impartiality. Article 29.2 requires experts to submit a statement of independence and qualifications before appointment, allowing parties a window to object. UNCITRAL mandates that the "terms of reference" for the expert be communicated to the parties, ensuring a level of procedural clarity that is often left to the arbitrator's discretion in AAA or JAMS. Similar to CIDC-SIAC, UNCITRAL ensures that if an expert is appointed, parties have an absolute right to interrogate them at a hearing and present their own rebuttal experts. However, UNCITRAL goes further by granting parties the right to examine any document the expert relied upon, a level of "discovery" into the expert's work that is more detailed than the general cooperation requirements in the CIDC-SIAC or AAA rules.

The ICC Arbitration Rule do not provide specific provisions regarding evidence.

4.6. Expedited arbitration procedures

Expedited arbitration rules are not a novel concept in arbitral proceedings. Currently, numerous arbitration institutions provide expedited procedural rules in various forms.

Stand-Alone Fast-Track Arbitration Rules: These represent expedited rules that are entirely independent of the standard arbitration rules, forming a distinct set of regulations governing the entire dispute resolution process - from the commencement of the claim and the constitution of the Arbitral Tribunal to the submission of pleadings, the conduct of hearings, and the issuance of the final award.[49] This is considered the most comprehensive framework among expedited arbitration rules. Numerous sets of rules fall into this category, such as the 2008 Expedited Arbitration Rules and the most recent 2021 version of the Australian Centre for International Commercial Arbitration (ACICA), the 2018 Fast-Track Arbitration Rules of the Asian International Arbitration Centre (AIAC)—formerly the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the UNCITRAL Expedited Arbitration Rules 2021.

[49] Fatih Serbest (2012), *Fast-Track Arbitration - Should it be Encouraged in International Commercial Disputes*?, Conference paper: Reopening the Silk Road in the Legal Dialogue between Turkey and China, June 2012, Volume 1, pp 309-335.

Semi-Separate Fast-Track Arbitration Rules: These are expedited rules integrated within the standard arbitration rules, typically structured as a specific chapter or a separate set of provisions. They are generally triggered based on the value of the dispute, the mutual agreement of the parties, or in exceptional circumstances. In such cases, other provisions of the standard arbitration rules continue to apply to the expedited proceedings. In certain instances, parties may flexibly transition from expedited rules back to standard arbitration procedures. Such as Articles 56-64) China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2015, Article 83-90 of the 2021 Commercial Arbitration Rules of the Japan Commercial Arbitration Association (JCAA), Rule 14 of Arbitration rules of Singapore International Arbitration Centre 2025.

Similarly, the evolution of expedited arbitration procedures within the construction sector has gained significant momentum across various jurisdictions. These expedited construction arbitration procedures possess several distinct characteristics, which primarily revolve around procedural rules themselves.

The Rules for Expedited Arbitration of Construction Disputes of the International Institute for Conflict Prevention & Resolution – CPR (US) also known as "Arbitration in 100 Days," are designed with an arbitral procedure limited to a 100-day duration according to a detailed timeline. This 100-day period commences from the date of the Preliminary Conference between the parties. Within this 100-day window, the parties must submit all pleadings within 60 days; subsequently, a hearing is convened within the following 30 days, and the final award must be dispatched to the parties 10 days thereafter.

The Fast Track Procedures (Section F) in the AAA Construction Arbitration Rules establish a "standard timeframe" of 45 days to conclude the formal hearing, utilizing an accelerated arbitrator appointment process. Furthermore, a specialized panel of qualified arbitrators may be pre-established to facilitate dispute resolution on an expedited basis. Upon the constitution of the Arbitral Tribunal, a hearing is conducted promptly within 10 days; notably, the duration for organizing the hearing and the hearing itself must not exceed one day. Following the conclusion of the hearing, the Tribunal must issue the award within 14 days.[50]

In comparison with the UNCITRAL Expedited Arbitration Rules, UNCITRAL provides a broad, consensual framework applicable to various legal relationships, its hallmark is the six-month deadline for a final award, extendable to nine months only with unanimous party consent.[51] The tribunal is granted broad powers to streamline the

[50] F-11, 13 Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association.
[51] Article 16 UNCITRAL Expedited Arbitration Rules.

process, including the ability to utilize technological means for remote hearings, limit document production, and even decide to forgo oral hearings entirely if no party requests them, default sole arbitrator to ensure speed.[52] This contrasts with the highly specialized construction-focused rules of the CPR and AAA, which prioritize even more aggressive schedules.

In comparison with the ICC Expedited Arbitration provision, the rules apply automatically if the value of the claims does not exceed a specific threshold (typically $2 million or $3 million depending on when the arbitration agreement was concluded).[53] Beyond financial value, the rules also apply if the parties explicitly "opt-in" by mutual agreement, regardless of the amount at stake. The ICC Expedited Arbitration provisions allow for greater judicial discretion, where the ICC Tribunal may opt out of the expedited track if the circumstances of the case are deemed inappropriate. This sets it apart from the UNCITRAL framework, which remains largely consensual and flexible (extendable to nine months), and the CPR/AAA rules, which emphasize specialized panels and high-speed efficiency to prevent the prolonged delays common in complex construction litigation. In addition, ICC Expedited Procedure Provisions are rendered inapplicable under three specific conditions.

5. Selection of the Optimal Arbitration Rules for Construction Disputes

In general, construction arbitration rules offer significant procedural advantages over general commercial frameworks by providing specialized mechanisms tailored to the technical and multi-party complexities of the industry. A primary strength lies in the diversified procedural tracks, such as the AAA's "Fast Track" and "Large, Complex Dispute" procedures which allow parties to align the arbitration process with the specific scale and monetary value of their dispute, thereby enhancing cost-effectiveness and expediency. Unlike the uniform approach often found in commercial arbitration, these rules frequently mandate stringent professional qualifications for arbitrators, ensuring that tribunals possess deep sectoral expertise in fields like engineering and architecture rather than just legal knowledge. Furthermore, construction rules proactively address the "chain reaction" of liability inherent in project lifecycles through robust consolidation and joinder procedures, which prevent conflicting outcomes in multi-party disputes that a feature sometimes lacking in framework standards like the UNCITRAL Rules. In addition, the inclusion of emergency and interim measures specifically designed for urgent technical or payment issues allows vulnerable parties to mitigate irreparable losses before a formal tribunal

[52] Article 11, 18 UNCITRAL Expedited Arbitration Rules.

[53] Article 30 ICC Arbitration Rules.

is even constituted. Finally, to the general advantages of construction arbitration, expedited or fast-track procedures represent a critical evolution in addressing the industry's need for rapid dispute resolution. These specialized rules offer a significantly more aggressive timeline than standard commercial frameworks like the UNCITRAL Expedited Rules, which typically allow for a six-month window.

The ICC also provides "gold standard framework for all types of disputes, encompassing a wide range of provisions such as Consolidation or Joinder procedures, Interim and Emergency Measures of Protection, and Expedited arbitration procedures. However, the substance of these provisions does not specifically emphasize specialized tribunal or high-speed efficiency designed to prevent the prolonged delays common in complex construction dispute. Instead, the ICC mandates that arbitral tribunals ensure the pace of proceedings does not compromise the fundamental requirements of due process by balancing mandatory efficiency with the flexibility of the Tribunal’s oversight. Construction-specific rules offer a more surgical approach, providing tools tailored to the physical and economic realities of the construction industry, such as protecting perishable works or ensuring the continuity of project funding.

Thus, if simple construction disputes do not require time-efficient resolution such as legal conflicts regarding late payments or non-payments that do not involve technical issues, the application of general commercial arbitration rules remains appropriate. Conversely, specialized construction arbitration rules prove more effective for disputes of a highly technical nature such as Extensions of Time (EOT) and liquidated damages, valuation of variations and latent defects, disputes over workmanship or design liability and simultaneously demand expedited resolution.

6. Conclusion

The resolution of modern construction disputes requires a delicate balance between legal precision and technical expertise. While commercial arbitration remains a universally recognized and flexible platform, its generalist nature often fails to address the multi-party, multi-layered complexities inherent in large-scale infrastructure projects. As this study has demonstrated, the emergence of specialized Construction Arbitration Rules represents an essential evolution in the "jurisprudence of dispute resolution," providing a surgical approach to the physical and economic realities of the industry.

The comparative analysis reveals that construction-specific frameworks offer significant advantages in three critical areas: procedural diversity, technical competence, and multi-party management. By providing distinct tracks such as the AAA’s "Fast Track" for smaller claims and "Large, Complex Construction"

procedures for high-value disputes - these rules allow parties to align the arbitral process with the specific scale of their conflict. Furthermore, the mandate for arbitrators to possess deep sectoral knowledge in engineering, architecture, or construction management ensures that technical issues like Concurrent Delay or latent defects are adjudicated with a level of insight that general legal practitioners may lack.

Finally, the robust mechanisms for consolidation and joinder found in construction rules are vital for addressing the "chain reaction" of liability common in the employer-contractor-subcontractor string. While commercial rules like those from the ICC or UNCITRAL provide a "gold standard" for neutrality, specialized construction rules prioritize the aggressive timelines and interim protections such as emergency measures for payment issues - necessary to prevent project cessation. Ultimately, for disputes involving technical performance or complex liability, specialized rules provide the most efficient path to an enforceable and technically accurate award.

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CONSTRUCTION OR COMMERCIAL ARBITRATION RULES: WHICH IS THE BETTER FIT?

Presented by: Nguyễn Mai Linh

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ISSUES/CONTENTS

1 Nature of Construction Disputes: Complexity and Technicality

2 Commercial Arbitration Rules: The "One Size Fits All" Approach

3 Construction Arbitration Rules: Specialized Mechanisms

4 Comparative Analysis: Efficiency, Cost, and Outcome

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Construction Disputes

There are three common construction dispute categories:

- The Time/Schedule Of The Implementation: dispute of Extension of Time (EOT) Concurrent Delay, Liquidated Damages (LDs)
- Delayed Payments: dispute of valuation of variations, non-payment/under-payment, retention money.
- Quality of Work: defective workmanship, design liability, latent vs. patent defects.

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Construction Disputes

- Complex technical issues
- The large volume of documentation
- The large value of disputes and the long duration of disputes

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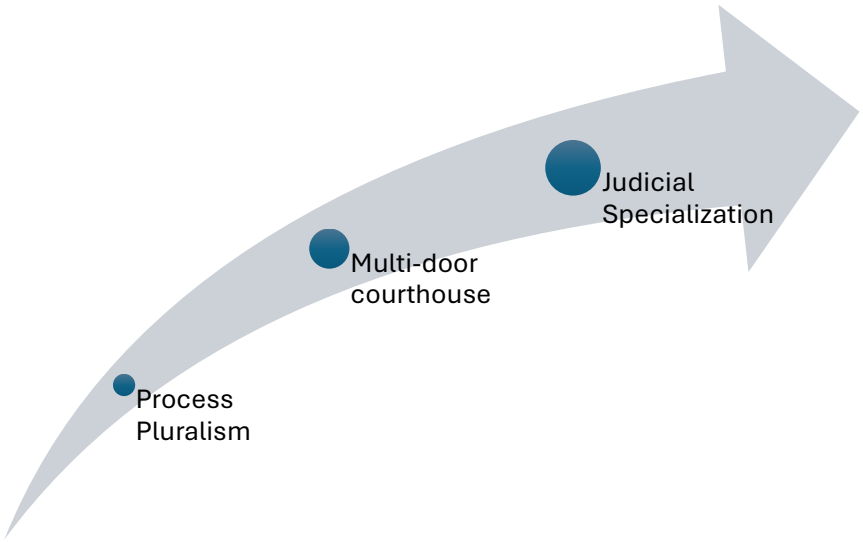
The theory of specialization in dispute resolution



The Emergence of Construction Arbitration

Construction Arbitration Rules

1. Construction Industry Arbitration Rules and Mediation Procedures of American Arbitration Association (US)
2. Engineering and Construction Arbitration Rules & Procedures of Judicial Arbitration and Mediation Services, Inc – JAMS (US)
3. Rules of Arbitration Procedure for Disputes Relating to Building and Construction of Danish Building and Construction Arbitration Board
4. Construction Industry Model Arbitration Rules in Joint Contracts Tribunal (JCT) of Society of Construction Arbitrators (UK)
5. Rules of Procedures Governing Construction Arbitration of the Construction Industry Arbitration Commission in Philippines
6. Rules for Mediation and Arbitration of Construction Disputes of the Canadian Construction Documents Committee - CCDC.
7. Arbitration Rule for Resolution of Construction and Infrastructure related disputes of Construction Industry Development Council, India (CIDC) in association with the Singapore International Arbitration Centre (SIAC).

The Emergence of Construction Arbitration

Expedited Construction Arbitration Rules

1. Rules for Expedited Arbitration of Construction Disputes of the International Institute for Conflict Prevention & Resolution – CPR (US)
2. The Fast Track Procedures (Section F) in the AAA Construction Arbitration Rules (US)
3. The JAMS Engineering and Construction Arbitration Rules & Procedures for Expedited Arbitration (US)
4. Expedited Construction Arbitration rules of The Arbitration Foundation of Southern Africa (AFSA)

Commercial Arbitration Rules

- Established, flexible, and universally recognized frameworks.
- Excellent for broad business and corporate disputes.
- Often more cost-effective for purely financial disputes.
- Ideal for issues like: equity buyouts, simple payment breaches, or clear-cut contract violations without technical defenses.
- Limitation: Often lack specific mechanisms required to address multi-layered technical complexities.

Construction Construction Rules

Construction arbitration procedures

- Regular/ Full procedures
- Procedures for Large, Complex Construction Disputes
- Document procedure
- Short procedure

Construction Construction Rules

Qualification and Appointment of Arbitrators

- Construction sector adopts a stringent approach to professional qualifications compared to general commercial arbitration.
- the CIAC of the Philippines and AAA mandate legal expertise plus deep sectoral knowledge.
- arbitrators are drawn from diverse fields: engineers, architects, and construction managers.
- AAA attorney-arbitrators are generally required to dedicate at least 50% of their practice to construction matters.

Construction Construction Rules

- ***Consolidation or Joinder procedures***

Under the AAA Construction Arbitration rules

- **Primary Purpose:** Efficiently manage complex, multi-party construction disputes to avoid conflicting outcomes.
- **The R-7 Arbitrator:** A specialized arbitrator appointed strictly to decide consolidation/joinder issues when parties cannot agree. They cannot serve as the Merits Arbitrator without mutual consent.
- **Non-Response Default:** Inactive internal parties are deemed to *waive* objections; non-responding external parties are deemed to *deny* the request.
- **Approval Outcomes:** If approved, the R-7 Arbitrator establishes the selection process for the Merits Arbitrators and allocates initial arbitrator compensation. The AAA may stay (pause) ongoing arbitrations during this review.

Construction Construction Rules

Consolidation or Joinder procedures

JCT Model Rules (UK)

- **Consolidation:** A single notice can cover multiple disputes under the same agreement.
- **Arbitrator Power:** Can consolidate different proceedings sharing common issues (with party consent), even if parties are not identical.
- **Flexibility:** The arbitrator can issue a single binding award, revoke consolidation if separate hearings are better, and exercise powers jointly or separately.

Construction Construction Rules

Interim and Emergency Measures of Protection

- Emergency Measures (Pre-Tribunal Phase)
  - appoints a single emergency arbitrator: "Special Master"
  - party will suffer immediate and irreparable loss without such relief.
- Interim Measures (Tribunal Phase):
  - any measures deemed necessary
  - interim financial measures

Construction Construction Rules

• *Evidence*

- AAA allows arbitrators to exclude evidence if the cost of inclusion outweighs its value.
- JAMS Engineering and Construction Rules focus on voluntary submissions for expediency and finality.
- CIDC-SIAC grants the Tribunal the explicit right to appoint its own independent experts.
- UNCITRAL requires experts to submit a statement of independence and qualifications before appointment.

Construction Construction Rules

- ***Expedited arbitration procedures***

- Pleadings (60 Days)
  - Parties must submit all pleadings within 60 days of the Preliminary Conference.
- Hearing (30 Days)
  - A formal hearing is convened within the following 30-day window.
- Final Award (10 Days)
  - The final award must be dispatched to the parties 10 days after the hearing.

Conclusion & Strategic Recommendation

- For purely financial disputes (e.g., simple payment breaches): The Commercial Arbitration approach is often more cost-effective and legally focused.
- For complex, technical, or multi-party issues (e.g., delays, defects): Specialized Construction Rules are the better fit.
- Final Takeaway: Choosing the right rules is not just a formality—it is a strategic decision that dictates the speed, cost, and success of the resolution.

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Thank you for your attention!

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ARBITRATING INTERNATIONAL CONSTRUCTION DISPUTES: CHOOSING AVENUES FOR CONTRACT CLAIMS AND TREATY CLAIMS

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TWO SENARIOS FOR ARBITRATING CONTRACT CLAIMS AND TREATY CLAIMS

ONE TRIBUNAL

TWO TRIBUNALS

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ISSUES ARISING FROM THE CHOICE OF CONTRACT OR TREATY-BASED ARBITRATION

1. CONSOLIDATION

2. ANTI-ARBITRATION INJUCNTION

3. TREATY MECHANISMS: UMBRELLA CLAUSE AND MFN CLAUSE

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Consolidating contract and treaty claims into one single arbitration

- Tribunal's power to consolidation
- Tests for consolidation
- Types of Consolidation
  - *Full Consolidation*
  - *Quasi-Consolidation: coordinated arbitration*

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Consolidation of Contract Claims and Treaty Claims

Claims under three distinct agreements in Noble Energy v. Ecuador

CLAMANT 1: Noble Energy (US company);
CLAIMANT 2: MachalaPower (a Cayman Islands company)
RESPONDENT 1: Ecuador;
RESPONDENT 2: Ecuador's National Electricity Council (CONELEC)

1. **A US-Ecuador BIT** dispute between CLAIMANT 1 and RESPONDENTS 1& 2 ;

2. A dispute between CLAIMANT 2 and RESPONDENTS 1& 2, under the **Concession Contract for the construction, installation and operation of an electric power generation plant**; and

3. A dispute between CLAIMANTS 1& 2 and RESPONDENTS 1& 2 , under the **Investment Agreement**.

Tribunal's power to consolidate

Noble Energy v. Ecuador, Decision on Jurisdiction dated March 5, 2008

ICSID Convention, Article 44: "**the Tribunal shall decide the question**" in the exercise of its general procedural powers. [paras. 190, 191];

Cf. Arbitration rules on consolidation (VIAC, HKIAC, SIAC, ICC, SCC…)

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Tribunal's tests to consolidate

Noble Energy v. Ecuador, Decision on Jurisdiction dated March 5, 2008

- ❑ Connectivity between the cases
- ❑ Objective of consolidation: the promotion of fair and efficient dispute resolution
- ❑ Consent of the disputing parties

Cf. Arbitration rules on consolidation (VIAC, HKIAC, SIAC, ICC, SCC…)

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Was there consent to dispose of the three disputes in one single proceeding?

Noble Energy v. Ecuador, Decision on Jurisdiction dated March 5, 2008

- No express consent (para.194)
- Implied consent established
  - ➢ the disputes at issue are closely related:
    - ❖ arise out of the same investment project and the same overall economic transaction (para.198)
    - ❖ Disputes under the Concession Contract and the Investment Agreement are closely linked (para.199)
  - ➢ Compatibility of dispute settlement provisions (para.200)
  - ➢ Disputing parties
    - ❖ Ecuador is a party to all the three legal instruments (para.201)
    - ❖ Ecuador accepted the possibility that an investment dispute be decided together with a contract dispute
      - ▪ BIT arbitration clause (para.202)
      - ▪ Domestic law (para.203-4)

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ANTI-ARBITRATION INJUNCTION

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Anti-Arbitration Injunction

- In two parallel arbitration proceedings under two distinct agreements
- Cases:
  - Mozambique v. Patel Engineering Limited (ICC Case No. 25334/JPA, contract-based arbitration, Procedural Order No. 14, dated November 24, 2022)
  - Patel Engineering Limited v. The Republic of Mozambique (PCA Case No. 2020-21, treaty-based arbitration, Procedural Order No. 6, dated November 30, 2022)

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Anti-Arbitration Injunction

Mozambique v. Patel, ICC Case No. 25334/JPA, PO No. 14

CLAIMANTS: Mozambique and MTC (Ministry of Transport and Communications)
RESPONDENT: PEL (Patel Engineering Limited, an Indian company)

- a project to develop a rail corridor in the Mozambique that was to span approximately 500 km and link Moatize, in the Tete province, to a new deep-water port in Macuse, in the Zambezia province
- 18 May 2022: CLAIMANTS, filed an application pursuant to Article 28(1), ICC Arbitration Rules 2017 to enjoin RESPONDENT from proceeding in its entirety in the PCA until a decision from the ICC Tribunal relating to the disputes arising out of the Memorandum of Interest (MOI).

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Anti-Arbitration Injunction

Mozambique v. Patel, ICC Case No. 25334/JPA, PO No. 14

The decision on whether to enjoin the Respondent depends on

- *(1.) there being a legal basis for the Tribunal's powers to grant such interim relief; and*
- *(2.) the conditions for the requested measures as required under the applicable standard being fulfilled.*

(para. 51)

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Anti-Arbitration Injunction

Mozambique v. Patel, ICC Case No. 25334/JPA, PO No. 14

LEGAL BASIS:

- Clause 10 of the MOI (the Arbitration Agreement)
- Art. 33(1) of Mozambican Arbitration Law
- Art. 28(1), ICC Arbitration Rules 2017

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Anti-Arbitration Injunction

Mozambique v. Patel, ICC Case No. 25334/JPA, PO No. 14

THE CONDITIONS FOR PROVISIONAL MEASURES (ANTI-ARBITRATION INJUNCTION):

- The Tribunal has jurisdiction
- The Applicant have a prima facie case on the merits regarding the right for which they seek protection
- Urgency in protecting that right and that otherwise the Applicant would suffered irreparable harm or at least substantive prejudice
- On the balance of equities it is necessary to take the requested measure.

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Anti-Arbitration Injunction

Mozambique v. Patel, ICC Case No. 25334/JPA, PO No. 14

The Respondent is enjoined from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorily for the purpose of the adjudication of Treaty Claims, ***until this Arbitral Tribunal has taken its decision on those matters***. [Correction to PO No. 14]

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Anti-Arbitration Injunction

Patel v. Mozambique, PCA Case No. 2020-21, PO No. 6

"There is a basic distinction in the type of disputes which can be resolved by arbitration. There can be international law disputes which derive from a treaty breach and there can be contractual disputes which derive from breaches of contract,

...we have, as an international law tribunal constituted under the BIT and the UNCITRAL rules, [...] the right and the duty to define our own jurisdiction. This is a basic principle of international arbitration."

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TREATY MECHANISMS : UMBRELLA CLAUSE AND MFN CLAUSE

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Contract Claims and Umbrella Clause

Strabag v. Libya, Award dated June 29, 2020

The dispute arises from multiple claims under the bilateral investment treaty between

RESPONDENT - the Republic of Austria and the State of Libya ("Treaty" or "BIT") for losses allegedly suffered by

CLAIMANT, Strabag SE ("Strabag"), a major international construction firm.

Claimant alleges multiple violations of the Treaty by Libya, primarily related to construction work performed under several large road and infrastructure contracts prior to the revolutionary violence that began in Libya in February 2011. Claimant also asserts claims under the Treaty for property lost or damaged during the course of the revolutionary violence in 2011 and subsequently.

[Award, para. 1];

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Contract Claims and Umbrella Clause

Strabag v. Libya, Award dated June 29, 2020

Umbrella Clause

Article 8(1) Austria – Libya BIT:

Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party"

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Contract Claims and Umbrella Clause

Strabag v. Libya, Award dated June 29, 2020

"Accordingly, from an international law perspective, [...] its treaty-based jurisdiction is not barred by the provisions in the several contracts or Respondent's Administrative Contracts Regulations referring disputes arising from or connected with the contracts to the jurisdiction of the Libyan courts. [para. 207];

HICAC 2026
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Contract Claims, Umbrella Clause and MFN Clause

İçkale İnşaat Limited Şirketi v. Turkmenistan, Award dated March 8, 2016

CLAIMANT - İçkale İnşaat Limited Şirketi (a Turkish company)

RESPONDENT - Turkmenistan

The dispute arises out of a series of thirteen construction contracts (the "Contracts") concluded by İçkale with various Turkmen State organs and State entities during the period from March 2007 to July 2008, and the alleged governmental interference with the performance of the Contracts, in breach of the Turkey-Turkmenistan BIT [Award, para. 3];

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Contract Claims, Umbrella Clause and MFN Clause

İçkale İnşaat Limited Şirketi v. Turkmenistan, Award dated March 8, 2016

The Claimant seeks to import the umbrella clause protection from other investment treaties concluded by Turkmenistan with third States on the basis of the MFN clause.

Tribunal: "there is no basis in the BIT for the Tribunal to apply any investment protection standards otherthan those specifically included in the BIT" (para. 341)

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Thank you for your attention!

Address: Lore
Lore

Phone number 02:4
024

Email: info

AGENDA
CHƯƠNG TRÌNH

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SECTION C - Topical issues in construction arbitration
PHẦN C - Các vấn đề tiêu biểu trong trọng tài xây dựng

MODERATOR/ĐIỀU PHỐI VIÊN

Mr./Ông **TRẦN THẾ NHÂN**

Quantum Expert at DLS Consultant
Chuyên gia định lượng thiệt hại tại công ty DLS

09:00AM - 10:30AM

SESSION C1
Expert Evidence in Construction Arbitration

PHIÊN C1

Chứng cứ chuyên gia trong trọng tài xây dựng

SPEAKER/DIỄN GIẢ

Mr./Ông **FREDERIC GILLION**

Partner at Pinsent Masons MPillay LLP
Luật sư thành viên Pinsent Masons MPillay LLP

Presentation 01
How to Manage Expert Evidence Effectively in Construction Arbitration

Tham luận 01
Cách quản lý chứng cứ chuyên gia hiệu quả trong giải quyết tranh chấp xây dựng bằng trọng tài

Ms./Bà **LESLEY TAN**

Partner at Wong Partnership LLP
Luật sư thành viên tại Wong Partnership LLP

Presentation 02
Bridging the Gap: Understanding the SCL Singapore Protocol for Experts' Joint Statements

Tham luận 02
Thu hẹp khoảng cách: Tìm hiểu về Nghị định thư SCL Singapore về Bản tuyên bố chung của Chuyên gia

Ms./Bà **TRẦN NGUYỄN THIÊN TRANG**

Manager, Delay Expert at Secretariat
Quản lý, Chuyên gia chậm trễ tiến độ Secretariat

Presentation 03
Technology and Expert Evidence in Construction Disputes: Between Promise and Practicality

Tham luận 03
Công nghệ và chứng cứ chuyên gia trong tranh chấp xây dựng: Giữa tiềm năng và tính khả thi trong thực tiễn

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HOW TO MANAGE EXPERT EVIDENCE EFFECTIVELY IN CONSTRUCTION ARBITRATION

Frédéric Gillion
Partner, Pinsent Masons LLP

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OVERVIEW

1 Why expert evidence often fails tribunals

2 Selecting the right expert

3 Procedural tools to manage expert evidence

4 Testing expert evidence at the hearing

5 The role of experts post-hearing

6 Practical takeaways

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(1) WHY EXPERT EVIDENCE OFTEN FAILS TRIBUNALS

- Evidence most often fails tribunals because it does not reduce complexity.
- In delay cases, this failure commonly arises where:
  - Experts rely on different factual records, baselines, or datasets;
  - Assumptions are implicit;
  - Methodology debates are not linked to their practical impact; or
  - Reports focus on advocacy rather than assistance.
- When expert evidence does not clearly explain why experts disagree, and what difference that disagreement makes, tribunals struggle to use it effectively.
- Effective expert evidence is evidence that helps the tribunal decide, not evidence that merely defends a party's position.

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(2) SELECTING THE RIGHT EXPERT

- The most effective experts are experts who:
  - Exercise sound analytical judgment;
  - Are prepared to concede points that should properly be conceded;
  - Can engage constructively with opposing experts; and
  - Can explain complex technical issues clearly and proportionately.
- A common mistake is selecting an expert primarily for perceived advocacy strength. This often damages credibility, particularly during expert meetings or concurrent evidence.

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(3) PROCEDURAL TOOLS TO MANAGE EXPERT EVIDENCE

- What tools exist to manage expert evidence in construction arbitrations?
  - Case Management Conference ("CMC") and mid-stream CMC; and
  - Experts Joint Statements.
- Some helpful sources:
  - "*Recommended Tools and Techniques for effective management*" published by the ICC in 2019; and
  - "*SCL(S) protocol for the use of experts' joint statements in arbitration*" published by the Society of Construction Law (Singapore) in January 2026.

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(3) PROCEDURAL TOOLS TO MANAGE EXPERT EVIDENCE
(a) Case Management Conference and mid-stream CMC

- The ICC Report recognizes this and advocates the use of mid-stream CMC.
- Held midway through the arbitration process, typically around the disclosure phase, to review the progress of the case and refine the procedure going forward.
- For reference, the ICC Report includes the following:

> 8.3 Subsequent CMCs can be convened in order to take stock as the arbitration progresses, e.g. 1) to narrow the issues; 2) to define further evidence (such as expert evidence) or further written submissions; 3) to isolate any preliminary issues which should be heard or decided prior to the main hearing; and 4) to deal with matters that cannot be resolved by correspondence. A pre-hearing CMC may also be

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(3) PROCEDURAL TOOLS TO MANAGE EXPERT EVIDENCE
(b) Managing expert meetings and joint statements

- The SCL(S) Protocol treats expert joint statements as a decision support tool for the tribunal
- Core objectives:
  - Narrow the issues genuinely in dispute;
  - Expose differences in methodology, assumptions, and inputs;
  - Record agreed facts so the tribunal doesn't have to reconstruct them; and
  - Reduce expert "advocacy" and improve transparency.
- The SCL(S) Protocol encourages joint statements:
  - after exchange of expert reports; and
  - before the hearing, with enough time for proper engagement.
- They are not meant to be rushed or treated as an annex to closing submissions.

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(3) PROCEDURAL TOOLS TO MANAGE EXPERT EVIDENCE
(c) How the joint statement process should work (SCL(S) Protocol)

1. Expert-to-expert engagement (without counsel)
   - A core SCL (S) Protocol principle is that experts meet directly without lawyers.
   - The purpose is to preserve independence and avoid "negotiated" opinions.

2. Clear identification of agreements
   - Experts should record agreed facts, documents, methodology and intermediate results.
   - This prevents re-litigation at the hearing and allows tribunals to focus on true disputes.

3. Precise articulation of disagreements
   - Where experts disagree, they must explain what exactly they disagree on and why.
   - Vague formulations are discouraged

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(3) PROCEDURAL TOOLS TO MANAGE EXPERT EVIDENCE
(d) Role of counsel (SCL(S) Protocol)

- Counsel's proper role is limited to:
  - Agreeing procedural directions;
  - Defining the issues to be addressed; and
  - Ensuring timing and logistics work.
- Counsel should not:
  - Draft the joint statement;
  - Negotiate its wording; or
  - Steer experts toward agreement or disagreement.
- Tribunals tend to discount joint statements that read like counsel submissions.

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(4) TESTING EXPERT EVIDENCE AT THE HEARING

- Expert witness conferencing / hot tubbing, refers to taking evidence from experts during the hearing from similar disciplines together.
- This enables each expert to engage both with the tribunal and with each other in a forum like discussion on the differences in their analysis and conclusions.
- And this allows in turn tribunals to:
  - Ask the same question of both experts;
  - Immediately test explanations; and
  - Understand differences without filtering through counsel.

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(4) TESTING EXPERT EVIDENCE AT THE HEARING
(a) When does witness conferencing add value?

- Hot-tubbing works best where:
  - The factual or technical landscape is already well defined, and
  - The real dispute is how to interpret or weigh the same material.
- Tribunals like seeing experts test each other's logic in real time.

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(4) TESTING EXPERT EVIDENCE AT THE HEARING
(b) Conferencing is effective following a positive joint statement

- Witness conferencing works best then as a second stage, not a substitute:
  - Joint statement will have identified agreed facts and narrowed issues;
  - Conferencing focuses only on residual disagreements; and
  - The tribunal uses the joint statement as a live roadmap.
- Without this foundation, conferencing turns into a disorganised re-hearing of the reports.

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(4) TESTING EXPERT EVIDENCE AT THE HEARING
(c) Issues of professional judgment rather than credibility

- Tribunals find hot-tubbing particularly valuable when deciding:
  - Whether assumptions are reasonable;
  - How sensitive conclusions are to changes in inputs; and
  - Which approach is more robust, not who is "right".
- This is why it is especially effective for delay and quantum experts, less so for fact witnesses

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(5) ANY ROLE FOR EXPERTS POST-HEARING?

- What use remains of expert witnesses after they have provided their testimony?
- Experts may have a valuable role to assist the tribunal in their calculations.
- Post-hearing involvement may be structured in an Experts Access Protocol if it contains an agreement that the tribunal is able to communicate with the quantum experts solely for the purpose of their performing calculations based on existing material contained in their expert reports.

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(5) PRACTICAL TAKEAWAYS

- Expert evidence must reduce complexity, not multiply it.
- Make assumptions explicit and outcome linked.
- Choose judgment over aggression.
- Use mid-stream CMCs to control expert sprawl.
- Treat joint statements as decision tools, not formalities.
- Protect expert independence in joint processes.
- Force precision on disagreement.
- Use hot tubbing selectively.
- Delay and quantum are prime candidates for conferencing.
- Post hearing expert input can assist - if tightly controlled.

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Questions

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Bridging the Gap: Understanding the SCL Singapore Protocol for Experts' Joint Statements

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Partner, WongPartnership LLP

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WONG PARTNERSHIP

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Overview of the SCLS Protocol for Experts' Joint Statements

In January 2026, the Society of Construction Law Singapore (SCLS) released the Protocol for the Use of Experts' Joint Statements in Arbitration.

Recognising that expert evidence is the cornerstone of construction dispute resolution, this Protocol provides a much-needed practical framework to enhance procedural clarity and efficiency.

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Drafting timeline

❖ **January 2019**

SCL(S) published the article *"Experts' joint statements and discussions: What role should the lawyers play?"* in its newsletter, sparking discussion on the topic.

❖ **2019–2020**

– SCL(S) conducted a survey of the construction and arbitration community to assess demand for a protocol.

– 95% of respondents (experts, consultants, arbitrators, lawyers) supported drafting such a protocol.

– Thereafter a working group under the Thought Leadership Committee was formed to draft the initial protocol.

❖ **2024**

At the SCL(S) Annual Conference, an eminent panel of legal practitioners discussed and provided feedback on the draft protocol.

❖ **2025**

The Working Group invited members, and other stakeholder individuals, organisations and institutions to provide further comments; feedback was carefully considered and incorporated.

❖ **January 2026**

First edition of the Protocol launched, providing practical guidance for stakeholders in Singapore domestic and international arbitration.

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Justice Philip Jeyaretnam
President of the Singapore International Commercial Court

"This highlights the importance of early and effective case management concerning the scope of expert evidence and how it will be adduced… Dealing with expert evidence efficiently and effectively is one of the most important tasks of case management for matters involving the construction of energy infrastructure. I commend the SCL(S) for addressing this issue in its draft protocol and through the organisation of this conference."

---Keynote Address for the SCL(S) Conference 2025

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Protocol published in January 2026 at Asia Pacific Institute of Experts (APIEx)

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Asia Pacific Institute of Experts

Tunnelling and Underground Construction Society (Singapore)

ciarb. Singapore Branch

NUS National University of Singapore

Singapore Institute of Building Limited

RICS

Society of Project Managers Singapore

CIOB THE CHARTERED INSTITUTE OF BUILDING

Singapore Institute of Surveyors and Valuers

Lighthouse CLUB SINGAPORE

SIAC 1981 ASIAN SENSIBILITIES • GLOBAL STANDARDS

THE SINGAPORE CONTRACTORS ASSOCIATION LTD

AWiCS ASSOCIATION OF WOMEN IN CONSTRUCTION (SINGAPORE)

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For full text of the Protocol, visit:

https://www.scl.org.sg/public-resources/protocols.html

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Industry Pain Points to Address

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Perceived (or Actual) Partisanship

Party-appointed experts may consciously or unconsciously align with the appointing party's case.

Even though their duty is to the court/tribunal, proceedings often shift toward attacking credibility rather than testing the substance of the expert's reasoning.

→ Focus moves from analysis to allegation of bias, wasting time and resources.

Perceived (or Actual) Partisanship

The Singapore High Court observed in *Gunapathy Muniandy v Khoo James* [2001] SGHC 165:

> "Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*; and when this is the case, it is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes and interests of the parties who call them. **They do not, indeed, wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject in one point of view, that, when conscientiously disposed, they are incapable of expressing a candid opinion.** Being **zealous partisans**, their belief becomes synonymous with faith as defined by the Apostle, and it too often is but 'the substance of things *hoped for*, the evidence of things *not seen'*. To adopt the language of Lord Campbell "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence" [*Tracy Perrage Case* (1843) 10 Cl&F 154, 191; Tay s 58]."

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Perceived (or Actual) Partisanship

"We find such a **sweeping generalisation** redolent of a predisposition to shore up the respondent's stance. This belies Singh's role as an independent expert. In addition, Singh's inclination to make **suppositions or assumptions in favour of the respondent** is apparent…Finally, we observed that Singh had **selectively quoted**, in support of his conclusions, portions of the SSAs while **omitting to include qualifications which were adverse to the respondent's case**.

Whilst we recognise that a **certain degree of partisan advocacy may be an inevitable consequence** of adducing expert evidence in the gladiatorial context of an adversarial system, we must emphatically reiterate that the court will not hesitate, in an appropriate case, to **disregard or even draw an adverse inference** against expert evidence that exceeds the judicially determined boundaries of coherence, rationality and impartiality. When that happens, experts should note that the primary casualty will be their professional reputation."

-- *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR 460

Divergent Starting Points & Unequal Information

Experts are initially briefed separately by opposing parties and may rely on different assumptions, datasets, or documentary access.

Significant hearing time is spent reconciling factual foundations before technical disagreements can even be addressed.

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Misaligned Framing of Issues

Experts may define questions differently, apply different methodologies, or structure their reports in incompatible ways.

→

Opinions become difficult to compare side-by-side; experts “talk past each other”, frustrating the tribunal.

Procedural Inefficiency & Duplication

Two fully developed expert cases often mean:

- duplicated analysis
- overlapping reports
- extended cross-examination
- lengthy joint statements drafted late in the process

→

Escalating costs and procedural drag without proportional benefit.

Lack of Structured Case Management

Absent clear procedural guidance:

- lawyer involvement may be unclear
- scope of expert evidence may be unfocused
- joint statements may lack structure

→ Without early direction, expert evidence may increase complexity rather than clarify issues.

Lack of Structured Case Management

"One obvious benefit of having the expert give his evidence through an affidavit is that he would be able to condense the advice previously given to his client into a single document. The court should ideally have one opinion from each side containing all the relevant arguments. In the present case, as mentioned at [53] above, we were faced with **five different documents from the two sides**, **springing from an exchange of correspondence** between the parties. This was **messy and undesirable**."

--Pacific Recreation Pte Ltd v S Y Technology Inc and Another Appeal [2008] SGCA 1

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Core Principles

1. Experts' Declaration of Competence and Independence

Principle:

*Experts providing a joint report should each include a **declaration** to the effect that:*

*(i) all matters they have stated are **within their area of expertise**;*
*(ii) the statements are their true and professional opinion which **has not been influenced by any Party** to the arbitration;*
*(iii) there is **no arrangement** where the payment of the **Expert's fees are contingent** on the outcome of the case;*
*(iv) they are **not aware of any issues of bias** or conflict of interest other than those already disclosed in their respective reports; and*
*(v) they have **not been instructed to avoid or otherwise defer from reaching agreement** on any matter within their competence.*

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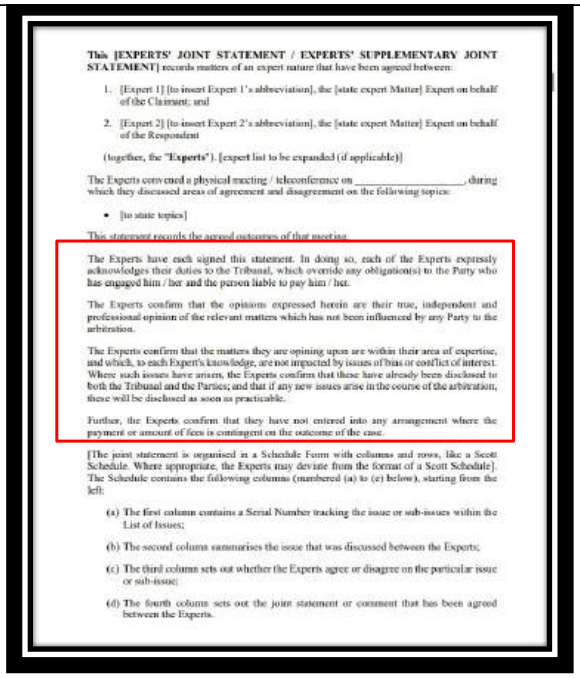
Proposed declaration included in the form for experts' joint statement



This [EXPERTS' JOINT STATEMENT / EXPERTS' SUPPLEMENTARY JOINT STATEMENT] records matters of an expert nature that have been agreed between:

1. [Expert 1] [to insert Expert 1's abbreviation], the [state expert Matter] Expert on behalf of the Claimant; and
2. [Expert 2] [to insert Expert 2's abbreviation], the [state expert Matter] Expert on behalf of the Respondent

(together, the "**Experts**"). [expert list to be expanded (if applicable)]

The Experts convened a physical meeting / teleconference on _____, during which they discussed areas of agreement and disagreement on the following topics:

- [to state topics]

This statement records the agreed outcomes of that meeting.

The Experts have each signed this statement. In doing so, each of the Experts expressly acknowledges their duties to the Tribunal, which override any obligation(s) to the Party who has engaged him / her and the person liable to pay him / her.

The Experts confirm that the opinions expressed herein are their true, independent and professional opinion of the relevant matters which has not been influenced by any Party to the arbitration.

The Experts confirm that the matters they are opining upon are within their area of expertise, and which, to each Expert's knowledge, are not impacted by issues of bias or conflict of interest. Where such issues have arisen, the Experts confirm that these have already been disclosed to both the Tribunal and the Parties; and that if any new issues arise in the course of the arbitration, these will be disclosed as soon as practicable.

Further, the Experts confirm that they have not entered into any arrangement where the payment or amount of fees is contingent on the outcome of the case.

[The joint statement is organised in a Schedule Form with columns and rows, like a Scott Schedule. Where appropriate, the Experts may deviate from the format of a Scott Schedule]. The Schedule contains the following columns (numbered (a) to (e) below), starting from the left:

(a) The first column contains a Serial Number tracking the issue or sub-issues within the List of Issues;

(b) The second column summarises the issue that was discussed between the Experts;

(c) The third column sets out whether the Experts agree or disagree on the particular issue or sub-issue;

(d) The fourth column sets out the joint statement or comment that has been agreed between the Experts.

If the Tribunal is satisfied that the opinion or testimony of an Expert is not in accordance with the terms of the declaration, the Tribunal may **disregard the Expert's opinion and testimony either in whole or in part**, or **determine the weight** to be placed on such opinion and testimony, as it considers appropriate in all the circumstances.

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2. Communication Between Experts for the Preparation of the Experts' Joint Statement

Principle:

*Experts should be able to **communicate freely to comprehensively discuss** the issues and their areas of agreement and / or disagreement (and not be limited to answering questions posed by counsel) for the purposes of preparation of the Experts' Joint Statement.*

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2. Communication Between Experts for the Preparation of the Experts' Joint Statement

Guidance:

- Unless ordered by the Tribunal, or agreed by all Parties, **neither the Parties nor their counsel should attend Experts' discussions**. If the counsel do attend, they should as a norm not intervene in the discussion, except to answer questions put to them by Experts or to advise on matters of law. Experts may also, if they wish, hold part of their discussions in the absence of counsel.
- Experts should also **not be limited to answering only those questions which have been posed by counsel**. Experts should be free to pose to each other and answer questions in their Expert discipline which counsel may not be able to ask or understand in order to flush out and address the core Expert issues.
- Experts may wish to **consider discussing issues such as the identification of common assumptions,** common datasets, and agreed methodologies where possible.
- **Communications** (including emails, and text messages), drafts, working papers or any other documentation created by an Expert for the purposes of preparing the Experts' Joint Statement, including those exchanged between Experts, **are provided on a "without prejudice" basis** and must not be used in the proceedings unless the Parties otherwise agree.

3. Communication Between Parties, Their Counsel and Their Experts

Principle:

*Parties and **their counsel should not seek to influence their respective Experts** regarding the contents of the Experts' Joint Statement (including the negotiation and drafting of the same).*

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3. Communication Between Parties, Their Counsel and Their Experts

Guidance:

- Whilst the Parties' counsel may assist the Experts in identifying issues which the Experts' Joint Statement should address, parties and their counsel must avoid influencing their respective Experts regarding its contents. In particular, the Parties' **counsel must not be involved in the process of negotiating or drafting the Experts' Joint Statement**.
- On the other hand, the Parties' **counsel should provide the Experts with such instructions** (including on fact or legal assumptions) as may be requested, all documents (including those referred to by the Parties in their pleadings or memorials, as well as documents produced in disclosure), and any factual witness statements, **that may be relevant and material** to the Experts' Joint Statement.
- The Parties' counsel may only invite Experts to consider **amending any draft Experts' Joint Statement in exceptional circumstances** where there are serious concerns that the Tribunal may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all Experts giving the joint statement.

4. Communication Between the Tribunal and the Experts

Principle:

*There should **not be any unilateral communications between an Expert and the Tribunal**, and all communications should generally be sent to all Experts. The Tribunal shall be at liberty to intervene appropriately in order to facilitate the production of the Experts' Joint Statement, subsequent Experts' Joint Statements, and Experts' reports on any issues that remain to be determined.*

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4. Communication Between the Tribunal and the Experts

List of directions the Tribunal can give to experts:

(1) whether the Tribunal is to have any conference(s) with the Experts outside of the evidentiary hearing;

(2) the stage at which such conference(s) is/are to take place (e.g. whether prior to Experts' discussions taking place, prior to production of the Experts' Joint Statement, after production of the Experts' Joint Statements but prior to production of further Experts' Joint Statements, prior to the hearing, and so on);

(3) the basis on which any such conference(s) is to take place, including whether such discussion is "on the record" or "off the record";

(4) the matters to be discussed at the conference(s);

…

4. Communication Between the Tribunal and the Experts

List of directions the Tribunal can give to experts:

…

(5) whether the Parties and/or the Parties' counsel are to attend the conference(s);

(6) the logistics in relation to the holding of such conference(s) (e.g. how many conferences are to be held, venue(s), who is to arrange for the venue or conference facilities); and

(7) the use of electronic means of communication for such conference(s).

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5. Consultation between the Experts / Methodology of the Experts

Principle:

The traditional approach *is for the Tribunal to require the* ***Experts to file their reports and then to proceed to a conference of Experts*** *to produce the Experts' Joint Statement.*

However, what ***sequence*** *is adopted* ***depends very much on the nature of the case*** *and the kind of Expert evidence required.*

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5. Consultation between the Experts / Methodology of the Experts

Guidance:

- Tribunals may wish to consider the **implication of the use of the pleadings or memorials procedure.** The pleadings procedure may allow earlier engagement between the Experts and a first Expert's Joint Statement prior to the Experts' reports. The memorials procedure may offer less opportunity for early meetings, although such meetings still provide value, particularly in promoting alignment on methodology, and for the identification of common datasets to be provided to the Experts.

- It is generally considered sensible, for the Experts **to meet at least once** before they exchange their reports, which provides an early opportunity for their agreements to be recorded by way of an Experts' Joint Statement. However, in less complex cases, the traditional sequence of the submission of the Experts' reports before the conference of Experts may be more useful, as it allows a more focused discussion between Experts before they issue the Experts' Joint Statement.

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6. Content of the Experts' Joint Statement

Principle:

The Experts' Joint Statement should focus on the issues within the Experts' remit and, in particular, ***narrowing the issues in dispute where possible*** *to do so. Where the Experts are unable to reach an agreement on particular issues, each Expert should* ***provide full reasons (and references, if applicable) as to why he / she disagrees*** *with the other on that issue and, where possible, the effect of that disagreement on the outcome of the case or issue.*

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WONG PARTNERSHIP

6. Content of the Experts' Joint Statement

Guidance:

- If there is **disagreement on methodology**, the Tribunal may wish to consider whether to direct each **Expert to state in the alternative the conclusions if the other Expert's methodology is adopted**.
- The use of **more than one Experts' Joint Statement may be considered,** where a final Experts' Joint Statement may seek summarise the positions with key decision points and rival propositions, with references to key statements and documents, to assist the Tribunal. A Tribunal may consider using this to set the agenda for the Experts' evidence to be given at the hearing.

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7. Post-hearing Issues

Principle:

*Post-hearing, the **Tribunal should be free to consider approaching the Experts to ask that the Experts confer further** to reach an agreed outcome (where possible) on particular issues which are yet to be determined by the Tribunal.*

7. Post-hearing Issues

Guidance:

- Post-hearing, the Tribunal may pose further queries to the Experts relating to the Experts' Joint Statement(s) and their evidence at the hearing. The Tribunal may direct the Experts to confer further and provide a supplementary statement to the Tribunal either jointly or separately. If so, the Tribunal should provide clear written instructions to the Experts as to the precise issues which it would like the Experts to consider. Such instructions can be set out in an annexure to the Experts' Supplementary Joint Statement.

- The Tribunal may wish to consider, after consulting the Parties, giving express directions in respect of matters such as:
  (1) how the Tribunal's queries and the Experts' answers are to be communicated, e.g. in writing, orally and/or in-person;
  (2) whether the Parties are to be present during and/or given access to the communications between the Tribunal and Experts

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Form of Tribunal instructions to experts

ANNEXURE

Instructions to Experts

In this Annexure, the Experts set out all instructions received from the Tribunal and each appointing Party.

1. **Instructions from the Tribunal (where applicable)**

Name of Arbitrator(s)	[Insert name of arbitrator(s)]
Instructions	[Insert instructions]

2. **Instructions from Party A to Expert 1**

Name of Party A	[Insert name of Party A]
Name of Party A's Counsel	[Insert name of Counsel]
Instructions	[Insert instructions]

3. **Instructions from Party B to Expert 2**

Name of Party B	[Insert name of Party B]
Name of Party B's Counsel	[Insert name of Counsel]
Instructions	[Insert instructions]

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Model Procedural Order

Model Order for Incorporation of Protocol

Except as otherwise directed, the SCL(S) Protocol for the Use of Experts' Joint Statements in Arbitration shall apply [as guidance on arbitral best practice, which the Tribunal and the Parties shall not be bound to follow].

Model Order for preparation and submission of Experts' Joint Statement

By the date stipulated in [xx], experts of the same discipline shall meet (in person or by video conference), [in the absence of the Parties and their counsel], and shall prepare and submit to the Tribunal and the Parties a joint statement setting out:

(a) those matters upon which they agree and the agreed opinions they have reached on those issues; and

(b) those matters upon which they disagree, with a summary of their reasons for their disagreement.

[Meetings between the Parties' experts shall be without prejudice to the Parties' respective positions in the arbitration and privileged from disclosure to the Tribunal.]

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The Form of Experts' Joint Statement

[The joint statement is organised in a Schedule Form with columns and rows, like a Scott Schedule. Where appropriate, the Experts may deviate from the format of a Scott Schedule]. The Schedule contains the following columns (numbered (a) to (e) below), starting from the left:

(a) The first column contains a Serial Number tracking the issue or sub-issues within the List of Issues;

(b) The second column summarises the issue that was discussed between the Experts;

(c) The third column sets out whether the Experts agree or disagree on the particular issue or sub-issue;

(d) The fourth column sets out the joint statement or comment that has been agreed between the Experts.

(e) The fifth and final column sets out a series of columns in which the Experts may clarify the disagreement between them in respect of that particular issue (as the case may be) and, as appropriate, add any further individual comments by way of additional clarification. Where quantifiable, the Experts should provide an indication of the effect of that disagreement on the outcome of the case or issue.

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The Form of Experts' Joint Statement

SCHEDULE

No.	Description	Agree / Disagree	Agreement Reached	Respective Positions in case of disagreement	
				[Expert 1's Position]	[Expert 2's Position]
A	**[insert Issue 1]**				
A1	**[insert sub-issue 1]**				
A1.1	[insert description]	[insert Y or N]	[Insert comment on agreed areas]	[Insert comments on any areas of disagreement and reasons why] [Insert reference in Expert's own report or elsewhere in the record (if applicable)]	[Insert comments on any areas of disagreement and reasons why] [Insert reference in Expert's own report or elsewhere in the record (if applicable)]

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Practical Adoption of the Protocol

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Suggestions for Practical Adoption

- Early Integration: Incorporating Protocol principles into initial procedural orders.
- Internalisation: Training counsel and experts to adopt the Protocol's mindset.
- Flexibility: Customising the framework to suit cases of varying complexity.

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Conclusion

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The SCLS Protocol is more than a procedural document; it is a consensus-based tool for reducing costs and supporting tribunals.

Its principles are designed to respond to common challenges in the preparation and use of expert statements in arbitration.

It provides useful templates, schedules, and model orders designed to standardise practice and enhance efficiency in arbitration.

It offers a useful framework for practitioners seeking to align with best practices.

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TECHNOLOGY AND EXPERT EVIDENCE IN CONSTRUCTION DISPUTES: BETWEEN PROMISE AND PRACTICALITY

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Secretariat, 60 Robinson Road, Singapore

Abstract: *In an age where artificial intelligence frequently comes up in our conversations, it is worth taking a step back and reminding ourselves that improving the quality of our work does not necessarily require the most sophisticated technologies. Instead, meaningful progress often comes from better understanding and more effective use of the tools that are already available.*

In the construction industry, projects often generate a substantial amount of information from various tools and systems, which have increasingly evolved from standalone applications toward more integrated delivery ecosystems. The increasing adoption of digital technologies in construction projects has changed not only how projects are delivered, but also how disputes can be resolved. Against this background, this paper examines how technological developments influence the expert practice in construction disputes where technologies serve both as sources of data and as tools that assist experts in preparation and presentation of expert evidence.

While emerging technologies including artificial intelligence may offer potential, their extent of adoption remains uncertain. Ultimately, the fundamental purpose of expert evidence is to guide the tribunal or court through a transparent, well-reasoned analysis supported by sensible assumptions, reliable facts and being capable of withstanding thorough scrutiny.

Keywords: *Construction arbitration, Expert evidence, Technology, Digital transformation, Artificial intelligence*

1. INTRODUCTION

There is a common perception that the construction industry lags behind when it comes to technological innovation compared to other industries. Yet over recent decades, digital tools have gradually become embedded in many aspects of construction projects, supporting design development, project planning, document management and project administration.

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[1] Ms. Tran specialises in construction and engineering disputes across sectors such as transport infrastructure, real estate developments, process plants and energy projects. Her experience covers delay analysis, claim evaluation, client advisory regarding matters of delay, as well as supporting delay experts in formal dispute resolution proceedings.

[2] Dr. Lancaster is a delay and disruption expert focused on the Oil & Gas and Energy sectors, and has been appointed as an expert in arbitrations on over 50 occasions. He has over 40 years of industry experience with wide geographical experience having worked on energy related projects throughout, Europe, Africa, the Middle East and the Asia Pacific region.

Despite these advances, the construction industry continues to face challenges that may ultimately lead to disputes.[3] International construction disputes often involve complex factual and technical issues that require specialised expertise. In such cases, the main role of an expert witness is not merely about presenting complex numbers and calculations. The expert must also assist the court or tribunal in understanding the technical background and provide clear opinions explaining the methodology adopted, supported by reasonable assumptions and reliable facts.[4] The role of technology in an expert's work remains an important and ongoing consideration, and their applications must be carefully assessed, particularly in relation to the expert's independent opinion.

Against this background, this paper examines how technological developments influence the work of experts in construction disputes. First, the paper provides an overview of how digital transformation has changed the nature of project records relevant in construction disputes. Secondly, it explores how experts can better leverage technology to manage and interpret large datasets at the input stage. Thirdly, it examines the adoption of simulation and modelling tools as part of the analysis stage, followed by the presentation stage where complex evidence must be communicated clearly and effectively to the court or tribunal. Finally, the paper reflects on the implications of emerging technologies, including artificial intelligence, in light of recent professional guidance in the field of expert evidence.

2. DIGITAL ADOPTION IN CONSTRUCTION PROJECTS

This discussion focuses on technologies that generate and manage project data – as these would affect the nature of the information that may subsequently form part of the evidentiary records in construction disputes.

Construction practitioners rely on a wide range of established technologies throughout the project's life cycle, ranging from computer-aided design (CAD) systems, planning and scheduling software, site monitoring tools, as well as electronic document management systems (EDMS). In recent years, these tools have increasingly evolved from standalone applications towards more integrated project ecosystems such as Building Information Modelling (BIM), Common Data Environments (CDEs), internet of things (IoT), smart

[3] Stavros Brekoulakis and David Brynmor Thomas KC, 'Introduction' in *The Guide to Construction Arbitration* (6th edn, Global Arbitration Review 2025) < https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/sixth-edition/article/introduction>

[4] Royal Institution of Chartered Surveyors, 'The Role and Responsibilities of Expert Witnesses in the Built Environment' (20 June 2025) <https://www.rics.org/news-insights/role-responsibilities-expert-witnesses-built-environment>

sensors and mobile apps. Project documents can now be stored and managed across cloud-based platforms such as Procure, Aconex, Asite, ProjectWise, Trimble Connect, and Autodesk Construction Cloud. Such digital shifts aim to enable stakeholders to share and manage information through connected digital environments that improve accessibility, transparency and traceability. At the same time, these platforms are increasingly supported by data analytics and automation capabilities aimed to improve productivity and support data-driven decision-making. Alongside this, modern tools such as unmanned aerial vehicles (UAVs), augmented and virtual reality (AR and VR), laser scanning, and digital simulations have allowed site progress and conditions to be captured and visualised more comprehensively.

In a recent report on *State of Digital Adoption in the Construction Industry 2025*, a survey of 894 construction firms across the Asia-Pacific region found that companies now use an average of 6.2 digital technologies in their operations. This represents an increase of about 20% from a year earlier, where the average was 5.3 digital technologies, reflecting growing integration of tools such as cloud-based construction management platforms, mobile applications, data analytics, and BIM (refer to Table 1 below).[5]

Digital technology	Using it already	Not yet, but planning to implement
Drones	37%	32%
Digital twin	27%	33%
3D printing	39%	29%
Building Information Modelling (BIM)	45%	26%
Non-destructive testing	36%	30%
Artificial Intelligence and machine learning	37%	33%
Prefab and modular construction	42%	31%
Robotics and automated systems	25%	29%
Construction wearables	44%	29%
Construction management cloud software	49%	28%
Advanced building materials	41%	30%
Blockchain	29%	32%
Augmented, virtual and mixed reality	29%	34%
Internet of things and smart sensors	45%	26%
Data analytics	48%	28%
Mobile apps	49%	26%

Table 1: Use and intentions of digital technologies responses for all businesses[6]

[5] Deloitte Access Economics, State of Digital Adoption in the Construction Industry 2025 (2025) (engineering and construction business survey, sample: 894 firms).

[6] Ibid.

The increasing adoption of digital technologies in construction projects is transforming not only how projects are delivered, but also how project records are generated. Indeed, the records available in modern construction disputes are often far more substantial and complex.[7] As a result, expert witnesses are increasingly required to handle extensive project datasets, often affected by gaps and inconsistencies. This requires not only a proper understanding of the systems that generate the data, but also the capability to use necessary tools in reconciling and interpreting large datasets in order to arrive at meaningful conclusions and communicate them clearly.

3. TECHNOLOGY ACROSS THE STAGES OF EXPERT WORK

A helpful way to structure the discussion is to consider expert work in three stages: gathering input, conducting the analysis, and presenting findings (as shown in Figure 1 below).

- The **input stage** involves gathering and organising project records, where technologies serve both as sources of data and as tools to assist experts.
- The **analysis stage** focuses on examining and interpreting this data to develop conclusions, including the use of available modelling and simulation tools.
- The **delivery stage** then addresses how the expert communicates the conclusions of their analysis to the court or tribunal, where technology can support the explanation of complex technical issues through visualisation and structured reports or presentations.

Figure 1: Stages of expert work – input, analysis and output

3.1 Managing a large volume of complex data

As with any profession, effective data management is fundamental to the work of expert, affecting both the efficiency and quality of the analysis. In many engagements, experts

[7] Queen Mary University of London and Pinsent Masons, *2019 International Arbitration Survey: International Construction Disputes* <www.qmul.ac.uk/arbitration/research/2019>

receive large volumes of documents from clients, with varying formats and levels of detail. While these records may have been generated over many years, experts are often required to review them within a much shorter period, often in a matter of a few months or even weeks. To address this challenge, technology can be used to extract information from these varied sources and organise it within a database. This would in turn allow the relevant information to be more easily identified, navigated, analysed, and referenced. For example, a common exercise at the outset of an analysis or causes of project delays is the extraction of as-built information from progress reports in order to develop a chronological understanding of what occurred on site throughout the construction project. However, these progress reports are rarely uniform in format as they may have been produced by different parties as PDFs, spreadsheets or scanned images each with their own structure and level of detail. Manually extracting and standardising this information is extremely time-consuming and subject to inconsistencies. As a starting point, spreadsheets can be used for organising and structuring the extracted data. Where reports are issued as scanned documents or image-based PDFs, existing optical character recognition (OCR) technology can be used to convert image text into readable form.

For more complex or large-scale projects, technology can automate much of the data mining process – custom scripts may be used to process the different report formats, identify relevant fields, and extract the required data. Thereafter, the data can be cleaned, structured, and stored in a relational database, creating a comprehensive dataset that can be easily queried and cross-referenced for further analysis. Through this automated approach, a task that would otherwise require extensive manual effort can be completed far more efficiently and with significantly reduced risk of human error.

However, while technology can greatly enhance efficiency in processing large datasets, it cannot eliminate the factual uncertainty that often exists in disputed projects which may not be adequately addressed in a fully automated process. Maintaining transparency and traceability in the analytical process therefore remains essential, and this still requires expert judgement. Experts must therefore verify the accuracy of the extracted information thoroughly, particularly where it is relevant to their key findings. When applied in this manner, technology supports the analytical process without replacing or undermining the expert's opinion.

3.2 Modelling and simulations

The analysis stage focuses on examining and interpreting this data to develop conclusions, including the use of available modelling and simulation tools, as discussed further below.

(a) Project planning software and schedule analytics

Project planning software is widely used to develop and manage construction schedules. These systems allow project teams to define project activities, establish logical relationships between tasks, allocate resources and monitor project progress. Therefore, these schedules are key to understanding how the project was planned to be carried out, and how that plan changed over time.

From a data analytics perspective, it is worth noting that project planning software (such as the ubiquitous Primavera P6) operates on a relational database, which allows the underlying schedule data to be queried directly. This enables experts to review cumulative information across multiple schedule updates, for example to track changes to key milestones or specific activities over time. In this sense, the programme serves primarily as a means of accumulating, comparing, and analysing existing data rather than altering the underlying project records. In practice, many in-house schedule analytics tools have been developed to enable users to analyse multiple schedules simultaneously, as well as generating reports that:[8]

- evaluate the quality and reliability of schedules;
- assess compliance with industry standards;
- identify inconsistencies in logic and coding;
- analyse changes in key parameters over time and detect potential risks such as slippage or resource conflicts.

Beyond their analytical use, project planning software can also be used to simulate the potential impacts of different delay events. By impacting the programme with the relevant delay events, different scenarios can be tested quickly, and expected outcomes can be generated based on the inputs provided. The key advantage of this approach is its speed and efficiency, allowing users to evaluate multiple scenarios with minimal effort while maintaining a structured assessment framework. Nevertheless, the reliability of these programmes for the purpose of simulations depends heavily on how they were developed and maintained during the project. Experts frequently encounter issues such as incomplete updates, unrealistic or overly constrained logic, and programmes that were not consistently used as genuine project-control tools. As a result, while scheduling software provides

[8] PwC, Capital Projects: Schedule Analytics Tool <https://www.pwc.in/assets/pdfs/ras/governance-risk-and-compliance/pwc-capital-projects-schedule-analytics-tool.pdf>

useful material, the quality and credibility of the programme must be carefully assessed before it is relied upon in any assessment.

(b) Engineering and visualisation models

In disputes involving detailed engineering or coordination issues, expert analysis may benefit from the use of engineering and visualisation models, such as finite element analysis (FEA) and building information modelling (BIM). These approaches can also facilitate the consideration of alternative scenarios and sensitivity analysis, which tribunals often find helpful in understanding how different assumptions affect the expert's conclusions and in identifying the key drivers of the analysis.

FEA is a numerical modelling technique widely used in structural and geotechnical engineering to simulate how structures or materials respond to loads and physical conditions. By breaking complex systems into smaller elements known as meshing, FEA can assist experts in examining issues such as structural, vibration, fracture mechanics, thermal, buckling, and transient analysis.[9] As with other forms of modelling, the reliability of FEA depends heavily on the assumptions adopted, and experts must ensure that these assumptions are transparent and consistent with established engineering practices and the available project documents.

BIM provides a three-dimensional representation of the project and often incorporates contemporaneous design and coordination data. When the BIM 3D model is linked with scheduling data from the project programme, a "4D" model can be created which allows construction activities to be visualised in sequence over the project's timeline. Such visualisations can assist experts in illustrating design coordination issues, highlighting changes over time, and demonstrating how delay events may have affected construction sequencing, and interfaces between trades. Despite this potential, the practical use of BIM/4D modelling in disputes remains limited. Cost, time constraints, and the level of expertise required often make full BIM-based modelling impractical, particularly when conventional methods can achieve similar outcomes without the same overhead.[10] Another difficulty is that many projects do not have contemporaneous or properly maintained BIM

[9] Andrew Marchesseault, 'Integrating Finite Element Analysis into Root Cause Failure Investigations' <https://www.jsheld.com/insights/articles/integrating-finite-element-analysis-into-root-cause-failure-investigations>

[10] Doug Jones, 'Innovating Evidence Procedure in International Construction Arbitration' (2023) <https://dougjones.info/content/uploads/2023/03/Doug-Jones-Innovating-Evidence-Procedure-in-International-Construction-Arbitration.pdf>

models, and creating new models after the event is not the same as relying on real-time project records.[11]

3.3 Presenting expert evidence

The growing volume and complexity of technical evidence in construction disputes has highlighted the importance of clear and effective presentations. A key challenge for experts lies not only in conducting the analysis, but also in presenting it in a manner that allows tribunal members to understand both the overall analytical approach and the key drivers of the expert's conclusions.[12]

In international arbitration, while institutional rules such as those of the ICC and LCIA provide general frameworks for expert evidence, they offer limited guidance on how expert testimony should be presented. Traditionally, direct examination has been limited to confirming key points from written reports. However, this approach is increasingly supplemented by oral presentations, allowing experts to explain their reasoning more clearly and address areas of disagreement.

Conventional presentation tools such as slides, graphics, timelines, and structured summaries can be highly effective in illustrating key aspects of an expert's analysis. These may be deployed through structured presentation, handouts, or real-time display of documents during hearings. When used appropriately, such tools can simplify complex technical information and assist tribunals in following the expert's reasoning as well as calculations. However, the use of visual and electronic aids also presents challenges. Their effectiveness depends on careful preparation and reliable technology, and there remains limited formal guidance on their use. Accordingly, while visual tools can enhance the clarity and persuasiveness of expert evidence, they must be applied thoughtfully to ensure they support rather than detract from the expert's analysis.[13]

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[11] Ahmed Bobat and Sarah Sheppard, 'The Role of Building Information Modelling (BIM) in Construction Arbitration' (May 2023) <https://www.nortonrosefulbright.com/en/knowledge/publications/0b57daf7/the-role-of-building-information-modelling-bim-in-construction-arbitration>

[12] Owain Stone, 'Best Practices for Presenting Quantum Evidence' in *The Guide to Evidence in International Arbitration* (3rd edn, Global Arbitration Review 2025) <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/3rd-edition/article/best-practices-presenting-quantum-evidence>

[13] Neil Ashton, Daniel Langley and Elizabeth Davidson, 'Creating Compelling Expert Testimony in International Arbitration Using Visual Aids' (23 November 2019) <https://legalblogs.wolterskluwer.com/arbitration-blog/creating-compelling-expert-testimony-in-international-arbitration-using-visual-aids/>

4. ARTIFICIAL INTELLIGENCE IN EXPERT WORK

4.1 Development of AI in the context of construction disputes

Artificial intelligence is a broad field that refers to technologies designed to enable machines and computer systems to perform tasks typically associated with human intelligence. These tasks may include analysing data, recognising patterns, understanding spoken or written language, and generating responses or recommendations.[14]

Although AI is often perceived as a recent technological development, research and development in this field have been around for many decades. Many AI-enabled tools have been embedded in everyday technologies for some time. Examples include optical character recognition (OCR), automated transcription tools, recommendation systems, and various forms of data analytics. Techniques such as Artificial Neural Networks (ANN), which underpin the development of Machine Learning (ML), have been studied for many years. More recently, advances in computing power and electronics have enabled these pre-existing techniques to be applied at practical scales, with the speed and capacity required to process large volumes of data. As a result, ML has become a key driver of modern AI systems, enabling algorithms to analyse patterns in existing datasets and apply them to predict outcomes, generate responses, or produce new content such as text, images, and other media.

These developments have drawn attention to the impact of AI in construction practices as well as dispute resolution, raising concerns relating to data protection, confidentiality, regulatory compliance, and the reliability of automated outputs.[15] For example, the potential use of AI as an arbitrator has raised a number of key questions:

- Is there a risk that data can be biased, i.e. skewed by any number of conscious and/or unconscious factors; and if so, can such bias be identified and eliminated?
- Is the computer a “black box” operating in ways that are beyond our ability to understand, and if so, are there algorithms that can assist us in understanding how the computer is actually operating?

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[14] Google Cloud, ‘Artificial Intelligence vs Machine Learning’ <https://cloud.google.com/learn/artificial-intelligence-vs-machine-learning>

[15] Ante Golem, Noe Minamikata and Jake Reynolds, ‘The Digital Transformation in Construction: What You Need to Know’ (18 September 2024) Inside Arbitration (Issue 18) <https://www.hsfkramer.com/insights/reports/inside-arbitration-issue-18/the-digital-transformation-in-construction-what-you-need-to-know>

- Assuming AI-driven awards become a reality, will the award be persuasive, insightful, and timely, or mechanical, predictable, and rigidly correct?

These concerns are equally relevant where AI is used to generate or assist in the preparation of expert evidence particularly in relation to inaccurate outputs, potential bias, and the difficulty of verifying how complex algorithms reach their conclusions.[16]

4.2 Professional guidance and future adoption of AI

In the expert witness field, AI technologies are increasingly used across disciplines such as forensic analysis, medical assessment, financial modelling, and digital forensics. Recognising both the potential benefits and risks of AI, professional bodies have begun to develop guidance on how practitioners may approach the use of these technologies.

One such framework has been published by the Academy of Experts[17], which aims to assist expert witnesses in navigating the responsible use of AI in their work. A key feature of the guidance is its distinction between different levels of risk associated with the use of AI.

- Prohibited uses include situations where AI would effectively replace the expert's independent judgement or breach regulatory or contractual obligations.
- High-risk uses involve circumstances where AI contributes to the analysis or reasoning underlying the expert's opinion, such as analysing datasets or generating substantive content for expert reports.
- Low-risk uses typically involve administrative or supportive functions, such as document organisation, transcription, or spelling and grammar checks.

Table 2 below provides illustrative examples of AI use cases in expert work across different risk levels. The new guidance for expert witnesses reminds experts that they remain ultimately responsible for their evidence and emphasises several core principles which apply particularly to High-risk uses. These include transparency in how AI tools are used, the ability of the expert to explain the operation and limitations of the technology and ensuring that any outputs are reliable and properly validated against underlying data.

[16] Simmons & Simmons, 'New Guidance for Expert Witnesses on the Use of AI' (24 February 2026) <https://www.simmons-simmons.com/en/publications/cmm0r3bjr0010u4gofw4xfdcw/new-guidance-for-expert-witnesses-on-ai>

[17] The Academy of Experts, *Guidance for Expert Witnesses on the Use of Artificial Intelligence (AI)* (January 2026)

Experts must also remain mindful of potential bias in AI systems and maintain sufficient competence and oversight when using such tools.

AI Activity/Use Case in expert work	Example Tools	Risk
Basic internet search	Google, Bing	Very Low
Grammar/spell checking	MS Word Editor, Grammarly	Very Low
Transcription services	Otter, Teams/Zoom transcripts	Low
Summarising non-sensitive documents	Claude, ChatGPT	Low
Document organisation	eDiscovery platforms	Low
Pattern analysis of non-critical datasets	Domain-specific analytics tools	Medium
Research assistance on familiar topics	ChatGPT, Gemini	Medium
Drafting illustrative diagrams	Midjourney, DALLE	Medium
Analysis used in part to inform an expert opinion	Specialist tools	High
Generating narrative content for a report	ChatGPT etc.	High
Scenario modelling	Agentic/simulation tools	High
AI drafts substantive expert reasoning or conclusions	Any GenAI	Extreme
AI completes or outsources expert report writing	Any GenAI	Prohibited/Extreme
Inputting confidential case data into public AI tools	Public ChatGPT, Gemini	Prohibited

Table 2: Demonstrative example of level of risk arising from the use of AI in expert work

That said, these principles reinforce the point that AI should be regarded as a tool that may assist in certain aspects of the expert's work rather than as a substitute for professional judgment. While emerging technologies may improve efficiency in handling large volumes of project information, the expert's role in interpreting evidence and explaining their reasoning to the tribunal remains fundamental.

While AI research continues to progress, including advances in technologies such as deep learning, where AI systems are modelled along the lines of the human brain[18], the wider application of these tools to more complex analytical tasks is only likely to occur once the associated risks can be satisfactorily addressed. In the meantime, concerns raised in relation to the potential use of AI for arbitrators may also serve as a useful check on the performance of experts, encouraging them to ensure that they continue to uphold the standards that might be expected from any future AI experts.[19]

[18] Paramita (Guha) Ghosh, 'The Future of Deep Learning' (9 March 2023) DATAVERSITY <https://www.dataversity.net/the-future-of-deep-learning/>

[19] Cole Dorsey, 'Hypothetical AI Arbitrators: A Deficiency in Empathy and Intuitive Decision-Making' (2021) 13 *Arbitration Law Review*

5. CONCLUSION

As construction projects increasingly generate large volumes of digital records, experts must navigate complex datasets and digital models in order to carry out the required analysis and provide reliable opinions. At the same time, the growing complexity of project information has reinforced the importance of presenting expert analysis in a clear and structured manner so that courts and tribunals can understand the relevant issues in dispute.

Existing tools, data management systems, and other efficiency-enhancing technologies may support expert analysis by assisting in data management and illustration of complex technical issues. Nevertheless, experts remain responsible for ensuring that any technology applied in their work does not compromise the exercise of their professional judgement or the independence of their opinions. Looking further ahead, the role of emerging technologies, including artificial intelligence, remains an important and ongoing consideration. When the stakes are high, any imperfections in the underlying records, methodology, or assumptions may have significant consequences. Adoption of emerging technologies is therefore likely to be gradual, beginning with lower-risk and routine tasks before potentially extending to higher-risk applications. Ultimately, the value of expert evidence continues to depend not on the sophistication of the technology used, but on the expert’s ability to provide independent and balanced opinions that are clearly explained and capable of withstanding detailed examination.

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VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

HICAC 2026

TECHNOLOGY AND EXPERT EVIDENCE IN CONSTRUCTION DISPUTES: BETWEEN PROMISE AND PRACTICALITY

TRANG TRAN
Manager, Secretariat

Secretariat

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

Secretariat

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01. DIGITAL TRANSFORMATION & THE CHANGING NATURE OF RECORDS

Secretariat

Project technologies have evolved from standalone applications towards more integrated ecosystems

20% increase in digital adoption

Companies report using over 06 different technologies in a single project in 2025, 20% increase from 2024

most used digital tools in construction

Building Information Modelling (BIM)
Common Data Environments (CDEs)
Internet of things (IoT)
Smart sensors and mobile apps

HICAC 2026

01. DIGITAL TRANSFORMATION & THE CHANGING NATURE OF RECORDS

Secretariat

Project technologies have evolved from standalone applications towards more integrated ecosystems

However,

- Digital adoption remains uneven across the industry
- Many companies still operate with fragmented systems
- This creates inefficiencies, information silos, and challenges in interpreting project data

HICAC 2026

01. DIGITAL TRANSFORMATION & THE CHANGING NATURE OF RECORDS

Secretariat

The digital shift is changing

- how projects are managed & delivered
- how project information is generated
- how construction disputes are dealt with

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02. TECHNOLOGY ACROSS STAGES OF EXPERT WORK

Secretariat

INPUT — ANALYSIS — DELIVERY

Managing large volume of complex data

Modelling & Simulations

Presenting expert evidence

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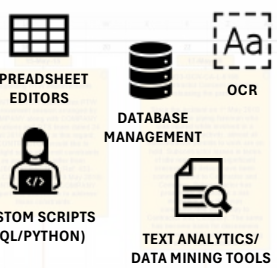
INPUT STAGE

Effective data management is fundamental to both efficiency and quality of expert analysis.

Experts must deal with large volumes of multi-format records, often under tight timelines.

Technology enables data extraction, structuring, and storage into databases → allow efficient search and analysis.

Examples:



However, data gaps and inconsistencies remain → requiring verification and expert judgement.

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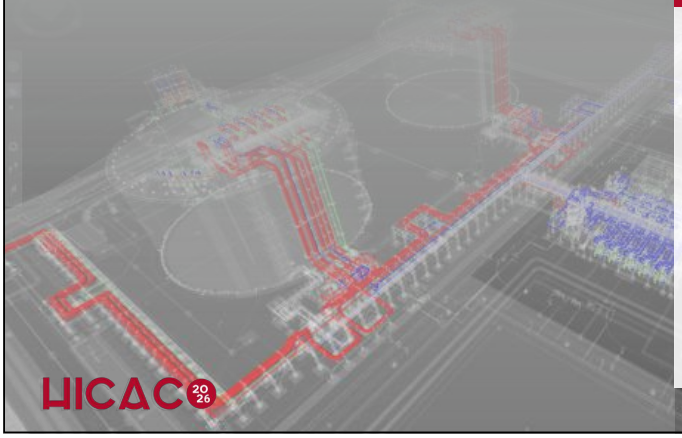
ANALYSIS STAGE

The analysis stage focuses on applying appropriate methodologies, interpreting data and form conclusions based on reasonable assumptions.



In order to examine and interpret data, experts can use modelling and simulation tools.

Planning & Scheduling Software → schedule analysis and simulate delay impact

PRIMAVERA P6 | MICROSOFT PROJECT | IN-HOUSE SCHEDULE ANALYTICS TOOL

3D/4D Modelling → visualisation, sequencing, and coordination

Finite Element Analysis (FEA) → structural / geotechnical analysis

However, application is constrained by cost and time; reliability depends on input selection, model quality, and assumptions.

DELIVERY STAGE

The growing volume and complexity of technical evidence highlights the importance of clear and effective presentation.

Institutional rules provide general frameworks, but limited guidance on expert presentation.

Presentations and visual tools can assist in explaining technical issues and complex analysis.

SLIDES | TRENDLINES | BAR CHART

Effectiveness depends on preparation and balance ensuring that they should support rather than detract from the conclusion.

02. TECHNOLOGY ACROSS STAGES OF EXPERT WORK

Secretariat

INPUT	ANALYSIS	DELIVERY
Managing large volume of complex data	Modelling & Simulations	Presenting expert evidence

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TABLE OF CONTENTS

03. THE EMERGING ROLE OF ARTIFICIAL INTELLIGENCE (AI)

Secretariat

- Although AI is often seen as a new, many of its underlying technologies have been used in everyday tools for many years.
- With advances in computing power and big data, AI enabled by Machine Learning can now identify patterns & produce contents.

With recent development, AI is becoming increasingly relevant in construction disputes, but it also raises important concerns around data protection, compliance and reliability.

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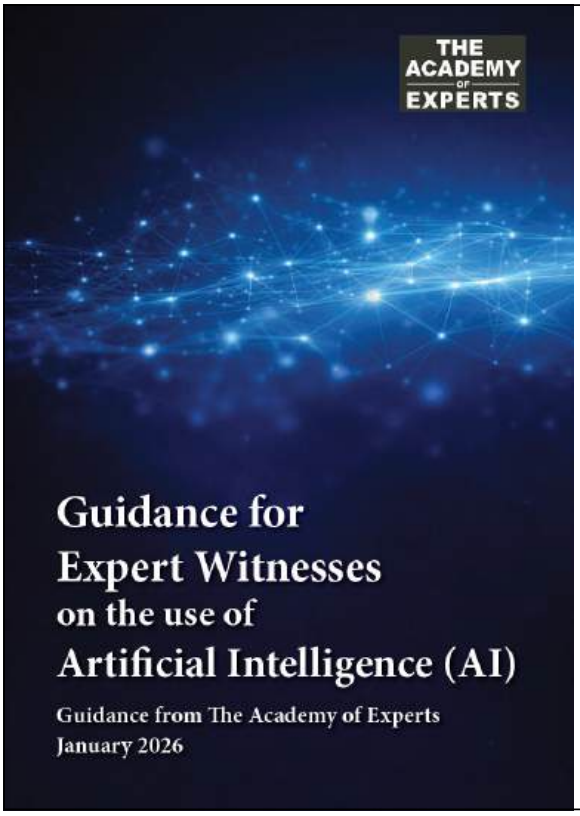
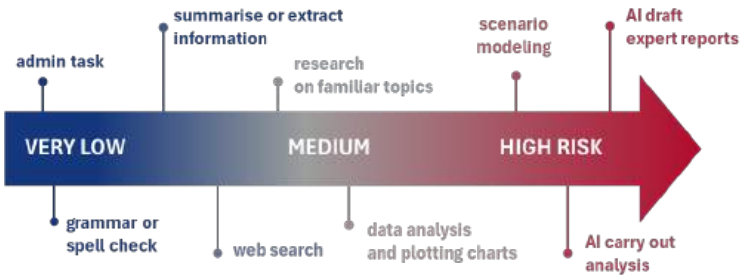


Secretariat

The Academy of Experts have developed a guidance which aims to assist expert witnesses in navigating the responsible use of AI.

A key feature of the guidance is its distinction between different levels of risks:



Experts are required to handle complex data and present clear analysis.

Technology provide support, but cannot replace professional judgement.

Emerging technologies (AI) offer potential, but adoption remains uncertain.

Ultimately, the value of expert evidence depends not on the sophistication of the technology used, but on transparent, well-reasoned analysis supported by reliable facts and capable of withstanding scrutiny.

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Thank you for your attention!

Secretariat

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AGENDA
CHƯƠNG TRÌNH

HICAC 2026

SECTION C - Topical issues in construction arbitration
PHẦN C - Các vấn đề tiêu biểu trong trọng tài xây dựng

MODERATOR/ĐIỀU PHỐI VIÊN

Ms./Bà **NGUYỄN THỊ THANH MINH**

Special Counsel and Head of
Dispute Resolution Practice of ACSV Legal
Cố vấn Cao cấp (Special Counsel) và Trưởng Bộ phận Giải quyết Tranh chấp của ACSV Legal

11:00AM - 12:30AM

SESSION C2
Arbitration Topical Issues

PHIÊN C2
Các vấn đề tiêu biểu trong trọng tài xây dựng

SPEAKER/DIỄN GIẢ

Mr./Ông **HO CHIEN MIEN**

Partner at Allen & Gledhill LLP
Luật sư thành viên, Đồng Trưởng Bộ phận Xây dựng & Kỹ thuật tại Allen & Gledhill

Presentation 01
Topical Issues in Construction Arbitration - A Regional Perspective

Tham luận 01
Vấn đề nổi bật trong Trọng tài Xây dựng - Góc nhìn từ khu vực

Mr./Ông **LÊ MINH SÁNG**

PhD candidate at Lumière University Lyon 2
Nghiên cứu sinh Tiến sĩ tại Đại học Lumière Lyon 2, Pháp

Presentation 02
From Contractual and Party Fragmentation to Parallel Proceedings in Construction Arbitration

Tham luận 02
Sự phân mảnh hợp đồng, các bên tham gia và hiện tượng tố tụng song song trong trọng tài xây dựng

Mr./Ông **HARJEET KUMAR JAGGI**

Independent Consultant, Arbitrator and
Dispute Resolution Expert
Tư vấn độc lập, Trọng tài viên, Chuyên gia giải quyết tranh chấp

Presentation 03
Award of Interest in Arbitration Awards – Adverse impact on Claimants when contract bars payment of Interest.

Tham luận 03
Việc trao tiền lãi trong phán quyết trọng tài – Tác động bất lợi đối với bên yêu cầu khi hợp đồng cấm thanh toán tiền lãi

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HICAC 2026:
TOPICAL ISSUES IN CONSTRUCTION ARBITRATION

A REGIONAL PERSPECTIVE

Presented by

Ho Chien Mien
Partner (Co-Head), Construction & Engineering

April 2026

THE SCALE OF CONSTRUCTION DISPUTES IN VIAC

424
New VIAC cases in 2023
+46% year-on-year

19%
Construction disputes at VIAC
of total caseload

⅔
Foreign parties from China, Korean & Japan
cross-border character

Source: VIAC Annual Report 2023; Baker McKenzie International Arbitration Yearbook 2024–2025

THE SCALE OF CONSTRUCTION DISPUTES IN SIAC

886

New SIAC cases in 2025

Booming development

9%

Construction disputes at SIAC

of total caseload

Top 3

Foreign parties from China, Vietnam & India

cross-border character

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3

COMMON ISSUES IN CONSTRUCTION DISPUTES

Delay Claims

Regulatory risks, Structural risks, Legal and Technical issues such as Concurrencies, Notices and Condition Precedents and Proof of Default

Valuation and Variation Claims

Scope of Design and Design Responsibility, Design Development

Force Majeure

Wars, Sanctions and Supply Chain Interruptions, Lessons from COVID-19

Defects and Fitness for Purpose

Defects and Definition, Defects and Loss, Defects and Fitness for Purpose

Dispute Resolution – Arbitration within VIFC Framework

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4

DELAY CLAIMS

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DELAY CLAIMS

- Most common and also most complex claims in construction disputes
- Types of Issues arising in Delay Claims
  - Legal Issues
    - Responsibility for delays
    - Notices, Relevant Events and Condition Precedents
    - Concurrencies and Causation
    - Liquidated Damages
  - Technical Issues
    - How to prove delay
    - Methods of Delay Analysis
    - SCL Delay and Disruption Protocol

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DELAY CLAIMS

- Responsibility for Delays
  - Party that causes the delays
  - Neutral events, e.g. regulatory and permitting issues, weather, third parties
  - Issues with identification of parties and not so neutral events
- Notices, Relevant Events and Condition Precedents
  - Notices, scope and requirements
  - Relevant Events and Entitlement to Extensions of Time / Prolongation Costs
  - Condition Precents, Waivers and Estoppel
- Concurrencies and Causation
  - Proving concurrencies
  - Legal consequence of concurrencies

DELAY CLAIMS

- Liquidated Damages
  - Genuine Pre-estimate of Damages vs Penalty
- Technical Issues in Proving Delay
  - How to prove delay
  - Use of Experts
  - Methods of Delay Analysis
  - SCL Delay and Disruption Protocol

VALUATION AND VARIATION CLAIMS

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VALUATION AND VARIATION CLAIMS

- Scope of Responsibility
  - Specifications
  - Design Obligation and Design Development
  - Design Obligation and Fitness for Purpose
- Variations in the context of Design Development
- Valuation of Variations

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FORCE MAJEURE AND UNFORESEEN EVENTS

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FORCE MAJEURE AND UNFORESEEN EVENTS

- Concept of Force Majeure
- Legal consequences of Force Majeure
  - Force Majeure vs Frustration of Contract
- Contractual consequences and definitions of Force Majeure
- Exceptionally, the Law can step in to provide reliefs and remedies – e.g. Covid-19. In Singapore COTMA legislation helped alleviate the suffering of contractors.
  - Covid-19 (Temporary Measures) Act 2020

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DEFECTS AND FITNESS FOR PURPOSE

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DEFECTS AND FITNESS FOR PURPOSE

- Concept of “defect”
- Not all defects result in compensation or substantial compensation having to be paid
  - Compensation / Damages for Defects – principle of compensation
  - Defects that do not result in any loss of use or utility – e.g. affecting aesthetics
  - *Ruxley Electronics* type defects - where cost of rectification is all out of proportion to the benefit that such rectification will bring.
- “Defect” and the concept of Fitness for Purpose
  - No actual defect but works or product that fail to perform as contracted or is not fit for the purpose the works or product was intended.
  - Concept of Fitness for Purpose can lead to extreme results – *Hojgaard v E.ON UK PLC*

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14

ARBITRATION WITHIN THE VIFC FRAMEWORK

ARBITRATION WITHIN THE VIFC FRAMEWORK

- Vietnam International Financial Centre ("VIFC") officially established in June 2025.
- New arbitration regime for arbitrations which are conducted within the framework of the VIFC.
  - New International Arbitration Centre handles disputes arising from investments and business activities within the International Financial Centre ("IFC") – this would include disputes arising from construction projects undertaken within the IFC.
  - Where there are foreign elements involved, parties can choose foreign law to govern their relationship (although Vietnamese land law still applies to disputes over real estate ownership).
  - Parties can opt to waive their right to apply to a Vietnamese court for annulment of the recognition of an arbitration award.

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From Contractual and Party Fragmentation to Parallel Proceedings in Construction Arbitration

Abstract:

Parallel proceedings in construction arbitration are closely connected to the contractual configuration of construction projects. In practice, construction activities are commonly carried out through a web of interrelated yet legally autonomous contracts involving multiple participants. Although these arrangements pursue a unified economic objective, each contract is governed by its own arbitration agreement, binding only the parties that have entered into it. Where disputes arise from the same factual circumstances, including delay, design deficiencies or cost overruns, claims are frequently pursued through separate arbitral proceedings.

This pattern has become increasingly evident in the Vietnamese construction sector, particularly in large-scale and complex projects implemented under the framework of the 2025 Vietnamese Construction Law. Despite the growing reliance on arbitration as a dispute resolution mechanism in Vietnam, the limited reach of arbitration agreements, together with practical constraints on consolidation and joinder, continues to obstruct the comprehensive resolution of disputes involving multiple contracts and multiple parties. The recurrence of parallel proceedings consequently affects procedural economy, the consistency of arbitral decisions and, in certain cases, their enforceability.

The analysis turns to procedural techniques developed in arbitral practice to manage these challenges, including the consolidation of related arbitrations, the appointment of the same arbitrator in connected proceedings, and the use of anti-suit or anti-arbitral injunctions where overlapping proceedings arise. Taken together, these techniques underline the importance of coordinated dispute resolution planning at the contract-drafting stage in construction projects in Vietnam.

Keywords: Construction arbitration, Parallel proceedings, Multi-contract and multi-party, Consolidation, Joinder.

I. Introduction

The construction industry is a major contributor to national economies, accounting for approximately 8% of GDP in developing countries and around 5% in developed ones. In Vietnam, In the industry and construction sector, industrial growth reached its highest level since 2019. In 2025, industrial value added was estimated to increase by 8.80% year on year, accounting for 35.15% of overall economic growth.[1] However, its inherent complexity and uncertainty frequently give rise to conflicts that may escalate into costly and time-consuming disputes.[2] Such disputes impose significant direct and indirect financial burdens, adversely affect project performance, and may generate broader social and economic consequences beyond the industry.

Arbitration is widely regarded as the preferred mechanism for resolving disputes arising out of international commercial transactions, including those in the construction sector.[3] Arbitration is a dispute resolution mechanism through which two or more parties, including sovereign States, submit their dispute to a neutral decision-maker for a final and binding determination in the form of an arbitral award. The authority of an arbitral tribunal to render a binding decision on the merits distinguishes arbitration from mediation or conciliation, in which the neutral third party lacks the power to impose a binding outcome.[4] Sophisticated parties are generally understood to favor arbitration over litigation in international agreements for several key reasons.[5] First, arbitration offers a high degree of procedural flexibility, enabling parties to design dispute resolution mechanisms that reflect their particular needs. This flexibility also underscores the consensual nature of arbitration, which can take place only with the agreement of all parties. Second, the risk of domestic court bias often encourages parties to remove dispute resolution from the national legal systems of either side by opting for a neutral arbitral forum. Third, the relative ease of enforcing arbitral awards internationally under the New York Convention[6] provides a further incentive for parties

[1] Vietnam Chamber of Commerce and Industry (VCCI) (30 January, 2026), *Vietnam records 8.02% GDP growth, fastest in ASEAN*, retrieved from: https://en.vcci.com.vn/economic-news/vietnam-records-802-gdp-growth-fastest-in-asean-114982 [accessed 1 March, 2026].

[2]Olaimat, A. R. A., & Marey-Perez, M., 'Lifecycle-Based Analysis of Construction Dispute Causes: A Semi-Automated Systematic Review', *Buildings*, *16*(5), 944, 2026, p. 1, https://doi.org/10.3390/buildings16050944.

[3] Dimitar Kondev, *Multi-Party and Multi-Contract Arbitration in the Construction Industry*, John Wiley & Sons Ltd, 2017, p. 1.

[4] Andrews, Neil H, 'Commercial Arbitration: What Is It and Why Choose It?', Chapter. In *Andrews on Civil Processes: Arbitration and Mediation*, Intersentia, 2013, pp. 85-112.

[5] Julian Nyarko, 'We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts', *International Review of Law and Economics*, Volume 58, 2019, pp. 6-24, https://doi.org/10.1016/j.irle.2018.12.004 [accessed 2 March, 2026].

[6] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.

to choose arbitration over litigation. Morevoer, in construction disputes, confidentiality is one of the principal reasons why parties choose arbitration. The arbitral process allows parties to protect trade secrets, commercially sensitive information, and potentially damaging allegations that often arise during the production of evidence. By preventing public disclosure, confidentiality helps preserve the parties' market position, reputational interests, and competitive standing, thereby making arbitration particularly attractive in the construction sector.[7]

However, in this field, complexity and uncertainty primarily arise from two defining characteristics of construction arbitration, namely its *multi-party* and *multi-contract* nature. Construction projects typically involve numerous participants bound by a network of interrelated yet legally autonomous contracts, which significantly increases the risk of fragmented disputes and overlapping proceedings.[8] Divergences in dispute resolution mechanisms across multi-contract projects often give rise to multiple arbitral and judicial proceedings running in parallel, notwithstanding that such proceedings may concern identical or closely related issues arising from the same project.[9] This procedural fragmentation increases time and costs for the parties, heightens the risk of inconsistent decisions, and creates significant difficulties in enforcing conflicting outcomes, thereby undermining the efficient and final resolution of disputes.

II. Multi-Contract and Multi-Party Structures in Construction Arbitration

2.1. Multi-Contract and Multi-Party Structures in the Construction Sector

In construction industry, they reflect the inherent complexity of modern construction projects, where multiple participants and multiple contracts coexist within a single project structure. These characteristics are typically manifested in several aspects.

In international construction contracts, the core legal relationship is typically formed between the *project owner* (maître de l'ouvrage) and the *contractor* (constructeur). The project owner establishes the objectives, specifications, and overall

[7] Rahul Mahajan, 'The Dilemma of Confidentiality in Arbitration Proceedings: A Legal Quagmire', *Indian Journal of Integrated Research in Law*, II(II), 2019, p. 3.
[8] Redfern, A., Hunter, M., *Law and Practice of International Commercial Arbitration*, 4th Edition, London: Sweet & Maxwell, 2004, p. 202.
[9] McDougall, K., & Sharp, H. (30 October, 2019), *Dispute resolution for multi-contract projects: Avoiding parallel proceedings and conflicting decisions*, Vietnam International Arbitration Centre, retrieved from: https://www.viac.vn/en/arbitration/dispute-resolution-for-multicontract-projects-avoiding-parallel-proceedings-and-conflicting-decisions-a103.html [accessed 1 March, 2026].

programme of the construction project, while the *main contractor* (entrepreneur principal) assumes responsibility for carrying out the construction works. Historically, this bilateral relationship between the project owner and the main contractor was considered sufficient for the execution of a construction project. However, as construction projects have become increasingly complex, this traditional structure has gradually expanded to include other essential participants, most notably *subcontractors* (sous-traitants).[10]. In addition, construction projects typically involve a wide range of participants beyond the core contractual relationship. These may include the employer, designers, consultants, a third-party certifier (often referred to as the engineer), suppliers, lending banks, and issuers of performance bonds, among others.[11] For instance, it is common for an employer to conclude a construction contract with a main contractor, who subsequently subcontracts different portions of the works to several subcontractors and maintains contractual relationships with various suppliers. Meanwhile, the design phase of the project is often carried out by an architect or an engineer under a separate contract, which, depending on the project structure, may be concluded either with the employer or with the main contractor, etc.[12]

The construction contracts between the parties discussed above may often be drafted with reference to the standard conditions of contract developed by the International Federation of Consulting Engineers (FIDIC).[13] This organization represents the consulting engineering industry at both international and national levels and has developed a series of model contracts that are widely used in construction projects around the world. These standard forms aim to establish the contractual framework governing the relationships between the parties involved in the project, while allocating project risks between the employer and the contractor. According to FIDIC, the allocation of risks in these contracts is designed to achieve a balanced distribution, whereby each risk is assigned to the party best positioned to manage and control it effectively. In particular, the FIDIC has developed a range of standard forms of contract tailored to different types of construction and engineering projects.[14] The

[10] Yacine El Issa, *Les contrats internationaux de construction. Responsabilités et droit applicable*, Université Paris-Saclay, Thèse de doctorat en Droit, 2022, p. 39.
[11] Kondev, D., 'The Need for Multi-Party Arbitration in the Construction Sector', In D. Kondev (Ed.), *Multi-Party and Multi-Contract Arbitration in the Construction Industry*, John Wiley & Sons Ltd, 2017, p. 32.
[12] *Ibid*.
[13] FIDIC is the acronym for the *Fédération Internationale des Ingénieurs-Conseils*, or the International Federation of Consulting Engineers. Founded in 1913 and based in Geneva, it is the global representative body for consulting engineers, best known for creating standardized contract forms used in international construction and engineering projects. Retrieved from: https://fidic.org/about-fidic [accessed 2 March, 2026].
[14] LexisNexis, & Mayer Brown International LLP., *Introduction to FIDIC contracts*, Mayer Brown, 2012.

Green Book (Short Form of Contract) is typically used between the employer and the contractor for small or simple projects. The *Red Book* (Conditions of Contract for Construction) governs construction contracts between the employer and the contractor where the employer provides the design. The *Pink Book* (MDB Harmonised Edition) is a harmonised version of the Red Book used for construction contracts between the employer and the contractor in projects financed by multilateral development banks such as the World Bank. The *Yellow Book* (Plant and Design-Build) applies to design–build contracts between the employer and the contractor, where the contractor undertakes most of the design. The *Silver Book* (EPC/Turnkey Projects) is used for EPC or turnkey contracts between the employer and the contractor, under which the contractor delivers a completed facility. The *Gold Book* (Design-Build-Operate) governs design-build-operate arrangements between the employer and the contractor. The *Blue Book* (Form of Contract for Dredging and Reclamation Works) is intended for dredging and reclamation works contracts between the employer and the contractor. Finally, the *White Book* (Client/Consultant Model Services Agreement) regulates consultancy service agreements between the employer and the consultant.

In Vietnam, under the most recent 2025 Law on Construction,[15] construction contracts are classified according to the nature and scope of the work performed. Accordingly, construction contracts include the following types: (i) construction consultancy contracts; (ii) construction works execution contracts; (iii) contracts for the supply of materials and equipment to be installed in construction works; (iv) design-supply of materials and equipment contracts; (v) design-construction contracts; (vi) supply of materials and equipment-construction contracts; (vii) design-supply of materials and equipment-construction contracts; (viii) turnkey contracts; and (ix) other types of construction contracts.

Taking the Long Thanh International Airport project as an example, this mega-project provides a clear illustration of the multi-party structure typical of modern construction projects. The project owner is Airports Corporation of Vietnam (ACV), which acts as the principal investor responsible for major infrastructure components.[16] The construction of the passenger terminal (Package 5.10) is carried out by the VIETUR Consortium, a multinational consortium led by IC ISTAS from Türkiye and including

[15] Construction Law No. 135/2025/QH15 was adopted by the 15th National Assembly of Vietnam at its 10th session on 10 December 2025 (the Construction Law), Article 82(1).
[16] Vietnam.vn, *'Consortium Announced as Winner of the VND 35 Trillion Long Thanh Airport Package'* (24 August 2023), Retrieved from: https://www.vietnam.vn/en/cong-bo-lien-danh-trung-goi-thau-35-000-ty-dong-san-bay-long-thanh [accessed 3 March 2026].

major Vietnamese contractors such as Vinaconex, Newtecons, Ricons, and SOL E&C.[17] In addition, the project involves a number of international design and engineering consultants, including Japan Airport Consultants, ADP Ingénierie, Nippon Koei, and Oriental Consultants Global, together with Vietnamese consultancy firms such as Airport Design and Construction Consultancy and Transport Engineering Design Inc..[18] The architectural design of the passenger terminal is prepared by Heerim Architects & Planners from South Korea, while operational consulting services are provided by a consortium including Incheon International Airport Corporation and PMI Consulting.[19] The involvement of these numerous actors, together with various subcontractors, suppliers, and service providers, illustrates the highly fragmented contractual structure of modern infrastructure projects, where multiple interconnected contracts coexist within a single construction project.

From the foregoing analysis, it follows that the multi-party and multi-contract nature of construction projects embodies the structural complexity of contemporary construction arrangements, characterized by the involvement of numerous actors connected through a series of interdependent contracts within a single project framework.

2.2. Multi-contract and Multi-party in Construction Arbitration

In construction arbitration, multi-party and multi-contract disputes are commonly regarded as two fundamental structural features. In both case law and legal scholarship, these terms are often used interchangeably to describe similar procedural situations. However, despite their frequent association, they refer to distinct concepts and should not be treated as identical. In particular, multi-party arbitration refers to proceedings involving more than two parties with potentially opposing interests, while multi-contract arbitration arises from disputes connected to two or more contracts. The two do not necessarily coincide. A multi-party arbitration may arise from a single contract, for example where an employer contracts with a consortium of contractors. Conversely, multi-contract arbitration may occur between the same parties under

[17] *Ibid*.
[18] Airports Corporation of Vietnam (ACV), 'Japan–France–Vietnam Joint Venture Won the Tender of Consulting and Formulating Feasibility Study Report – Phase 1 of Long Thanh International Airport Project' (25 May 2018), Retrieved from: https://acv.vn/en/tin-tuc/acv-s-activities/japan-france-vietnam-joint-venture-won-the-tender-of-consulting-and-formulating-feasibility-study-report-phase-1-of-long-thanh-international-airport-project [accessed 3 March 2026].
[19] Saigon Giai Phong News, *Contractors of Long Thanh Airport Revealed* (20 May 2018), Retrieved from: https://en.sggp.org.vn/contractors-of-long-thanh-aiport-revealed-post72266.html [accessed 3 March 2026].

several related agreements, without involving additional parties.[20] In practice, however, the two concepts frequently overlap. Construction disputes often arise from networks of related contracts involving different parties, either through horizontal relationships (e.g., an employer contracting separately with several contractors) or vertical chains of contracts (e.g., employer, contractor, subcontractor). In such situations, disputes under multiple contracts involving different parties may be addressed within a single arbitration, thereby combining both multi-party and multi-contract features.[21]

III. Parallel proceedings in Construction Arbitration

3.1. What is the Parallel Proceedings?

According to Professor Salim Moollan KC, parallel proceedings in international arbitration refer to situations in which two or more dispute resolution proceedings are conducted before different adjudicatory bodies, at least one of which is an international arbitral tribunal. The starting point of this concept lies in the existence of a minimum threshold, whereby the proceedings must share at least one common party and arise from the same core set of underlying facts giving rise to the dispute.[22] Beyond this foundational element, the proceedings must also exhibit a close connection in one of three principal respects.[23] First, the parties involved in the proceedings may be identical, substantially identical, or closely related. Second, the causes of action may be the same or substantially similar. Third, the object of the claims may be identical or closely related. Under this approach, parallel proceedings are not confined to situations of complete identity between proceedings. Rather, the concept also encompasses cases where there is a significant degree of overlap in terms of parties, causes of action, or the subject matter of the dispute. This indicates that the notion of parallel proceedings is inherently flexible and must ultimately be assessed in light of the specific circumstances of each case.

In this sense, parallel proceedings occur when two or more claims, contractual relationships, or disputes involving the same or related parties are pursued at the same time before different dispute resolution forums. Such situations may arise where several claimants assert claims, where a single dispute is based on multiple legal grounds, or where the parties have agreed to different mechanisms for dispute resolution. Examples

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[20] Kondev, D., 'Multi-party arbitration in general', In D. Kondev (Ed.), *Multi-Party and Multi-Contract Arbitration in the Construction Industry*, John Wiley & Sons Ltd, 2017, pp. 12-13.
[21] *Ibid*, pp. 13-14.
[22] Moollan, S., 'Defining the Subject: What are Parallel Proceedings in International Arbitration?', In *Parallel Proceedings in International Arbitration*, Leiden, The Netherlands: Brill | Nijhoff, 2024, pp. 221-222.
[23] *Ibid*.

may arise where issues relating to jurisdiction or the merits are pursued at the same time before both an arbitral tribunal and a national court, or before different arbitral tribunals operating in separate jurisdictions.[24]

3.2. Multi-Party and Multi-Contract Structures Leading to Parallel Proceedings in Construction Arbitration

Although the problem of multiple or parallel proceedings may arise in many industries, it is especially visible in sectors characterised by multi-party and multi-contract arrangements, most notably in large-scale construction projects.[25] For instance, disputes may arise concurrently between the project owner, the main contractor, and several subcontractors connected through a chain of contracts containing different dispute resolution clauses.[26] Consequently, parallel proceedings are frequently considered to complicate and delay the resolution of disputes, as they consume significant resources, particularly time and financial costs. In the most problematic situations, they may also lead to conflicting judgments or arbitral awards, thereby creating the risk that lengthy and expensive proceedings ultimately prove ineffective or meaningless.[27] Even where the underlying facts and legal questions substantially overlap, the existence of separate procedural mechanisms may prevent these disputes from being consolidated before a single adjudicatory forum. The risk is further heightened when the applicable arbitration framework does not permit the joinder of third parties to the proceedings where arbitral proceedings are inherently confidential and bind only the parties to the arbitration agreement.

Which legal doctrines provide the normative basis for preventing or limiting parallel proceedings? To prevent or limit parallel proceedings, procedural law and international arbitration commonly rely on several foundational legal doctrines. The two most significant doctrines are *lis pendens* and *res judicata*, although a number of additional complementary principles may also play a supporting role.

The doctrine of *lis pendens*, in legal scholarship and practice, meaning a "lawsuit pending elsewhere," is frequently invoked as a mechanism to address parallel

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[24] Fortin, E., *2024 PAW: Arbitration, Parallel Proceedings, and Conflicts of Decisions: A Comparative Perspective* (23 March, 2024), Kluwer Arbitration Blog, Retrieved from: https://legalblogs.wolterskluwer.com/arbitration-blog/2024-paw-arbitration-parallel-proceedings-and-conflicts-of-decisions-a-comparative-perspective/ [accessed 3 March 2026].

[25] Nazemizadeh, M., & Soltani, R., 'An Introduction to Parallel Arbitration and Solutions to Overcome It', *Interdisciplinary Studies in Society, Law, and Politics*, 5(3), 2026, p. 3

[26] *Ibid*, p. 4.

[27] I.M. Amir, Summary of Young-OGEMID Symposium No. 6: 'Double Trouble: Parallel Proceedings in International Arbitration (9-18 October 2017)', *Transnational Dispute Management*, 2018, p. 2.

proceedings.[28] Nevertheless, an arbitral tribunal and a state court may each retain the authority to determine their own jurisdiction simultaneously, thereby creating the possibility of parallel proceedings. This doctrine requires the forum seized later to stay or decline jurisdiction if another adjudicatory body has already been seized of the same dispute. However, this situation is generally assessed through the triple identity test, which requires *same parties*, *causa petendi* (the legal and factual basis of the claim), and *petitum* (the relief sought). Under this approach, three conditions must normally be satisfied.[29] First, there must be an identity of parties, meaning that the litigants involved in the different proceedings are essentially the same. Determining this element may be complex in situations where distinct actors nonetheless share an equivalent legal position, such as an insurer and the insured acting in relation to a third party. Second, the proceedings must share the same subject matter, often described in civil law terminology as causa petendi. This refers to the underlying facts, the rights invoked, and frequently, though not necessarily, the same legal rules forming the basis of the claim. Third, there must be an identity of object, referred to as petitum, which concerns the type of remedy or outcome sought in the parallel proceedings. Most domestic legal systems incorporate these criteria, although their interpretation and application may vary. In practice, disputes involving lis pendens are commonly resolved by applying the *first-in-time rule*.[30] According to this principle, the court that was first seized of the dispute retains jurisdiction and continues to adjudicate the case, while any court subsequently seized is generally required to decline jurisdiction in favour of the court first seized. Under Vietnamese law, the doctrine of *lis pendens* is reflected in the Civil Procedure Code 2015 of Vietnam.[31] Accordingly, where a civil case involves the same parties and the same subject matter or claims, and the dispute does not fall within the exclusive jurisdiction of Vietnamese courts, Vietnamese courts must refuse to accept the case or must terminate the proceedings if one of the following grounds exists: (i) The parties have entered into an arbitration agreement or have chosen a foreign court to resolve the dispute. (ii) A foreign court or a foreign arbitral tribunal has already accepted

[28] Emil Brengesjö, *Parallel Proceedings in International Arbitration*, Stockholm Centre for Commercial Law Årsbok VI, 2015, p. 22.

[29] C Silvestri, 'Lis Pendens, Related Actions and Parallel Litigation' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (eds), *Comparative Procedural Law and Justice* (Part V Chapter 4), 2024, p. 7.

[30] The first in time rule, also known as the rule of capture, is a property law theory that means the first appropriator, or user, of a property is the owner and thus any subsequent owner is subject to the original owner. The full name of this theory is "First in Time, First in Right." The "first in time" theory is the default rule to recording property transfers unless there are state statutes with different requirements. Retrieved from: https://www.law.cornell.edu/wex/first_in_time [accessed 5 March 2026].

[31] The Civil Procedure Code 2015 (No. 92/2015/QH13), effective from July 1, 2016, regulates the order, procedures, and competence of courts in resolving civil, marriage/family, business, and labor cases, including those involving foreign elements.

jurisdiction, is resolving the dispute, or has issued a judgment, decision, or arbitral award. (iii) The civil case falls within the exclusive jurisdiction of a foreign court.[32] The spirit is also reflected in Article 6 of the Law on Commercial Arbitration 2010 of Vietnam (the LCA 2010),[33] which provides that: "*where the disputing parties have entered into an arbitration agreement but one party initiates proceedings before a court, the court must refuse to accept the case, unless the arbitration agreement is invalid or incapable of being performed*".

Similarly to lis pendens, the doctrine of *res judicata* represents another manifestation of the principle of *ne bis in idem* ("not twice for the same matter").[34] This principle prohibits a claim or dispute from being pursued again once a final decision has already been rendered regarding the same conduct or subject matter. *Res judicata*, in essence, the doctrine prevents the re-examination of claims that have already been raised and finally resolved in a prior proceeding.[35] The rationale underlying res judicata is generally understood to reflect two complementary objectives. First, it serves a public interest by ensuring the finality of disputes and bringing litigation to an end. Second, it protects a private interest by shielding parties from the burden of facing repetitive claims. Under Vietnamese law, the principle of *res judicata* is reflected in several provisions of the Civil Procedure Code 2015 of Vietnam. First, a judge must return a statement of claim where the dispute has already been resolved by a legally effective judgment or decision of a court, or by a legally effective decision of another competent state authority.[36] This provision prevents a court from accepting a case that has already been definitively adjudicated. Second, the Code also regulates the legal consequences of the suspension of civil proceedings, provides that once a decision to suspend the settlement of a civil case has been issued, the parties are not entitled to re-initiate the same lawsuit before the court if the subsequent claim is identical to the previous one in terms of the plaintiff, the defendant, and the disputed legal relationship.[37] Taken together, these provisions embody the res judicata principle in Vietnamese procedural

[32] Article 472 of the Civil Procedure Code 2015.
[33] The Vietnamese Law on Commercial Arbitration is primarily governed by Law No. 54/2010/QH12 on Commercial Arbitration, which took effect on January 1, 2011. This law provides a modern framework for resolving commercial disputes through non-judicial, private methods, aligning closely with international standards such as the UNCITRAL Model Law.
[34] JANEČKOVÁ, Pavlína, 'is Pendens Before National and Arbitration Courts', *International Journal of Multidisciplinary Thought*, CD-ROM, 2017, Vol. 6, No. 1, p. 292.
[35] George A. Bermann, *Res Judicata in International Arbitration*, Cambridge Compendium of International Commercial and Investment Arbitration, Stefan Kröll, Andrea K. Bjorklund & Franco Ferrari (Eds.), Cambridge University Press, 2023, p. 1676.
[36] Article 192(1)(c) of the Civil Procedure Code 2015.
[37] Article 218(1) of the Civil Procedure Code 2015.

law, ensuring the finality of judicial decisions and preventing the re-litigation of disputes that have already been conclusively resolved.

In addition, one of the most important doctrines is the *Kompetenz-Kompetenz* principle, under which the arbitral tribunal has the authority to determine its own jurisdiction. Pursuant to this principle, the tribunal may examine and decide any objections relating to the existence or validity of the arbitration agreement while ruling on its jurisdiction.[38] Under Vietnamese law, In Vietnamese law, this principle is reflected in the LCA 2010. In this sense,[39] before considering the merits of the dispute, the arbitral tribunal must examine the validity of the arbitration agreement, determine whether the agreement is capable of being performed, and assess its own jurisdiction. If the tribunal concludes that the dispute falls within its jurisdiction, it will proceed with the resolution of the dispute in accordance with the law. Conversely, if the dispute does not fall within its jurisdiction, or if the arbitration agreement is invalid or clearly incapable of being performed, the tribunal must issue a decision to terminate the proceedings and promptly notify the parties.

IV. Current Legal Mechanisms for Managing Parallel Proceedings in Construction Arbitration

4.1. Procedural Mechanisms to Manage Parallel Proceedings in Construction Arbitration

Notwithstanding the foregoing analysis, the doctrines and statutory provisions under Vietnamese law do not fully address the challenges posed by parallel proceedings, particularly in the context of multi-contract and multi-party disputes that frequently arise in construction arbitration. Construction projects are typically structured through numerous interrelated contracts involving various stakeholders such as employers, main contractors, subcontractors, and consultants. As a result, disputes arising from the same project may be brought before different tribunals or forums under separate arbitration agreements, thereby increasing the risk of fragmented proceedings and inconsistent outcomes. In this context, doctrinal principles such as *lis pendens*, *res judicata*, and the *Kompetenz-Kompetenz* principle provide only partial solutions. These doctrines primarily address jurisdictional conflicts or the finality of decisions, but they do not

[38] Divya MB, 'Determining the doctrine of Kompetenz-Kompetenz: An instrument of fraud or justice', *International Journal of Law, Policy and Social Review*, Volume 5, Issue 4, 2023, p. 198.
[39] Article 43(1) of the Law on Commercial Arbitration 2010 of Vietnam.

necessarily prevent the simultaneous conduct of multiple proceedings arising from interconnected contractual relationships.

In international arbitral practice, several procedural techniques have therefore been developed to mitigate these challenges.

First, *consolidation* of related arbitrations and the *joinder* of third parties, a key legal issue concerns the requirement of party consent and the scope of the arbitration agreement, allow disputes arising from interconnected contracts or involving overlapping parties to be resolved within a single arbitral proceeding. This approach enhances procedural efficiency and reduces the risk of inconsistent awards. The 2021 International Chamber of Commerce (ICC) Rules of Arbitration,[40] where provide specific tools to address such situations in Articles 7 to 10. With respect to joinder, Article 7(5) provides that requests for joinder made after the confirmation or appointment of an arbitrator shall be decided by the arbitral tribunal once constituted. Such joinder is permitted only if the additional party accepts the constitution of the tribunal and agrees to the Terms of Reference, where applicable. Regarding consolidation, Article 10 largely maintains the existing framework while clarifying the circumstances in which consolidation may occur. Consolidation may be permitted where: (i) all parties agree (Article 10(a)); (ii) the parties to the arbitrations are not the same but have all signed the same arbitration agreement or arbitration agreements (Article 10(b)); or (iii) the parties are the same, the disputes arise from the same legal relationship, and the arbitration agreements are compatible (Article 10(c)). The revised provision further clarifies that consolidation may still be possible even when the claims are not brought under the same arbitration agreement, thereby providing greater procedural flexibility while maintaining predictability in the exercise of the Court's discretion.

Second, arbitral tribunals or institutions may facilitate *the appointment of the same arbitrator* in related proceedings, which can enhance coherence in the assessment of facts and the interpretation of contractual arrangements across multiple arbitrations.

Third, in certain circumstances, parties may seek *anti-suit or anti-arbitration injunction*s from national courts in order to restrain parallel proceedings that could undermine the effectiveness and integrity of the arbitral process. An anti-suit injunction

[40]International Chamber of Commerce (ICC), *2021 Arbitration Rules*, https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ [accessed 5 March, 2026].

is a judicial order that restrains a party from initiating or continuing proceedings before a foreign court or tribunal. Its primary purpose is to safeguard the applicant's right to have the dispute resolved before the court or arbitral tribunal that grants the injunction.[41] Anti-arbitration injunctions constitute a form of interim relief granted by courts or, in certain circumstances, arbitral tribunals, directing a party either not to initiate or to discontinue arbitration proceedings. Such measures are typically sought when the commencement or continuation of arbitration is alleged to violate a dispute resolution arrangement previously agreed upon by the parties.[42] Importantly, anti-arbitration injunctions are generally directed at the litigating party rather than the arbitral tribunal before which the parallel or contemplated arbitration proceedings are pending. In essence, these measures constitute a form of interim relief.

Together, these procedural mechanisms represent practical tools developed within arbitral practice to manage the complexities of parallel proceedings, particularly in large-scale construction disputes characterised by multiple contracts and parties.

4.2. Legal and Procedural Challenges in Managing Parallel Proceedings in Construction Arbitration

Despite the promising potential of procedural mechanisms designed to manage parallel proceedings in construction arbitration, significant challenges remain that must be addressed and overcome.

First, the issue of consent in consolidation and joinder arises from the principle that arbitration derives its jurisdiction solely from the parties' agreement.[43] Arbitral tribunals may only exercise authority within the scope of the arbitration agreement concluded between the parties. Consequently, when consolidation of proceedings or the joinder of additional parties is contemplated, legal concerns emerge as to whether all parties involved have genuinely consented to resolving their disputes within a single arbitral procedure. This requirement is reflected in the New York Convention, particularly Article II (1),[44] which requires the existence of a written arbitration agreement between the parties.

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[41] Thomas Raphael, 'Anti-Suit Injunctions', in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, 2017, p. 79.
[42] Baltag, C., '9: Anti-arbitration injunctions'. In *Elgar Concise Encyclopedia of International Commercial Arbitration*, Cheltenham, UK: Edward Elgar Publishing, 2025, p. 23.
[43] Hackman, Nana Adjoa), 'The Problem of Arbitration and Multi-Party/Multi-Contract Disputes: Is Court-Ordered Consolidation an Adequate Response?', CAR Volume 13 - *CEPMLP Annual Review* 2008/09, pp. 11-12.
[44] Article II (1) of the New York Convention: "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may

Second, multi-party or multi-contract arbitration may create risks of setting aside or refusal of recognition and enforcement of the award. Under the New York Convention and national arbitration laws, an award may be challenged if the arbitration agreement is invalid, if a party was unable to present its case, if the tribunal exceeded the scope of the arbitration agreement, or if the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement.[45] In complex multi-party proceedings, disputes over consent and procedural arrangements may therefore increase the likelihood of challenges to the validity or enforceability of the arbitral award.

Third, the appointment of the same arbitrator in multiple related proceedings may raise concerns regarding the arbitrator's independence and impartiality,[46] particularly where overlapping facts, issues, or parties could give rise to perceptions of bias or unequal access to information. This concern is closely linked to the fundamental principle of independence and impartiality of arbitrators, which is widely recognised in most national arbitration laws and major institutional arbitration rules.

Finally, Vietnamese law, and indeed the laws of many jurisdictions, does not appear to recognise the authority of either courts or arbitral tribunals to grant anti-suit injunctions or anti-arbitration injunctions as interim measures.[47] The absence of such mechanisms may limit the ability to restrain parallel proceedings and to effectively manage potential jurisdictional conflicts.

arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".

[45] Article V(1) of the New York Convention.

[46] Anh Thuy Dung Nguyen, 'Standards of independence and impartiality in the context of international commercial arbitration', *The VMOST Journal of Social Sciences and Humanities*, 65(2), 85-92.

[47] Article 114 of the Civil Procedure Code 2015 and Article 49(2) of the LCA 2010.

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FROM CONTRACTUAL AND PARTY FRAGMENTATION TO PARALLEL PROCEEDINGS IN CONSTRUCTION ARBITRATION

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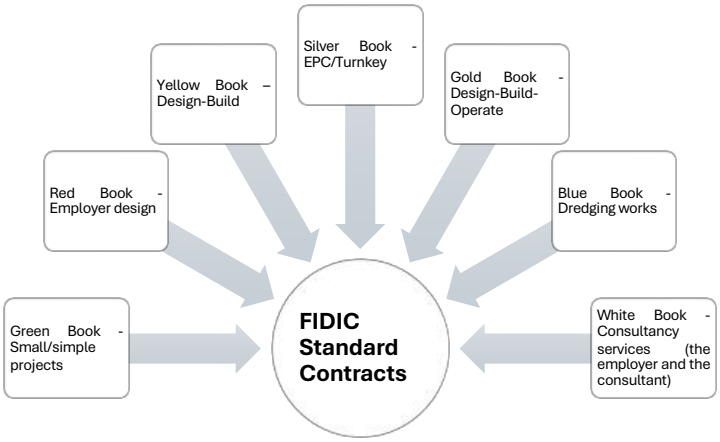

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1. Construction consultancy contracts;
2. Construction works execution contracts;
3. Contracts for the supply of materials and equipment to be installed in construction works;
4. Design-supply of materials and equipment contracts;
5. Design-construction contracts;
6. Supply of materials and equipment-construction contracts;
7. Design-supply of materials and equipment-construction contracts;
8. Turnkey contracts;
9. Other types of construction contracts.

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II.5. Multi-Contract and Multi-Party under The Long Thanh International Airport

Project owner:
Airports Corporation of Vietnam (ACV).

Contractor:
VIETUR Consortium (led by IC ISTAS from Türkiye), and major Vietnamese contractors such as Vinaconex, Newtecons, Ricons, and SOL E&C.

Architectural design:
Heerim Architects & Planners from South Korea.

Design and engineering consultants:
Japan Airport Consultants, ADP Ingénierie, Nippon Koei, and Oriental Consultants Globaltogether with Vietnamese consultancy firms such as Airport Design and Construction Consultancy and Transport Engineering Design Inc.

Operational consulting services:
A consortium including Incheon International Airport Corporation and PMI Consulting.

Others:
The involvement of these numerous actors, together with various subcontractors, suppliers, and service providers.

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III. Parallel Proceedings in Construction Arbitration

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III.1. Result: Parallel Proceedings?

According to Professor Salim Moollan KC:

Parallel proceedings in international arbitration refer to situations in which *two* or *more* dispute resolution proceedings are conducted before *different adjudicatory bodies*, at least one of which is an international arbitral tribunal.

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III.2. The triple identity test to qualify Parallel Proceedings?

1. Same parties (Persona)

An identity of parties, meaning that the litigants involved in the different proceedings are essentially the same.

2. Causa petendi (the legal and factual basis of the claim)

The proceedings must share the same subject matter: the underlying facts, the rights invoked, same legal rules forming the basis of the claim.

3. Petitum (relief sought)

Type of remedy or outcome sought in the parallel proceedings.

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III.3. Why they occur in Construction Arbitration?

- Multiple contracts with different dispute clauses
- Separate arbitration agreements
- Vertical contractual chains ((employer → contractor → subcontractor)
- Horizontal contractual structures (employer → multiple contractors)

→ Fragmented dispute resolution

III.4. Risks of Parallel Proceedings

- Increased time and costs
- Procedural inefficiency
- Conflicting judgments or arbitral awards
- Difficulty in enforcement

→ Undermines finality of dispute resolution

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IV. Legal Mechanisms for Managing Parallel Proceedings in Construction Arbitration

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IV.1. Legal Doctrines Addressing Parallel Proceedings

1. *Lis pendens:* meaning a "lawsuit pending elsewhere", requires the forum seized later to stay or decline jurisdiction if another adjudicatory body has already been seized of the same dispute.

2. *Res judicata*: a dispute that has been resolved by a final and binding decision cannot be litigated again between the same parties in respect of the same issue.

3. In addition: *Kompetenz-Kompetenz* principle, the arbitral tribunal has the authority to determine its own jurisdiction.

Both 1 vs 2 : another manifestation of the principle of *ne bis in idem* ("not twice for the same matter").

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IV.2. Incorporation of legal doctrines into legislation

1. *Lis pendens:*

Article 472 of the Civil Procedure Code 2015: Where a civil case involves the same parties and subject matter, Vietnamese courts must refuse jurisdiction or terminate proceedings if the parties have agreed to arbitration or a foreign court, if a foreign court or tribunal has already accepted the case or issued a decision, or if the dispute falls within the exclusive jurisdiction of a foreign court;

Article 6 of the Law on Commercial Arbitration 2010: Where the parties have concluded an arbitration agreement, a court must refuse to accept the case if one party initiates court proceedings, unless the arbitration agreement is invalid or incapable of being performed.

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IV.2. Incorporation of legal doctrines into legislation

2. Res judicata:
Article 192(1)(c) of the Civil Procedure Code 2015: courts must reject or prevent a claim if the dispute has already been resolved by a legally effective judgment or decision;
Article 218(1) of the Civil Procedure Code 2015: Parties are not allowed to re-initiate the same lawsuit where the plaintiff, defendant, and disputed legal relationship remain identical.

3. Kompetenz-Kompetenz :
Article 43(1) of the Law on Commercial Arbitration 2010: Before addressing the merits, the arbitral tribunal must verify the validity of the arbitration agreement and determine its own jurisdiction.

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IV.3. Procedural Mechanisms to Manage Parallel Proceedings in Construction Arbitration

1. *Consolidation* of related arbitrations and the *joinder* of third parties (Party consent is a key) (2021 ICC Rules of Arbitration: Article 7-10);

2. Facilitating *the appointment of the same arbitrator* in related proceedings;

3. Seeking *anti-suit or anti-arbitration injunction*s from national courts in order to restrain parallel proceedings (interim measure).

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IV.4. Challenges to Manage Parallel Proceedings in Construction Arbitration

1. Consent issues: *Consolidation or joinder may be difficult because arbitration jurisdiction depends on the parties' consent.*

2. Enforcement risks: Multi-party or multi-contract proceedings increase the risk of setting aside or refusal of recognition and enforcement of the award.

3. Impartiality concerns: Appointment of the same arbitrator in related cases may raise doubts about independence and impartiality.

4. Lack of injunction mechanisms: Vietnamese law generally does not recognise anti-suit or anti-arbitration injunctions to restrain parallel proceedings.

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Thank you for your attention!

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INTEREST IN ARBITRATION AWARDS

RECONCILING PARTY AUTONOMY AND COMPENSATORY JUSTICE IN INDIA

By: **Harjeet Kumar Jaggi, IRSE,**

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New Delhi, India

Abstract

The award of interest in arbitration under Section 31(7) of the Arbitration and Conciliation Act, 1996 represents a crucial mechanism to compensate parties for the time value of money. However, many Government contracts in India bar Pre award interest on the amount awarded. Indian courts have consistently upheld contractual clauses that prohibit payment of interest, thereby limiting arbitral discretion. This creates inequities where claimants suffer prolonged deprivation of funds due to delays inherent in arbitration. This paper critically examines judicial developments, especially recent Supreme Court rulings, and proposes doctrinally sound alternatives that enable tribunals to compensate claimants without violating contractual prohibitions or risking annulment under Section 34.

1. Introduction

Arbitration aims to provide **efficient and equitable dispute resolution**, but delay is endemic in Indian arbitration. Interest on delayed payments and compensation serves as **compensation for time-value of money**. However, contractual clauses often state: *"No interest shall be payable on any amount due."*

Interest is not merely ancillary but central to commercial justice. In arbitration, delays—sometimes spanning years—undermine the efficacy of dispute resolution. The issue becomes acute when contracts contain **"no interest" clauses**, effectively depriving claimants of compensation for delayed payments.

2. Statutory Framework: Section 31(7)

Section 31(7) establishes a **two-tier structure of interest on award money**:

1. **Section 31(7) (a): Pre-award interest –** Period between the date on which the cause of action arose and the date on which the award is made – **Discretionary.**
2. **Section 31(7) (b): Post-award interest -**Period from the date of award to the date of payment – **Statutory Default.**

Key principle is that the Tribunal's power to award Pre award interest exists **"unless otherwise agreed by the parties"**

Thus:

- Party autonomy can **contractually exclude pre-award interest**
- But **post-award interest remains largely statutory**

3. Evolution of Judicial Approach

a. Recent jurisprudence reaffirms:

- Pre-award interest = **derogable**
- Post-award interest = **non-derogable in nature**

b. Early Expansion: Arbitrator's Broad Powers

ONGC v. M.C. Clelland Engineers (1999)

- Recognized arbitrator's power to award interest across stages.

Hyder Consulting v. State of Orissa (2015)

- Supreme Court clarified:
  - Post-award interest applies to **aggregate sum (principal + pre-award interest)**

Significance:

- Strengthened compensatory role of arbitration.

4. Restrictive Turn: Primacy of Contract

- ***Union of India v. Ambica Construction (2016)***

  Held that Arbitrator **cannot award interest** if contract explicitly prohibits it.

  However, Court clarified that ambiguous clauses may not completely bar interest.

- ***Union of India v. Larsen & Toubro Limited (2026):***

  Confirmed that pre-award interest cannot be granted, even as compensation, if a contract bars it.

- ***Garg Builders v. Bharat Heavy Electricals Limited (2021):***

  Reaffirmed that a specific bar against interest on "any moneys due" is binding on the arbitrator.

- ***Union of India v. Bright Power Projects (2015)***:

  Established that the 1996 Act gives "more respect" to the agreement than the older 1940 Act.

- **Saw Pipes v ONGC (2003)**

  Expanded judicial review of arbitral awards; tribunals must respect contract. Awards can be set aside for patent illegality.

5. Doctrinal Clarification: Interpretation of "No Interest" Clauses

ONGC v. G&T Beckfield Drilling Services (2025)

This is the **most important recent authority**.

Facts

- Clause: "No interest shall be payable on delayed or disputed payments"
- Tribunal awarded **12% pendente lite interest**

Issue

- Does such a clause bar arbitral power?

Held

- Supreme Court upheld the award

Key Principles

a. **Strict Interpretation of Exclusion Clauses**
   - A general clause does not automatically bar arbitral power

b. **Requirement of Explicit Bar**
   - Only **clear and comprehensive exclusion** removes tribunal jurisdiction

c. **Distinction Between Contractual Liability and Arbitral Power**
   - Clause may limit liability during contract performance
   - But not necessarily tribunal's adjudicatory power

d. **Post-Award Interest is Statutory**
   - Cannot be excluded by agreement

Therefore, A clause barring interest on delayed payments does not "expressly or by necessary implication", exclude pendente lite interest.

6. Primacy of Express Wording

- **Arbitrator as a "Creature of Contract"**: The tribunal derives its authority from the agreement and cannot act contrary to its express terms.
- **Specific Phrases**: Clauses such as "no interest shall be payable" or "no claim for interest will be entertained" are considered clear enough to take away the arbitrator's power to award interest.
- **Broad Scope**: The phrase "amounts payable to the contractor under the contract" is interpreted broadly; it is not limited to security deposits but covers all monetary claims arising from the contract.

7. Disjunctive Interpretation (The "Or" Rule)

- **Independent Bars**: In many General Conditions of Contract (GCC), phrases like "no interest... on earnest money **or** security deposit **or** amounts payable" are read disjunctively.
- **No Ejusdem Generis**: Courts generally reject the argument that the bar only applies to "deposits." Because of the word "or," the prohibition on "amounts payable" stands as an independent, absolute bar.

8. No Interest Even Disguised as Compensation

- 2026 ruling (L&T-type dispute):
    - Tribunal cannot award **pre-award interest "even as compensation"** if contract bars it.

9. No Expansion by Courts

- Courts cannot add or modify interest terms at enforcement stage

10. Synthesis of Law

From case laws, the position is:

Type of Clause	Tribunal Power
Narrow clause (“no interest on delayed payments”)	✓ Interest may still be awarded
Broad clauses (“no interest whatsoever”) (“no interest on the awarded amount(s)	❌ Complete bar
Silence	✓ Full discretion

11. The Problem of Hardship

Despite doctrinal clarity, practical issues remain:

- Arbitration delays (3–10 years or even more)
- Inflationary erosion
- Respondent gains **interest-free retention of money**

This creates:

- **Unjust enrichment**
- Strategic delay incentives

12. Some examples of gross injustice due to “No interest” clause:

a. Case 1

Date of Acceptance of tender**- December 2002**

Original Completion Period **– 16 months**

Actual execution period **-** **31 months (**all extensions with PVC and without LD)

Causes of delay

Delay in handover of land

Delay in issue of approved drawings

Work **foreclosed in July 2005, for want of land**, without settling the contractor’s claims

Tribunal appointed **– February 2021**

Final Award published- August 2022

b. Case 2:

Date of Acceptance of tender**- May 2011**

Original Completion Period **– 8 months**

Actual execution period **-** Work could not start for want of unencumbered land. Contract foreclosed in March 2014. Contractor’s claims not entertained.

Claimant invoked Arbitration **– April 2014**

Tribunal appointed **– April 2023**

Final Award published- October 2023

c. Case 3:

Date of award**- August 1993**

Original Completion Period **– 6 months**

Actual execution period **-** **February 1994**

Causes of Dispute

Wrongful imposition of LD by the Respondent Department

Wrongful deduction of amount from contractor's due payments

Claimant invoked Arbitration **– April 1994**

Tribunal appointed (with intervention of Courts) **– July 2004**

The case dragged on for 15 years without any outcome. The claimant, thereafter, approached the courts for appointment of a new tribunal to consider the claims.

New Tribunal appointed – **September 2019**

Final Award published- March 2020

The core issue therefore, is:

Can arbitral tribunals ensure equitable compensation without violating express contractual prohibition on interest?

13. Limits on Arbitral Innovation

Recent jurisprudence suggests:

- Tribunal **cannot circumvent contract** by:
    - Awarding "interest disguised as damages"
    - Granting equitable compensation contrary to clause

Risk:

- Award may be set aside under Section 34 for:
    - Patent illegality
    - Excess of jurisdiction

14. Doctrinal Openings: Scope for Tribunal Creativity

1. Strict Construction Doctrine

Courts insist:

- Clause must be **clear and unambiguous**

Thus:

- Tribunals can interpret **narrowly drafted clauses**, where possible

2. Distinction Between Debt and Damages

- Interest may be barred on:
  - Certified payments
- But not necessarily on:
  - Damages claims

3. Compensation vs Interest

While courts reject disguised interest, they allow:

- Genuine damages for:
  - Loss
  - Delay
  - breach consequences

15. Alternative Remedies

1. Escalation and Price Adjustment

- Particularly in construction disputes
- Courts routinely uphold:
  - Increased costs due to delay

✓ Safe
✓ Evidence-based

2. Prolongation Costs

Includes:

- One site and off site overheads
- Staff expenses
- Machinery idling

✓ Recognized in arbitral practice

3. Loss of Profit / Opportunity Cost

- Framed as:
  - Business loss
- Not as time-value compensation

4. Post-Award Interest Strategy

Even if pre-award interest is barred:

- Tribunal can:
  - Award **higher post-award interest**

✓ Statutorily protected
✓ Low risk of challenge

5. Costs as Compensation

- Full legal costs
- Funding costs
- Institutional fees

Emerging trend:

- Costs as **quasi-compensatory tool**

6. Composite Damages Model

Tribunal may:

- Increase principal claim for Inflation adjustment/Value restitution to arrive at real economic value

But must:

- Provide detailed reasoning
- Avoid linkage to “interest”

  ✗ Risk:

  May be construed as Interest absorption in the Principal

16. Suggested Model for Arbitral Reasoning

“The contract expressly prohibits payment of interest. This Tribunal is bound by party autonomy and refrains from awarding interest for the pre-award period. However, the evidence establishes that the claimant has suffered quantifiable financial loss due to prolonged deprivation of funds caused by the respondent’s breach. Such loss includes escalation in costs, loss of business opportunity, and additional financial burden. These heads constitute damages independent of interest and are therefore awardable under general principles of contract law.”

17. Risk Analysis under Section 34

High-Risk Approaches

- Interest relabelled as damages
- Ignoring contractual bar
- Equity-based awards

Low-Risk Approaches

- Evidence-backed damages
- Narrow clause interpretation
- Statutory post-award interest

18. Recommendations

1. Legislative Reform

- Amend Section 31(7):
  - Allow tribunals to grant **reasonable compensation despite contractual bar**

2. Judicial Development

- Introduce:
  - **Unjust enrichment doctrine**

3. Contract Drafting Reform

Replace:

“No interest shall be payable”

With:

“No interest shall be payable except in cases of wrongful withholding or adjudicated liability”

19. Conclusion

Indian arbitration law strongly favours party autonomy, often at the cost of equitable compensation. The strict enforcement of “no interest” clauses, while doctrinally consistent, produces unjust outcomes in delay-heavy arbitrations. Through careful legal structuring—particularly via damages, escalation, and cost-based compensation—tribunals can still achieve substantive justice without violating contractual limits. However, author strongly recommends some legislative reforms to allow some discretion to the Arbitrators in the interest of party equity and justice.

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Interest on Arbitration Awards

Reconciling Party Autonomy and Compensatory Justice

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Arbitration for efficient and equitable Justice

But **Delay endemic** in Arbitrations

Interest on delayed payments serves as compensation for **time Value of Money**

Interest is Central to Commercial Justice

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However, Contract Clauses in many Contracts state:

"No Interest shall be payable in any amount due"

Arbitral awards also carry this Bar

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Two tier structure on Interest as per Section 31(7) of Indian Arbitration & Conciliation Act

Section 31(7) (a)
Pre Award Interest
includes pre-reference and pendente lite interest.
Discretionary

Section 31(7) (b)
Post award interest
Interest after declaration of award till the date of payment.
Statutory default.

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Section 31 (7) (a):

"***Unless otherwise agreed by the parties***, *where And in so far as an award is for the payment of money,* ***the arbitral tribunal may include*** *in the sum For which an award is made, an interest, which it deems reasonable ……."*

Section 31 (7) (b):

"*Sum directed to be paid by an arbitral award* ***shall****, unless the award otherwise directs****, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award****, from the date of award to the date of payment"*

Key principle is that the Tribunal's power to award Pre award interest exists **"unless otherwise agreed by the parties"**

Thus,
Party autonomy can **contractually exclude pre-award interest**
But **post-award interest remains largely statutory**

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Judicial Interventions on Interest in Awards

A number of references to the courts, have brought out the **following important inferences**.

- Arbitrator is Creature of Contract
- Contract clause specifically barring interest on award amount shall always hold.
- No use of the term *"Ejusdem Generis"* applies in the contractual interpretations. E.g. Phrases like "no interest shall be payable on the earnest money **OR** security deposit OR any amount due." have to be interpreted separately and disjunctively
- Tribunal cannot award **pre-award interest "even as compensation"** if contract bars it.
- **Courts cannot add or modify** interest terms at enforcement stage

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However, Indian Courts have held that

Only **clear and comprehensive exclusion** removes tribunal jurisdiction

Thus an Explicit Bar in Clauses is essential

Some Clause may limit liability during **contract performance** but not necessarily **tribunal's adjudicatory power**

Thus there is distinction Between Contractual Liability and Arbitral Power

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The Problem of Hardship

Despite doctrinal clarity, practical issues remain:

- Arbitration delays (3–10 years or even more)
- Inflationary erosion
- Respondent gains **interest-free retention of money**

This creates:

- **Unjust enrichment**
- Strategic delay incentives

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Examples of injustice due to "No interest" clause

Case 1

Bid Acceptance **December 2002**
Original Completion Period **– 16 months**
Actual execution period **- 31 months** (all extensions with PVC and without LD)

Causes of delay: Delay in handover of land , Delayed drawings approval
Work **foreclosed in July 2005, for want of land**, without settling the contractor's claims
Tribunal appointed **– February 2021**

Final Award published- August 2022

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Examples of injustice due to "No interest" clause

Case 2

Bid Acceptance **May 2011**
Original Completion Period **– 8 months**
Actual execution period **-** Work could not start for want of unencumbered land.
Contract foreclosed in March 2014. Contractor's claims not entertained.

Arbitration Invoked **April 2014**
Tribunal appointed **–** **April 2023**

Final Award published- October 2023

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Examples of injustice due to "No interest" clause

Case 3

Bid Acceptance **August 1993**
No delay in completion
However, Dispute due to wrongful Recoveries by the Respondent Department

Arbitration Invoked **– April 1994**
Tribunal appointed **– July 2004**
Case dragged on for **15 years** with tribunal not giving any decision.

New Tribunal Appointed **September 2019**
Final Award published- April 2020

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The core issue

How can arbitral tribunals ensure equitable compensation ?

(without violating express contractual prohibition on interest)

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Tribunal **cannot circumvent contract** by:

- Awarding “interest disguised as damages”
- Granting equitable compensation contrary to clause

Risk:

Award may be set aside under **Section 34** for:

- Patent illegality
- Excess of jurisdiction

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Alternative Strategies

1. "No interest Clause" must be **clear and unambiguous**
   Thus, Tribunals can interpret narrowly drafted clauses, where possible
2. Escalation and Price Adjustment
3. Prolongation Costs
4. Loss of Profit / Opportunity Cost
5. Other Costs: Legal, Institutional,

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Recommendations

1. Legislative Reform
Amend Section 31(7): Allow tribunals to grant **reasonable compensation despite contractual bar**

2. Judicial Development
Introduce: **Unjust enrichment doctrine**

3. Contract Drafting Reform
Replace: **"No interest shall be payable"**
With: **"No interest shall be payable except in cases of wrongful withholding or adjudicated liability"**

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AGENDA
CHƯƠNG TRÌNH

SECTION D – Regional Construction Arbitration
PHẦN D – Trọng tài xây dựng trong khu vực

MODERATOR/ĐIỀU PHỐI VIÊN

Mr./Ông **TRẦN PHẠM HOÀNG TÙNG**
Partner of CNC Counsel (Vietnam)
Cố vấn Cao cấp (Special Counsel) và Trưởng Bộ phận Giải Luật sư thành viên tại CNC Counsel

SPEAKER/DIỄN GIẢ

Mr./Ông **AJIT KUMAR MISHRA**
Board member as Director (Works) in IRCON International Ltd
Thành viên Hội đồng quản trị kiêm Giám đốc (Works) tại IRCON International Ltd

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Luật sư điều hành Công ty luật Hui Zhong (Singapore)

Mr./Ông **BILLY DESMOULINS**
Director at Accuracy
Giám đốc tại Accuracy

10:30AM – 12:30PM

SESSION D1
Updates with recent development of construction arbitration in Asia

PHIÊN D1
Cập nhật sự phát triển trọng tài xây dựng trong khu vực Châu Á

Presentation 01
India's Divergent Approach to Delay and Disruption Analysis in Construction Arbitration

Tham luận 01
Cách tiếp cận riêng biệt của Ấn Độ đối với việc phân tích chậm tiến độ và gián đoạn trong trọng tài xây dựng

Presentation 02
The Impacts of the 2025 Amendments to China's Arbitration Law on Construction Dispute Arbitration and the Recognition and Enforcement of Arbitral Awards in China

Tham luận 02
Tác động của các sửa đổi năm 2025 đối với Luật Trọng tài Trung Quốc trong giải quyết tranh chấp xây dựng bằng trọng tài và vấn đề công nhận và cho thi hành phán quyết trọng tài tại Trung Quốc

Presentation 03
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BEYOND THE PROTOCOL:

India's Divergent Approach to Delay and Disruption Analysis in Construction Arbitration

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ABSTRACT

Delay and disruption claims constitute the most financially significant construction disputes globally. International practice increasingly relies on soft law frameworks—the Society of Construction Law (SCL) Delay and Disruption Protocol (2017) and AACE International's Recommended Practice No. 29R-03—establishing standardised critical path analysis, concurrent delay apportionment, and disruption quantification methodologies. These protocols have achieved substantial acceptance in Singapore, Hong Kong, the United Kingdom, Australia, and the Middle East.

India presents a striking anomaly. Despite being Asia's second-largest construction market with projected infrastructure investment of USD 1.4 trillion and extensive international arbitration activity, Indian practice has developed in effective isolation from protocol-based standards. Doctrinal analysis of Indian Supreme Court and High Court decisions from 2010 to 2025 reveals virtually no engagement with SCL Protocol or AACE methodologies, creating systemic unpredictability and outcomes potentially untethered from rigorous causation analysis.

This paper identifies four structural conditions that produce India's divergence: baseline fragility (programmes functioning as contractual formalities rather than analytically reliable CPM tools); record asymmetry (records unsuited to activity-level causal analysis); contractual risk allocation (EOT-only regimes limiting compensation recovery despite analytical merit); and doctrinal constraints (damages law and arbitration review standards discouraging granular causation findings). Without settled concurrency doctrine, tribunals avoid explicit frameworks, widening the protocol divergence. Disruption claims regress to industry multipliers rather than measured mile methodology given record limitations.

The paper advances a reform framework comprising five implementable measures: Minimum Scheduling Data Standards in procurement; model procedural orders for tribunals; expert evidence architecture adapting joint statement practice; India-compatible delay principles reconciling protocols with the Indian Contract Act,

1872; and institutional practice notes from arbitration centres. The paper concludes that protocol effectiveness depends on institutional infrastructure, not merely technical capacity—a transferable lesson for Asian arbitration development.

Keywords: *delay analysis, disruption claims, SCL Protocol, concurrent delay, Indian construction arbitration, critical path method, AACE RP 29R-03, construction claims, arbitration reform*

1. INTRODUCTION

Construction delay is a universal pathology. Across jurisdictions and project types, disputes about when works were to be completed, which party caused delay, and how much that delay cost represent the largest category of construction arbitration claims by both frequency and quantum. The emergence in the early 2000s of standardised analytical frameworks—most prominently the Society of Construction Law Delay and Disruption Protocol[1] and AACE International's forensic schedule analysis methodology[2]—promised a rationalising influence: a shared vocabulary of critical paths, concurrent delay, and measured mile productivity by which tribunals, experts, and counsel could test causation claims against consistent evidential standards.

That promise has been substantially realised in mature construction arbitration markets. In England and Wales, Singapore, Hong Kong, and Australia, the SCL Protocol has achieved the status of persuasive guidance that courts and tribunals actively engage, cite, and calibrate their analysis against. AACE RP 29R-03[3] provides the methodological taxonomy within which expert witnesses are expected to situate their chosen analytical technique. Departure from protocol approaches requires justification; compliance with them creates a rebuttable presumption of methodological adequacy.

India presents a systematic and structurally-generated exception. With the National Infrastructure Pipeline projecting infrastructure expenditure exceeding USD 1.4 trillion[4], a construction sector characterised by endemic delay and cost overrun, and an active arbitration ecosystem processing thousands of infrastructure disputes annually, India has nevertheless failed to integrate protocol-

[1] Society of Construction Law, *Delay and Disruption Protocol*, 2nd edn (SCL, 2017).

[2] AACE International, *Recommended Practice No. 29R-03: Forensic Schedule Analysis* (AACE International, 2011, updated 2018).

[3] AACE International, *Recommended Practice No. 25R-03: Estimating Lost Labor Productivity in Construction Claims* (AACE International, 2004, updated 2020).

[4] NITI Aayog, *National Infrastructure Pipeline: Final Report of the Task Force* (NITI Aayog, 2020). The NIP identified USD 1.4 trillion in infrastructure investment across 2019-2025, with roads, railways, urban infrastructure, and energy constituting the primary sectors..

based analysis into mainstream arbitration practice. Indian tribunals and courts operate almost entirely without reference to the SCL Protocol or AACE methodologies. Delay experts deploy techniques that range from sophisticated to impressionistic without disciplinary constraint. Concurrent delay remains doctrinally unsettled. Disruption claims are resolved by reference to industry productivity norms rather than actual resource utilisation data.

This paper argues that India's divergence is not primarily a product of ignorance of international methodologies, nor simply a matter of professional capacity requiring educational correction. It is structurally generated by four systemic conditions—baseline fragility, record asymmetry, contractual risk allocation, and doctrinal constraints—each of which renders protocol analysis either technically impracticable or commercially irrelevant in the Indian context. Understanding this structural causation is prerequisite to meaningful reform.

The methodology is doctrinal. It conducts analysis of Indian Supreme Court and High Court jurisprudence on delay and disruption damages from 2010 to 2025, comparative analysis with English, Scottish, Singaporean, and Australian approaches, and institutional examination of procurement frameworks, standard contract conditions, and arbitral procedural practice. The paper does not conduct empirical survey of arbitration outcomes, a limitation acknowledged at the outset.

The paper proceeds in seven substantive sections. Section 2 sets out the international framework. Section 3 surveys comparative reception in mature jurisdictions. Section 4 describes India's structural context. Section 5 analyses the four systemic conditions of divergence in detail. Section 6 examines concurrent delay. Section 7 addresses disruption. Section 8 advances the reform framework. Section 9 concludes.

2. THE INTERNATIONAL FRAMEWORK: SCL PROTOCOL AND AACE RP 29R-03

2.1 The SCL Delay and Disruption Protocol

The Society of Construction Law published its Delay and Disruption Protocol in 2002, with the significantly revised second edition appearing in 2017[5]. The Protocol articulates Core Principles—normative statements about best practice—and Guidance on their application. Although expressly non-binding and not incorporated by reference in most standard form contracts, the Protocol has achieved substantial informal authority as the leading codification of best practice in delay and disruption analysis.

For delay analysis, the Protocol's Core Principle 3 requires, as a condition of reliability, that any programme relied upon for causation purposes be "a reliable, resource-loaded, logic-linked CPM programme that accurately reflects the manner in which the works were or are intended to be executed."[6] The Protocol recognises several recognised techniques for retrospective delay analysis: Impacted As-Planned Analysis, Collapsed As-Built Analysis, As-Planned versus As-Built Windows Analysis, and Time Impact Analysis (TIA). Each technique has recognised strengths and limitations documented in both the Protocol and the academic commentary.[7]

For concurrent delay, the Protocol recommends—though with acknowledged jurisdictional variation—that where employer risk events and contractor risk events are of approximately equal causative potency and are truly concurrent, the contractor should ordinarily be entitled to an extension of time but not to prolongation costs[8]. The Protocol acknowledges the ongoing controversy between

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[5] Society of Construction Law, *Delay and Disruption Protocol*, 2nd edn (SCL, 2017). The Protocol was first published in 2002; the 2017 edition substantially revised guidance on concurrency and disruption.

[6] SCL (2017), Core Principle 3: "If a party intends to rely on a programme for delay analysis purposes, the programme should be a reliable, resource-loaded, logic-linked CPM programme that accurately reflects the manner in which the works were or are intended to be executed."

[7] See generally Roger Gibson, *Construction Delays: Extensions of Time and Prolongation Claims*, 2nd edn (Taylor & Francis, 2014), Chapter 9 (Windows Analysis and Time Impact Analysis). Windows analysis divides the project into discrete periods, analysing delay causation within each window independently.

[8] SCL (2017), para 10.1. The Protocol defines concurrent delay as "a period of project overrun caused by two or more effective causes of delay which are of approximately equal causative potency."

the English "but for" approach, the Scottish apportionment approach, and other emerging frameworks without prescribing a universal resolution.[9] A 2024 survey of concurrent delay across major international standards confirms that true concurrent delay as defined by the SCL Protocol is in practice 'a rare occurrence' and that 'there is no discrete formula for identifying or evaluating concurrent delays,' with ASCE, SCL and AACE each adopting different levels of technical specificity in their definitions.[10]

For disruption, Core Principle 6 requires contemporary records as the foundation of any reliable analysis.[11] The measured mile methodology—comparing productivity in impacted periods against productivity in unimpacted baseline periods drawn from the same project—is preferred as generating project-specific evidence rather than relying on industry norms.[12]

2.2 AACE International RP 29R-03 and RP 25R-03

AACE International's Recommended Practice No. 29R-03, Forensic Schedule Analysis, provides the most comprehensive taxonomy of delay analysis methodologies in current use[13]. It classifies nine primary methodologies—including Modelled, Observational, and Contemporaneous Approach families—and identifies the evidentiary conditions under which each is appropriate. Critically, RP 29R-03 does not prescribe a single superior methodology; it requires

[9] Luigi Di Paola and Paolo Spanu, 'Concurrent Delays' [2006] International Construction Law Review 374 (Pt 3). Di Paola (Studio Legale Bonelli Erede Pappalardo) and Spanu (Tecnimont SpA) survey six approaches to concurrent delay under common law, confirming that apportionment cannot be applied in contract at common law (citing Keating on Building Contracts, 7th edn, para 8.33), and that the Malmaison approach—consistent with the SCL Protocol—is the most appropriate for employer risk events in English construction contracts.

[10] Zack Kilgore and Muhammad Khedr, "Concurrent Delay in the Complex World of Construction Projects" (Global Arbitration Review, 19 July 2024)

[11] SCL (2017), Core Principle 6: "In order to prepare a reliable and persuasive delay and/or disruption analysis, it is essential that contemporary records are kept."

[12] SCL (2017), para 21.2: "The measured mile analysis involves a comparison of the productivity rate achieved by the contractor during an unimpacted period of the works... with the productivity rate achieved during an impacted period."

[13] AACE International, *Recommended Practice No. 29R-03: Forensic Schedule Analysis* (AACE International, 2011, updated 2018). This Recommended Practice sets out nine recognized methodologies for delay analysis.

the analyst to justify the choice of methodology by reference to the quality and completeness of available data.

AACE RP 25R-03 on estimating lost labour productivity provides the corresponding framework for disruption quantification.[14] It distinguishes measured mile analysis, project productivity loss calculation, earned value disruption analysis, and industry productivity factor methods, ranking them in descending order of reliability. The measured mile is preferred because it draws on the contractor's own project-specific productivity data; industry productivity factors are a last resort where project records are inadequate and can be contested on the basis that industry averages do not reflect the particular conditions of the project in dispute.

2.3 Conceptual Architecture: Critical Path, Concurrency, and Causation

The foundational concept underlying both frameworks is the critical path: the sequence of activities determining the project's minimum duration, such that any delay to a critical activity necessarily delays project completion.[15] Float—time buffer available to non-critical activities—complicates the analysis: a delay to a near-critical activity may or may not affect completion depending on float consumption. The ownership of float (whether belonging to the employer, the contractor, or the project itself) is a contested question across jurisdictions.

The causal chain from event to delay must be established through the programme: a delay event must be shown to have impacted a critical or near-critical activity and through the logic network affected the overall programme. This is what distinguishes protocol-based analysis from narrative delay description: the former tests causation through the project's own logic; the latter relies on the persuasiveness of the expert's account.

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[14] AACE International, *Recommended Practice No. 25R-03: Estimating Lost Labor Productivity in Construction Claims* (AACE International, 2004, updated 2020).

[15] AACE International, *Recommended Practice No. 10S-90: Cost Engineering Terminology* (AACE International, 2021). Defines "critical path" as "the longest path through the network schedule, which establishes the minimum overall project duration."

Disruption, analytically distinct from delay, refers to loss of productivity caused by employer breaches or employer risk events: a contractor that completes work on time may nonetheless have incurred additional cost due to working in less efficient conditions than planned. Disruption quantification requires evidence of what productivity was actually achieved (the impacted rate) and what productivity was achievable absent the disrupting event (the baseline or measured mile rate).

3. COMPARATIVE LANDSCAPE: PROTOCOL RECEPTION IN MATURE JURISDICTIONS

3.1 England and Wales

The Technology and Construction Court has engaged extensively with the core principles listed in SCL Protocol. It can also be considered that the core principles have evolved based on leading case laws and jurisprudence. In *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd*,[16] the court established the foundational English proposition on concurrent delay: where employer-caused and contractor-caused delays are concurrent and of approximately equal causative potency, the contractor is entitled to an extension of time. This was subsequently elaborated and confirmed in *Walter Lilly & Company Ltd v. Mackay,*[17] where Akenhead J undertook a comprehensive review of concurrent delay authorities and held — in obiter dictum, since on the facts no actual concurrent delay was found — that where delay is caused by two or more "effective causes," one of which is a Relevant Event entitling the contractor to an EOT under JCT clause 25, the contractor is entitled to a full extension of time. He expressly rejected the Scottish apportionment approach in *City Inn Ltd v. Shepherd Construction Ltd*[18] as inapplicable in England and Wales. The decision implies, though does not expressly state, that a "but for" causation standard is inapplicable to employer-risk

[16] *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32 (TCC). Dyson J held that where there is true concurrency of delay, the contractor is entitled to an EOT even if it cannot demonstrate the employer delay was the dominant cause, provided the contractor delay was not the dominant cause either. This case is genesis of ‘Malmaison Approach’ of dealing with the concurrent delays.

[17] *Walter Lilly & Company Ltd v. Mackay & Anr* [2012] EWHC 1773 (TCC).

[18] *City Inn Ltd v. Shepherd Construction Ltd* [2010] CSIH 68

events under JCT forms, the question being whether the Relevant Event was an effective cause of critical delay rather than the dominant or sole cause.

In *De Beers UK Ltd v. Atos Origin IT Services UK Ltd,*[19] Edwards-Stuart J addressed the evidentiary consequences of inadequate records, holding that while poor records may weaken a claim they do not automatically extinguish it; the tribunal may draw reasonable inferences from secondary evidence. This pragmatic flexibility is calibrated against the expectation of contemporaneous records established by the Protocol.

For global and composite claims, *John Doyle Construction Ltd v. Laing Management (Scotland) Ltd*[20] and *Balfour Beatty Construction Ltd v. Chestermount Properties Ltd*[21] together establish that global claims are permissible in appropriate circumstances but carry the burden of demonstrating that the composite losses flowed from a composite of employer breaches without intervening contractor default.

3.2 Scotland

Scottish courts have diverged from the English approach on concurrency by adopting an apportionment methodology. In *City Inn Ltd v. Shepherd Construction Ltd,*[22] the Court of Session held that where both parties have contributed to delay, a fair and reasonable apportionment of responsibility is appropriate. This approach—more flexible than the English position but correspondingly less

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[19] *De Beers UK Ltd v. Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC)

[20] *John Doyle Construction Ltd v. Laing Management (Scotland) Ltd* [2004] BLR 295 (Court of Session). Lord Macfadyen held that a contractor relying on a global claim must show that the clump of breaches caused the global loss, and that the causal nexus is not broken by any intervening contractor default.

[21] *Balfour Beatty Construction Ltd v. Chestermount Properties Ltd* (1993) 62 BLR 1 (QBD). Colman J confirmed that for EOT purposes the "dominant cause" test does not apply; the employer's delay must simply be a cause of the relevant critical delay.

[22] *City Inn Ltd v. Shepherd Construction Ltd* [2010] CSIH 68; 2010 SC 365. The Scottish Court of Session adopted an "apportionment" approach to concurrency based on fair and reasonable attribution of responsibility.

predictable—has influenced discussion of the concurrency problem across jurisdictions including Singapore and Hong Kong.

3.3 Singapore

The SCL Protocol is referenced by parties in Singapore as a guide and carries persuasive authority in proceedings, but no Singapore court or tribunal has yet established judicial precedent endorsing its application. The standard public sector form (PSSCOC) does not define concurrent delay, and the position on concurrent delay law remains unsettled following *Ser Kim Koi v GTMS Construction Pte Ltd*[23] and *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering*[24]. Chow Kok Fong's Law and Practice of Construction Contracts (5th edn, 2019), the leading Singapore text, cites the Protocol as a reference for the general position on concurrent delay. SCL Singapore is actively developing complementary professional infrastructure — including a protocol for joint statements in arbitration — but the Protocol has not been formally adopted by any Singapore institution or court.

3.4 Hong Kong

The Protocol has greater relevance in Hong Kong than elsewhere in Asia, given the influence of English law. However, two qualifications substantially temper this. First, Hong Kong courts have adopted the *City Inn* apportionment approach to concurrent delay — the Scottish position that the Protocol is not based on and that was rejected in England in *Walter Lilly v Mackay*. Second, practitioners report that certifiers in Hong Kong do not apply Protocol principles mid-project, and direct contractual adoption of the Protocol is unlikely. The Protocol's guidance on contemporaneous records aligns with Hong Kong judicial practice (*Chun Wo Building Construction Ltd v Metta Resources Ltd* [25]), and expert delay analysis in arbitration routinely invokes methodologies described in the Protocol; but the

[23] *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34
[24] *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering* [2024] SGHC(A) 1
[25] *Chun Wo Building Construction Ltd v Metta Resources Ltd* [2016] HKCFI 1357

Protocol functions as a methodological reference for expert evidence rather than as institutional guidance adopted by courts or the HKIAC.

3.5 Australia

Australian courts have similarly engaged with protocol-based analysis. In *Turner Corporation v. Co-ordinated Industries Pty Ltd,*[26] the New South Wales Supreme Court accepted modified total cost methodology as a last resort where project records were inadequate, subject to stringent conditions including proof that the inadequacy of records was not attributable to the claimant. This represents the mirror image of the Indian position: Australian courts permit pragmatic methodology in record-poor circumstances while maintaining the protocol standard as the default.

4. INDIAN CONSTRUCTION ARBITRATION: STRUCTURAL CONTEXT

4.1 Scale and Significance

India's construction sector is the second largest in Asia and among the five largest globally with the National Infrastructure Pipeline committed USD 1.4 trillion in infrastructure expenditure across 2019-2025, with the Railways, National Highways Authority of India (NHAI), and urban infrastructure constituting the dominant public sector clients.[27] The Ministry of Statistics and Programme Implementation's quarterly monitoring reports consistently record that approximately 40-45% of large central sector infrastructure projects (above INR

[26] *Turner Corporation v. Co-ordinated Industries Pty Ltd* (1994) 11 BCL 202 (NSW Supreme Court). The court accepted that a contractor could recover disruption costs using a modified total cost method where records were unavailable, subject to stringent conditions.

[27] NITI Aayog, *National Infrastructure Pipeline: Final Report of the Task Force* (NITI Aayog, 2020). The NIP identified USD 1.4 trillion in infrastructure investment across 2019-2025, with roads, railways, urban infrastructure, and energy constituting the primary sectors.

1500 million) experience cost overruns, and over 50% experience schedule overruns, generating a substantial and continuous stream of claims and disputes.[28]

4.2 Governing Legislation

Through is no specific Construction Law, Construction disputes in India are resolved primarily through arbitration under the Arbitration and Conciliation Act, 1996 ("ACA"), substantially amended in 2015 and 2019.[29] The substantive law of damages is governed by Sections 73 and 74 of the Indian Contract Act, 1872 ("ICA").[30] Section 73 codifies the compensatory principle—damages for loss naturally arising from breach or within the contemplation of the parties—in terms closely resembling *Hadley v. Baxendale.*[31] Section 74 governs liquidated damages and stipulated penalties, requiring proof of "reasonable compensation" notwithstanding the contractual stipulation.[32]

4.3 Standard Contract Forms

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[28] Ministry of Statistics and Programme Implementation, *Quarterly Report on Projects Costing Rs. 150 crore and above* (MoSPI, September 2024). As of the report date, 779 of 1,841 monitored central sector infrastructure projects (42.3%) reported cost overruns, with a total original cost of Rs.21.84 lakh crore against revised cost of Rs.29.82 lakh crore.

[29] The Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019), inserting Part IA (Arbitration Council of India) and amending Section 34 to clarify the scope of "patent illegality". The Eighth Schedule prescribing qualifications for arbitrators was omitted by the 2021 Amendment.

[30] Indian Contract Act, 1872, Section 73: "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken it, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

[31] *Hadley v. Baxendale* (1854) 9 Exch 341; 156 ER 145. Alderson B formulated the twin limbs of remoteness: loss arising naturally according to the usual course of things, and loss within the reasonable contemplation of the parties at contract formation.

[32] Indian Contract Act, 1872, Section 74: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken it reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

Indian public construction contracting is governed by a heterogeneous array of standard forms: the Central Public Works Department (CPWD) General Conditions,[33] the Ministry of Road Transport and Highways (MoRTH) standard bidding documents, the Indian Railways Standard General Conditions, and various departmental forms. Different public sector units typically adopt customised versions of their administrative Ministry contract conditions. FIDIC forms are used in multilateral-funded projects but with significant modifications that frequently dilute the FIDIC dispute resolution architecture.

Critically, none of these standard forms incorporates requirements for resource-loaded, logic-linked CPM baseline programmes. Programme submission clauses typically require bar chart programmes within a specified period after contract award, without specifying CPM logic, resource loading, or update protocols. The baseline programme, from a contract governance perspective, is a compliance artefact rather than a management or analytical tool.

The General Financial Rules 2017, which govern Central Government procurement, do not address scheduling standards, and PSUs are not directly bound by GFR 2017, though their procurement manuals typically incorporate equivalent principles.[34]

The DoE Works Manual Second Edition 2025 requires submission of a "detailed Work Program" (para 7.4.2) within four weeks of the Letter of Award, but does not require a resource-loaded, logic-linked CPM programme; monthly bar chart updating satisfies the contractual obligation. The Works Manual does not address CPM logic, float, or resource loading—confirming that the baseline fragility identified in this paper is embedded at the procurement governance level.[35]

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[33] Central Public Works Department, *General Conditions of Contract for Central Public Works* (CPWD, 2023 edition). CPWD Form 7/8 contains the standard EOT clause and compensation provisions applicable to civil construction contracts.

[34] Ministry of Finance, Government of India, *General Financial Rules 2017* (Department of Expenditure, 2017). GFR 2017 governs public procurement by Central Government Ministries and Departments. PSUs are not directly bound by GFR 2017 but their procurement manuals typically incorporate equivalent principles.

[35] Ministry of Finance, Department of Expenditure, Government of India, *Manual for Procurement of Works*, Second Edition (2025) ("Works Manual SE 2025") para 7.4.2 ("Work Program"): "Work Program is the

4.4 Arbitration Landscape

Most infrastructure contracts with Indian public sector entities provide for domestic arbitration. The 2015 Amendment Act[36] introduced the principle of minimal judicial interference and the 2019 Amendment Act sought to establish an Arbitration Council of India, though operationalisation has been slow. The Section 34[37] review standard—permitting challenge on "patent illegality" for domestic awards and on "public policy" grounds generally—creates a background against which tribunals must operate, knowing that granular factual and methodological findings may be susceptible to challenge on the basis of inadequate reasoning.[38]

The evolution of Section 34 jurisprudence from *ONGC v. Saw Pipes*[39] through the 2015 Amendment and the recent Constitution Bench decision in *Gayatri Balasamy v. ISG Novasoft Technologies*[40] has attempted to narrow judicial interference, but the practical effect on tribunal behaviour in complex delay disputes has been modest. Tribunal conservatism in quantification continues, incentivised by the risk that a meticulously reasoned but ultimately incorrect causation finding may be

document against which project progress is monitored, and the extent and cause of delay (and any related extension of time entitlement) is assessed. The Contractor submits a detailed Work Program for approval to the Contract Manager... within the time stipulated in the Contract (or four weeks from the issue of the LoA). The Contractor will update the program at intervals stipulated (usually every month) in the Contract." Significantly, the Works Manual does not require a resource-loaded, logic-linked CPM programme; bar chart submission updated monthly satisfies the contractual obligation, confirming the absence of CPM discipline at the procurement governance level.

[36] Indian Arbitration and Conciliation Act, 1996

[37] Ibid

[38] Ibid, Section 34(2)(b)(ii) (as amended in 2015): an award may be set aside if it is "in conflict with the public policy of India". Section 34(2A) additionally provides that an award arising from a domestic arbitration is liable to be set aside if it is "vitiated by patent illegality appearing on the face of the award".

[39] *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd* (2003) 5 SCC 705. The Supreme Court expanded the "public policy" ground under Section 34 to include awards that are "patently illegal" or against "the interest of India", a position subsequently modified by the 2015 Amendment.

[40] *Gayatri Balasamy v. ISG Novasoft Technologies Ltd* (2024) (Constitution Bench, Supreme Court of India). The five-judge bench clarified the outer limits of Section 34 review, holding that courts may not review the merits of an arbitral award but may set aside awards that are perverse or violate fundamental policies.

vulnerable to challenge, while a generalised "fair estimate" finding is more defensible.

5. THE FOUR SYSTEMIC CONDITIONS OF DIVERGENCE

5.1 First Condition: Baseline Fragility

Every delay analysis methodology in the Protocol's toolkit — from Time Impact Analysis[41] to collapsed as-built — stands or falls on the quality of the baseline programme. SCL Core Principle 3 puts it plainly: the programme must be "a reliable, resource-loaded, logic-linked CPM programme" that actually reflects how the contractor planned to build. Without that foundation, delay analysis is an exercise in contested assumption rather than verified causation.[42]

Indian construction contracting produces systematically inadequate baselines for three reasons. First, contract requirements. Standard form contracts require bar chart programmes within specified timeframes, without any insistence on logic-linking or resource-loading requirements. Contractors who have tendered to Government clients understand that the programme is a compliance requirement; they submit a bar chart that accommodates the contract completion date and satisfies the engineer's acceptance, rather than a CPM programme reflecting their actual execution methodology. In the author's experience managing linear projects at Railway/Highway, programme submissions rarely satisfy the contract's submission deadline and bears little resemblance to the contractor's actual execution sequence.

Second, procurement incentive. The absence of baseline programme quality requirements in procurement evaluation means contractors are not rewarded for rigorous scheduling. The engineer or employer's representative rarely has the analytical capacity or institutional mandate to reject a non-CPM programme

[41] This was stated to be preferred methodology in the First Edition of the SCL Protocol. The Second Edition no longer mention it to be a preferred methodology.

[42] SCL Delay and Disruption Protocol, 2nd edn (2017), Core Principle 3: "If a party intends to rely on a programme for delay analysis purposes, the programme should be a reliable, resource-loaded, logic-linked CPM programme that accurately reflects the manner in which the works were or are intended to be executed."

submission. In the absence of contractual consequence for programme inadequacy, rational contractors invest in execution rather than schedule management.

Third, updating failure. Even where acceptable baseline programmes are submitted, update requirements are systematically not followed. Monthly progress reports contain bar charts reflecting actuals but rarely updated logic networks. Resource curves are not tracked against baseline resource-loading. Event records are not linked to programme activities with unique identifiers.

The consequence for delay analysis is that Time Impact Analysis becomes "contestable theatre": the expert attempts to insert a contemporaneous TIA into a baseline programme of indeterminate reliability, whereupon the opposing expert contests the validity of the baseline before the substantive causation analysis is reached. Tribunals, unable to resolve the methodological dispute on technical grounds, tend to discount the TIA and fall back on global delay arithmetic—subtracting the number of days of employer-caused delay from the total overrun—without the CPM rigour that the arithmetic implicitly assumes.

5.2 Second Condition: Record Asymmetry

SCL Core Principle 6 requires that contemporary records be kept as the foundation of reliable delay and disruption analysis.[43] For delay analysis, the relevant records are: daily site diary entries, engineer's instructions, correspondence, access records, site meeting minutes, and progress photographs linked to activities. For disruption analysis, the measured mile methodology requires activity-level resource input records: labour hours per activity, plant utilisation logs, and material delivery records linked to specific programme activities.a

Indian construction projects generate substantial site records. Monthly/Daily progress reports (MPRs/DPRs) are mandated by most standard contracts; hindrance registers record impediments to progress; site measurement books

[43] SCL (2017), Core Principle 6: "In order to prepare a reliable and persuasive delay and/or disruption analysis, it is essential that contemporary records are kept."

record quantities executed. However, these records are not curated for causal analysis. The asymmetry is not between the records that exist and the records that do not—it is between the records that exist and the records that delay and disruption analysis needs.

Specifically, MPRs/DPRs record aggregate daily labour and plant on site, not activity-level resource allocation. Hindrance registers record the existence of hindrances but not their causal impact on specific activities or their duration as programme events. Site measurement books record quantities executed but not the rate of execution relative to baseline productivity or the reasons for variance. Photographs record physical progress but are rarely georeferenced to programme activities.

The result is that measured mile disruption analysis—comparing impacted productivity (labour hours per unit of output during hindered periods) against baseline productivity (labour hours per unit of output during unhindered periods)—is frequently not performable from available records. The activity-level resource data required for the numerator and denominator of the measured mile calculation does not exist in a form that can be extracted from site records without assumptions that are themselves contestable.

Where measured mile analysis is not performable, experts fall back on industry productivity factors: standard norms from schedule of rates or academic studies estimating the productivity loss attributable to particular categories of disruption. These factors are generic, not project-specific, and are vulnerable to the objection that the project's particular conditions—workforce composition, method of measurement, soil conditions, weather—render the industry norm inapplicable. Tribunals confronting competing industry factor analyses, neither anchored in project-specific data, tend toward compromise figures lacking analytical pedigree.

5.3 Third Condition: Contractual Risk Allocation

Indian standard form contracts for public works are characterised by a structural feature that radically reduces the commercial incentive for protocol-based analysis: the EOT-only regime. Under most of the CPWD, MoRTH, and Railway standard

conditions, the employer's obligation upon establishing delay caused by employer-risk events is to grant an extension of time—thus relieving the contractor from liability for liquidated damages—but not to compensate the contractor for prolongation costs incurred during the extension period.[44]

Here is the commercial reality that makes protocol analysis commercially irrelevant for much Indian public works contracting. A contractor who invests in forensic CPM analysis — who hires a delay expert, maintains activity-level records, and constructs a rigorous TIA demonstrating that employer access failures caused six months of critical delay — ends up with an extension of time. The LD clock stops. The employer cannot sue for late completion. But the contractor's prolongation costs — site staff, plant on standby, head office overhead, financing costs — run on throughout the extension period at the contractor's risk.

The courts' reluctance to intervene in this contractual allocation is reinforced by the arbitral review jurisprudence. In *Associate Builders v. Delhi Development Authority,*[45] the Supreme Court affirmed that an arbitral award cannot be set aside merely because an alternative interpretation of the contract is possible. In *Ssangyong Engineering & Construction Co. Ltd v. NHAI,*[46] the Court clarified the scope of patent illegality under Section 34(2A) for domestic arbitrations. The combined effect is that a tribunal finding prolongation costs irrecoverable on the basis of the EOT-only clause is unlikely to be disturbed on challenge—reinforcing the contractual risk allocation rather than incentivising analytical challenge to it.

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[44] Central Public Works Department, *General Conditions of Contract for Central Public Works* (CPWD, 2023 edition). CPWD Form 7/8 contains the standard EOT clause and compensation provisions applicable to civil construction contracts.

[45] *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49. The Supreme Court of India held that an arbitral award cannot be set aside merely because an alternative view is possible; however, an award that awards damages without evidence of actual loss may be patently illegal.

[46] *Ssangyong Engineering & Construction Co. Ltd v. National Highways Authority of India* (2019) 15 SCC 131. The Supreme Court interpreted Section 34(2A) (patent illegality) as applicable only to domestic arbitrations and held that an award contravening a fundamental policy of Indian law remains challengeable.

FIDIC forms, which do provide compensation pathways for employer-risk delays (Clause 8.5 for EOT entitlement and Clause 20.2 for claims procedure), are increasingly adopted in multilateral-funded projects including those financed by the World Bank, ADB, and JICA.[47] However, even in FIDIC-governed projects, the claim notice and substantiation requirements of Clause 20.2 (and the former Clause 20.1 under the 1999 edition) create procedural traps that frequently preclude recovery on technical grounds before the substantive analytical merits are reached. The 2017 Second Edition's 84-day "full detailed claim" requirement is particularly demanding for Indian contractors accustomed to less rigorous contemporary record keeping.

5.4 Fourth Condition: Doctrinal Constraints

The Indian Contract Act's damages regime creates analytical pressure toward approximation rather than rigour. Section 73 provides compensation for loss "naturally arising in the usual course of things from such breach, or which the parties knew... to be likely to result from the breach."[18] The "reasonable compensation" standard under Section 74—applicable whether or not the contract stipulates liquidated damages—requires proof of actual loss but permits estimation where precise proof is unavailable.[48]

In *Maula Bux v. Union of India,*[49] the Supreme Court distinguished two categories under Section 74- contracts where assessment of compensation is impossible (in

[47] FIDIC, *Conditions of Contract for Construction* (Red Book), 2nd edn (FIDIC, 2017), Clause 20.2 (Claims for Payment and/or EOT). The 2017 edition introduced a detailed "full detailed claim" requirement within 84 days of the event, and strengthened the role of the Engineer in contemporary claim assessment.

[48] Indian Contract Act, 1872, Section 74: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken it reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

[49] *Maula Bux v. Union of India* (1969) 2 SCC 554. The Supreme Court held that Section 74 applies to forfeiture clauses as well as to clauses for payment of stipulated sums. On the reach of the phrase "whether or not actual damage or loss is proved," the Court distinguished two categories: contracts

which case a genuinely pre-estimated contractual sum may serve as the measure), and contracts where loss can be calculated by established rules (in which case actual proof of loss is required). On the facts, the Government's failure to lead evidence of replacement rates meant it could not retain the forfeited deposit. In *Kailash Nath Associates v. Delhi Development Authority,*[50] the Court held that Section 74 requires proof of actual loss even where LD are stipulated, unless such proof is genuinely impossible. These cases together create a doctrinal space for "reasonable estimate" awards that does not create incentives for granular analytical precision.

The arbitration review jurisprudence compounds this effect. A tribunal that makes a carefully reasoned CPM-based finding on delay causation—identifying the critical path, computing float, apportioning concurrent delay—produces a detailed award susceptible to point-by-point challenge on patent illegality grounds if any step in the analytical chain is contestable. A tribunal that makes a generalised "fair estimate" of delay entitlement, acknowledging uncertainty and adopting a global approach, produces an award that is harder to challenge precisely because its reasoning is less precise. The perverse result is that analytical rigour may increase award vulnerability rather than award defensibility.

The Constitution Bench in *Gayatri Balasamy v. ISG Novasoft Technologies*[51] has clarified that Indian courts can modify arbitral awards in limited situations to

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where assessment of compensation is impossible, in which case a genuinely pre-estimated contractual sum may be taken as the measure of reasonable compensation; and contracts where loss is quantifiable by established rules, in which case proof of actual loss is required. In the latter category, failure to lead evidence of loss is fatal to the claim. On the facts, the Government's failure to prove by evidence the rates at which it had procured replacement commodities — evidence that was readily available — meant the forfeited deposits could not be retained. This case does not stand for the proposition that courts must award substantial damages wherever loss is certain; it stands for the opposite qualification: where loss is assessable, it must be proved.

[50] *Kailash Nath Associates v. Delhi Development Authority & Anr* (2015) 4 SCC 136. The Supreme Court held that Section 74 of the Indian Contract Act requires proof of actual loss even where liquidated damages are stipulated, unless such proof is impossible, distinguishing a "genuine pre-estimate" from a penalty.

[51] *Gayatri Balasamy v. ISG Novasoft Technologies Ltd*. (2025) 4 SCC 1 (Constitution Bench), decided on 30 April 2025

correct clear, severable errors and prevent injustice, rather than being restricted to only setting aside or upholding awards. The court held that courts have a narrow, supervisory power to amend parts of an award—such as compensation or post-award interest—when justified, ending years of conflicting precedent. However, the practical effect of this clarification on tribunal behaviour in complex delay quantification cases remains to be observed. The institutional incentive structure continues to favour conservative generalised findings over analytically precise but challengeable quantifications.

6. CONCURRENT DELAY: THE MISSING DOCTRINE

Concurrent delay—the situation where employer-risk events and contractor-risk events simultaneously affect the critical path—is one of the most contested issues in construction law.

The English courts have at least staked out a working position. *Malmaison* established that genuine concurrency does not extinguish the contractor's EOT entitlement; *Walter Lilly* confirmed (in obiter) that the contractor need only show the employer's event was an effective cause of critical delay, not the dominant or sole cause. Scotland in *City Inn* takes a different view, allowing apportionment. The SCL Protocol follows the English approach.

Di Paola and Spanu's systematic survey of the six competing approaches under common law — from Devlin's symmetrical-liability approach through to the Malmaison formulation — demonstrates why no single approach commands universal acceptance: each approach produces its own internal contradiction when applied to the obverse factual scenario.[52]

India has no position. No Indian Supreme Court decision, and no High Court judgment this author has identified from the period 2010 to 2025, directly addresses concurrent delay as a legal concept, identifies a methodology for determining it, or states what consequences follow. That is not simply a gap in the case law waiting

[52] Luigi Di Paola and Paolo Spanu, 'Concurrent Delays' [2006] International Construction Law Review 374 (Pt 3).

to be filled. It reflects a deeper absence. Concurrent delay analysis requires a CPM network, activity-level records, and expert evidence that can actually demonstrate contemporaneous delay on two paths. Those preconditions do not generally exist in Indian construction practice, or merely exist in contract documents. The doctrine is missing because the infrastructure that would generate it is missing.

The practical consequence is that Indian tribunals confronting situations of overlapping employer and contractor delay do not deploy a concurrent delay framework. They either make a global finding that some quantum of the delay is attributable to the employer, without dissecting concurrency, or they apply a simple arithmetic approach: total delay minus contractor-caused delay equals employer-caused delay, without examining whether the two categories overlap on the critical path. Both approaches may produce correct results in simple cases; neither is analytically adequate for complex infrastructure disputes where multiple delays interact across a multi-year programme. In the author's experience in arbitrations involving Indian public works contracts, concurrent delay is occasionally asserted as a label — 'there was concurrent delay on both sides' — but rarely subjected to the CPM-based analysis that the concept requires.

Ministry of Finance, Department of Expenditure, Government of India, Manual for Procurement of Works, Second Edition (2025) ("Works Manual SE 2025") do defines and acknowledges the concept of concurrent delay as “when two or more events responsible for delay overlap each other. The delays may be attributable to the Procuring Entity or the contractor or none and fall in above categories. The eligibility for extension of time (EOT) should be determined by plotting each contributing concurrent delay on the critical path. The Procuring Entity should see that the concurrent delays do not result in unnecessary extra extension of time."[53] This is the first articulation in any Indian Government standard-form document of a critical-path test for concurrent delay, though it stops short of prescribing a methodology for conducting that analysis.

[53] Ministry of Finance, Department of Expenditure, Government of India, *Manual for Procurement of Works*, Second Edition (2025) ("Works Manual SE 2025"), para 7.4.5(d).

The absence of concurrency doctrine has a second-order effect on disruption analysis. Where delay and disruption are intertwined—as they frequently are in Indian infrastructure projects where employer-caused access restrictions both delay progress and disrupt working efficiency—the inability to segregate concurrent delay consequences prevents precise attribution of productivity loss to employer causes. The disruption claim collapses into the delay claim, and both are resolved by global estimate.

7. DISRUPTION ANALYSIS: FROM MEASURED MILE TO INDUSTRY MULTIPLIERS

The SCL Protocol and AACE RP 25R-03 together establish the measured mile as the preferred disruption quantification methodology.[54] The analytical sequence is: (a) identify periods of disruption attributable to employer-risk events; (b) identify corresponding unimpacted "measured mile" periods; (c) compute the productivity differential; (d) multiply by the volume of work performed during the disrupted periods to arrive at lost efficiency cost. The methodology is project-specific, uses the contractor's own data, and produces evidence directly responsive to the legal test of causation and loss.

In India, this methodology is available in theory but impracticable in most cases for the record reasons identified in Section 5.2. The Indian alternative—industry productivity multipliers drawn from schedule of rates data, departmental productivity norms, or academic literature—is fundamentally different in nature. It does not demonstrate what productivity loss this contractor suffered on this project; it asserts what productivity loss contractors generally experience when subject to this category of disruption.

The evidentiary implications are significant. Opposing experts can contest: the applicability of the multiplier to the particular project conditions; the accuracy of the baseline productivity assumed; the extent to which the productivity loss was

[54] SCL (2017), para 21.2: "The measured mile analysis involves a comparison of the productivity rate achieved by the contractor during an unimpacted period of the works... with the productivity rate achieved during an impacted period."

caused by employer disruption rather than contractor inefficiency; and the interaction between disruption losses and delay-related unproductivity. Since none of these contests is answerable by reference to the project record, the tribunal confronts a battle of industry-factor experts that cannot be resolved by appeal to project evidence.

The consequence is that disruption claims in Indian arbitration are substantially less recoverable than delay claims—not because the disruption did not occur, but because the evidence does not exist to quantify it to the standard of proof ordinarily required. Contractors with genuine disruption losses receive partial or nil recovery because their record-keeping systems were not designed to generate the evidence that analytical methods require. This is a systemic under-compensation that has both fairness and incentive implications. If disruption losses are unrecoverable, rational contractors inflate other claims categories—variation quantum, rate of completion, delay damages—to recover actual project economics through less analytically demanding heads.

8. A REFORM FRAMEWORK FOR INDIAN CONSTRUCTION ARBITRATION

None of the four structural conditions identified in this paper — baseline fragility, record asymmetry, contractual risk allocation, and doctrinal constraints — can be addressed by training practitioners in SCL Protocol methodology. That would be treating the symptom. The conditions are embedded in procurement documentation, contract standard forms, and damages law. Reforming them requires action at those levels.

Five measures are proposed to address the concern. They are framed as implementable — not aspirational — because each has a direct institutional home. Ministry of Finance procurement guidelines for the first; arbitration institution rule committees for the second and third; a working group of the kind that produced the SCL Protocol for the fourth; and the institutionalisation of the protocol for the fifth.

8.1 Minimum Scheduling Data Standards in Procurement

The foundational reform is embedding CPM scheduling requirements in procurement documentation. Standard form contracts for projects above a threshold value (recommended: INR 500 million and above) should require: (a) submission of a resource-loaded, logic-linked CPM baseline programme within 30 days of contract award; (b) quarterly CPM updates with change narrative; (c) maintenance of activity-level daily resource logs linked to programme activities by unique identifier; (d) event recording protocols linking site events to programme activities contemporaneously.

International precedents support this approach. FIDIC's 2017 Second Edition strengthened programme requirements under Clause 8.3, requiring contractors to submit a Programme within 28 days and to update it upon the occurrence of events affecting the programme. NEC4, widely used in the UK and adopted in several jurisdictions in Asia, makes programme submission and updating a contractual mechanism for early warning and compensation event assessment. The Indian standard form bodies—CPWD, MoRTH, Railways—should undertake a coordinated review of programme requirements aligned to international best practice.

8.2 Model Procedural Orders for Tribunals

Tribunals should be equipped with model procedural orders addressing delay and disruption analysis specifically. Leading arbitration centres—IIAC, DIAC, ICA, and others—should develop and publish model orders addressing: (a) exchange of expert delay analysis at a defined stage with methodology disclosure; (b) exchange of baseline programme and update history; (c) joint expert meetings before hearing; (d) the "reliability ladder" framework for baseline assessment; (e) hot-tubbing protocols for expert evidence.[42]

The reliability ladder is a particularly useful procedural tool. Experts are required to assess the reliability of the baseline programme on a defined scale (from fully reliable resource-loaded CPM to bar chart of indeterminate provenance) and select their analytical methodology accordingly. This provides a structured basis for

tribunal assessment of expert evidence quality without requiring the tribunal to conduct its own CPM analysis.

8.3 Expert Evidence Architecture

Reform of expert evidence practice in Indian construction arbitration requires three measures. First, mandatory joint statements between delay experts before hearing, identifying agreed facts, agreed methodology, and genuine areas of dispute. "Experience from the English Technology and Construction Court shows that structured pre-hearing expert engagement — joint statements, methodology declarations and structured hot-tubbing — materially reduces the range of contested issues by the time a case reaches a hearing. There is no procedural or structural barrier to Indian tribunals adopting equivalent mechanisms. As *Kilgore and Khedr*[55] note in their 2024 survey of concurrent delay methodology, a detailed explanation of the analyst's choices and assumptions used in the model is essential when presenting the findings; institutionalising that requirement in procedural orders would significantly narrow the scope of expert contest in Indian delay arbitrations. This suggests that there is no structural barrier to its adoption in Indian arbitration.

Second, expert evidence on disruption should be subject to a methodology declaration: the expert should state whether measured mile, industry factor, or total cost methodology is adopted, the reason for the choice, and the data limitations driving the methodology selection. This prevents experts from deploying more rigorous-appearing methodologies than available data actually support.

Third, hot-tubbing of delay experts—simultaneous examination under tribunal supervision—has proved effective in jurisdictions including Australia and the United Kingdom in resolving expert disputes that would otherwise generate

[55] Zack Kilgore and Muhammad Khedr, "Concurrent Delay in the Complex World of Construction Projects" (Global Arbitration Review, 19 July 2024). The authors (both Directors, Secretariat) confirm that modelled delay analysis requires "a detailed explanation of the analyst's choices and assumptions" and that fact-based techniques require "reliable and comprehensive record-keeping over the course of the project." This is consistent with the SCL Protocol's Core Principle 1 on records and Core Principle 11 on retrospective methodology selection.

multiple hearing days of sequential examination. Indian arbitration practice has not adopted hot-tubbing systematically; institutional adoption of model procedural orders encouraging the technique would materially improve efficiency in complex delay arbitrations.

8.4 India-Compatible Delay Principles

The development of India-specific delay and disruption principles—recognising the structural constraints on full protocol application while advancing a coherent analytical framework—is both necessary and achievable. Such principles should address five questions currently unanswered in Indian jurisprudence:

(i) What is the legal standard for baseline programme reliability, and what are the evidential consequences of an inadequate baseline?

(ii) How should concurrent delay be defined and what is its legal consequence under Section 73 ICA, where the employer's breach and the contractor's default together produce a loss that neither alone would have caused?

(iii) What is the appropriate methodology for global claims in Indian arbitration, including what threshold showing of causation is required to avoid the global claim being dismissed for failure to particularise?

(iv) What standards of record evidence are required for disruption claims, and when may secondary evidence or industry factors be admitted as a fallback?

(v) How should the "reasonable compensation" standard of Section 73 apply to prolongation costs where the claimant can demonstrate delay causation but not precise cost quantum?

These principles could be developed by a specialist working group, drawing on the SCL Protocol as a reference point while calibrating the principles to Indian contract law, procurement conditions, and record-keeping realities.

8.5 Institutional Practice Notes

Arbitration institutions administering large infrastructure disputes should publish practice notes on delay and disruption analysis, setting out the institution's expectations regarding expert evidence, procedural order structure, and methodological disclosure. The ICC Commission on Arbitration and ADR has issued guidance on construction industry arbitrations including recommendations on delay analysis.[56] Indian institutions should develop equivalent materials calibrated to Indian structural conditions. In case, there is difficulty in drawing new practice notes from scratch, the existing practice notes/ protocols from SCL, AACE, IBA, the Academy of Experts and others may be adopted as soft laws.

Practice notes should specifically address the treatment of baseline programme inadequacy (where baseline data is insufficient, what methodological alternatives are permissible and what additional conditions apply to their admission); the standard for contemporaneous records in disruption claims; the conditions under which global claims are permissible; and the treatment of claims submitted under EOT-only contractual regimes where the underlying analytical work exceeds the contractual entitlement but is relevant to the true economic loss.

9. CONCLUSION

This paper set out to explain why India, with the second-largest construction market in Asia and an active arbitration ecosystem, has produced almost no jurisprudence on delay and disruption methodology. The answer is not that Indian practitioners do not know about the SCL Protocol or AACE standards. There are good number of practitioners who use it. The answer is that the four conditions examined in this paper — baseline fragility, record asymmetry, the EOT-only risk allocation, and the doctrinal constraints of Sections 73–74 ICA — make rigorous protocol analysis either technically impossible or commercially pointless in the

[56] ICC Commission on Arbitration and ADR, *Construction Industry Arbitrations: Recommendations for Dispute Avoidance and Resolution* (ICC, 2019 Guidance Note). The Note specifically addresses delay analysis standards in multi-jurisdictional construction disputes.

typical Indian infrastructure dispute. The divergence is structurally produced, not culturally chosen.

The transferable lesson for Asian arbitration development is that the protocols do not create their own preconditions. Where the Protocol has taken root — in England, to some extent in Singapore and Hong Kong, in Australia — it did so because standard forms already required proper programmes, contract mechanisms already generated contemporaneous records, and procedural culture already expected expert engagement. Those features came first. Protocol methodology followed. India needs to build in the same sequence- project governance first, methodology second.

The reform framework advanced in Section 8—Minimum Scheduling Data Standards, model procedural orders, expert evidence architecture, India-compatible delay principles, and institutional practice notes—addresses the structural conditions rather than their symptoms. Implementation requires coordinated action across procurement agencies, standard form bodies, arbitration institutions, and the judiciary.

India's scale, the depth of its construction arbitration ecosystem, and the economic significance of its infrastructure programme provide both the necessity and the opportunity for this structural reform. The objective is not docile adoption of protocols designed for different institutional conditions, but the development of an Indian framework—informed by international best practice, calibrated to Indian structural realities—that converts delay disputes from duelling narratives into predictable, testable, enforceable resolution. That is both a professional imperative and a public interest.

The Impacts of the 2025 Amendments to China's Arbitration Law on Construction Dispute Arbitration and the Recognition and Enforcement of Arbitral Awards

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Abstract: The PRC 2025 Amended Arbitration Law is the first holistic revision since its implementation 30 years ago, marking a key step in China's arbitration system moving towards modernization, internationalization and specialization. The construction industry, with its characteristics of long project cycle, complex contractual relations, high technical content and frequent disputes, has always been one of the main fields of arbitration practice in China. The 2025 amendments have made substantial adjustments to core systems such as arbitration agreement validity, arbitration procedure efficiency, interim arbitration, and recognition and enforcement of arbitral awards, which will profoundly reshape the practice pattern of construction dispute arbitration and optimize the mechanism for the recognition and enforcement of arbitral awards. This paper focuses on the important amendments to PRC Arbitration Law in 2025, explores their specific impacts on the arbitration of construction disputes from the aspects of jurisdiction determination, procedure operation and dispute settlement effect, analyzes the improvements and practical impacts brought by the amendments to the recognition and enforcement of arbitral awards, and puts forward recommended responsive actions for construction enterprises.

Keywords: PRC Arbitration Law; Construction Disputes; Arbitration Practice; Recognition and Enforcement of Arbitral Awards

1. Introduction

Arbitration, as an internationally accepted dispute resolution mechanism, is characterized by autonomy of parties, flexibility, non-governmental decision-maker selected by or for the parties and non-appealable final and binding awards. It has become the preferred way for resolving construction disputes in China due to its ability to balance efficiency and professionalism and adapt to the technical and commercial characteristics of the construction industry.

The PRC Arbitration Law was promulgated in 1994 and ever since then functioned as the backbone of China's arbitral system for three decades. While judicial interpretations and Supreme People's Court (SPC) of guidance progressively modernized practice, the statutory text remained comparatively static. With the rapid development of China's construction industry, the existing arbitration system gradually exposed some shortcomings in practice, such as unclear validity of arbitration agreements in construction contracts, low efficiency of arbitration procedures, imperfect judicial support mechanisms, and difficulties in the recognition and enforcement of some arbitral awards, which have restricted the role of arbitration in resolving construction disputes.

On September 12, 2025, the People's Congress of China passed the Amended Arbitration Law which came into force on March 1, 2026 (hereinafter referred to as the 2025 Amended Arbitration Law). The 2025 amendments have made improvements to the above-mentioned problems, and have made major breakthroughs in improving the efficiency of arbitration procedures, optimizing the provisions on arbitration agreements, improving the supervision mechanism, and integrating with international arbitration rules. With the implementation of 2025 Amended Arbitration Law, construction disputes arbitration will face significant changes in the entire process from the conclusion of arbitration agreements, the promotion of arbitration procedures to the recognition and enforcement of arbitral awards. Therefore, in-depth research on the impacts of the 2025 amendments on construction dispute arbitration and the recognition and enforcement of arbitral awards is not only of great theoretical significance for improving China's arbitration law and construction law, but also of important practical values for guiding construction

enterprises who may be involved in arbitration in China according to their arbitration agreements concluded.

2. Key Amendments

The 2025 Amended Arbitration Law consists of 8 chapters and 96 articles, which has made systematic adjustments and improvements on the basis of the original law. The following key amendments are critically important for construction dispute arbitration and recognition and enforcement of arbitration decisions:

2.1 Improvements of the Provisions on Arbitration Agreements

The arbitration agreement is the cornerstone of arbitration jurisdiction. The 2025 Amended Arbitration Law has further clarified and improved the validity, form and scope of arbitration agreements.

Firstly, it has clarified the effectiveness of implied consent to arbitration agreements. For the first time, it has stipulated at the legislative level that if one party claims the existence of an arbitration agreement when applying for arbitration, and the other party does not deny it before the first hearing, it shall be deemed that there is an arbitration agreement between the parties after being prompted and recorded by the arbitration tribunal[1], which has realized the transformation of "implied consent" from judicial interpretation to legislative confirmation[2].

Secondly, it has expanded the scope of application of the principle of independence of an arbitration agreement. Before 2025 amendment of arbitration law, the principle of independence of an arbitration agreement was applied to the revision, pending effectiveness, termination, revocation, and

[1] See Article 27, Arbitration Law of P.R. China.

[2] As early as 2006, the Supreme Court of China issued a judicial interpretation of PRC Arbitration Law which made clear that the People's courts should not support a party's challenge of the validity or an arbitration agreement and the jurisdiction of the arbitral tribunal if no objection was raised before the first hearing of the arbitration proceeding. So implied consent to arbitration agreement existed in Chinese arbitration practice for many years, and the 2025 Amendment is no more than a legislative recognition of an existing practice.

invalidity of a contract by which the validity of an arbitration agreement was not affected. The 2025 Amended Arbitration Law clarifies that, in addition to the revision, pending effectiveness, termination, revocation or invalidity of a contract, whether a contraction is formulated does not affect the validity of the concluded arbitration agreement either[3], extending the scope of application of independence of arbitration agreements to the stage before the conclusion of the contract.

Thirdly, competence-competence doctrine is legislatively recognized in the 2025 Amended Arbitration Law which recognizes the arbitral tribunal's power to rule on its own jurisdiction[4], and clarifies that when one party requests the arbitration institution or arbitral tribunal to make a decision and the other party requests the people's court to make a ruling, the people's court shall make a ruling.

Finally, it recognizes ad hoc arbitration for foreign-related maritime disputes, or for foreign-related disputes between enterprises registered in free trade pilot zones, Hainan Free Trade Port and other designated regions, on the condition that the arbitral tribunal is composed of qualified arbitrators meeting the statutory requirements provided in the Arbitration Law and the arbitration shall be conducted in accordance with the arbitration rules agreed by the parties[5]. While the UNCITRAL Model Law adopts ad hoc arbitrations without categorical restriction, China retains institutional preference. Ad Hoc

[3] See Article 30, Arbitration Law of P.R. China.

[4] Article 30 of the 2025 Amended Arbitration Law provides that the arbitration tribunal shall have the power to affirm the validity of a contract (Arbitration Agreement); Article 31 of the 2025 Amended Arbitration Law provides that where a party challenges the validity of the arbitration agreement, the party may request the arbitral institution or arbitration tribunal to make a decision or apply to the people's court for a ruling.

Before 2025 amendment, the Arbitration Law provided that the arbitration institutions or people's courts had the power to decide the validity of arbitration Agreement, and the arbitral tribunal was not empowered to decide the issue by the Arbitration Law itself. However, in arbitration practice before 2025 amendment of the Arbitration Law, the arbitration rules adopted by most of arbitration institutions provided that the validity of arbitration agreement should be decided by the arbitration institutions before the establishment of the arbitral tribunal, and should be decided by the arbitral tribunal after tribunal has been established. Accordingly, Article 30 and Article 31 of the 2025 Amended Arbitration Law does no more than recognize the competence-competence doctrine widely adopted in Chinese arbitration practice.

[5] See Article 82 of the 2025 Amended Arbitration Law.

arbitrations although no more totally invalid under the 2025 Amended Arbitration Law, are still strictly restricted.

2.2 Optimization of Arbitration Procedures to Improve Efficiency

To solve the problems of long cycle and low efficiency in arbitration practice, the 2025 Amended Arbitration Law has taken a series of measures to optimize arbitration procedures.

Firstly, it has shortened the time limit for applying for the revocation of arbitral awards from six months to three months[6], which helps to maintain the stability of arbitral awards and avoid the delay of dispute resolution due to the revocation procedure.

Secondly, it affirms that arbitration activities conducted online through information networks have the same legal effect as offline arbitration[7], providing legal basis for resolving construction disputes efficiently through online arbitration[8].

Thirdly, it enhances judicial supports for arbitration. For this purpose, three measures are taken. First, in addition to such judicial supports as preservation of property and evidence in arbitration proceedings as provided in the arbitration law before 2025 amendment, the 2025 Amended Arbitration Law further provides act preservation (similar to interim injunction in common law system), under which a party in arbitration proceeding may apply to the people's courts to order the other party to take certain actions or refrain from taking certain actions if it may become impossible or difficult to implement the arbitral award or cause other damages to the party by reason of an act of the other party[9]. Second, the 2025 Amended Arbitration Law expressly requires the people's courts to handle arbitration preservation applications in a timely

[6] See Article 72 of the 2025 Amended Arbitration Law.

[7] See Article 11 of the Amended Arbitration Law.

[8] Before 2025 amendment, online arbitration practice was adopted by arbitration rules of many Chinese arbitration institutions and widely practiced ever since the outbreak of Covid 19. The 2025 Amended Arbitration Law reaffirms the arbitration practice in legislation.

[9] See Article 39 of the Amended Arbitration Law.

manner[10], which will improve the operability of preservation measures in construction dispute arbitration. Third, emergency preservation application before launching arbitral proceeding is provided in the 2025 Amended Arbitration Law: a party to an arbitration agreement may apply for property, evidence and act preservation even before the commencement of arbitral proceeding in case of emergency[11].

Fourthly, it has imposed more professional requirements for arbitrators to guarantee the quality of arbitration. In addition to the requirements for arbitrators to be fair and upright and the required legal professional experience as an arbitrator, a lawyer, a judge, and a legal academic with senior academic titles, as provided in the Arbitration Law before 2025 amendment[12], the 2025 Amended Arbitration Law requires arbitrators to be diligent, responsible, impartial and incorruptible, with qualities of high professionalism and integrity, and abide by professional ethics[13].

2.3 Improvement of the System for Recognition and Enforcement of Arbitral Awards

The recognition and enforcement of arbitral awards is the key to ensuring the effectiveness of arbitration results. The 2025 amendments have further improved the relevant systems to enhance the enforcement of arbitral awards.

Firstly, reciprocity principle is not only required for recognition and enforcement of arbitral awards[14], but is also required, under the 2025 Amended Arbitration Law, in the arbitration practice of arbitration institutions: if a foreign arbitration institution restricts or discriminates against the legitimate

[10] See Article 39 of the 2025 Amended Arbitration Law.

[11] See Article 39 and 58 of the 2025 Amended Arbitration Law.

[12] According to the Arbitration Law before the 2025 amendments, a qualified arbitrator shall pass the national unified legal professional qualification examination, or have at least eight years of practice as a lawyer, or eight years of service as a judge, or hold a senior academic title in legal research or teaching.

[13] See Article 21 of the 2025 Amended Arbitration Law.

[14] Before 2025 amendment, reciprocity doctrine was not provided in the Arbitration Law. However, the PRC Civil Procedure Law as amended in 2023 provides reciprocity principle in the recognition and enforcement of foreign arbitral awards. See Article 304 of PRC Civil Procedure Law as amended in 2023.

rights and interests of Chinese citizens and entities, the relevant Chinese institutions have the right to apply the reciprocity principle to citizens and entities of that country[15].

Secondly, compliance of good faith principle in arbitration is required under 2025 Amended Arbitration Law[16]. Fabrication of basic facts and collusive practices of the parties in arbitration attempting to harm the national interest, the public interest or the lawful rights and interests of another person, are expressly forbidden under 2025 Amended Arbitration Law, which provides that the arbitration application of a party committing the aforesaid malpractice must be dismissed[17].

Thirdly, it makes clear that the legal status of arbitration institutions are non-profit legal persons for public interests[18], which helps to improve the credibility of arbitration institutions and lay a foundation for the smooth recognition and enforcement of arbitral awards.

2.4 Improvement of the Foreign-related Arbitration System

The 2025 Amended Arbitration Law has made a series of improvements to the foreign-related arbitration system. Such improvements aims to adapt to the needs of high-level opening up and the construction of China (including Hong Kong SAR and Macao SAR) as a preferred place for international commercial arbitrations.

Firstly, it adopts the concept of “seat of arbitration”. Under the 2025 Amended Arbitration Law, the seat of arbitration may be agreed by the parties, or be determined in accordance with the arbitration rules agreed by the parties if there is no agreement, or if there is no provisions in the arbitration rules, be decided by the arbitral tribunal with considerations of the circumstances of the

[15] See Article 88 of the 2025 Amended Arbitration Law.

[16] See Article 8 of the 2025 Amended Arbitration Law.

[17] See Article 61 of the 2025 Amended Arbitration Law.

[18] See Article 13 of the 2025 Amended Arbitration Law.

case and the principle of facilitating the dispute resolution[19]. The seat of arbitration act as the basis in determining the procedural rules and laws of arbitration unless agreed otherwise by the parties, as well as the ground for determining the competent jurisdiction of judicial courts over arbitration-related issues[20]. Arbitral awards shall be deemed to be made at the seat of arbitration[21]. Such provisions align functionally with Article 20 of the UNCITRAL Model Law (1985, amended 2006). The adoption of the seat of arbitration clarifies the historic ambiguity in China regarding the nationality and annulment competence of arbitral awards.

Secondly, the 2025 Amended Arbitration Law expressly encourages parties to choose arbitration institutions in China (including Hong Kong SAR and Macao SAR) as preferred arbitration institutions and choose China (including Hong Kong SAR and Macao SAR) as preferred seat of arbitration[22].

Thirdly, it encourages Chinese arbitration institutions to establish business entities overseas to carry out arbitration activities, and allows foreign arbitration institutions to establish business entities in free trade pilot zones, Hainan Free Trade Port to carry out foreign-related arbitration activities[23].

3. The Impacts of the 2025 Amendments on Construction Dispute Arbitration

Construction disputes involve a wide range of issues, including disputes over construction project contracts, engineering quality, engineering payment, project delay, and construction safety, which have the characteristics of complex facts, strong technicality, variety of disputes and a long cycle of the dispute resolution.

The core amendments to the 2025 Arbitration Law will have a profound impact

[19] See Article 81 of the 2025 Amended Arbitration Law.

[20] Ibid

[21] Ibid

[22] See Article 87 of the 2025 Amended Arbitration Law.

[23] See Article 86 of the 2025 Amended Arbitration Law.

on the entire process of construction dispute arbitration, which is mainly reflected in the following aspects:

3.1 Clarifying the Jurisdiction of Construction Dispute Arbitration and Reducing Jurisdictional Disputes

Before the amendment, in construction dispute arbitration practice, disputes over the validity of arbitration agreements often occurred, which became an important factor affecting the smooth progress of arbitration.

In practice, some construction project contracts do not have explicit arbitration clauses, but after a dispute arises, one party applies for arbitration and the other party participates in the arbitration procedure without denying the jurisdiction of the arbitration tribunal. In the past, the validity of the arbitration agreement could only be determined according to judicial interpretation, and there were differences in the judgment standards of different courts and arbitration institutions. Under the 2025 Amended Arbitration Law, no explicit arbitration agreement is not a barrier for arbitration as long as the party has actually participated in the arbitration proceeding without raising objections after being reminded and recorded. After the amendment, the legislative confirmation of implied consent has unified the judgment standards, which is conducive to reducing jurisdictional disputes in construction dispute arbitration.

Another disputed issue frequently occurred in construction industry is whether a construction contract is effectively formulated. This is caused by illegal subcontracting or the contractor's lack of corresponding construction qualifications. Before the amendment, there were disputes in practice as to the validity of the arbitration agreement when the formation and validity of construction contracts are challenged. The 2025 Amended Arbitration Law clearly provides that the formation and invalidity of the main contract do not affect the validity of the arbitration agreement. The amendment has strengthened the predictability of arbitration clauses in construction contracts and will help parties to resolve disputes through arbitration in a timely manner.

With the acceleration of China's construction enterprises' "going global" pace, more and more Chinese construction enterprises are involved in overseas construction projects, especially in Belt and Road Initiative regions, and

foreign-related construction disputes are increasing. Ad hoc arbitration, with its flexibility and professionalism, is more in line with the needs of foreign-related construction disputes. The 2025 Amended Arbitration Law allows ad hoc arbitration for foreign-related disputes between enterprises registered in free trade pilot zones, Hainan Free Trade Port and other approved regions. Such amendment enables parties in construction industry to adopt flexible professional ad hoc arbitrations in China. This in fact will encourage the parties to select China as the seat of arbitration[24].

The 2025 Amended Arbitration Law allows foreign arbitral institutions to set up entities to conduct arbitration in free trade pilot zones, Hainan Free Trade Port and other approved regions. This will enable Chinese enterprises to benefit from the outstanding arbitration practice of international arbitration institutions, who play great roles in international settlement of construction disputes.

3.2 Optimizing the Arbitration Procedure of Construction Disputes and Improving the Efficiency of Dispute Resolution

Construction projects have the characteristics of long cycle and large investment. Once a dispute arises, the delay of dispute resolution will not only increase the economic losses of the parties, but also may affect the progress of the project and even lead to the suspension of the project. The 2025 Amended Arbitration Law has optimized the arbitration procedure, which has a significant positive impact on improving the efficiency of construction dispute arbitration.

Firstly, the shortening of the time limit for applying for the revocation of arbitral awards has effectively maintained the stability of arbitral awards and accelerated the progress of dispute resolution. In the past, the time limit for applying for the revocation of arbitral awards was six months, and some

[24] Before 2025 amendment, ad hoc arbitration was not recognized entirely in China. However, in practice, parties intending to have ad hoc arbitration could choose a foreign territory as the seat of arbitration. According to the PRC Law of the Application of Laws, the validity of an arbitration agreement is to be determined by the law agreed by the parties, or by the law of seat of arbitration if there is no agreement. So ad hoc arbitration agreement could be recognized in China before 2025 amendment if the agreement chose the laws of a foreign territory accepting ad hoc arbitration as the applicable law or chose that foreign territory as the seat of arbitration.

parties abused the right to apply for revocation to delay the performance of arbitral awards, which seriously affected the efficiency of dispute resolution in construction disputes. After the amendment, the time limit was shortened to three months, which not only restricts the abuse of rights by the parties, but also helps to quickly determine the validity of arbitral awards, so that the winning party may apply for enforcement in a timely manner and reduce economic losses.

Secondly, the legalization of online arbitration has provided a convenient way for resolving construction disputes. Construction projects are often distributed in different regions, and the parties and witnesses are in different territories, which brings inconvenience to the arbitration hearing. Online arbitration, with its characteristics of convenience, efficiency and cost saving, can effectively solve this problem. The 2025 Amended Arbitration Law clearly stipulate that online arbitration has the same legal effect as offline arbitration, which provides a legal basis for arbitration institutions to carry out online arbitration for construction disputes. In addition, construction disputes arbitration often involves thousands of pages of engineering records, progress reports, and variation orders. Digital infrastructure materially enhances case management efficiency and aligns with best practice in global arbitrations.

Thirdly, the strengthening of judicial support for arbitration has improved the operability of preservation measures in construction dispute arbitration. In construction disputes, it is often necessary to take preservation measures such as property preservation and evidence preservation to prevent the parties from transferring property or destroying evidence, so as to ensure the smooth progress of arbitration and the effective enforcement of arbitral awards. Before the amendment, there were problems such as unclear procedures and slow handling of arbitration preservation applications, which affected the effect of preservation measures. The 2025 Amended Arbitration Law requires people’s courts to handle arbitration preservation applications in a timely manner, which has accelerated the handling speed of preservation applications and improved the operability of preservation measures.

3.3 Improving the Professionalism of Construction Dispute Arbitration

and Ensuring the Fairness of Awards

Construction disputes involve a lot of professional knowledge such as engineering technology, engineering cost and engineering management, which have high requirements on the professionalism of arbitrators. The 2025 Amended Arbitration Law has standardized the selection and appointment of arbitrators, which helps to improve the professionalism of construction dispute arbitration and ensure the fairness of arbitral awards.

Firstly, the 2025 amendments emphasize the professionalism and impartiality of arbitrators, requiring arbitration institutions to establish and improve the arbitrator selection scheme, and select personnel with rich professional experience and good moral character as arbitrators. For construction dispute arbitration, which involves strong technicality, arbitration institutions will further increase the proportion of arbitrators with professional backgrounds in construction engineering, engineering cost, engineering management and other fields, so that arbitrators can more accurately grasp the technical issues in construction disputes, improve the quality of arbitration awards.

Secondly, the clarification of the attribute of arbitration institutions as non-profit legal persons for public interests under the 2025 Amended Arbitration Law has also helped to improve the credibility of arbitration institutions. This will promote the selection of arbitration for settlement of disputes in arbitration industry.

4. The Impact of the 2025 Amendments on the Recognition and Enforcement of Construction Arbitral Awards

The recognition and enforcement of arbitral awards is critical in ensuring the effectiveness of arbitration. For construction disputes, the effective recognition and enforcement of arbitral awards can help the parties realize their legitimate rights and interests in a timely manner, maintain the order of the construction market, and promote the healthy development of the construction industry. The 2025 Amended Arbitration Law has made substantial improvements to the recognition and enforcement of arbitral awards, which will have significant impacts on the recognition and enforcement of construction arbitral awards

(including domestic and foreign awards).

4.1 Optimizing the Recognition and Enforcement of Domestic Construction Arbitral Awards and Reducing Enforcement Difficulties

Before the amendment, in the practice of recognizing and enforcing domestic construction arbitral awards, there were problems such as unclear standards for refusing recognition and enforcement, slow enforcement procedures, and abuse of the right to refuse enforcement by the parties, which led to difficulties in enforcing some arbitral awards and affected the effectiveness of arbitration in resolving construction disputes. The 2025 Amended Arbitration Law optimizes relevant schemes, which helps to reduce the difficulty in enforcing construction arbitral awards.

Firstly, the 2025 amendments have clarified the standards for refusing the recognition and enforcement of arbitral awards, narrowing the scope of refusal to recognize and enforce, and preventing the parties from abusing the right to refuse enforcement. Before the amendment, the grounds for refusing the recognition and enforcement of arbitral awards were relatively vague, and some parties used the unclear grounds to refuse to perform arbitral awards, which led to difficulties in enforcement. The 2025 amendments have clearly listed the grounds for refusing the recognition and enforcement of arbitral awards, and stipulated that the people's court shall not refuse the recognition and enforcement of arbitral awards without justifiable reasons, which has standardized the behavior of the people's court in handling recognition and enforcement applications and restricted the abuse of rights by the parties.

Secondly, the 2025 amendments have strengthened the crackdown on false arbitration, which helps to maintain the order of arbitration and ensure the smooth recognition and enforcement of arbitral awards. In construction dispute arbitration practice, some parties fabricate facts and evidence to apply for arbitration in order to obtain improper interests, which is called false arbitration. False arbitration not only infringes on the legitimate rights and interests of third parties, but also wastes arbitration resources and affects the credibility of arbitral awards, making it difficult to recognize and enforce some arbitral awards involved in false arbitration. The 2025 amendments have

added provisions on false arbitration, clarifying that the people's court shall refuse to recognize and enforce the arbitral award if it finds that the arbitration is false, and may impose penalties on the relevant parties. This provision has effectively deterred false arbitration in construction disputes, reduced the occurrence of false arbitration, and ensured the smooth recognition and enforcement of legitimate arbitral awards.

4.2 Improving the Recognition and Enforcement of Foreign-related Construction Arbitral Awards and Promoting International Judicial Cooperation

With the acceleration of China's construction enterprises' "going global" pace, more and more Chinese construction enterprises are involved in overseas construction projects, and foreign-related construction disputes are increasing. The recognition and enforcement of foreign-related construction arbitral awards is critically significant for protecting the legitimate rights and interests of Chinese construction enterprises overseas and foreign enterprises in China. The 2025 Amended Arbitration Law has made important improvements to the system for the recognition and enforcement of foreign-related arbitral awards, which helps to improve the efficiency of recognition and enforcement of foreign-related construction arbitral awards and promote international judicial cooperation.

Firstly, the adoption of "seat of arbitration" in the 2025 Amended Arbitration law helps to clarify the jurisdiction of the recognition and enforcement of foreign-related arbitral awards. The seat of arbitration is the core factor determining the nationality of an arbitral award which is important for recognition and enforcement of arbitral awards under 1958 New York Convention. For construction disputes, the seat doctrine is of tremendous importance. EPC contracts frequently designate neutral venues as the place of arbitration. Clear statutory grounding of arbitration seat enhances enforceability and reduces jurisdictional challenges.

Secondly, the 2025 amendments have improved the procedures for the recognition and enforcement of foreign-related arbitral awards, clarifying the specific requirements and time limits for applying for recognition and

enforcement, which helps to improve the efficiency of recognition and enforcement. The amendment stipulates that the parties applying for the recognition and enforcement of foreign-related arbitral awards shall submit the application, the original or certified copy of the arbitral award, and the original or certified copy of the arbitration agreement to the competent people's court. The people's court shall review the application in accordance with the law and make a ruling on whether to recognize and enforce it within a reasonable time limit. This provision has standardized the procedures for applying for recognition and enforcement of foreign-related construction arbitral awards, made the application process more transparent and predictable, and helped the parties to complete the application procedures in a timely manner.

Thirdly, the 2025 amendments have established a reciprocal principle for foreign arbitral awards, which helps to protect the legitimate rights and interests of Chinese construction enterprises overseas. The amendment stipulates that if a foreign arbitration institution restricts or discriminates against the legitimate rights and interests of Chinese citizens, legal persons and other organizations, the relevant Chinese institutions have the right to apply the reciprocal principle to citizens, enterprises and other organizations of that country. This provision has effectively responded to the discrimination against Chinese construction enterprises in the recognition and enforcement of arbitral awards in some countries, protected the legitimate rights and interests of Chinese construction enterprises in overseas projects, and promoted the fair treatment of Chinese construction enterprises in the international arbitration field.

In addition, the 2025 amendments allow foreign arbitration institutions to establish business institutions in free trade pilot zones, Hainan Free Trade Port and other regions to carry out foreign-related arbitration activities, which helps to promote the exchange and cooperation between Chinese and foreign arbitration institutions, improve the level of China's foreign-related arbitration, and lay a foundation for the smooth recognition and enforcement of foreign-related construction arbitral awards. At the same time, the amendment supports Chinese arbitration institutions to establish business institutions overseas to carry out arbitration activities, which helps Chinese arbitration

institutions to better understand the arbitration rules and practices of other countries, promote the mutual recognition and enforcement of arbitral awards between China and other countries, and provide better protection for Chinese construction enterprises to resolve foreign-related construction disputes overseas.

5. Challenges and Responsive Strategies Under the New Arbitration Law Framework

The 2025 Amended Arbitration Law has brought important opportunities for the arbitration of construction disputes and the recognition and enforcement of arbitral awards, but they also put forward new challenges to construction enterprises, arbitration institutions and judicial organs. It is necessary for all parties to take positive responsive strategies to adapt to the new legal framework.

Construction enterprises, as the main participants in construction disputes, should actively adapt to the new Arbitration Law and standardize their own dispute resolution behaviors.

Firstly, they should standardize the conclusion of arbitration agreements. When signing construction project contracts, they should clearly stipulate the arbitration clause, including the arbitration institution, arbitration scope, arbitration place and arbitration rules, so as to avoid disputes over the validity of the arbitration agreement. At the same time, they should pay attention to the effect of implied consent to the arbitration agreement and avoid participating in the arbitration procedure without denying the jurisdiction and then raising an objection to the validity of the arbitration agreement.

Secondly, they should actively use online arbitration, preservation measures and other systems to protect their legitimate rights and interests. For construction disputes involving parties domiciled in various places or disputes with urgent time limits, they can choose online arbitration to improve the efficiency of dispute resolution; when they find that the other party may transfer property or destroy evidence, they should apply for preservation measures in a timely manner to ensure the smooth progress of arbitration and

enforcement.

Thirdly, they should abide by the principle of good faith and refrain from false arbitration. Construction enterprises should provide true facts and evidence in arbitration, and shall not fabricate facts for the purpose of arbitration, so as to avoid being subject to legal penalties and affecting their own credibility.

6. Conclusion

PRC arbitration practice in the past has responded faster to the good arbitration practice in international community than statutory legislations and has become a driving force for improving PRC Arbitration law which finally recognizes and confirms the existing practical approaches borrowed by the arbitration institution and practitioners from international practice. Chinese experience demonstrates that arbitration practitioners are not only the law-abiders, but may also become the driving force to promote the consummation of domestic arbitration laws by adopting best arbitration practice developed in international community, and thus further promote the international unification of arbitration laws.

The PRC 2025 Amended Arbitration Law is a major reform of China's arbitration system, which has made substantial improvements to the core systems such as arbitration agreement, arbitration procedure, and recognition and enforcement of arbitral awards, marking a new stage of China's arbitration system moving towards modernization, internationalization and specialization. For the construction industry, which is prone to disputes, the amendments have a profound impact on construction dispute arbitration and the recognition and enforcement of arbitral awards.

In terms of construction dispute arbitration, the amendments have clarified the jurisdiction of arbitration, optimized the arbitration procedure, improved the professionalism of arbitration, reduced jurisdictional disputes, improved the efficiency of dispute resolution, and ensured the fairness of arbitral awards, providing a more convenient, efficient and fair dispute resolution way for construction enterprises. In terms of the recognition and enforcement of arbitral awards, the amendments have optimized the recognition and

enforcement system of domestic arbitral awards, reduced enforcement difficulties, improved the recognition and enforcement system of foreign-related arbitral awards, promoted international judicial cooperation, and ensured the effective realization of the legitimate rights and interests of the parties.

However, the implementation of the new Arbitration Law also brings new challenges to construction enterprises, arbitration institutions and judicial organs. It is necessary for all parties to take positive responsive strategies: construction enterprises should standardize the conclusion of arbitration agreements and protect their legitimate rights and interests in accordance with laws. Only in this way can we give full play to the role of arbitration in resolving construction disputes, maintain the order of the construction market, promote the healthy development of the construction industry.

SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

HICAC 2026

The Impacts of PRC 2025 Amended Arbitration Law on Construction Dispute Arbitration

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SOCIETY OF CONSTRUCTION LAW – VIETNAM (SCLVN)

VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

Preamble

1994

Enactment

PRC Arbitration Law was enacted in 1994.

2009

1st Amendment

Only change 3 article numbers of PRC Civil Procedure Law which the Arbitration Law refers to because of the revision of the Civil Procedure Law

2017

2nd Amendment

Only one single clause was amended: persons with 8 years of work experience in arbitral institutions must pass National Legal Professional Qualification Examination to be qualified to be arbitrators.

2025

3rd Amendment

- More than 50/80 articles are substantially amended, and
- 16 new clauses are added
- Amendments are Related to a variety of fundamental issues:
  - Aligning with international best practice
  - Addressing efficiency, fairness, and enforceability issues, Etc.
- Coming into force on March 1st, 2026

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1 Some Key Amendments and their Impacts

2 Recommended Responsive Actions

3 Conclusions

HICAC 2026
09 – 10 April 2026 Ho Chi Minh City, Vietnam

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

SOCIETY OF CONSTRUCTION LAW - VIETNAM (SCLVN) VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

Key Amendments & Impacts

1 Related to Arbitration Agreement

2 Related to Arbitral Procedure

3 Related to Recognition and Enforcement

HICAC 2026
09 – 10 April 2026 Ho Chi Minh City, Vietnam

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

Key Amendment Related to Arbitration Agreement

Implied Consent

- The law now explicitly recognizes implied consent if a party participates in proceedings without raising an objection before the first hearing.
- A legislative recognition of an existing practice confirmed by The Supreme Court in a judicial interpretation in 2006

Expanded Independence

Independence/ separtion of an arbitral clasue is extended to the pre-contract stage, ensuring validity of an arbitral agreement even if the main contract is never formally concluded

Competence-Competence

The arbitral tribunal is now legally empowered to rule on its own jurisdiction, aligning with key international arbitration principles

Limited Ad Hoc Arbitration

Ad hoc arbitration is permitted for

- foreign-related maritime disputes
- Foreign-related disputes between enterprise registered in designated areas like Free Trade Pilot Zones, Hainan Free Trade Port.

HICACO 2026

Key Amendment Related to Procedural Issues

Shorter Revocation Period

The time limit for applying to revoke an arbitral award in a judicial court is shortened from 6 months to 3 months.

Online Arbitration

The legal validity of online arbitration is confirmed, offering a more efficient dispute resolution method

Enhanced Judicial Support

- New provisions for "act preservation" and emergency preservation before arbitration are introduced to better protect parties' interests.
- Timely addressing of Preservation Applications by the Judiciary courts are expressly required

HICACO 2026

Key Amendment Related to Recognition & Enforcement

Seat of Arbitration

The "Seat of Arbitration" concept clearly defines the nationality of an award, simplifying the process for its recognition and enforcement abroad.

Good Faith Principle

The law explicitly prohibits bad faith practices in arbitration such as

- fabricating facts, or
- collusive practice to harm third parties or public interests,

The arbitration application of a party committing the malpractices will be dismissed.

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Responsive Actions Recommended

1 **Draft arbitral Agreements properly**

2 **Beware of risks of the implied consent doctrine**

3 **Take seriously the principle of Good faith**

HICACO 2026

09 – 10 April 2026 Ho Chi Minh City, Vietnam

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

Responsive Actions:
Drafting Arbitral Agreements Properly

- Draft arbitration clause properly
  - Intention to arbitrate
  - Scope of issues subject to arbitration
  - Arbitration institution
  - arbitration rules
  - Seat and venue of arbitration
  - Applicable law
- Be cautious in accepting ad hoc arbitration if the arbitral seat is in China
  - Specify a chosen arbitration institution clearly
  - Designation of arbitration rules of an arbitration institution does no mean the designation of that arbitration institution
  - ad hoc arbitration outside mainland China recognized
  - the governing law of arbitration agreement and the independence of an arbitral clause

HICAC 2026

Responsive Actions:
Beware of the risks of implied consent

- Beware of the risks of implied consent doctrine
  - Raise objections (if any) before the first hearing of arbitral proceeding
  - No denial in the exchanges of claim and defense does not constitute an implied consent

HICAC 2026

Responsive Actions:
Take Seriously the Good Faith Principle

Understanding violations

- Collusive practices
- Fabrication of facts
- Forgery of evidence
- Concealing of evidence
- False allegation of the existence of an arbitral agreement?

- Claim may be dismissed directly if claimant committing such practice (Article 61)

- In arbitration for domestic disputes without foreign elements: Arbitral awards may revokable and recognition and enforcement may be rejected (Article 71, 75)
- In arbitration for foreign-related disputes: not listed in the law as the circumstances for revocation or nonenforcement of an arbitral award, but the violation of good faith principle may be interpreted as a violation of public policy and an arbitral award may be revoked, or rejected for recognition and enforcement on the basis of public policy

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SOCIETY OF CONSTRUCTION LAW - VIETNAM (SCLVN) VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

Conclusions

- Arbitration practice in China in the past has responded faster to the good arbitration practice in international community than statutory legislations and has been acting as a driving force for improving PRC Arbitration law which finally recognizes and confirms the existing practical approaches learned by the arbitration institution and practitioners from international practice.
- The PRC 2025 Amended Arbitration Law represents a significant modernization of China's arbitration system. This will have a profound and positive impact on construction industry.
- However, there remain some issues and problems, which may be challenged, questioned, and scrutinized and developed in arbitration practice and to which the construction industry must pay cautious attention and may make great contribution.

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Thank you for your attention!

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HICAC 2026

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE PAPER SUBMISSION

Drafting for Enforcement: Case Studies from Singapore, Hong Kong SAR and People's Republic of China on Construction Arbitral Awards and Their Implications for Vietnam

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Introduction and Executive Summary

Construction arbitration in Asia has expanded rapidly in recent years, driven by major infrastructure programmes such as the Belt and Road Initiative and the resolution of post-pandemic project disruption. These disputes are long, technically complex and expensive. For parties, a favourable award is only valuable if it can be enforced in places where counterparties and their assets are situated. A "*paper win*" which cannot survive in the courts of key jurisdictions undermines the commercial point of the arbitral process.

For Vietnamese parties and regional stakeholders, Singapore, Hong Kong SAR and People's Republic of China ("PRC") have emerged as critical supervisory and enforcement hubs. They function as leading arbitral seats and as preferred venues for recognition and enforcement of foreign awards, including VIAC awards and other Vietnam-related arbitrations. Understanding how courts in these three jurisdictions scrutinise construction awards—particularly on natural justice, scope of submission, multi-tier dispute resolution clauses and public policy—is therefore increasingly important for anyone drafting or arbitrating Vietnam-facing construction contracts.

This paper adopts a case-study methodology. It focuses on a curated set of recent decisions from Singapore, Hong Kong SAR and PRC and uses them to distil practical drafting and strategy lessons for the construction industry. The emphasis is not on providing an exhaustive doctrinal survey, but on extracting concrete guidance that counsels, arbitrators and in-house teams can use when negotiating contracts and running arbitrations.

Three themes run through the analysis:

- first, even in strongly pro-enforcement jurisdictions, courts will intervene where tribunals stray beyond the parties' pleaded cases, borrow too heavily from parallel awards, or deny a fair hearing;

- second, there is a convergence in Singapore and Hong Kong SAR towards treating non-compliance with pre-arbitration steps as an admissibility issue for tribunals rather than a jurisdictional defect, with PRC focusing more on validity and authority issues in the arbitration agreement;

- third, the main enforcement risks in all three hubs can in fact be mitigated at the drafting stage, particularly in multi-party, multi-contract construction projects.

The final part of the paper turns to Vietnam. It uses the Singapore, Hong Kong SAR and PRC lessons as reference points to suggest how Vietnamese parties and their international partners can "*draft for enforcement*" in Vietnam-related projects, considering Vietnam's evolving legal framework, including the Construction Law 2025 and Article 86.

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1. Singapore: Case Studies and Lessons

Singapore's enforcement framework for international arbitration is anchored in the International Arbitration Act and the New York Convention. The courts emphasise minimal curial intervention and a pro-enforcement policy, but they have been willing to set awards aside in rare cases involving excess of jurisdiction or serious breaches of natural justice.

The construction-related decisions discussed below illustrate how Singapore courts scrutinise awards and provide practical guidance for drafting and case strategy.

1.1 Lesson 1: Scope of submission, pleadings and natural justice - *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd*

The first case concerns the scope of the tribunal's mandate and the importance of keeping relief within the bounds of the pleaded case. In *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd*[1], a dispute arose out of the "Defu Industrial City" project in Singapore. The main contractor engaged the subcontractor to perform works and later terminated the contract on the basis that those works were defective. In the arbitration, the subcontractor counterclaimed for "*the full value of works done to-date*", while the main contractor sought substantial backcharges representing completion costs.

The arbitration proceeded on an expedited, documents-only basis. Within three months, the parties had exchanged pleadings, witness statements and written submissions; no oral hearing was held. The sole arbitrator ultimately dismissed the main contractor's claims and concluded that the termination was wrongful. She then awarded the subcontractor its counterclaim for the "*full value of works done to-date*", calculated as the aggregate value of both completed and uncompleted work under the subcontract.

On an application to set aside part of the award, the Singapore Court of Appeal held that the arbitrator had breached the fair hearing rule. It found that although the subcontractor had advanced an expanded valuation methodology in its written submissions, extending to uncompleted work it expected to perform, this claim had never been a part of its pleaded case. In its pleaded case, the subcontractor only sought payment of the value of work it had *completed* under the sub-contract. The arbitrator failed to appreciate that the head of claim for uncompleted work was unpleaded, oversimplified the main contractor's case and proceeded on the mistaken basis that the main contractor did not object to the subcontractor's measure of its expectation interest to claim for work that it expected to complete under the sub-contract. This resulted in the arbitrator mis-ascribing a position to the main contractor and failing to consider the entirety of its case on valuation, causing actual prejudice.

The Court emphasised that the "*submission to arbitration*" is reconstructed holistically from the arbitration agreement, pleadings, agreed or tribunal-settled lists of issues and the parties'

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[1] *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* [2025] SGCA 5.

submissions, rather than from a narrow reading of the statement of claim and defence alone. Agreed lists of issues can crystallise what has been submitted, but they cannot cure the absence of any pleaded foundation for a fundamentally new claim or defence. Conversely, even in the absence of a formal list of issues, courts may infer the scope of submission from how the parties conducted the arbitration, but they remain cautious not to allow tribunals to extend this to issues that were not raised on the pleadings, and that tribunals should seek clarification from parties on how they wish to proceed, particularly in the context of "*documents-only*" proceedings.

A recent Singapore decision involving Vietnam Oil and Gas Group and a Russian contractor consortium in relation to a Vietnam power plant reinforces this point.[2] There, the tribunal adopted a decisive legal theory about how two termination notices interacted, which neither party had advanced and which conflicted with the contractor's own pleaded position. The Court of Appeal held that this breached the fair hearing rule because the reasoning bore no reasonable nexus to the parties' submissions, and the losing party had been denied the opportunity to adduce expert evidence and argument on the tribunal's chosen theory. Together with *Wan Sern*, the case confirms that Singapore courts are attentive to whether a tribunal has decided the dispute that was put to it, by reference to the pleaded case and the evidential record.

Practical implications

The case yields several practical lessons for construction counsels:

- plead clearly and completely. Heads of claim and relief should track the contract's risk allocation (for example, variation regimes, prolongation and disruption claims, and liquidated damages) and be properly pleaded rather than left to emerge in submissions;

- treat lists of issues as control documents. Counsel should ensure that any list of issues accurately reflects the pleaded case and evidence, and resist formulations that implicitly widen the scope of submission; and

- manage late-arising points formally. Where new claims or defences surface, seek amendments and procedural orders recording the broadened submission, rather than relying on informal references in submissions.

For arbitrators, the case underscores the need to check systematically that each head of relief awarded can be traced to a pleaded claim or defence, and to invite submissions explicitly where new analytical routes appear.

1.2 Lesson 2: Copy-paste awards and the integrity of the arbitral process - *DJP v DJO*

The second Singapore case takes a different angle on natural justice: the use of template awards across parallel arbitrations. In *DJP and others v DJO*[3], the Singapore Court of Appeal affirmed the setting aside of an arbitral award in its entirety because the presiding arbitrator had effectively copied large parts of earlier awards from parallel arbitrations without proper disclosure or fresh consideration.

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[2] *Vietnam Oil and Gas Group v Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport)* [2025] 2 SLR 273.
[3] *DJP and others v DJO* [2025] SGCA (I) 2.

The dispute concerned a dedicated freight corridor project in India. A contractor consortium commenced a Singapore-seated ICC arbitration seeking additional payment following an increase in statutory minimum wages, which it characterised as a contractual "*change in legislation*". Around the same time, two other consortiums initiated parallel arbitrations seated in New Delhi under similar, but not identical, contracts. All three tribunals had the same presiding arbitrator, but different co-arbitrators.

The award in the Singapore-seated arbitration was issued after the awards in the New Delhi-seated arbitrations and was subsequently found to be substantially similar: 212 out of 451 paragraphs were reproduced from the earlier awards, including references to arguments, contractual clauses and even the governing arbitration law that did not apply in the Singapore case. The Singapore High Court set the award aside for breach of natural justice; the Court of Appeal upheld that decision.

The Court of Appeal accepted that it is not inherently objectionable for arbitrators to reach consistent outcomes in related disputes or to draw on their own prior reasoning. However, any such reliance must occur through a transparent process: parties must be told that earlier awards are being considered, be given an opportunity to address them, and the tribunal must still decide the case based on the record before it.

Here, there was no such process. The earlier awards were used as templates, with only minor adjustments for what were assumed to be the distinct features of the case; the co-arbitrators in Singapore had not participated in the earlier proceedings; and the award contained references to non-existent submissions and to the wrong lex arbitri.

The Court of Appeal held that a fair-minded and informed observer would reasonably apprehend that the presiding arbitrator had been improperly influenced by his own previous decisions, giving rise to anchoring and confirmation bias. Because the copy-paste methodology permeated the decision-making process, the defect could not be confined to discrete passages. It would therefore be artificial to preserve parts of the award; the Court set it aside in full.

Practical implications

Drawing from the experience in *DJP v DJO*, construction counsels should take note of the falling when similar or related proceedings are ongoing in parallel:

- appointing the same presiding arbitrator in related cases can be efficient, but parties should record, for example in terms of reference or procedural orders, that each case must be decided independently on its own record;

- where parallel awards exist, counsel should ask whether the tribunal intends to consider them and, if so, seek disclosure and make submissions on similarities and differences; and

- when reviewing an award, counsel should look for signs of extraneous material (wrong clauses, wrong governing law, references to absent submissions) which may indicate systemic process defects rather than isolated errors.

For arbitrators, the decision highlights the need to approach each case afresh, even in similar or related disputes, and avoid verbatim copying of prior awards. It is also important to ensure

that all members of the tribunal work from the same record and clearly engage with any contractual or procedural differences between cases.

1.3 Lesson 3: Multi-tier clauses, admissibility and consortium disputes - *DRO v DRP*

The third Singapore decision, *DRO v DRP*, deals with two recurring issues in construction arbitration: multi-tier dispute resolution clauses and consortium structures.[4] The contract in question was between an employer and a consortium of two contractors (one onshore, one offshore) for a major project. The consortium agreement defined the contractors as "*jointly and severally*" liable and permitted each member, in certain circumstances, to invoice the employer directly.

Disputes arose when the employer sought to impose liquidated damages. The offshore consortium member eventually entered into a bilateral settlement with the employer. The onshore consortium member (the respondent in the court proceedings) then commenced an UNCITRAL arbitration against the employer, claiming payment of two final milestone invoices and compensation for additional work. The employer challenged the tribunal's jurisdiction in the Singapore courts on two main grounds: first, that the onshore consortium member lacked standing to arbitrate alone; and second, that pre-arbitration escalation steps had not been complied with.

The arbitration clause provided that disputes which could not be "*settled amicably*" would be finally resolved by arbitration, and a separate clause stated that any dispute "*shall, in first instance, be submitted ... to* [the parties'] *respective project management level for resolution, failing which the dispute shall then be referred to their respective senior management level*". The employer argued that this required the consortium to act collectively at all stages, including arbitration, and that the failure to complete the escalation steps deprived the tribunal of jurisdiction.

The Singapore High Court rejected both arguments. On standing, it held that the contract's definition of "*contractor*" as including both consortium members "*jointly and severally*", coupled with clauses allowing separate invoicing, meant that the onshore consortium member could bring arbitration proceedings on its own where the dispute concerned its own invoices and onshore scope. The bilateral settlement with the offshore consortium member did not alter the essential bilateral nature of the dispute between the employer and the onshore member. Requiring the onshore member to proceed only jointly would be commercially illogical and would give the offshore member an unwarranted veto over the enforcement of its rights.

On the multi-tier clause, the Court held that non-compliance with the escalation steps concerned admissibility, not jurisdiction, in line with the Singapore Court of Appeal's guidance distinguishing jurisdiction (the tribunal's power) from admissibility (whether a particular claim is ready for decision). The Court noted that earlier Singapore authority treating non-compliance as jurisdictional did not bind it, as the jurisdiction-admissibility distinction had not been argued there. It also held that, on the wording of the clause, the escalation mechanism was not expressed as a clear condition precedent to arbitration. Even if it were, the employer had waived strict compliance by participating in meetings without objection.

[4] *DRO v DRP* [2025] SGHC 255.

Practical implications

For drafting and strategy, *DRO v DRP* reinforces several points:

- In consortium and joint venture arrangements, careful use of "*joint and several*" language and express recognition of separate invoicing and rights can support the ability of a single consortium member to pursue arbitration where the dispute is effectively bilateral;

- pre-arbitration steps may be treated as admissibility issues unless the contract clearly provides otherwise. If parties wish to make escalation steps true conditions precedent, they should say so expressly and specify the consequences of non-compliance (for example, a stay or costs orders); and

- parties who wish to rely on non-compliance with escalation steps must raise objections promptly; active participation without protest may amount to a waiver of strict compliance.

Taken together, *Wan Sern*, *DJP v DJO* and *DRO v DRP* show that while Singapore courts remain strongly supportive of arbitration, they will not hesitate to intervene when the grounds for setting aside are established. For Vietnamese construction contracts that choose Singapore as a seat or enforcement hub, these cases are useful as guides to inform both clause drafting (scope, multi-tier wording, consortium arrangements) and advocacy strategy.

2. Hong Kong SAR: Case Studies and Lessons

Hong Kong SAR remains an important seat for construction arbitration. The Arbitration Ordinance (Cap. 609) incorporates the UNCITRAL Model Law, and the courts have repeatedly emphasised their commitment to party autonomy and minimal intervention. HKIAC rules are widely used in PRC-related and Belt and Road construction projects, making Hong Kong SAR a key supervisory and enforcement hub alongside Singapore and Mainland China.

Recent Hong Kong SAR decisions echo Singapore's pro-enforcement stance but focus on slightly different pressure points: the treatment of multi-tier clauses and the management of multi-contract disputes.

2.1 Lesson 1: Multi-tier clauses and conditions precedents – *C v D*

C v D is the leading Hong Kong SAR authority on multi-tier clauses.[5] It involved a dispute resolution clause requiring negotiation or other consensual steps before arbitration. C argued that D had failed to comply with these steps and that the tribunal therefore lacked jurisdiction to hear the dispute. The tribunal rejected C's jurisdiction challenge and ruled in D's favour on the merits of the case. C applied to the Hong Kong court to set aside the arbitral award due to the tribunal's lack of jurisdiction. The Hong Kong Court of First Instance rejected C's set aside application, a decision was subsequently upheld by the Court of Appeal and ultimately the Court of Final Appeal (which is the apex court in Hong Kong).

The Courts held that, absent clear language to the contrary, non-compliance with pre-arbitration procedural requirements (such as negotiation, senior management meetings or mediation) goes to admissibility, not jurisdiction. The question is whether the claim is ready to be heard, not

[5] *C v D* [2023] HKCFA 16; *C v D* [2022] HKCA 729; *C v D* [2021] HKCFI 1474.

whether the tribunal has the power to hear it at all. That classification means such objections should ordinarily be raised and resolved before the tribunal; they do not typically ground an application to set aside or refuse enforcement.

The Courts noted that this approach is consistent with international commentary and the jurisprudence of other Model Law jurisdictions, including Singapore, which have drawn a similar distinction. It also emphasised the practical advantages of treating pre-conditions as admissibility issues: tribunals can order short stays to allow parties to complete escalation steps, rather than restarting the process in court.

The High Court in particular, observed that, in practice, where a tribunal concludes that the preliminary stages in a multi-tier dispute resolution clause have not been satisfied, it may give effect to the clause by staying the arbitration, in whole or in part, to permit completion of the escalation steps, by imposing appropriate costs sanctions, or by dismissing the claims as inadmissible. In doing so, the tribunal is well placed to determine what is required, taking into account commercial realities and practical considerations, including whether it would be futile to compel the parties to merely "go through the motions".[6]

Although *C v D* is not a construction dispute, the decision is important for construction contracts, where multi-tier dispute resolution provisions often sit alongside mediation and negotiation mechanisms. Hong Kong SAR courts will not readily entertain arguments that failure to mediate or negotiate deprives tribunals of jurisdiction; those fights belong in the arbitration. Moreover, Hong Kong's Construction Industry Security of Payment Ordinance (Cap 652) expressly provides, at Section 51, that statutory adjudication mechanism "*does not affect any right of a party to a construction contract to submit a payment dispute relating to or arising from the contract in any court or other dispute resolution proceedings*".

Practical implications

For drafting and strategy, *C v D* highlights several important points for multi-tier clauses:

- Use explicit language if escalation steps are genuinely intended to be strict conditions precedent; otherwise, courts are likely to treat them as admissibility matters.

- Specify the consequences of non-compliance (stay, costs or no consequence) instead of leaving tribunals and courts to infer them.

- In long-term construction projects, not every grievance needs to go through an elaborate ladder; over-engineered escalation sequences increase opportunities for tactical delay without necessarily improving settlement prospects.

2.2 Lesson 2: Consolidation, multi-contract structures and the "centre of gravity" – *AAA, BBB, CCC v DDD*

Construction projects invariably involve webs of related contracts: EPC agreements, subcontracts, supply contracts, guarantees and financing instruments. Hong Kong SAR courts have grappled with what happens when those contracts contain non-aligned arbitration clauses.

[6] *C v D* [2021] HKCFI 1474 at [49].

In *AAA, BBB, CCC v DDD*[7], the lender commenced arbitration under an arbitration clause contained in a loan agreement. However, in the arbitration it purported to advance claims not only under the loan agreement but also under a promissory note, which contained its own arbitration clause, and against guarantors whose obligations arose under the note rather than the loan.

The tribunal assumed jurisdiction over the note-based claims. On an appeal against the tribunal's decision on jurisdiction, the High Court set aside the tribunal's decision.

The High Court identified three broad paradigms in which conflicting dispute resolution clauses can feature: (i) a basic paradigm where there is a single contract with two or more conflicting dispute resolution clauses; (ii) an intermediate paradigm where there are multiple related contracts and only one contains a dispute resolution clause; and (iii) a generalised paradigm where there are multiple related contracts with conflicting dispute resolution clauses in two or more of the contracts.[8]

It applied a "*centre of gravity*" analysis: where multiple contracts contain different dispute resolution provisions, one must ask which arbitration agreement is most closely connected to the dispute, having regard to the nature and purpose of each contract, their inter-relationship, and the relief sought etc. On the facts, the guarantors' liability under the promissory note fell within the centre of gravity of the note's arbitration clause, not the loan agreement's clause. The tribunal constituted under the loan agreement clause therefore lacked jurisdiction over the note-based claims.

Although the case did not arise from a construction project, the reasoning maps neatly onto typical construction structures. For example, an EPC contract may contain one arbitration clause, while on-demand bonds, direct agreements with lenders, and operation and maintenance contracts may contain different clauses, seats or institutions. Disputes relating to the project may fall within the ambit of two or more of these dispute resolution clauses. Hong Kong SAR courts will not simply ignore those differences in the name of efficiency.

Most arbitral institutional rules do, of course, allow for consolidation and multi-contract arbitrations where the clauses are compatible. But Hong Kong SAR case law confirms that courts will not rewrite fundamentally inconsistent dispute resolution clauses after the fact to enable consolidation. The work must be done at the drafting stage.

Practical implications

AAA, BBB, CCC v DDD highlights several important points to bear in mind when drafting dispute resolution clauses across construction contracts so that they can be "*rolled up*" into enforceable awards:

- If the intention is for disputes under a suite of project documents to be heard together, they should align the core elements of the arbitration clauses—seat, institution, rules and language—across those documents;

[7] *AAA, BBB, CCC v. DDD* [2024] HKCFI 513.
[8] *AAA, BBB, CCC v. DDD* [2024] HKCFI 513 at [47].

- Consider including express consolidation and multi-contract language referencing specific arbitral institutional rules where Hong Kong SAR is the likely seat, to reduce the risk of parallel tribunals and inconsistent awards; and

- Avoid mixing arbitration and litigation, or different seats, within a tightly integrated project unless the distinction is deliberate and mapped to the risk allocation; otherwise, the "*centre of gravity*" of a particular dispute may fall under a clause that was not designed with enforcement in mind.

3. Mainland China: Case Studies and Lessons

Mainland China is an increasingly important jurisdiction for both the supervision and enforcement of construction awards. Many large infrastructure projects involve PRC state-owned employers, PRC contractors or PRC-linked financiers, and assets are often located in Mainland China.

The PRC enforcement regime combines domestic law, the New York Convention and mutual arrangements with Hong Kong SAR, and is overseen by the Supreme People's Court (SPC).

3.1 Enforcement landscape: empirical picture

An empirical study of 203 cases on the recognition and enforcement of foreign arbitral awards in Mainland China between 2012 and 2022 provides a useful overview of how PRC courts approach enforcement.[9] The key findings are:

- approximately 91% of applications were fully granted and around 2% partially granted, with only 7% refused in full;

- almost half of the applications were concluded within 180 days and around 68% within 360 days, with only a small minority extending beyond two years;

- enforcement activity is concentrated in economically active regions such as Shandong, Jiangsu, Shanghai, Zhejiang and Guangdong, but courts in 20 provinces and municipalities have handled cases, indicating a broadening of Convention expertise.

These figures include a significant number of awards arising from trading, energy and construction disputes seated in major arbitration hubs. Overall, they support the conclusion that PRC courts are generally supportive of arbitration and of the New York Convention.

A distinctive feature of the system is the SPC "*report and verification*" mechanism [10] Intermediate courts that intend to refuse enforcement of a foreign or foreign-related award must report to a higher court and ultimately to the SPC for approval.

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[9] "*Recognition and Enforcement of Foreign Arbitral Awards in China Between 2012 – 2022: Review and Remarks (Part I)*", Sam (Ronghui) Li, Michael (Haomin) Zhang, Lucas (Zhouquan) Lu, Tina (Yanfei) Qian (Zhong Lun Law Firm (Shanghai Office), Kluwer Arbitration Blog, 12 September 2023 (see: https://legalblogs.wolterskluwer.com/arbitration-blog/recognition-and-enforcement-of-foreign-arbitral-awards-in-china-between-2012-2022-review-and-remarks-part-i/)

[10] Fafa [1995] No. 18, promulgated by the Supreme People's Court on August 20, 1995, and effective on August 28, 1995; revised by the decision of the SPC on "Adjusting the Article Number Order of the Civil Procedure Law

The empirical study notes that in most non-enforcement cases, the SPC issued written opinions, which has contributed to a more uniform and arguably more pro-enforcement approach nationwide.

It should also be particularly noted that, under the new PRC Arbitration Law (which took effect on 1 March 2026),[11] Article 88 introduces a reciprocal mechanism in terms of enforcement of foreign arbitral awards. That article stipulates that where a foreign arbitration institution restricts or discriminates against the lawful rights and interests of Chinese parties, the relevant authorities in China shall have the right to implement the principle of reciprocity against the citizens, enterprises, and other organizations of that country.

3.2 Why enforcement is refused: implications for construction drafting

Despite the generally positive picture, non-enforcement does occur. The empirical study shows that the main grounds are highly concentrated, with direct implications for construction contracts.

First, based on the study, the most common ground is the lack of a valid arbitration agreement under Article V(1)(a) of the New York Convention.[12] This ground was relied on in more than half of the non-enforcement decisions. Typical fact patterns include:

- the person who signed the contract containing the arbitration clause lacked authority to bind the company;
- the award debtor never signed the version of the contract that contained the arbitration clause;
- the parties subsequently replaced the arbitration clause with a different dispute resolution provision;
- the award creditor could not prove that the award debtor was the same legal entity as the original signatory; and
- the dispute had no foreign element, but two purely domestic Chinese parties had agreed to submit to foreign arbitration, contrary to PRC law on foreign-related arbitration.

Second, the ground under Article V(1)(c) pertaining to awards dealing with matters beyond the scope of the submission to arbitration is sometimes invoked, particularly where the tribunal has decided additional claims or issues not clearly captured by the arbitration clause and those parts of the award are not easily severable.

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of the People's Republic of China in Judicial Interpretations and other Documents", promulgated on December 16, 2008, effective on December 31, 2008. (see: https://cicc.court.gov.cn/html/1/219/199/411/701.html)

[11] Arbitration Law of the People's Republic of China (2025 Revision) (see: https://www.moj.gov.cn/pub/sfbgw/gwxw/xwyw/202509/t20250913_525029.html)

[12] "*Recognition and Enforcement of Foreign Arbitral Awards in China Between 2012 – 2022: Review and Remarks (Part II)*", Sam (Ronghui) Li, Michael (Haomin) Zhang, Lucas (Zhouquan) Lu, Tina (Yanfei) Qian (Zhong Lun Law Firm (Shanghai Office), Kluwer Arbitration Blog, 12 September 2023 (see: https://legalblogs.wolterskluwer.com/arbitration-blog/recognition-and-enforcement-of-foreign-arbitral-awards-in-china-between-2012-2022-review-and-remarks-part-i/)

Other grounds, such as improper tribunal composition or procedure, or public policy, feature far less frequently. Notably, only one award in the sample was refused enforcement on public policy grounds, due to a conflict with a prior effective PRC judgment on the same legal facts.

For construction parties, these patterns suggest that the main enforcement risks in the PRC are not sweeping public policy concerns but more technical questions about the validity and scope of the arbitration agreement and the identity of the parties.

3.3 Drafting tips for enforcement in PRC-facing construction projects

The empirical data can be translated into concrete drafting and transactional guidance:

(a) Ensure a valid and provable arbitration agreement

- State the arbitration agreement clearly, with an identifiable institution and seat, in the actual contract signed by the relevant entities. Avoid last-minute "*battle of forms*" situations where different versions of the contract circulate.

- In EPC and subcontract chains, consider execution mechanics carefully: if a local project company is the counterparty which will hold the assets, ensure that it is the signatory to the arbitration clause, and that the signatory has authority (for example, via board resolutions).

- Where two PRC parties with no foreign element are involved, avoid referring disputes to foreign arbitration; use PRC-seated arbitration if enforcement in China is important.

(b) Manage multi-contract and party-change risks

- When it is commercially desirable that subcontracts and major supply contracts share the main arbitration clause, use explicit incorporation wording, for example: "*Disputes arising out of or in connection with this Subcontract shall be referred to arbitration in accordance with clause* [x] *of the EPC Contract*, *mutatis mutandis*." That said, caution should be given to make sure that applying the arbitration agreement in another contract will not cause problems such as consistency.

- Document assignments, novations and group restructurings carefully, making clear that the arbitration agreement travels with the rights and obligations being transferred, so that award creditors can show that the award debtor is the same legal person (or a clear successor) as the party which agreed to arbitrate.

(c) Keep awards within the scope of submission

- Draft arbitration clauses broadly enough to capture the full range of construction disputes (delay, variation, defects, termination, guarantees) to minimise scope objections at the enforcement stage.

- During the arbitration, ensure that claims and counterclaims are pleaded within that scope and that tribunals are not asked to determine matters that could give rise to V(1)(c) arguments later.

3.4 Practical takeaways for enforcement strategy

From an enforcement perspective, the empirical study and the SPC's supervisory role support several practical observations for construction parties:

- Properly drafted and administered construction awards are likely to be enforced in the PRC. Enforcement risk should not be overstated where the arbitration agreement is valid, and the tribunal has stayed within its mandate.

- If a PRC party wishes to resist enforcement, its most promising avenues lie in articulating serious Article V(1)(a) or V(1)(c) objections; public policy is a rarely successful fallback.

4. Implications and Lessons for Vietnam

4.1 Vietnam's evolving framework

Vietnam sits at the intersection of these three hubs. Vietnamese employers and contractors regularly contract with Singaporean, Hong Kong SAR and PRC counterparties; project finance often comes from banks in Singapore or Hong Kong SAR; and projects may involve PRC state-owned contractors or suppliers.

Vietnam's own legal framework is also evolving. Article 86 of the Construction Law 2025 expressly recognises negotiation, mediation, arbitration, court proceedings and "*dispute resolution models based on international practice*" for construction disputes and reaffirms party autonomy on contractual penalties, rewards and compensation.

4.2 Applying the checklist to Vietnam-facing contracts

For Vietnamese employers, contractors and lenders, the lessons from Singapore, Hong Kong SAR and PRC translate into concrete drafting choices:

- When choosing seats and institutions, consider where enforcement will realistically occur and align the arbitration clause accordingly.

- Integrate mediation or negotiation (or other adjudication processes such as DAB/DAAB) in a way that is compatible with Article 86's open list approach and can be converted into enforceable awards in Singapore, Hong Kong SAR or the PRC if necessary.

- For projects financed by regional banks or involving PRC contractors, anticipate enforcement pathways into Hong Kong SAR and PRC via the mutual enforcement arrangement and the New York Convention.

4.3 Drafting Vietnam-facing contracts for enforcement abroad

When negotiating Vietnam-related construction contracts, parties should think from the outset about where they may ultimately need to enforce an award. If the counterparty's main assets or lenders are in Singapore or Hong Kong SAR, it will often make sense to designate one of those places as the seat and to choose an institution familiar to those courts. If assets or guarantors are in the PRC, care should be taken to ensure that the arbitration agreement will be recognised under PRC law.

Drafters should also structure multi-tier mechanisms with a view to both arbitral efficiency and enforceability. Singapore and Hong Kong SAR case law now treat pre-arbitration steps as admissibility issues unless clearly stated otherwise; this reduces scope for jurisdictional ambushes but increases the importance of spelling out contractual consequences (such as stays or costs orders) for non-compliance. Article 86's open list approach gives Vietnamese parties flexibility to design such mechanisms, including negotiation, mediation, dispute boards and adjudication, in a way that aligns with regional practice.

In complex project structures, consistency of dispute resolution clauses across EPC contracts, subcontracts and financing documents is critical. The Singapore, Hong Kong SAR and PRC case studies show that tribunals and courts are unlikely to rectify inconsistent arbitration agreements after the fact. Vietnamese parties and their counsel therefore need to manage this alignment carefully at the drafting stage.

4.4 Aligning arbitral risk with the law of the likely enforcement forum

Vietnamese stakeholders should also internalise procedural lessons drawn from the laws of the jurisdictions where enforcement is most likely to be sought for their projects.

In Singapore and Hong Kong SAR, tribunals will be supported if they decide the case framed by the parties, but awards may be vulnerable if tribunals decide unpleaded issues, rely on undisclosed external materials, or copy reasoning from parallel awards without proper process.

In the PRC, enforcement risk arises primarily from defects in the arbitration agreement and scope. Vietnamese parties should ensure that signatories have proper authority, that arbitration clauses are valid under PRC law where relevant, and that awards remain within the agreed scope of submission.

In practice, this means that Vietnamese in-house teams and external counsel should treat case-management decisions in the arbitration phase as critical for enforcement, not just for the immediate outcome. When tribunals signal a potential analytical route not pleaded by the parties, counsel should insist on an opportunity to address it. Where parallel proceedings exist, they should seek clarity on how those awards may be used and record any agreed parameters in procedural orders.

4.5 Building internal capacity: playbooks and model clauses

Vietnamese employers, contractors and lenders can benefit from developing internal "*playbooks*" which incorporate these lessons. These might include:

- model arbitration clauses calibrated to different enforcement scenarios (for example, assets in Singapore, Hong Kong SAR or PRC);
- standard multi-tier dispute resolution wording that is workable under Article 86 and consistent with Singapore and Hong Kong SAR's admissibility approach;
- guidance on how to structure mediation or negotiation (or other adjudication mechanisms such as DAB/DAAB) so that their outcomes can be converted into enforceable awards

in Singapore, Hong Kong SAR or PRC, including careful documentation of referrals, decisions and notices of dissatisfaction.

Such tools can help Vietnamese parties negotiate more effectively with international partners and avoid avoidable enforcement risks.

Conclusion

The case studies from Singapore, Hong Kong SAR and the PRC confirm that all three jurisdictions are, in different ways, committed to supporting arbitration and enforcing construction awards. At the same time, they demonstrate that courts will intervene where tribunals stray beyond the parties' submission to arbitration, undermine natural justice, or where the arbitration agreement is defective.

For Vietnam-related construction projects, the most effective way to manage these risks is at the drafting stage: by choosing seats and institutions strategically, structuring multi-tier clauses and project-wide arbitration agreements with enforcement in mind and aligning case strategy with how courts in these hubs analyse awards.

This, ultimately, is what "*drafting for enforcement*" requires: not simply selecting an arbitral institution or inserting a boilerplate clause but thinking through from the outset how an award will be scrutinised in Singapore, Hong Kong SAR and PRC—and ensuring that the contract and the conduct of the arbitration equip that award to withstand that scrutiny.

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VIAC VIETNAM INTERNATIONAL ARBITRATION CENTRE

HICAC 2026

DRAFTING FOR ENFORCEMENT:

Case Studies from Singapore, Hong Kong SAR and PRC on Construction Arbitral Awards and Their Implications for Vietnam

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HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

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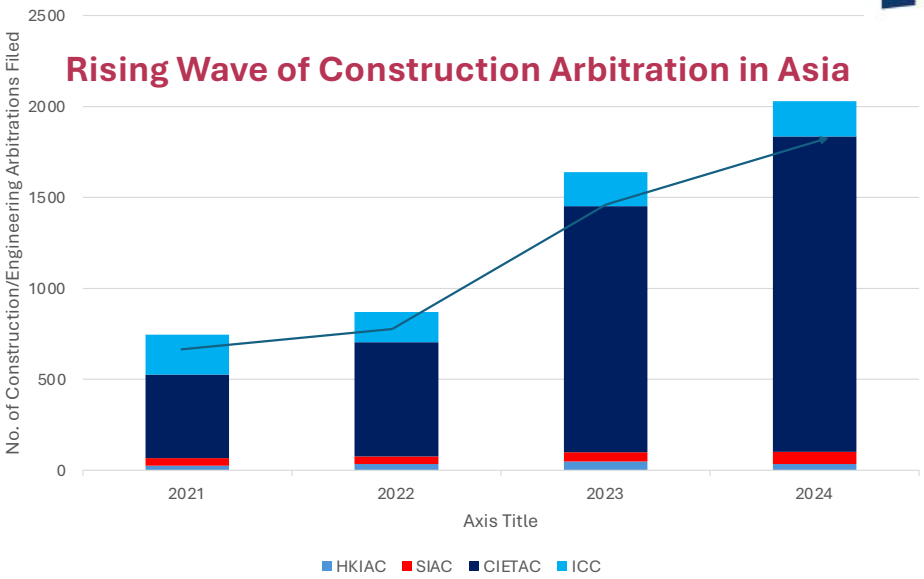
Rising Wave of Construction Arbitration in Asia



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Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

1. Singapore: Natural Justice, Pleadings and Multi-tier Clauses

Singapore lessons:

- plead and amend properly
- keep awards within pleaded case
- be disciplined with templates
- draft and use multi-tier clauses with consequences spelled out.

Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd [2025] SGCA 5

- Unpleaded head of claim (uncompleted work) awarded in expedited, documents-only arbitration → breach of fair hearing.
- Submission to arbitration reconstructed from pleadings, issues lists and submissions, not just broad case "themes".

Vietnam Oil and Gas Group v Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport) [2025] 2 SLR 273

- tribunal adopted unargued "second notice replaces first" theory
- no reasonable nexus to parties' case.

DJP and others v DJO [2025] SGCA (I) 2

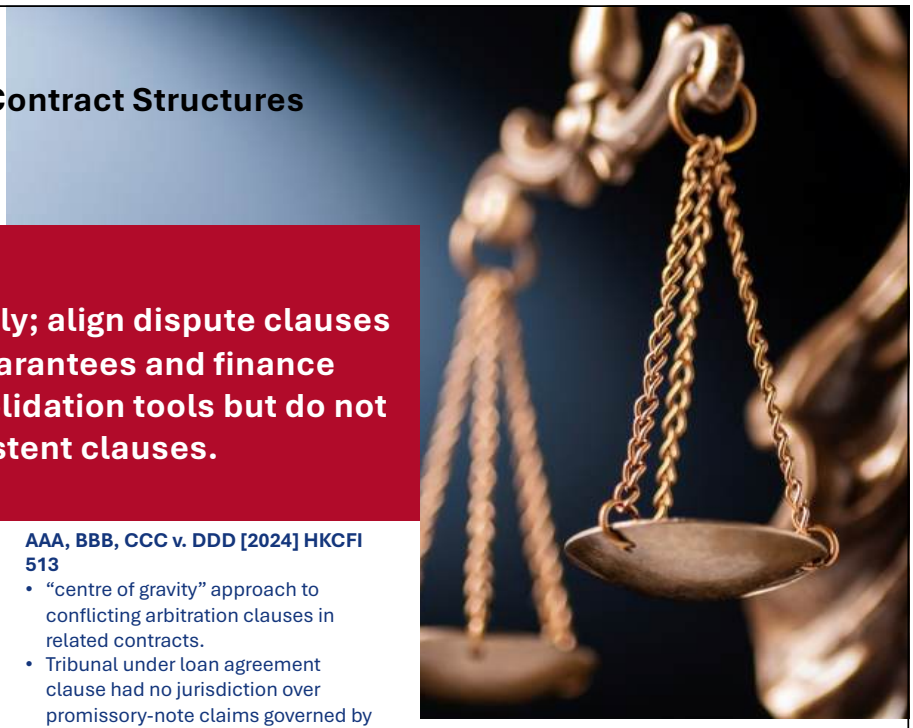
- copy-paste award from parallel arbitrations
- reliance on extraneous material
- reasonable apprehension of anchoring bias

→ award set aside in full.

DRO v DRP [2025] SGHC 255

Consortium member could arbitrate alone where rights were "joint and several" and dispute was bilaterally framed. Non-compliance with escalation clause = admissibility, not jurisdiction; waiver by participation

2. Hong Kong SAR: Multi-tier Clauses and Multi-Contract Structures



Hong Kong lessons:
draft escalation clauses clearly; align dispute clauses across EPC, subcontracts, guarantees and finance documents; use HKIAC consolidation tools but do not expect courts to cure inconsistent clauses.

C v D [2023] HKCFA 16; [2022] HKCA 729; [2021] HKCFI 1474

- non-compliance with pre-arbitration steps (negotiation etc) goes to admissibility, not jurisdiction, absent clear wording.
- Objections should be raised before tribunal; courts reluctant to set aside on this basis.

AAA, BBB, CCC v. DDD [2024] HKCFI 513

- "centre of gravity" approach to conflicting arbitration clauses in related contracts.
- Tribunal under loan agreement clause had no jurisdiction over promissory-note claims governed by a separate clause.

HICAC 2026

3. PRC: Empirical Enforcement Picture and Drafting Tips

2012–2022 data

91%	2%	7%
Fully enforced	Partially	Refused

PRC lessons:
get signature and authority right; avoid foreign-seat clauses for purely domestic PRC disputes; be explicit in incorporating arbitration clauses across EPC/subcontract chains; keep awards within scope.

Main refusal ground: Art V(1)(a) – no valid arbitration agreement (authority defects, wrong version signed, purely domestic dispute sent to foreign arbitration, identity issues).

Secondary ground: Art V(1)(c) – award beyond scope of submission, where excess is inseparable.

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4. Implications for Vietnam: Drafting for Enforcement

Article 86 Construction Law 2025: offers flexible menu of DR mechanisms; scope to mirror international practice.

- Choose seat/institution with realistic enforcement targets.
- Structure multi-tier clauses with clear timelines and consequences, assuming courts treat them as admissibility issues.
- Align arbitration clauses across project documents; anticipate PRC enforcement when PRC counterparties or assets are involved.

Internal playbooks and model clauses for Vietnamese stakeholders: seat and enforcement strategy, escalation templates, consortium and multi-contract wording, mediation /negotiation /DAB /DAAB integration.

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Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

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Thank you for your attention!

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Ho Chi Minh City International Construction Arbitration Conference (HICAC 2026)

Session D2: Regional Construction Arbitration – 10th April 2026

From Critical Path to Tribunal Persuasion: Why Technically Sound Delay Analyses Often Fail in Arbitration[1]

Abstract:

Delay analysis plays a central role in construction disputes, with critical path method-based techniques widely used to assess entitlement. Despite increasingly sophisticated methodologies, courts and tribunals often give limited weight to delay expert evidence, even where the analysis is technically sound.

This paper explores the reasons for this gap between technical validity and persuasive value. It argues that tribunals consistently favour clear, fact-based reasoning over complex modelling, and that delay analyses lose impact when they are not closely tied to the factual narrative of the project.

The paper identifies common issues that weaken delay evidence, including an overemphasis on methodology, excessive complexity, and lack of clarity in the presentation of facts and assumptions. It then proposes a more effective approach, focused on structuring the analysis around the key issues in dispute and presenting it in a clear, transparent and accessible manner.

Ultimately, the paper shows that the persuasiveness of delay analysis depends less on methodological sophistication and more on its ability to clearly demonstrate causation in a way that assists the tribunal's decision-making.

[1] This paper has been prepared exclusively for discussion during the HICAC Conference 2026 in Ho Chi Minh City. It is intended solely to assist the audience in reflecting on general aspects of delay analysis and how such issues may arise in their own matters. Nothing in this document relates to any specific project or dispute, nor should it be interpreted as expressing any definitive opinion of the author. The content is illustrative only and must not be treated as expert evidence or relied upon in any arbitration, litigation or cross examination proceedings.

Ho Chi Minh City International Construction Arbitration Conference (HICAC 2026)

Session D2: Regional Construction Arbitration – 10th April 2026

From Critical Path to Tribunal Persuasion: Why Technically Sound Delay Analyses Often Fail in Arbitration[2]

Introduction

1. Delay analysis has become a central feature of construction disputes, particularly on complex projects where the question of delay often sits at the heart of claims for extensions of time, liquidated damages or prolongation costs. As a result, delay experts frequently find themselves playing a pivotal role in arbitration, providing the technical backbone of the case on why the project finished later than planned.

2. Over the past several decades, the tools and techniques used to analyse delay have developed considerably. Modern scheduling software, combined with recognised methodological guidance, enables experts to examine projects with increasing precision. In theory, this evolution should have made delay evidence clearer and more persuasive. In practice, the picture is mixed. Tribunals often struggle to engage with highly technical analyses and not infrequently give limited weight to opinions that are entirely sound from a technical standpoint.

3. This paper considers why that disconnect persists. The challenge rarely lies in a lack of rigour. Rather, it arises when the analytical approach adopted by experts does not align with the way arbitral tribunals consider evidence and reach decisions. The following sections trace how delay analysis has evolved from a project-management tool into an evidentiary framework, examine judicial reactions to delay evidence, and explore how experts can tailor their analyses to better support the tribunal's task.

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4. The Critical Path Method, first developed in the late 1950s, began life as a forward-looking planning technique. It was designed to help managers understand the activities that controlled completion and to make sensible decisions about sequencing and resource allocation. It was never intended as a forensic reconstruction tool. Its purpose was to guide the work, not to explain it after the fact.

5. As construction contracts became more structured, programmes increasingly found their way into contractual frameworks. Time for completion, granting of extensions of time and entitlement to delay damages gradually became tied to programme logic. This shift transformed CPM from a management tool to an evidentiary device capable of influencing contractual outcomes.

6. To meet these new demands, a variety of retrospective delay methodologies emerged. Some, such as basic as-planned versus as-built comparisons, sought to measure divergence between expectation and reality. Others, such as impacted as-planned modelling and time-impact analysis, attempted to simulate the effect of individual delay events within the logic of the programme. Windows analysis provided a more dynamic picture by focusing on discrete periods. Collapsed as-built approaches, meanwhile, reconstructed the project by hypothetically removing delay events from the as-built timeline.

7. Industry bodies responded by producing guidance intended to bring structure and consistency to these methods. The SCL Protocol and AACE guidance reflect a noticeable trend toward contemporaneous, dynamic analysis, emphasising that the critical path is not a static concept but one that evolves as the project progresses. While this guidance has helped shape practice, it has also contributed to increasingly complex analyses.

8. That complexity, while often analytically justified, has significant implications for dispute resolution. Multiple programme iterations, intricate logic networks and layers of interpretive judgment can make delay opinions difficult for tribunals to follow. As the technical depth of the analysis increases, so too does the risk that its persuasive value diminishes. Understanding why this happens, and how experts can avoid it, is the focus of the remainder of this paper.

The Disconnect Between Technical Analysis and Arbitral Decision-Making: Judicial Responses to Delay Expert Evidence

9. Despite the increasing sophistication of delay analysis methodologies, arbitration practice reveals a persistent disconnect between technical analysis and arbitral decision-making. Tribunals are required to determine relatively straightforward questions of causation, responsibility, and contractual entitlement. However, the analyses presented to them are often highly complex, requiring detailed understanding of scheduling logic and modelling techniques.

10. This mismatch creates a practical difficulty. Arbitrators are typically legal professionals rather than scheduling experts. They must evaluate competing expert opinions within limited procedural time and without the benefit of extensive technical training. As a result, analyses that are technically rigorous may nonetheless be difficult to understand, test, or apply.

11. The consequence is that tribunals may give limited weight to such analyses, not because they are incorrect, but because they do not assist in answering the key issues in dispute. In some cases, tribunals may revert to simpler reasoning based on factual evidence, effectively bypassing complex expert analysis altogether.

12. This phenomenon suggests that the effectiveness of delay analysis in arbitration depends not only on methodological correctness, but also on its ability to communicate causation clearly and directly.

13. Judicial decisions provide valuable insight into how delay analyses are perceived by decision-makers. Several cases illustrate the challenges posed by complex expert evidence and the expectations tribunals have of delay experts.

14. In White Constructions Pty Ltd v PBS Holdings Pty Ltd[3], the New South Wales Supreme Court was presented with competing delay analyses from two experts who reached fundamentally different conclusions using fundamentally different methods. White, a property developer, argued that late preparation of a sewerage design had caused critical delay to a 100-lot subdivision. The factual

[3] *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166

premise was not in dispute. What was contested was whether the delay to the design process had actually driven delay to construction.

(1) Each expert chose a different methodology — one a Collapsed As-Built (but-for) analysis, the other an As-Planned versus As-Built Windows approach. Each criticised the other's methodology and its application. The Court found both analyses overly complex, model-driven, and ultimately unhelpful. Consequently, the court appointed an independent programming expert.

(2) The court expert's evidence was instructive. He observed that the choice of methodology was not itself the determinative question. What mattered was whether the analysis was grounded in the actual facts and contemporaneous documents of the project. A method could be theoretically sound and yet practically useless if it did not accurately reflect how the project had been delivered. The Court accepted this framing and rejected both parties' analyses on the basis that neither expert had connected their conclusions to real site data.

(3) On the facts, the court found that while contemporaneous diaries recorded delays to sewer works, they did not identify any specific follow-on activities that had actually been held up. The activities White claimed were affected by the sewerage design delay showed no evidence in the project records of being delayed for the reasons asserted.

(4) White failed to establish causation.

15. In Thomas Barnes & Sons v Blackburn with Darwen BC[4], the Technology and Construction Court examined a dispute about delay to the construction of Blackburn Bus Station. The parties disagreed about which events had driven critical delay: the claimant attributed the delay to structural steel deflection issues in the hub area; the defendant contended that the contractor's own failures — particularly serious delays to roof-covering works — were the true cause.

[4] Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)

(1) The claimant's expert said he had used an as-planned versus as-built windows analysis, but the court found that he had in practice relied on an oversimplified retrospective longest-path approach. He treated the steel deflection issue as the sole critical driver, largely ignoring the roof-covering works despite extensive contemporaneous evidence of slippage in that area. The court criticised him for reverse-engineering his conclusions from witness accounts rather than conducting an open, fact-driven investigation.

(2) The defendant's expert used a hybrid time-slice and time-impact analysis built around contemporaneous documents, photographs and the actual construction sequence. Though criticised for an arguably over-technical presentation, his analysis was more firmly anchored in site reality. He identified both the steel deflection issue and the roof-covering delays as contributing causes, often operating concurrently, contrary to the claimant's single-cause narrative.

(3) The court preferred the defendant's evidence, and in doing so made clear that methodology was secondary to whether the conclusions were grounded in factual project behaviour. The judgment carries an additional message: experts must justify their choice of methodology, and common sense must inform its application. Adherence to a recognised protocol does not insulate an analysis from challenge if the analysis itself does not engage with the actual sequence of events.

(4)

16. In Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd[5], the Singapore High Court addressed a dispute about delay to a solar farm project. Terrenus blamed the contractor, Attika, for missed completion milestones. Attika responded that the delays had been caused by Terrenus' own late approvals, late supply of solar panels, and delays attributable to Terrenus' subcontractor.

(1) The court considered two competing expert opinions. One expert's analysis was rejected in full. His methodology had no reliable factual or contractual basis, his linear-progress model did

[5] Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd, [2023] SGHC 173

not reflect how construction work actually proceeds, and his conclusions rested on unverified and hearsay data rather than contemporaneous project records. Critically, the analysis failed to establish a coherent causal link between the events he identified and actual critical-path delay.

(2) The court's preference came down to verifiability. One expert could point to his sources, show his working, and explain how the evidence supported his conclusion at each step.

17. In PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd[6], the court rejected the defendant's delay expert's opinion because his conclusion was inconsistent with the factual record, contradicted the sequence of events, and failed to reflect the reality of the disruption experienced on the project.

18. Secondary commentary across the *Walter Lilly*, *North Midland v Cyden Homes*, *Obrascon v Gibraltar*, and *Maeda v Bauer* cases reinforces the same themes: tribunals expect clear causation analysis, strict compliance with contractual mechanisms, and reliance on contemporaneous records rather than retrospective modelling.[7]

19. Taken together, these cases reveal a consistent judicial approach. Tribunals are not concerned with methodological sophistication for its own sake. They are concerned with whether the analysis provides a clear and reliable explanation of what happened, why it happened, and what its consequences were.

20. While this review focuses primarily on common-law judgments, the same trend is visible across civil-law jurisdictions[8]: courts increasingly expect expert evidence to be grounded in objective facts,

[6] PPG Industries (Singapore) Pte Ltd *v* Compact Metal Industries Ltd, [2012] SGHC 91

[7] See, e.g. Ramskill Martin, *Global Claims Article 2 – Causation and Global Claims (Article 45)*, Fenwick Elliott, *North Midland Building Ltd v Cyden Homes Ltd* (Case Commentary, 2018), CMS, *Delay claims under the FIDIC form: Obrascon challenged* (Lexology, 6 November 2023) and Cocking & Co, *Maeda v Bauer: The Long and Winding Road* (2021), commentary on strict compliance with notice provisions and the contractual basis of claims.

[8] See, e.g., standard German civil-procedure commentary emphasising the requirement that expert evidence be tatsachenfundiert (fact-based) and nachvollziehbar (traceable and logically reasoned), including MüKo-ZPO, §§286, 404a; Thomas/Putzo ZPO, §286; and recent CEPEJ guidelines on judicial expertise stressing transparency, evidentiary grounding, and methodological clarity.

transparently reasoned, and logically traceable. Civil-law judges are equally insistent that experts provide verifiable reasoning rather than theoretical assumptions. The preference for fact-anchored expert opinions is a modern judicial movement, regardless of whether the system is common-law or civil-law.

Common Reasons Why Technically Valid Delay Analyses Lose Persuasive Strength

21. A recurring difficulty in the presentation of delay evidence arises from an excessive focus on methodology. In many reports, considerable effort is spent setting out analytical frameworks, classifications of methods, elaborate descriptions of modelling approaches, and detailed explanations of the logic behind the chosen technique. Although these elements have their place, placing them at the forefront can divert attention from the project itself. If the structure of the report becomes too heavily centred on methodological exposition, the analysis begins to feel detached from the actual development of the works. Tribunals tend to engage more readily with material that first explains what unfolded on the project before moving into the accompanying analytical treatment. When the method supports the story rather than leading it, the conclusions usually retain more persuasive force.

22. Another area that affects credibility is the handling of programme information. In projects, programme updates evolve month by month. Activities move, sequences shift, and the critical path can change as the contractor adapts its strategy. These changes are common and do not, on their own, indicate that the project has suffered delay. A short illustration is useful here. Many projects can be executed in more than one logical order, and if progress continues through a different sequence without extending the overall completion, the project has not actually been delayed. It has simply been re-sequenced. This reinforces the need for experts to examine whether the work could continue elsewhere, rather than assuming that a shift in sequence equates to lost time.

23. When updates are used without explaining this context, or when sequence changes are treated as if they must represent delay, the analysis may appear misaligned with the way real projects operate. A persuasive assessment therefore does more than identify differences between planned and actual

logic; it explains the practical implications of those differences and whether they mattered in terms of progress.

24. Clarity in the structure of the report is equally important. Delay analyses that begin with complex technical observations tend to be harder to follow. A tribunal reading such a report may encounter intricate discussion of logic relationships, float usage and detailed modelling before understanding what actually happened on site. A more effective approach is to start with an accessible explanation of how the project progressed, how the sequence evolved, and where the main obstacles arose. Once this foundation is established, technical material becomes easier to absorb, especially when it is accompanied by straightforward illustrations. Simple diagrams, practical timeline summaries and concise descriptions of how the critical path developed help create a clearer picture of the project and make the later analytical work more comprehensible.

25. There is also a familiar pattern in which delay analysts attempt to model the entire project in extremely fine detail, covering every logic link and every minor adjustment in sequence. The intention is usually to be thorough and to show that no aspect of the programme has been overlooked. However, when only a small number of periods are actually relevant to entitlement, this level of modelling may add weight without adding clarity. Large models can obscure the central conclusion by spreading the analysis across more material than a tribunal can reasonably absorb. A more focused presentation usually maintains the credibility of technically correct work by allowing the decision makers to see quickly which periods truly matter and why.

26. A number of recurring issues also appear in delay analyses that are technically valid but still vulnerable to challenge.

    (1) One example is the treatment of prerequisites to the start of an activity. It is common to identify the last outstanding predecessor and to present this as the cause of the delay. This may be correct at the moment the activity begins, but it does not demonstrate that the same predecessor was influential throughout the entire delay period. In some instances, the critical driver may have changed several times as different constraints arose and were resolved. If

the report does not describe this development, the conclusion can appear too narrow and may be viewed as an oversimplification of a more complex sequence.

(2) Another issue appears when procurement delays and on-site delays are presented as directly linked without an explanation of how they interacted. Procurement activities often progress independently from construction, and delays in manufacturing or logistics do not always affect the on-site sequence. Conversely, delays on site may arise due to access, sequencing or resource constraints that have no relation to the procurement timeline. When an analysis presents these activities as intrinsically connected without supporting explanation, the tribunal may see a gap between the calculation and what actually happened. The analysis may still be technically correct in its measurements, but the reasoning behind it may appear incomplete unless the relationship between procurement and site readiness is set out in practical terms.

(3) In many cases, the available project records are inconsistent. Programme updates may indicate one set of dates, progress reports may show another, and correspondence may provide a third perspective on events. Subcontractor information often differs from main contractor reporting. These inconsistencies are common in major projects and do not automatically undermine the analysis. What can undermine its credibility is a failure to acknowledge them. When the expert clearly identifies where records conflict, explains why one source has been given more weight than another, and illustrates the potential effect of choosing alternative sources, the analysis usually gains rather than loses authority. Transparency about the state of the records reassures the tribunal that the analysis has been built on a realistic understanding of the available information.

(4) A further recurring challenge lies in the interpretation of programme updates. Forecasts may reflect optimism, resource changes, or internal planning intentions that do not correspond to the actual sequence executed on site. When a report treats each update as a direct representation of reality, technical accuracy may be overshadowed by concerns about interpretive assumptions. An analysis that explains how each update has been understood

and how changes in logic have been interpreted offers a much stronger foundation for the conclusions.

27. Finally, the treatment of facts, assumptions and expert judgments is another point where technically correct analysis can lose persuasive force. When these three elements are not clearly distinguished, tribunals may struggle to understand the weight that should be given to each conclusion. Clear statements of what is factual, what has been assumed due to gaps in the record and what reflects the expert's professional interpretation help the tribunal navigate the reasoning behind the analysis. This clarity enhances confidence in the conclusions, even where assumptions are necessary.

28. In summary, delay analyses tend to lose persuasive strength not because their calculations are technically flawed, but because the way in which the findings are presented leaves room for uncertainty or misinterpretation. By ensuring that methodological explanations do not overshadow the project story, by presenting programme developments with clarity and context, by addressing inconsistencies openly and by maintaining a clear distinction between facts and professional judgment, experts can preserve the credibility of their conclusions. An analysis that is technically sound, transparently explained and grounded in the practical development of the project is more likely to assist the tribunal and to be accepted as a reliable account of the causes and timing of delay.

Enhancing the Usefulness of Delay Evidence

29. These challenges suggest that the role of the delay expert in arbitration may need to be reconsidered. Traditionally, the expert has been viewed primarily as a technical analyst responsible for applying recognised methodologies to project data. While technical competence remains essential, it is no longer sufficient.

30. In the context of arbitration, the delay expert must also act as an interpreter of complex information and a guide to the tribunal. The objective is not simply to produce a technically correct analysis, but to provide evidence that is clear, focused, and directly relevant to the issues in dispute.

31. The quality of delay evidence depends not only on the expert's analysis but also on the environment in which that analysis is prepared. The questions the expert is asked to address, the form in which

the project information is provided, and the way the findings are ultimately presented all influence how effectively the evidence assists the tribunal. While the expert remains responsible for providing an independent and technically reliable opinion, the framework within which the analysis is developed can significantly improve or weaken its clarity. When this framework is handled well, the resulting evidence tends to be more focused, more coherent and more accessible.

32. The first area where support can have a real impact is the definition of the questions the analysis must answer. Delay disputes often involve a wide range of potential issues, and not all of them need to be addressed in detail. A clearly defined set of questions prevents unnecessary expansion of the investigation and allows the analysis to concentrate on the issues that matter most for the decision. Precision at this stage ensures that the expert does not drift into broader commentary or speculative modelling that does not contribute to resolving the dispute. It also avoids situations in which the analysis appears to respond to questions that were never formally put to it, which can create uncertainty about the relevance of the findings.

33. Clarity in the framing of questions also helps maintain focus throughout the work. When causation is at issue, the analysis naturally concentrates on identifying the events that drove critical delay. When the dispute revolves around notices, the analysis must connect the timeline of events to the procedural steps required under the contract. When concurrency is relevant, the work must explain how overlapping delaying events were examined and how they interacted. By identifying these themes early and keeping them central, the analysis remains aligned with the matters that the tribunal must ultimately determine.

34. The timing and structure of the project information made available to the expert also shape the strength of the analysis. Delay analysis depends on the ability to follow the project through contemporaneous documentation, including programme updates, progress records, correspondence, resource plans and commercial reports. The earlier this information is provided, the more complete and coherent the analysis becomes. When key data arrives late or in an unstructured way, even the most skilled experts must spend time reconstructing the timeline, clarifying inconsistencies and aligning records. This can lead to avoidable assumptions, gaps in the sequence,

or missed explanations that later attract criticism. A structured flow of information, organised by period and theme, gives the expert a solid base from which to work.

35. The form of the final report also plays a major role. Delay analysis often involves technical concepts that are not intuitive to those without a programming background. A dense report, filled with terminology, screenshots, tables and logic commentary, may be accurate but difficult to digest. Tribunals generally respond better to a narrative that explains the development of delay in direct and practical terms. Once the sequence of events is clearly set out, the supporting logic and calculations naturally sit in the right place. This approach does not reduce the depth of the analysis; instead, it positions the technical elements where they reinforce the story rather than obscure it.

36. Experts who adopt this approach usually present a main report that is clear and readable, supported by appendices where detailed technical work is preserved in full. This separation allows the tribunal to understand the key findings without needing to navigate the underlying model in detail. Diagrams, simplified timeline illustrations and extracts from the contemporaneous programme help bridge the gap between technical analysis and practical explanation. As a result, the report not only conveys the expert's conclusions but also shows how those conclusions were reached in a way that the tribunal can follow step by step.

Conclusion

37. Delay analysis has evolved into a sophisticated discipline supported by well-established methodologies, recognised guidance documents and increasingly advanced modelling tools. Yet experience in arbitration shows that technical depth alone does not guarantee that an analysis will be persuasive. Tribunals focus less on how complex the model is and far more on how clearly the expert explains the development of delay and how convincingly the analysis reflects what actually happened on the project.

38. Recent practice repeatedly illustrates that analyses which are clear, focused and grounded in the factual progression of the works carry greater weight than those that rely heavily on technical elaboration. A highly detailed model that is difficult to navigate can easily lose impact, even where the underlying logic is correct. When a tribunal cannot follow the reasoning from the factual record

to the expert's conclusion, the technical effort invested in the analysis risks being overlooked. This preference for clarity over complexity appears consistently across awards, hearings and feedback from arbitrators.

39. The central challenge for delay experts is therefore to bridge the gap between analytical rigour and practical intelligibility. This does not mean simplifying the work to the point of superficiality but rather presenting the analysis in a way that makes the technical steps transparent and accessible. A narrative that describes the sequence of events in a straightforward manner, supported by clear illustrations and coherent explanations of programme development, does more to support the expert's conclusions than extended methodological descriptions. When the sequence is explained clearly, the underlying calculations naturally fall into place.

40. Transparency is another key element of effective delay evidence. Tribunals respond more confidently to an analysis that openly acknowledges limitations in the project records, explains the reasoning behind key interpretive choices and presents assumptions plainly. Engaging with the imperfections of the data, rather than masking them, usually enhances rather than diminishes credibility. It shows that the expert understands the practical realities of project documentation and has accounted for them in a reasoned way.

41. Seen collectively, these factors point to a broader shift in expectations. Delay analysis today is not only about identifying the critical path or quantifying periods of impact. It is also about communication. The most effective experts are those who can take a complex sequence of events, a series of evolving programme updates, inconsistent records and technical modelling, and translate them into an account of delay that feels coherent and grounded in the project's reality.

42. By adopting an approach that emphasises clarity, relevance and practical explanation, delay experts can enhance the value of their work and support tribunals in forming a clear view of the issues before them. Sophisticated analysis remains essential, but it achieves its true purpose only when it is presented in a way that helps decision makers understand how the project unfolded and why certain periods of delay matter. When technical rigour and clear communication work together, delay analysis becomes a far more effective tool in the resolution of construction disputes.

From Critical Path to Tribunal Persuasion: Why Technically Sound Delay Analyses Often Fail

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  - Central in arbitration where causation drives outcomes
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Introduction: Evolution of Delay Analysis

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The Core Disconnect

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  - Dense models do not answer the tribunal's key questions
- **Impact**
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  - Simpler factual reasoning often prevails when expert evidence lacks clarity

The Core Disconnect: Examples

- **White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC**

01 Competing delay analyses reaching fundamentally different conclusions using fundamentally different methods

02 The Court found both analyses overly complex, model-driven, and ultimately unhelpful. It appointed an independent programming expert.

03 The Court rejected both parties' analyses on the basis that neither expert had connected their conclusions to real site data.

"The expert reports are complex. To the unschooled, they are impenetrable." [22]

The only appropriate method is to determine the matter by paying close attention to the facts, and assessing whether White has proved, on the probabilities, that delay in the underboring solution delayed the project as a whole and, if so, by how much." [197]

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The Core Disconnect: Examples

The court's preference came down to **verifiability**: one expert could point to his sources, show his working, and explain how the evidence supported his conclusion at each step. The other could not.

Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd [2023] SGHC

Single-cause explanations rarely withstand scrutiny. Real projects are shaped by multiple, overlapping drivers, and an analysis that isolates one cause while overlooking others, especially when contradicted by contemporaneous evidence, becomes highly vulnerable.

Thomas Barnes & Sons Plc v Blackburn with Darwen BC [2022] EWHC

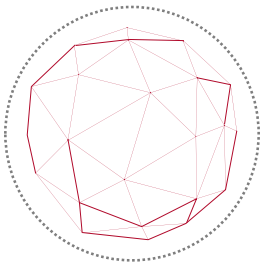
Common Reasons Why Delay Analyses Lose Persuasive Force

Method overwhelms the story

Leading with methodology obscures how the project actually unfolded and weakens the logical flow of the analysis

Over-modelling hides key issues

Excessive detail and large logic networks bury the few periods that genuinely affect entitlement



Record inconsistencies unaddressed

Failing to explain conflicting updates, reports or correspondence undermines confidence in the analysis's factual foundation

Programme resequencing misread as delay

Treating every sequence change as delay ignores whether work continued elsewhere or the change had no time impact

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Accuracy

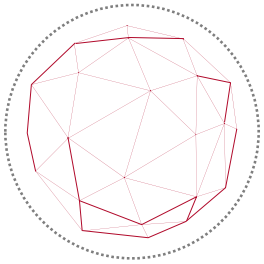
Common Reasons Why Delay Analyses Lose Persuasive Force

Facts, assumptions and judgment blurred

Mixing evidence, assumptions and interpretation prevents the tribunal from understanding the weight of each conclusion

Conflicting records not reconciled

Not explaining why one record is preferred over another creates uncertainty about accuracy and analytical judgment.



Programme updates taken as reality

Treating forecasts as actual progress ignores optimism, resource changes, or planning intentions embedded in updated programmes.

Procurement and site work wrongly linked

Treating procurement delays as automatically delaying site works overlooks differing sequences and independent progress patterns.

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Accuracy

Enhancing the Usefulness of Delay Evidence

- **Framing the right questions / Ensuring information is structured and timely**
- **Test the conclusions against the facts**
  - Confirm conclusions are aligned with general understanding of the project team and contemporaneous correspondences. If not, be able to explain the deviation.
  - Questions potential sub-critical paths to anticipate challenges.
- **Presenting evidence in an accessible way**
  - Tribunals understand narratives better than dense technical commentary; the sequence of events should lead the analysis.
  - Appendices should contain detailed logic models and calculations, while the main report remains clear and readable.
  - Diagrams, timelines and extracts from contemporaneous programmes help bridge the gap between technical analysis and practical explanation.

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Conclusion

Clarity outweighs complexity

- Delay analysis has become highly sophisticated, but tribunals prioritise clear explanation of how delay developed over technical modelling depth.
- Complex models lose impact when the reasoning from records to conclusions is difficult to follow.

Bridging rigour and intelligibility

- The challenge is not to simplify the work, but to present technical steps transparently, supported by a clear narrative of events and programme development.
- Illustrations, timelines and coherent sequencing help the tribunal understand why certain delays mattered.

Transparency strengthens credibility

- Openly addressing record limitations, interpretive choices and assumptions increases tribunal confidence and shows the expert has engaged realistically with the data.

A broader shift in expectations

- Effective delay analysis is now as much about communication as it is about logic.
- Experts who translate complex records and modelling into a coherent, fact-anchored account provide tribunals with genuinely useful evidence.

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AGENDA
CHƯƠNG TRÌNH

HICAC 2026

SECTION D - Regional Construction Arbitration
PHẦN D - Trọng tài xây dựng trong khu vực

MODERATOR/ĐIỀU PHỐI VIÊN

Dr./TS. **LÊ NẾT**

Partner at LNT & Partners
Luật sư thành viên
Công ty Luật LNT & Cộng sự

11:00AM – 12:30PM

SESSION D2
Construction dispute resolution in Southeast Asia

PHIÊN D2
Giải quyết tranh chấp xây dựng ở các nước Đông Nam Á

SPEAKER/DIỄN GIẢ

Mr./Ông **ANIL CHANGAROTH**

Managing Director of ChangAroth Chambers LLC and ChangAroth InterNational Consultancy, Singapore
Giám đốc điều hành của ChangAroth Chambers LLC và ChangAroth International Consultancy, Singapore

Presentation 01
Environmental, Social and Governance (ESG)-Driven Construction Disputes at the Crossroads: Practical Dispute Avoidance and Restorative Resolution Mechanisms

Tham luận 01
Tranh chấp xây dựng dưới tác động của Môi trường, Xã hội và Quản trị (ESG) - Thực tiễn phòng tránh và phương thức giải quyết tranh chấp mang tính phục hồi

Mr./Ông **MATTHEW KOH**

Partner at Rajah & Tann (Singapore)
Luật sư thành viên tại Rajah & Tann (Singapore)

Presentation 02
Continuing development of construction arbitration in Southeast Asia

Tham luận 02
Sự phát triển liên tục của Trọng tài Xây dựng tại Đông Nam Á

Ms./Bà **NAY YEE LYNN**

Advocate and Executive Committee Member, International Relations Division, Myanmar International Arbitration Centre (MIAC)
Luật sư và Thành viên Ban Chấp hành, Ban Quan hệ Quốc tế – Trung tâm Trọng tài Quốc tế Myanmar

Presentation 03
Construction Dispute Resolution in Myanmar: Institutional, Legal, and Regional Perspectives

Tham luận 03
Cơ chế giải quyết tranh chấp xây dựng tại Myanmar: Góc nhìn từ thể chế, pháp luật và khu vực

ENVIRONMENTAL, SOCIAL & GOVERNANCE (ESG) - DRIVEN CONSTRUCTION DISPUTES AT THE CROSSROADS: ARBITRATION CHALLENGES AND THE RISE OF RESTORATIVE JUSTICE APPROPRIATE DISPUTE RESOLUTION[1]

ABSTRACT

Environmental, Social and Governance (ESG) considerations are increasingly reshaping construction projects and the disputes arising from them. ESG-driven construction disputes are becoming a distinct and evolving category within international arbitration, characterised by their ongoing, multi-stakeholder, and forward-looking nature. Building on emerging categories of disputes—including those arising from energy transition measures, greenwashing, and carbon emissions obligations. This paper demonstrates that ESG disputes are not merely more complex, but differently structured from traditional construction disputes. Such disputes expose structural limitations in traditional arbitral frameworks, particularly in relation to jurisdiction, evidentiary complexity, confidentiality, interim relief, and the enforceability of non-monetary remedies.

Against this backdrop, the paper also advances Restorative Justice as a functionally superior and better aligned practical framework for addressing ESG disputes. It explores how restorative principles—centred on accountability, dialogue, remediation, and forward-looking solutions—can be operationalised through Appropriate Dispute Resolution (ADR) mechanisms, including Dispute Avoidance/Adjudication Boards (DAABs), mediation, and facilitated stakeholder engagement.

Drawing on developments in Vietnam, the broader Asian construction market, as well as recent ESG and climate arbitration trends between 2023 and 2025, the paper proposes an integrated dispute resolution model in which arbitration is complemented—and enhanced—by proactive, restorative mechanisms, requiring not the displacement of arbitration, but its recalibration within a broader dispute resolution ecosystem capable of delivering outcomes that are legally robust, commercially viable, and aligned with evolving ESG expectations.

[1] This paper advances the framework and builds/expands upon our article "*Restorative Justice For Climate Conflicts – Rethinking The Future of Appropriate Dispute Resolution*" that has been accepted by the Commonwealth Lawyers Association (https://www.commonwealthlawyers.com/)'s Climate Justice Committee (https://www.commonwealthlawyers.com/climate-justice-committee/)'s for publication in its first Newsletter - By **Anil Changaroth** (https://sg.linkedin.com/in/anil-changaroth), Internationally accredited Mediator, Arbitrator, Adjudicator, and Restorative Justice practitioner, Advocate and Solicitor of Singapore and Solicitor of England and Wales (called to the Middle Temple, England), MD ChangAroth Chambers LLC and ChangAroth InterNational Consultancy Singapore (https://changarothchambers.com/) and **Lenny Rahman** (https://www.linkedin.com/in/lenny-rahman/) - Digital Dispute Resolution Specialist, Accredited Civil / Commercial Mediator and Advocate & Solicitor, Bandar Seri Begawan, Brunei-Muara District, Brunei, Head of ChangAroth Chambers Brunei Darussalam (https://www.linkedin.com/company/changarothchambersbrunei/?originalSubdomain=bn).

INTRODUCTION

Conceptualising ESG and its Distinction from Sustainability

Environmental, Social and Governance (ESG) refers to a structured framework of criteria used to assess how organisations manage environmental impacts, social responsibilities, and governance practices in the context of risk, performance, and accountability. The “E” component encompasses issues such as climate change, emissions, resource efficiency, and biodiversity; the “S” addresses labour standards, community impact, human rights, and stakeholder engagement; while the “G” concerns corporate governance, transparency, compliance, and ethical conduct.

ESG has gained prominence through its integration into financial markets, regulatory disclosure regimes, and investment decision-making, particularly through frameworks such as the Organisation for Economic Co-Operation and Development (OECD) Guidelines, International Financial Corporation (IFC) Performance Standards, and emerging global disclosure standards. In the construction sector, ESG is increasingly embedded in project financing conditions, procurement requirements, and contractual obligations, thereby transforming ESG considerations into legally and commercially enforceable risk factors.

While often used interchangeably, ESG is conceptually distinct from sustainability. Sustainability is a broader, normative objective concerned with long-term environmental stewardship, social well-being, and economic resilience. ESG, by contrast, is an operational and measurable framework designed to translate sustainability goals into quantifiable metrics, compliance obligations, and governance structures.

In this sense, ESG functions as the instrumentalisation of sustainability—it converts aspirational sustainability principles into standards that can be monitored, disclosed, enforced, and, increasingly, litigated or arbitrated. This distinction is particularly significant in the context of construction disputes: whereas sustainability may inform project vision and policy direction, ESG defines the specific obligations, performance benchmarks, and risk allocations that give rise to legal disputes when expectations are not met.

This analysis is grounded not only in conceptual distinctions, but also in emerging categories of ESG disputes—including those arising from energy transition, sustainability disclosures, and emissions performance—which illustrate the practical implications of these structural changes.

Integration of ESG Considerations into Construction Projects

The integration of ESG considerations into construction projects has moved from peripheral concern to a central determinant of project viability. ESG obligations now influence financing, regulatory approvals, contractual performance, and stakeholder engagement, particularly in infrastructure and energy projects across Asia.[2] In Vietnam, this shift is reflected in strengthened environmental regulation, increasing reliance on international project financing, and growing alignment with global sustainability standards.[3]

Consequently, ESG-driven disputes are increasing in both frequency and complexity. Unlike conventional construction disputes, such disputes often arise during project execution, involve stakeholders beyond the contractual matrix, and require remedies extending beyond monetary compensation.[4] These characteristics challenge the suitability of arbitration as traditionally conceived—namely, a bilateral, retrospective mechanism for allocating liability and awarding damages.[5]

Recent developments between 2023 and 2025—including climate-transition arbitrations, Energy Charter Treaty (ECT) disputes, and institutional responses from ICC, ICSID and UNCITRAL—confirm that ESG disputes are no longer peripheral but increasingly central to arbitral practice.[6] This article argues that ESG disputes necessitate an integrated dispute resolution approach combining arbitration with restorative, forward-looking ADR mechanisms.

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[2] OECD, *Guidelines for Multinational Enterprises* (2023) - https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf

[3] Asian Development Bank, *Vietnam ESG and Infrastructure Report* (2023) - https://www.adb.org/sites/default/files/institutional-document/971966/adb-sustainability-report-2024.pdf

[4] UNEP, *Environmental Rule of Law* (2019) - https://www.unep.org/resources/publication/environmental-rule-law-tracking-progress-and-charting-future-directions

[5] Gary B Born, *International Commercial Arbitration* (3rd edn, 2021) - https://www.wolterskluwer.com/en/solutions/kluwerarbitration/born

[6] ICC Commission, *Resolving Climate Change Related Disputes* (2019) - https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf ; UNCITRAL WGIII Reports (2025) - https://uncitral.un.org/en/working_groups/3/investor-state.

THE STRUCTURAL CHARACTERISTICS OF ESG-DRIVEN CONSTRUCTION DISPUTES

ESG-driven construction disputes exhibit characteristics that distinguish them structurally from traditional disputes.

First, they are operational and prospective. ESG issues—such as environmental compliance failures, carbon reduction obligations, and social impact concerns—often arise during project execution and require immediate intervention.[7] Under Vietnam's *Law on Environmental Protection Law No 72/2020/QH14*, developers face continuous environmental compliance obligations, making disputes inherently dynamic rather than retrospective.[8]

Secondly, ESG disputes are multi-stakeholder in nature. In addition to employers and contractors, disputes may involve regulators, financiers, and affected communities.[9] In Vietnam, land acquisition and resettlement issues under the *Land Law No 45/2013/QH13* frequently intersect with construction disputes, introducing additional stakeholders outside the arbitration agreement.[10]

Thirdly, ESG disputes carry heightened reputational and regulatory implications. Allegations of environmental harm or social non-compliance may trigger regulatory sanctions, financing withdrawal, and public scrutiny.[11]

Fourthly, ESG disputes require forward-looking remedies, including remediation, compliance adjustments, and project redesign. These remedies differ fundamentally from the monetary or declaratory outcomes typically associated with arbitration.

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[7] World Bank, *Environmental and Social Framework* (2017) - https://documents.worldbank.org/en/publication/documents-reports/documentdetail/383011492423734099/the-world-bank-environmental-and-social-framework

[8] *Law on Environmental Protection Law No 72/2020/QH14* - https://winrock.org/wp-content/uploads/2023/02/LuatBVMT-Eng_20230203.pdf

[9] UNDP, *ESG and Infrastructure Governance* (2021) - https://www.undp.org/sites/g/files/zskgke326/files/2025-02/undp-are_2021.pdf

[10] *Land Law No 45/2013/QH13*) http://web.archive.org/web/20180507020809/http://www.itpc.gov.vn/investors/how_to_invest/law/Law_on_land/mldocument_view/?set_language=en

[11] IFC, *Performance Standards* (2012) - https://www.ifc.org/content/dam/ifc/doc/2023/ifc-performance-standards-2012-en.pdf

Taken together, these features indicate that ESG disputes constitute a qualitatively distinct category requiring adapted dispute resolution approaches.

These structural features are not merely theoretical. They are increasingly reflected in a range of ESG-related disputes emerging in construction and infrastructure projects, particularly in the context of energy transition, greenwashing, and carbon emissions obligations.

POTENTIAL ESG-DRIVEN DISPUTES

The structural characteristics of ESG-driven construction disputes are increasingly reflected in a growing range of disputes arising from the integration of climate policy, sustainability obligations, and disclosure frameworks into project development. These disputes do not arise solely from contractual non-performance, but from the interaction between contractual obligations, regulatory change, and evolving ESG standards. Three categories are particularly significant: disputes arising from energy transition measures, allegations of greenwashing, and compliance with carbon emissions obligations.

Energy Transition and Regulatory Change

Energy transition policies—such as coal phase-outs, renewable energy mandates, and decarbonisation targets—are an increasingly significant source of disputes in infrastructure and construction projects. These disputes often arise where regulatory changes alter project viability, delay implementation, or fundamentally affect contractual risk allocation.

The discontinuance of *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands* illustrates how climate-driven regulatory measures may disrupt existing energy investments, giving rise to complex disputes spanning contractual, regulatory, and investment treaty frameworks.[12] In construction contexts, similar disputes may arise where projects are required to transition to renewable energy sources, or where environmental approvals are modified or withdrawn under evolving regulatory regimes.[13]

[12] *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands* (ICSID ARB/21/4), https://www.italaw.com/cases/9156 discontinuance order, 12 January 2024.
[13] Ibid 7 & 8

Such disputes are inherently forward-looking and policy-driven, frequently involving multiple stakeholders—including states, regulators, financiers, and affected communities—and extending beyond the bilateral scope of arbitration agreements. They therefore raise issues not only of contractual interpretation, but of regulatory legitimacy, risk allocation, and project continuity.

Greenwashing and ESG Misrepresentation

A second category of disputes arises from allegations of "greenwashing"—the misrepresentation or overstatement of environmental or sustainability credentials in project documentation, procurement processes, or financing disclosures. As ESG considerations become embedded in contractual obligations and financing structures, inaccurate or misleading representations may give rise to disputes grounded in misrepresentation, breach of warranty, or regulatory non-compliance.[14]

In construction projects, this may include misstatements regarding emissions reductions or energy efficiency, failure to meet ESG-linked financing conditions and inaccurate reporting of environmental or social performance metrics. These disputes are particularly significant because they extend beyond the immediate contractual relationship, engaging investors, regulators, and the public.[15] They are therefore not merely legal disputes, but reputational and governance crises, requiring corrective disclosure, stakeholder reassurance, and ongoing compliance measures—outcomes not readily delivered through arbitral awards alone.[16]

The increasing prevalence of greenwashing enforcement actions further underscores the limitations of arbitration in ESG contexts. Cases such as *ASIC v Mercer Superannuation (Australia) Ltd* 2024 [FCA] 850[17] demonstrate that misleading ESG disclosures are being addressed through public regulatory enforcement, with remedies focused on transparency, deterrence, and market integrity. Likewise, strategic litigation initiatives—such as *ClientEarth*

[14] OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023) - https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf

[15] IFC, *Performance Standards on Environmental and Social Sustainability* (2012) - https://www.ifc.org/en/insights-reports/2012/ifc-performance-standards

[16] Ibid 6

[17] *ASIC v Mercer Superannuation (Australia) Ltd* 2024 [FCA] 850 - https://download.asic.gov.au/media/bq0nxstc/24-173mr-asic-v-mercer-superannuation-australia-limited-judgment-2-aug-2024.pdf

v Shell PLC & Others [2023] EWHC 1897 (Ch)[18] —highlight the role of stakeholders in holding corporations accountable for climate-related governance failures. These developments reflect a shift towards public, multi-party, and transparency-driven dispute resolution mechanisms**,** which are fundamentally incompatible with the private, bilateral, and confidential nature of arbitration.

Restorative approaches are better suited to address such disputes - enabling corrective disclosure, stakeholder engagement, and governance reform, outcomes align with the objectives underpinning ESG enforcement, not readily achievable through arbitral awards.

Carbon Emissions and Performance Obligations

A third emerging category concerns disputes relating to carbon emissions and environmental performance obligations. Increasingly, construction contracts and project financing arrangements incorporate emissions targets, ESG-linked key performance indicators, and reporting obligations aligned with international frameworks.[19]

Disputes may arise where emissions targets are not achieved, measurement methodologies are contested, regulatory standards evolve during project execution. Such disputes are often technically complex and require continuous monitoring and adaptive compliance, rather than one-off determinations of liability.[20] The appropriate remedy may involve revised performance standards, mitigation measures, or project redesign, rather than compensation.

Implications for Dispute Resolution

These categories of ESG disputes share common characteristics: they are ongoing, multi-stakeholder, technically complex, and forward-looking. They frequently engage regulatory frameworks and reputational considerations that extend beyond the contractual matrix.

These features reinforce the structural limitations of arbitration identified above. Arbitration remains effective for resolving defined disputes between parties, particularly where the remedy

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[18] *ClientEarth v Shell PLC & Others [2023] EWHC 1897 (Ch)*- https://www.judiciary.uk/wp-content/uploads/2023/07/ClientEarth-v-Shell-judgment-240723.pdf

[19] Asian Development Bank, *Sustainable Infrastructure in Asia* (2022) - https://www.adb.org/documents/asian-development-bank-sustainability-report-2022.

[20] IBA, *Rules on the Taking of Evidence in International Arbitration* (2020) - https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b

sought is monetary or declaratory.[21] However, it is less well suited to disputes that require continuous stakeholder engagement, adaptive and forward-looking solutions, integration of regulatory and social considerations, and ongoing compliance and monitoring.

In this context, restorative approaches—through mechanisms such as Dispute Avoidance/Adjudication Boards (DAABs), mediation, and facilitated stakeholder dialogue—offer a more appropriate framework. They enable disputes to be addressed at their operational stage, incorporate relevant stakeholders, and generate solutions that align with both legal obligations and ESG objectives.

In this sense, ESG disputes are not merely more complex than traditional construction disputes - but structurally incompatible with dispute resolution models designed for bilateral, retrospective adjudication. They are differently structured, requiring dispute resolution mechanisms that operate within, rather than outside, the systems in which they arise.

CHALLENGES TO ARBITRATION IN ESG CONTEXTS

ESG disputes therefore challenge not only the adequacy of arbitration as a forum, but its underlying assumptions about the nature of disputes, the identity of parties, and the form of appropriate remedies.

Jurisdictional Fragmentation and Non-Signatories

The practical manifestations of ESG disputes outlined above further expose the limitations of arbitration as currently configured. While arbitration is grounded in party consent, ESG disputes often involve stakeholders who are not parties to arbitration agreements, including regulators and communities. This creates fragmentation across arbitral, judicial, and administrative fora.

In Vietnam, arbitration is governed by the *Law on Commercial Arbitration No 54/2010/QH12* 2010, while administrative decisions—such as environmental approvals—fall within court

[21] Ibid 5

jurisdiction[22], parallel proceedings may therefore arise, undermining efficiency and consistency.

Evidentiary Complexity and Evolving Standards

ESG disputes frequently involve complex scientific and technical evidence, including environmental impact assessments (EIAs), emissions data, and sustainability metrics. These must often be assessed against evolving regulatory standards.

Vietnamese law mandates EIAs for major projects, and disputes may arise from both their adequacy and subsequent regulatory changes.[23] Arbitral tribunals must therefore grapple with scientific uncertainty and shifting benchmarks.

Confidentiality and Transparency

Confidentiality is a hallmark of arbitration, but ESG disputes generate competing demands for transparency.[24] Vietnam's environmental law emphasises public participation and access to information, creating tension with private arbitral proceedings.[25]

Interim Relief and Urgency

ESG disputes often require urgent intervention to prevent ongoing harm. While arbitral tribunals may grant interim measures, enforcement frequently requires court assistance.[26] Parties may therefore resort to courts or regulators, leading to procedural fragmentation.

Enforceability of Non-Monetary Remedies

Arbitral awards are traditionally monetary or declaratory. ESG disputes, however, require behavioural and forward-looking remedies, such as remediation and compliance programmes.

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[22] *Law on Commercial Arbitration 2010* (Vietnam) - https://www.viac.vn/images/Resources/Legal-Informative-Documents/54_2010_QH12_114053.doc; *Law on Administrative Procedures 2015* (Vietnam) - https://www.economica.vn/Content/files/LAW%20%26%20REG/93_2015_QH13%20Law%20on%20Administrative%20Procedures.pdf

[23] Ibid 8

[24] *ICC Arbitration Rules 2021*, art 22 - https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/

[25] Ibid 8

[26] UNCITRAL Model Law 2006, art 17 https://digitallibrary.un.org/record/622718/files/UNCITRAL_Model_Law.pdf

While Vietnam is a signatory to the *New York Convention*, enforcement of such non-monetary obligations remains uncertain, particularly where ongoing supervision is required.[27]

These limitations are not incidental but structural: they reflect the design of arbitration as a private, bilateral, and retrospective mechanism. ESG disputes, by contrast, are public-facing, multi-party, and forward-looking. This fundamental mismatch suggests that arbitration, while necessary, is not sufficient as a standalone mechanism for resolving ESG-related construction disputes.

These limitations are particularly evident in disputes involving energy transition, greenwashing, and emissions compliance, where the need for ongoing engagement and adaptive solutions extends beyond the capabilities of retrospective adjudication.

EMERGING ESG AND CLIMATE ARBITRATION DEVELOPMENTS

Recent developments confirm the growing prominence of ESG-related arbitration. In *RWE AG & RWE Eemshaven Holding II BV vs Kingdom of the Netherlands* ICSID Case No Arb 21/4, arising from coal phase-out legislation. The arbitration was formally discontinued in January 2024, reflecting the complex interaction between climate policy, EU law, and investment arbitration.[28] The case illustrates how ESG disputes often extend beyond arbitration into broader regulatory and political contexts.

Similarly, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration PLC v Italian Republic,* ICSID Case No Arb 17/14—a dispute concerning offshore drilling restrictions—remains a leading climate arbitration case. In June 2025, the ICSID award was annulled on procedural grounds, underscoring the importance of procedural integrity in ESG disputes.[29]

[27] New York Convention 1958 - https://www.newyorkconvention.org/
[28] Ibid 12
[29] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration PLC v Italian Republic* (ICSID ARB/17/14), https://www.italaw.com/cases/5788 annulment decision, 2 June 2025

More broadly, the Energy Charter Treaty reform and withdrawal wave in 2024, including the European Union's withdrawal, reflects a structural recalibration of investment protection in climate-sensitive sectors.[30]

Institutionally, ESG has become central to arbitral discourse. The ICC has explicitly addressed ESG disputes in its 2024 publications, while its 2025 statistics confirm sustained growth in complex infrastructure and energy disputes.[31] ICSID's 2024–2025 data similarly reflects the continued prominence of disputes in sectors closely linked to ESG risks.[32]

At the reform level, UNCITRAL Working Group III continues to address legitimacy, transparency, and public-interest concerns—issues closely aligned with ESG disputes.[33] These developments collectively demonstrate that ESG disputes are not theoretical but represent a growing and structurally significant category within arbitration.

RESTORATIVE JUSTICE AS A FRAMEWORK FOR ESG DISPUTES

The emerging categories of ESG disputes outlined above—characterised by ongoing harm, multi-stakeholder participation, and forward-looking obligations—render such disputes not merely compatible with, but structurally better suited to restorative approaches.

While arbitration resolves disputes through retrospective determinations of liability between defined parties, restorative mechanisms seek to stabilise projects, repair harm, and prevent recurrence. In ESG contexts, where disputes are embedded within ongoing commercial and social systems, this distinction is substantive rather than procedural.

[30] Kluwer Arbitration Blog, ECT Developments (2025) - https://legalblogs.wolterskluwer.com/arbitration-blog/the-completion-of-the-modernisation-of-the-ect-and-the-provisional-application-of-the-modernised-ect/
[31] ICC Dispute Resolution Bulletin (2024) - https://2go.iccwbo.org/2024-icc-dispute-resolution-bulletin-1.html ; ICC Statistics (2025) - https://iccwbo.org/news-publications/news/icc-releases-preliminary-2025-dispute-resolution-statistics/
[32] ICSID Annual Report (2024) - https://icsid.worldbank.org/sites/default/files/publications/ICSID-AR2024-WEB.pdf ; Caseload Statistics (2025) - https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-2025-caseload-statistics
[33] UNCITRAL WGIII (2025) - https://uncitral.un.org/en/working_groups/3/investor-state

Restorative Justice therefore offers a functionally superior framework for ESG-driven construction disputes. Such disputes are characterised by diffuse harm, evolving regulatory expectations, and stakeholder involvement extending beyond the contractual matrix.

Arbitration, by design, is limited to adjudicating disputes between consenting parties. By contrast, restorative approaches accommodate broader participation, address systemic impacts, and generate adaptive, forward-looking outcomes. They align more closely with both the nature of ESG risk and the objectives of ESG compliance.

This distinction is particularly significant in the construction context, where disputes arise during project execution and require timely intervention. Arbitration typically operates after disputes have crystallised, often when relationships have deteriorated and disruption has occurred. Restorative mechanisms—such as Dispute Avoidance/Adjudication Boards (DAABs), mediation, and facilitated engagement—operate contemporaneously with project delivery, enabling early identification of ESG risks, implementation of corrective measures, and recalibration of contractual performance. In doing so, they better preserve project continuity, mitigate reputational harm, and sustain long-term commercial relationships.

The effectiveness of Restorative Justice is further reinforced in Vietnam and across the broader Asian region, where dispute resolution traditions prioritise consensus, harmony, and relationship preservation. In such contexts, adversarial escalation may undermine both commercial outcomes and social legitimacy.

Restorative mechanisms therefore do not merely align with regional practices—they enhance dispute resolution outcomes by embedding legal processes within culturally congruent frameworks of dialogue and consensus-building. This makes restorative ADR particularly well suited to ESG disputes in Asia, where long-term infrastructure projects depend on sustained stakeholder engagement and social licence to operate.

Operationalising Restorative ADR in Construction

Restorative Justice, as applied in construction disputes, is not a standalone procedural mechanism but is operationalised through a suite of complementary ADR processes that enable early engagement, multi-stakeholder participation, and adaptive problem-solving. In the ESG

context, these mechanisms are particularly significant because disputes often arise during project execution and require ongoing management rather than retrospective adjudication.

Dispute Avoidance/Adjudication Boards (DAABs)

Under FIDIC contracts—widely used in Vietnam and across internationally financed projects—Dispute Avoidance/Adjudication Boards (DAABs) are established as standing bodies that accompany the project throughout its lifecycle.[34] Widely used in Vietnam, incorporate DAABs as standing mechanisms for dispute avoidance and resolution[35] their continuous involvement enables the early identification of ESG risks, including environmental compliance issues, community concerns, and evolving regulatory requirements.

Unlike arbitral tribunals, which are constituted only after disputes have crystallised, DAABs operate contemporaneously with project delivery. They are therefore able to provide informal assistance, facilitate dialogue between parties, and recommend corrective measures before issues escalate into formal disputes. In ESG contexts, this is particularly important where disputes relate to ongoing harm—such as environmental degradation or social impact—requiring immediate intervention rather than delayed adjudication.

DAABs thus embody restorative principles by shifting the focus from dispute resolution to dispute avoidance and system stabilisation. Their role is not limited to determining rights and liabilities, but extends to maintaining project continuity, preserving relationships, and ensuring compliance with evolving ESG obligations.

Mediation and Multi-Stakeholder Engagement

Mediation represents the most direct procedural expression of restorative principles in construction disputes. Vietnam's *Law on Commercial Mediation – Decree No 22/2017/ND-CP* effective 15th April 2017 supports mediation as a flexible dispute resolution mechanism.[36]

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[34] FIDIC, *Conditions of Contract for Construction* (2nd edn, 2017 Red Book) cl 21 - https://fidic.org/books/construction-contract-2nd-ed-2017-red-book ; Dispute Resolution Board Foundation, *DRB Manual* (2019) - https://www.drbf.org/dispute-board-manual

[35] FIDIC Red Book (2017, 2022) - https://fidic.org/books/construction-contract-2nd-ed-2017-red-book-reprinted-2022-amendments

[36] *Law on Commercial Mediation – Decree No 22/2017/ND-CP* https://vmc.org.vn/en/mediation/decree-no-222017ndcp-on-commercial-mediation-a119.html.

Mediation can facilitate multi-stakeholder engagement and the development of remediation frameworks.

In ESG disputes, mediation is particularly effective because it enables participation beyond the contractual parties, including regulators, financiers, and affected communities. This is critical in disputes involving greenwashing allegations, emissions compliance, or energy transition measures, where the resolution of issues often requires alignment between legal obligations, regulatory expectations, and stakeholder interests.

Unlike arbitration, which is confined to determining legal liability, mediation facilitates the development of forward-looking and adaptive solutions, including environmental remediation plans, revised compliance frameworks and corrective disclosure, governance measures; and stakeholder engagement strategies.

These are particularly significant in disputes arising from greenwashing, energy transition measures, and emissions compliance, where resolution requires not only legal determination, but coordinated adjustment of conduct, disclosure, and performance across multiple stakeholders.

Restorative Processes as Relational Governance

Beyond formal ADR mechanisms, restorative approaches may also be operationalised through structured stakeholder dialogues and facilitated engagement processes. These processes are particularly relevant in large-scale infrastructure projects, where ESG risks intersect with regulatory oversight and community impact.

Such mechanisms enable parties to move beyond adversarial positions and engage in collaborative problem-solving, addressing both the immediate dispute and its underlying causes. In doing so, they support not only dispute resolution but also the restoration of trust and legitimacy, which are critical in projects dependent on long-term stakeholder relationships.

From Adjudication to Governance

These outcomes reflect the reality that ESG disputes are not solely legal conflicts, but governance challenges requiring coordinated responses across multiple actors. In this sense,

restorative approaches move dispute resolution from a model of adjudication to one of governance—better reflecting the regulatory, relational, and systemic nature of ESG risk.

Taken together, these mechanisms demonstrate that restorative ADR transforms dispute resolution from a model of adjudication to one of ongoing relational governance. Arbitration remains essential for final determination and enforceability, but it operates at the endpoint of a process that, in ESG contexts, must begin much earlier.

In ESG contexts, dispute resolution is no longer a discrete adjudicative event, but an embedded process of governance—one that restorative ADR is uniquely equipped to deliver.

In this sense, restorative approaches are better aligned with the regulatory, relational, and systemic nature of ESG risk. They enable disputes to be addressed within the operational life of the project, incorporate relevant stakeholders, and generate solutions that are responsive to evolving obligations. This represents not merely a procedural adjustment, but a shift in the function of dispute resolution—from resolving past disputes to managing ongoing risk and ensuring sustainable project outcome.

TOWARDS AN INTEGRATED DISPUTE RESOLUTION MODEL

In ESG contexts, dispute resolution is no longer a discrete event, but an embedded process of governance—one that restorative ADR is uniquely equipped to deliver.

An effective approach to ESG disputes is an integrated dispute resolution model:

- Preventive stage: DAABs and early engagement
- Facilitative stage: Mediation and dialogue
- Determinative stage**:** Arbitration

This sequencing ensures that ESG disputes are addressed at their operational stage—where they arise—rather than at the point of escalation, where options are more limited and outcomes more disruptive. This model preserves arbitration's strengths while addressing its limitations in ESG contexts. It aligns with FIDIC frameworks and can be implemented through tailored dispute resolution clauses.

The proposed integrated model reflects a functional division of roles within dispute resolution. Restorative mechanisms address ESG disputes at their operational stage, enabling early intervention, stakeholder engagement, and adaptive problem-solving. Arbitration, by contrast, is reserved for residual disputes requiring final determination and enforceability. This sequencing is not incidental but strategic: it ensures that disputes are addressed at the level at which they arise, reducing escalation and narrowing the scope of issues requiring formal adjudication. In this sense, restorative ADR does not merely complement arbitration—it conditions and enhances its effectiveness**.**

In this way, restorative mechanisms do not merely precede arbitration—they redefine its role within a broader system of ESG risk management.

CONCLUSION

ESG-driven construction disputes expose Arbitration's structural limits. Where disputes involve ongoing harm, multiple stakeholders, and forward-looking obligations, mechanisms designed for retrospective, bilateral adjudication are inherently constrained.

Restorative Justice-based ADR responds directly to these limitations by enabling early intervention, inclusive participation, and adaptive solutions. In ESG contexts, it is therefore not merely an alternative, but a necessary evolution in dispute resolution practice.

The future of construction dispute resolution lies not in choosing between arbitration and ADR, but in integrating them within a framework that reflects the realities of ESG risk. In such a framework, restorative mechanisms address disputes at their source, while arbitration provides finality where required. Together, they enable outcomes that are legally enforceable, commercially sustainable, and socially legitimate. In this sense, restorative ADR does not merely complement arbitration—it reflects a broader evolution in dispute resolution from adjudication to governance.

Presented at the Ho Chi Minh City International Arbitration Conference 2026 [37]
10th April 2026 – Section D 2

[37] https://scl.org.vn/en/events/2026-ho-chi-minh-city-international-construction-arbitration-conference-hicac2026/

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10th April Section D2

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CORE THESIS

A FUNDAMENTAL SHIFT IN CONSTRUCTION RISK

ONGOING & MULTI-STAKEHOLDER

ESG disputes are not isolated events — they are dynamic, forward-looking, and involve multiple parties beyond traditional contracts.

Traditional Frameworks Fall Short

Conventional arbitration frameworks are no longer sufficient to address the structural complexity of ESG-driven disputes.

Restorative ADR Required

A transition to restorative, integrated alternative dispute resolution is now required to meet the demands of modern construction risk.

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WHAT IS ESG?

ESG refers to **environmental, social, and governance** criteria used to assess how organisations manage risk, impact, and accountability. It is now deeply embedded in financing, regulation, and project delivery — directly influencing project viability at every stage.

Environmental

Climate impact, emissions, resource use, and ecological responsibility.

Social

Community relations, labour standards, and stakeholder wellbeing.

Governance

Accountability, transparency, compliance, and ethical conduct.

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ESG VS. SUSTAINABILITY

Sustainability

Sets long-term policy objectives and aspirational goals for responsible development and environmental stewardship.

ESG

Translates sustainability objectives into **measurable, enforceable obligations**. It converts principles into legal standards — transforming sustainability into concrete legal risk and contractual exposure.

ESG does not replace sustainability — it operationalises it, making broad principles legally and commercially actionable.

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WHY ESG MATTERS IN CONSTRUCTION

Construction projects are increasingly ESG-driven. ESG now affects **financing, approvals, procurement, and delivery** — shaping contractual performance and compliance obligations at every phase.

Failure to meet ESG standards directly affects project viability and can halt progress entirely.

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LEGAL EXPOSURE

ESG = LEGAL RISK

Contractual Obligations
ESG requirements are embedded directly into contracts, creating enforceable performance standards.

Regulatory & Financial Conditions
Tied to financing conditions and mandatory disclosures — non-compliance can trigger loan defaults.

Disputes, Sanctions & Reputational Harm
Non-compliance triggers disputes, regulatory sanctions, and lasting reputational damage.

ESG has become a **core source of legal exposure** across the entire construction lifecycle.

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THE RISE OF ESG DISPUTES

ESG disputes are increasing in **scale and complexity**, particularly in the infrastructure and energy sectors.

They involve both public and private actors and are rapidly becoming central to international arbitration practice — reshaping how disputes are anticipated, managed, and resolved.

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VIETNAM: A CLEAR TRANSITION

Environmental Protection Law 2020

Imposes continuous environmental obligations throughout project execution.

Land Law 2013

Introduces social and resettlement complexities that generate ongoing dispute risk.

International ESG Standards

Projects increasingly align with international ESG financing standards, raising compliance expectations.

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A KEY SHIFT: DISPUTES ARISE DURING EXECUTION

Traditional Dispute Timing

Disputes historically arose **after breach or project completion** — a defined endpoint with clear facts and fixed parties.

ESG Dispute Timing

ESG disputes arise **during project execution**, requiring timely intervention and active management. This fundamentally changes dispute resolution dynamics.

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STRUCTURAL DIFFERENCE

ESG DISPUTES ARE DYNAMIC, NOT STATIC

→ **Responsive to Change**

ESG disputes evolve in response to regulatory change and shifting project conditions — they are not fixed at a point in time.

→ **Not Retrospective**

Unlike traditional disputes, ESG disputes are not purely backward-looking. They demand forward-facing solutions and ongoing engagement.

→ **Adaptive Solutions Required**

Resolution must be adaptive and continuous — not a single adjudicated outcome but an evolving process of compliance and remediation.

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THE MULTI-STAKEHOLDER NATURE OF ESG DISPUTES

ESG disputes extend **far beyond contractual parties**.

They involve regulators, financiers, and affected communities — each with distinct interests that must be balanced.

This multi-stakeholder reality fundamentally exceeds arbitration's traditional bilateral framework, demanding more inclusive resolution mechanisms.

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REPUTATIONAL & REGULATORY IMPACT

Regulatory Scrutiny	Financing Consequences	Public Visibility
ESG disputes attract heightened regulatory attention, affecting licences and approvals.	Disputes jeopardise financing arrangements and investor confidence in project delivery.	ESG disputes are not purely private — they carry reputational and commercial consequences that extend into the public domain.

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FORWARD-LOOKING REMEDIES

Traditional Remedies

- Damages and financial compensation
- Declarations of breach
- Fixed, retrospective outcomes

ESG Remedies

- Environmental remediation and compliance
- Behavioural and operational adjustments
- Project redesign and ongoing monitoring

ESG remedies go beyond damages and declarations —
they require **sustained engagement and adaptive implementation**.

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> ***"ESG disputes are not simply more complex. They are structurally different in nature — requiring different processes and outcomes. Traditional arbitration is inherently misaligned."***

This structural difference is the central challenge facing construction dispute resolution today.

The tools, timelines, and outcomes of conventional arbitration do not map onto the realities of ESG-driven disputes.

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ESG DISPUTE TYPES

ENERGY TRANSITION DISPUTES

Climate policies are reshaping project viability across the energy sector.

Coal phase-outs and renewable mandates shift risk allocation in ways that existing contracts may not reflect.

When regulatory reality diverges from contractual assumptions, disputes arise from policy-driven change — not merely from party conduct.

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CASE STUDY

RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands

The Dispute

Climate regulation disrupted investor expectations, triggering a major arbitration claim by RWE against the Netherlands.

Beyond Arbitration

The dispute extended beyond arbitration into public policy debate, demonstrating the limits of private dispute resolution.

Systemic Nature

Highlights how ESG disputes are systemic — involving regulatory, political, and commercial dimensions simultaneously.

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GREENWASHING DISPUTES

Misleading ESG claims create significant legal, regulatory, and reputational exposure.

This includes inaccurate sustainability representations, inflated emissions claims, and misleading disclosures linked to financing and procurement.

Greenwashing creates governance risk that extends across the entire project and supply chain.

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CASE STUDY

Enforcement Trend:

ASIC v Mercer Superannuation (Australia) Ltd 2024

Public Enforcement Rising

Greenwashing is increasingly subject to **public enforcement action** — regulators are actively pursuing misleading ESG claims, not leaving it to private parties.

Shifting Dispute Landscape

Stakeholders actively challenge ESG claims.

Dispute resolution is shifting beyond private arbitration into regulatory enforcement and public accountability frameworks.

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CARBON EMISSIONS DISPUTES

Contractual ESG KPIs

Contracts increasingly incorporate emissions targets and ESG performance indicators as binding obligations.

Contested Methodologies

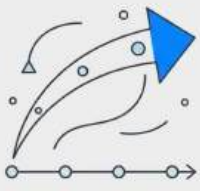
Disputes arise not only from failure to meet standards, but from disagreements over how emissions are measured and verified.

Evolving Standards

Emissions standards evolve throughout project execution, creating moving compliance targets and ongoing dispute risk.

WHY ESG DISPUTES DEFY CONVENTIONAL RESOLUTION

DYNAMIC



(evolving throughout project lifecycle)

MULTI-PARTY

(regulators, financiers, communities, contractors)

ONGOING

(require continuous engagement and adjustment)

REGULATORY

(involve public dimensions beyond private contracts)

These characteristics make ESG disputes **structurally incompatible with arbitration alone** — demanding new frameworks for resolution.

ARBITRATION CHALLENGES

THE STRUCTURAL MISMATCH OF ARBITRATION

Arbitration is **private, bilateral, and retrospective**.

It assumes defined parties, fixed disputes, and focuses on liability and compensation.

It is simply not designed for the evolving, multi-stakeholder, forward-looking nature of ESG disputes — creating a fundamental structural mismatch.

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PRACTICAL ISSUES WITH ARBITRATION IN ESG DISPUTES

Jurisdictional Limits

Arbitration jurisdiction excludes regulators and affected communities — key stakeholders in every ESG dispute.

Confidentiality vs. Transparency

Arbitration's confidentiality conflicts directly with the transparency expectations that ESG obligations demand.

Enforcement of Non-Monetary Remedies

Non-monetary remedies are difficult to enforce, and ongoing compliance cannot easily be supervised through arbitration.

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ARBITRATION: NECESSARY BUT INSUFFICIENT

What Arbitration Offers

- Legally binding determinations
- Enforceability across jurisdictions
- Established procedural framework
- Expert tribunal selection

What Arbitration Cannot Do

- Engage regulators and communities
- Provide adaptive, ongoing solutions
- Address public-facing ESG dimensions
- Supervise continuous compliance

Arbitration remains necessary —
but it is insufficient on its own to resolve the full spectrum of ESG disputes.

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RESTORATIVE JUSTICE

THE RESTORATIVE ADR APPROACH

Restorative ADR focuses on accountability, dialogue, and harm repair.

It prioritises future compliance over retrospective blame, includes all relevant stakeholders, and seeks sustainable, forward-looking outcomes — precisely what ESG disputes demand.

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RESTORATIVE MEDIATION IN ESG DISPUTES

Moves beyond legal positions to address underlying impacts.
It facilitates dialogue among contractors, regulators, and communities, enabling outcomes that arbitration cannot deliver.

Environmental Remediation

Compliance frameworks and corrective environmental action plans.

Governance Reform

Corrective disclosure and structural governance improvements.

Stakeholder Alignment

Alignment of stakeholder and regulatory expectations for project continuity.

Mediation becomes a mechanism of governance — not merely settlement.

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FROM ADJUDICATION TO GOVERNANCE

Restorative ADR complements and enhances arbitration — delivering outcomes that are legally robust, commercially sustainable, and socially legitimate.

The future of construction dispute resolution lies in this integrated, governance-oriented model.

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KEY TAKEAWAYS

01

ESG IS LEGAL RISK

ESG obligations are contractual, regulatory, and financial — non-compliance creates real legal exposure.

02

DISPUTES ARE STRUCTURALLY DIFFERENT

ESG disputes are dynamic, multi-stakeholder, and forward-looking — not merely more complex versions of traditional disputes.

03

ARBITRATION ALONE IS INSUFFICIENT

Its bilateral, retrospective structure cannot address the full scope of ESG dispute dimensions.

04

RESTORATIVE ADR IS THE ANSWER

An integrated DAAB → Mediation → Arbitration model delivers governance-grade outcomes for ESG disputes.

Section D: Regional Construction Arbitration

Continuing development of construction arbitration in Southeast Asia

Summary: This article considers some reasons for the growth of construction arbitration in Southeast Asia. It then looks at areas where construction arbitration has room to progress and some considerations relevant for arbitration practice.

1. The construction industry, while always significant, has grown in importance in Southeast Asia. One study estimates that from 2020 to 2023, economies such as Malaysia and the Philippines saw 9% growth per annum in the construction industry, closely followed by Indonesia and Singapore with 8% growth, and Vietnam with 7% growth.[1] In addition to significant infrastructure development across Southeast Asia generally, construction related to certain sectors of economy is also growing, including the technology sector and green energy.[2] With the increase in importance of the construction sector in Southeast Asia's economy, the volume of construction disputes being arbitrated has correspondingly increased.

A. Reasons for growth in arbitration in the construction sector in Southeast Asia

2. Generally, one reason that arbitration is popular is that it promises to provide a neutral forum for dispute resolution. Specific to the construction sector in Southeast Asia, particularly in larger or higher-value contracts, many players in infrastructure and construction, such as contractors and equipment suppliers, are from foreign countries (for example, China or Japan), contracting with owners in the country where the project is located. In relation to infrastructure projects, owners may be government branches or state-linked or state-owned entities. In such situations, perhaps unsurprisingly, foreign parties will rarely want to have disputes resolved in the domestic courts of the country where the project is located and/or that other contracting party is a national of, for fear that the domestic courts may be susceptible to influence, even if only indirectly or subconsciously. Thus, to the extent that their bargaining power allows, such foreign parties will often endeavour to negotiate for arbitration seated in a third country as the mode of dispute resolution.

3. In addition, arbitration, as a mode of dispute resolution, is generally perceived to have several advantages over litigation in court, which make arbitration generally more attractive to commercial parties.

4. First, arbitration is by default confidential in many jurisdictions. Confidential proceedings reduce the risk of commercial information or trade secrets being leaked into the public domain. This advantage comes to the fore in construction or engineering disputes if there is some amount of

[1] EAC International Consulting, online: < https://eac-consulting.de/wp-content/uploads/2025/03/EAC-Market-Insight-SEA-Construction-February-2025.pdf>.
[2] See, for example, "Where artificial intelligence lives: South-east Asia's data centre boom", Straits Times, online: <https://www.straitstimes.com/asia/se-asia/where-artificial-intelligence-lives-south-east-asias-data-centre-boom>, and "Clean Energy and Decarbonization in Southeast Asia: Overview, Obstacles, and Opportunities", Center for Strategic & International Studies, online: <https://www.csis.org/analysis/clean-energy-and-decarbonization-southeast-asia-overview-obstacles-and-opportunities>.

proprietary, technical knowledge or information involved in the dispute. Further, many commercial parties prefer to avoid making publicly known the fact that they are engaged in legal proceedings or disputes. This may be because of a perception that ongoing legal proceedings may signal weakness or faults in their business, and thereby shake customer confidence, or indicate vulnerability which competitors may attempt to capitalise on.

5. Second, parties may prefer also to have some degree of say in or control over the identity of their arbitrator, particularly in a specialised field such as construction. In most national courts, judges are generalist lawyers and do not hear cases within only a specific area of law or subject matter. In certain jurisdictions, judges may also have little exposure to commercial law or the requisite experience to hear a highly complex and technical dispute, where not only issues of law but also convoluted factual or expert issues are contested.

6. In comparison, in arbitration, parties may select arbitrators with relevant experience and expertise to hear their disputes. Not only is it possible to select a construction lawyer to hear a construction dispute, but, if parties desire, it may even be possible to choose an arbitrator who has experience in a specific type of project (e.g., power plants or rail projects) to preside over an arbitration concerning that type of project.

7. The reasons considered above are, of course, by no means exhaustive and there are other possible reasons why parties choose arbitration over domestic court proceedings as a means of resolving their disputes. For example, in some jurisdictions, the local courts are under-resourced and arbitration may provide a more expeditious or certain manner to resolve disputes.

B. Improving arbitration processes and procedures

8. As much as arbitration in Southeast Asia has increased in popularity with the growth in the construction industry in Southeast Asia, to continue to encourage foreign investment in the construction sphere, it is important that countries in Southeast Asia continue to ensure that their legal systems are arbitration-friendly, and that local contracting entities are familiar with arbitration and prepared to agree to it as a mode of dispute resolution.

9. However, arbitration of construction disputes can be costly, amongst others because construction projects often involve voluminous documentary evidence, multiple parties, and are often also factually and technically complicated. In addition, independent expert witnesses are frequently involved, adding an additional layer of costs.

10. The processes and procedures in international arbitration, at present, generally tend more towards those in the common law tradition than the civil law tradition. This appears to be the case even in Southeast Asia, where more countries are civil law jurisdictions.[3] It is proposed that both arbitrators and arbitration counsel need to be more prepared to adopt alternatives to traditional

[3] Of the eleven Southeast Asian countries, only Brunei Darussalam, Malaysia, Myanmar and Singapore are usually considered common law jurisdictions, although some other countries though incorporate elements from both common and civil law traditions.

common law style processes and procedures, particularly if these are faster and help to manage the time and costs incurred in arbitration. For example, procedures that are often associated with the civil law tradition, and which may assist to reduce the length of an arbitration process, include memorial-style submissions and limited or no document discovery and cross-examination. That said, no procedure should be adopted blindly; for example, some have cautioned that "*[t]he memorial style of pleading can be very burdensome in construction arbitrations due to the volume of documentation and the complex nature of the delay, quantum and technical issues*".[4] It is ultimately for a tribunal, in consultation with parties, to decide what procedures and mechanisms are most appropriate in the context of their particular arbitration.

11. In recent times, to enhance the time and cost efficiency of the process of taking expert evidence from experts, there has been increasing use of expert conferencing, often known colloquially as 'hot-tubbing' of experts. Expert conferencing is where experts appointed by the respective disputing parties, and also possibly comprising experts from more than one discipline, sit together during a merits hearing and take questions from the tribunal and counsel at the same time.

12. One aim behind expert conferencing is to allow opposing experts to answer the same questions at the same time, which may cause them to take less adversarial and more reasonable positions. This environment may help to crystallise agreement between experts more quickly. Counsel questioning the experts during the expert conferencing may also be more likely to frame questions in a fair and impartial manner, in the knowledge that their own experts may also be required to answer the same questions.

13. In addition, expert conferencing allows multiple experts from each side to answer a question or series of questions together. This is thus a useful mechanism to adopt in construction arbitration where in a single arbitration there may be multiple experts from several different disciplines giving evidence on interconnected points or the same overarching issue. By way of example, the question of whether a particular piled foundation is properly constructed or defective may require the input of a geotechnical expert, a structural engineering expert and a piling expert. Similarly, the question of the appropriate cost of certain rectification works may require the input of not only a quantum expert to give evidence on the appropriate rates and measurements to adopt, but also input from a planning expert to give evidence on how the rectification works should be scheduled and how long they will take to complete.

14. Another innovation is the "Expert Access Protocol" developed by Professor Douglas Jones,[5] which allows a tribunal to, after experts have given evidence at the main evidential hearing, communicate directly with parties' appointed experts in order that the experts may assist the tribunal in calculations that feed into the tribunal's award. The adoption of this protocol requires the tribunal, the parties and the relevant experts to all enter into a written agreement pursuant to

[4] Antony Smith and Marc Jones, "Arbitration News: Memorials or Pleadings? A Cultural Conflict", Beale & Co, online: < https://beale-law.com/wp-content/uploads/2025/10/arbitration-news-memorials-or-pleadings-a-cultural-conflict.pdf?>
[5] See Douglas S. Jones, *The International Journal of Arbitration, Mediation and Dispute Management*, "Party Appointed Experts in International Arbitration—Asset or Liability?", at 14 to 15, online: < https://www.kluwerarbitration.com/document/kli-ka-amdm-86-01-002-n?q=expert%20evidence>

which a tribunal is permitted to confidentially communicate with the experts "*for the purpose of their performing calculations on the basis of existing material contained in their expert reports forming part of the evidentiary record*", with such communications being kept confidential from the parties until the issuance of the award. A key feature of the protocol to prevent abuse is that the protocol only allows the tribunal to communicate with the experts for purposes of them performing calculations; the protocol does not allow the tribunal to seek additional opinions from the experts.

15. Any arbitration lawyer will readily recognise that the quantification of damages (for example, in a construction claim or a claim for loss of profit) can be an extremely complicated and time-consuming exercise. The use of this protocol is a pragmatic recognition of the fact that the quantum experts are in the best position to carry out calculations of damages. While tribunals are no doubt still capable of studying the quantum experts' approaches to calculations and replicating these approaches if necessary, it is artificial to assume that arbitrators (who are usually lawyers and not accountants or quantity surveyors) are able to carry out the calculations with the same speed and ease, and degree of familiarity, as the parties' appointed quantum experts who have prepared and given expert evidence on the issue. In construction arbitrations where claims for damages often comprise hundreds of line items and easily run into hundreds of millions of dollars, involving the parties' experts in the calculations that the tribunal wants to be done potentially saves a significant amount of time and cost, and also reduces the risk of errors in calculation in the tribunal's award. While arithmetical errors in an award can be corrected,[6] doing so simply entails parties spending more time and costs that could have been avoided.

C. Considerations for enforcement of arbitral awards and mediated settlements

16. The phase of enforcing an arbitral award is crucial since it goes without saying that the end goal of a claimant in an arbitration is to recover compensation, and not be left with a paper award.

17. In presiding over enforcement proceedings, courts in Southeast Asia ought to continue to be careful to avoid interventionist approaches to challenges to arbitration awards. Indeed, the degree to which the curial courts are interventionalist is often a key factor in determining whether a particular jurisdiction is considered to be 'arbitration friendly'. All ASEAN states are party to the New York Convention,[7] and therefore the limited grounds in Article V therein for refusing enforcement of an arbitral award should be adhered today. For example, these include where:

    (1) a party was "*unable to present his case*";[8]

[6] For example, Article 33 of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") sets out a procedure for the correction and interpretation of arbitral awards.
[7] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("**New York Convention**").
[8] New York Convention, Article V.1.(b).

(2) the "*award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration*";[9]

(3) the "*composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*";[10] and

(4) "*the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".[11]

18. Construction arbitrations are typically fact-heavy and also involve technical or specialised issues on which expert evidence is required. In those situations, it is all the more imperative that judges, who are only lawyers (and not engineers, quantity surveyors or accountants) avoid substituting their opinions for those of the parties' appointed experts who have the specialist experience and knowledge in their fields of expertise.

19. Article 5 of the Model Law encapsulates what is known as the principle of minimal curial intervention: "*In matters governed by this Law, no court shall intervene except where so provided in this Law.*" In Singapore, the jurisdiction in Southeast Asia most often designated as an arbitral seat, Court of Appeal has explained the importance of this principle of minimal curial intervention as follows:[12]

> "Under Singapore law, the scope for judicial intervention in arbitration proceedings is narrowly circumscribed. In the context of applications to set aside arbitral awards, this is borne out by the fact that a party seeking to challenge an award may only do so on limited statutorily-prescribed grounds. Even then, the court will exercise its power with restraint, setting aside awards only when there is good reason to do so. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial intervention, while ensuring that meritorious challenges are properly ventilated.
>
> A perusal of the published decisions of the Singapore court would show that, over the past 20 years, approximately only 20% of applications to set aside arbitral awards have been allowed. This attests to the fact that it is not common in Singapore for awards to be set aside, and the courts have only done so in exceptional cases when the grounds are clearly made out. […]"

[9] New York Convention, Article V.1.(c).
[10] New York Convention, Article V.1.(d).
[11] New York Convention, Article V.1.(e).
[12] *CAJ and another v CAI and another appeal* [2022] 1 SLR 505, at [1] to [2].

20. Similar pronouncements have been made by the courts in Malaysia, for example where the Court of Appeal stated:[13]

> "Further the law is crystal clear in that even if the arbitral tribunal was wrong in its interpretation of the terms in the [contract], it is not a ground for court's intervention. That is the philosophy behind Arbitration Act 2005. The simple rationale behind this philosophy is that the parties have agreed to have their disputes settled or resolved by an arbitral tribunal rather than the court of law and with that agreement, they have also agreed to abide by the decision of that tribunal irrespective whether the same is correct or not. The window of opportunity for court's intervention is for all intents and purpose closed save and except when the arbitral tribunal had exceeded its jurisdiction. […]
>
> It is our view that courts must continue to keep 'hands off' attitude when dealing with arbitral award for the simple reason that there is an express agreement between the parties that they prefer that their disputes to be resolved by an arbitral tribunal and not within the judicial system. Whatever the parties' reasons for such preference is of no concern to the courts. As in all commercial agreements, courts must give effect to or respect to parties' intentions."

21. In the meantime, enforcement risks may be a factor causing more parties to use arbitration as a tool for putting pressure on the opposing party while concurrently trying to achieve an amicable resolution. Even if a claimant succeeds in an arbitration, additional time and costs are required to enforce an arbitration award, including resisting against any attempts by a disgruntled respondent to set the award aside. In comparison, if a dispute is settled amicably, whether before or after the arbitral award is received, and a settlement agreement executed, the likelihood of parties voluntarily complying with the settlement agreement may be higher. In other words, the winning party's chances of receiving payment of amounts due, without spending further time and costs on enforcement, may be higher.

22. In this connection, it is likely that the system of 'Arb-Med-Arb' will increase in popularity and importance. The dispute resolution process of 'Arb-Med-Arb' is where a dispute is first referred to arbitration, during the course of which the disputing parties attempt to resolve the dispute through mediation. The mediation may take place while the arbitration continues concurrently, or the arbitration proceedings can be suspended for a period for mediation to be attempted. If the mediation is successful, parties then return to the tribunal and ask the tribunal to issue a consent award to give effect to the settlement to the extent this is possible.[14] If the mediation is unsuccessful, parties continue with the arbitration for their disputes to be decided in that forum.

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[13] *Government of India v Cairn Energy India Pty Limited & 2 Ors* (Dalam Mahkamah Rayuan, Malaysia (Appeal Jurisdiction) Rayuan Sivil/Rayuan No. W-02(NCC)(A)-2404–10–2012) at [22] and [37], as referred to in *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* [2023] 7 MLJ 415, at [27].

[14] There may be situations where it is not possible for an arbitral tribunal to issue a consent award to give effect to a negotiated settlement. For example, this may be where the scope of the settlement extends between the scope of the submission to arbitration and therefore covers issues or matters that are not within the tribunal's jurisdiction.

23. A desire to achieve a commercial settlement is often true in the construction and infrastructure sector if the employer is a government entity or authority, or a large private developer, as contractors are generally anxious to preserve commercial relationships. Employers may also value or depend on the technical expertise and experience of specific contractors, which then hold more bargaining power in any negotiations with employers. This gives parties an incentive to attempt mediation or other modes of amicable resolution of disputes instead of pursuing an arbitration all the way to an award. The 'Arb-Med-Arb' process is also particularly suitable for construction and infrastructure disputes as arbitrating large, fact-intensive and technically complex disputes can be extremely costly. If commercial settlements can be brokered, parties stand to benefit from significant time and cost savings, and avoid indirect drains on their resources (for example, from having project teams spend time and effort to providing factual input and evidence in support of ongoing arbitration).

24. In addition to these commercial considerations, mediation and working towards an achieving an amicable settlement may suit the generally less confrontational and more consensus-seeking culture of Southeast Asian societies better than the adversarial process of arbitration, where a third-party decision maker allocates fault and liability between parties. Indeed, some commentators have opined that mediation is not only suitable in the setting of Asian cultures but, further, governments in Southeast Asia encouraging mediation aligns with the goal of harmonization of legal systems between ASEAN states.[15] In this connection, the Singapore Mediation Convention[16] has the potential to lend greater efficacy to mediation as a mode of dispute resolution and more Southeast Asia states may wish to consider becoming parties to this treaty.[17]

D. Conclusion

25. In conclusion, arbitration is presently an important mode for the resolution of construction disputes in Southeast Asia as it affords, amongst others, a neutral form for dispute resolution, confidential proceedings and a degree of say in the identity of the third-party decision maker. However, whether it will continue to be depends on whether arbitration is able to match the expectations and meet the needs of commercial parties.

26. For this to happen, all stakeholders in the international system of arbitration have a role to play. Tribunals and counsel can help to ensure that arbitration is carried out in the most cost-effective and efficient manner possible, while maintaining procedural fairness. At the same time, the

[15] See Nguyen The Duc Tam and Nguyen Viet Gia Bao, "The Rise of Commercial Mediation in the ASEAN Countries: Harmonization for a Better Tomorrow", at 2, 16 to 17, online: https://law.unimelb.edu.au/__data/assets/pdf_file/0005/4356680/NGUYEN-The-Duc-Tam-and-NGUYEN-Viet-Gia-Bao.pdf.
[16] United Nations Convention on International Settlement Agreements Resulting from Mediation (date of adoption: 20 December 2018) ("**Singapore Mediation Convention**"). While this paper is not intended to focus on mediation, it is worth mentioning that the Singapore Mediation Convention allows disputing parties that enter into a mediated settlement agreement to enforce the terms of that settlement agreement directly, as if it were an order of court, rather than as an ordinary contract where successfully claiming for breach of contract would have to precede any enforcement of the contract.
[17] At the moment, apart from Singapore, no other Southeast Asian states are party to the Singapore Mediation Convention, although Brunei Darussalam, Lao People's Democratic Republic, Malaysia, the Philippines, and Timor-Leste are signatories: see online < https://www.singaporeconvention.org/jurisdictions>.

governments, including the courts, of Southeast Asian nations will have an important role to play in setting the direction to be taken in their jurisdictions. Amongst others, the need for the courts to respect parties' choice to arbitrate their disputes and eschew heavy-handed intervention in the decisions of arbitral tribunals cannot be overstated. In a similar vein, parties may choose to, concurrent with arbitration, resolve disputes through mediation, and the importance of 'Arb-Med-Arb' as an approach to dispute resolution is likely to increase.

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Continuing development of construction arbitration in Southeast Asia

Matthew Koh
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Rajah &Tann Asia

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ISSUES/CONTENTS

1. Reasons for growth in arbitration in the construction sector in Southeast Asia
2. Improving arbitration processes and procedures
3. Enforcement of arbitral awards
4. Mediated settlement

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Opportunities & Challenges in Construction Dispute Resolution: National and Global Perspectives

Rajah &Tann Asia

INTRODUCTION
There has been significant growth in the construction industry in southeast Asia.

Malaysia and Philippines
9% p.a.

Indonesia and Singapore
8% p.a.

Vietnam
7% p.a.

*Based on 2020 to 2023 figures, study from EAC International Consulting, online: < https://eac-consulting.de/wp-content/uploads/2025/03/EAC-Market-Insight-SEA-Construction-February-2025.pdf>

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Reasons for growth in arbitration in the construction sector in Southeast Asia

1. Desire for a neutral forum free from influence.
2. Confidentiality of proceedings.
3. Parties have a say in the arbitrator and can choose an arbitrator with specialized expertise or experience.

Improving arbitration processes and procedures

Broadly, there is a need to ensure arbitration remains time and cost-efficient.

1. Adopting processes from the civil law tradition, e.g., memorial-style submissions, reduced or no cross-examination.

2. Expert conferencing or 'hot tubbing'.

3. Expert Access Protocol: see Prof. Doug Jones, The International Journal of Arbitration, Mediation and Dispute Management, "Party Appointed Experts in International Arbitration—Asset or Liability?", at 14 to 15.

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Enforcement of arbitral awards

It is important that courts in Southeast Asia recognize importance of minimal curial intervention, especially in construction law disputes that are typically fact-heavy and also involve technical or specialised issues on which expert evidence is required.

The degree to which the curial courts are interventionalist is often a key factor in determining whether a particular jurisdiction is considered to be 'arbitration friendly'.

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Enforcement of arbitral awards

Singapore Court of Appeal, *CAJ and another v CAI and another appeal* [2022] 1 SLR 505, at [1] to [2]:

"Under Singapore law, the scope for judicial intervention in arbitration proceedings is narrowly circumscribed. In the context of applications to set aside arbitral awards, this is borne out by the fact that a party seeking to challenge an award may only do so on limited statutorily-prescribed grounds. Even then, the court will exercise its power with restraint, setting aside awards only when there is good reason to do so. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial intervention, while ensuring that meritorious challenges are properly ventilated.

A perusal of the published decisions of the Singapore court would show that, over the past 20 years, approximately only 20% of applications to set aside arbitral awards have been allowed. This attests to the fact that it is not common in Singapore for awards to be set aside, and the courts have only done so in exceptional cases when the grounds are clearly made out. […]"

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Enforcement of arbitral awards

Malaysia Court of Appeal, *Government of India v Cairn Energy India Pty Limited & 2 Ors* (Dalam Mahkamah Rayuan, Malaysia (Appeal Jurisdiction) Rayuan Sivil/Rayuan No. W-02(NCC)(A)-2404–10–2012) at [22] and [37]:

"Further the law is crystal clear in that even if the arbitral tribunal was wrong in its interpretation of the terms in the [contract], it is not a ground for court's intervention. That is the philosophy behind Arbitration Act 2005. The simple rationale behind this philosophy is that the parties have agreed to have their disputes settled or resolved by an arbitral tribunal rather than the court of law and with that agreement, they have also agreed to abide by the decision of that tribunal irrespective whether the same is correct or not. The window of opportunity for court's intervention is for all intents and purpose closed save and except when the arbitral tribunal had exceeded its jurisdiction. […]

It is our view that courts must continue to keep 'hands off ' attitude when dealing with arbitral award for the simple reason that there is an express agreement between the parties that they prefer that their disputes to be resolved by an arbitral tribunal and not within the judicial system. Whatever the parties' reasons for such preference is of no concern to the courts. As in all commercial agreements, courts must give effect to or respect to parties' intentions."

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Mediated settlements

- Enforcement risks constantly lean in favour of an amicable settlement where possible.
- 'Arb-Med-Arb' is likely to grow in importance.
- Mediation and working towards an achieving an amicable settlement may suit the generally less confrontational and more consensus-seeking culture of Southeast Asian societies

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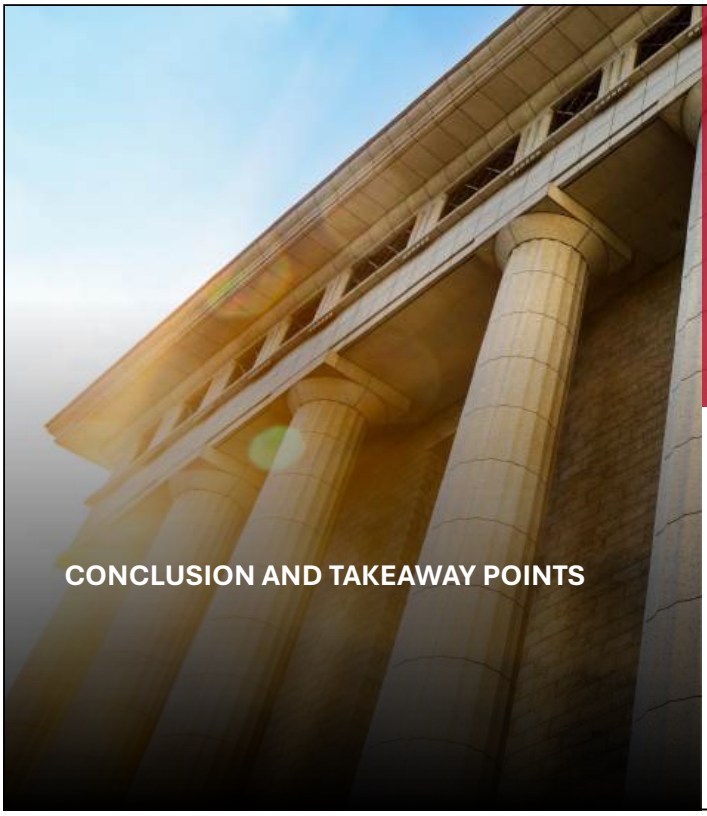

CONCLUSION AND TAKEAWAY POINTS

Arbitration needs to continue to match the expectations and meet the needs of commercial parties.

Stakeholders must ensure that arbitration is carried out cost-effectively and efficiently.

Courts must respect parties' choice to arbitrate their disputes and minimize curial intervention.

'Arb-Med-Arb', and mediation in general, are likely to grow in importance.

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Let me know if you have any questions.

Thank you for your attention!

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မြန်မာအာပြည်ပြည်ဆိုင်ရာအနုညာတစုံ့ဖွဲ့းအသင်း (အမ်အိုင်အေစီ) (တရားဝင်တည်ထောင်ထားသော)
Myanmar International Arbitration Centre (MIAC) Incorporated
Reg. No. 125762980/2020
အမှတ် ၃(ဘီ)၊ ၇ လွှာ၊ သပြေညိုလမ်း၊ ရှင်စောပုရပ်ကွက်၊ စမ်းချောင်းမြို့နယ်၊ ရန်ကုန်တိုင်းဒေသကြီး။
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Construction Dispute Resolution in Myanmar: Institutional, Legal, and Regional Perspectives

On Behalf of MIAC:
Presented by
NAY YEE LYNN (Advocate)
Arbitrator and Executive Member,
International Relations Divisions of MIAC

Date: 20th March 2026

ABSTRACT

Myanmar's construction sector has become a critical driver of economic growth, fueled by infrastructure, urban development, and energy projects. As contracts have grown in value and complexity, so too have disputes, highlighting the need for effective dispute resolution mechanisms. This paper examines construction arbitration in Myanmar, focusing on the legal framework, institutional development, and practical challenges. Emerging procedural trends and regional cooperation opportunities are also considered. While Myanmar has made significant strides with the Arbitration Law (Law No. 5/2016) and the Myanmar International Arbitration Centre (MIAC), continued attention to contract drafting, technical expertise, and enforcement practices remains essential to strengthen the construction arbitration ecosystem.

Contents

1. INTRODUCTION

Construction disputes are among the most complex and high-stakes matters in commercial arbitration, involving multi-party contracts, technical analyses, delay claims, and quantum assessments. In developing economies, infrastructure delivery is central to national development, heightening the stakes for foreign investors, contractors, and domestic stakeholders.

Myanmar provides a case study of rapid transition: from a largely closed economy in the early 2010s to an environment actively seeking international investment. This transition has produced larger, more technically complex disputes, creating urgent demands on legal and institutional frameworks.

This paper examines Myanmar's construction arbitration landscape through three lenses: (i) legal framework, (ii) institutional infrastructure, and (iii) practical challenges. It also identifies emerging trends and regional cooperation opportunities, drawing on Myanmar's Arbitration Law (Law No. 5/2016), Investment Law (Law No. 40/2016), the UNCITRAL Model Law, the New York Convention, and MIAC's institutional practice.

2. MYANMAR'S CONSTRUCTION SECTOR: BACKGROUND AND CONTEXT

2.1 Sector Overview

Myanmar's construction sector has expanded rapidly over the past decade, driven by infrastructure, urban development, and energy projects. Roads, bridges, ports, airports, hydropower, and oil and gas projects have attracted international contractors and financiers. Urbanisation in Yangon and Mandalay has increased demand for commercial and residential construction.

Projects now often involve international consortia, multilateral financing, and technically complex scopes of work. The frequency and complexity of disputes have increased accordingly.

2.2 The Dispute Resolution Imperative

Effective dispute resolution mechanisms are essential for investor confidence and project delivery. Foreign investors require enforceable remedies, while domestic parties increasingly recognise the limitations of court litigation, long timelines, limited technical expertise, and lack of confidentiality. Arbitration, with its neutrality, finality, and cross-border enforceability, is increasingly preferred for construction disputes in Myanmar.

3. LEGAL FRAMEWORK FOR ARBITRATION IN MYANMAR

3.1 Arbitration Law (Law No. 5/2016)

Myanmar's Arbitration Law, effective 5 January 2016, replaced the 1944 Arbitration Act and aligns closely with the UNCITRAL Model Law. Key features include:

- **Party Autonomy:** Parties may choose the number of arbitrators, seat, procedural rules, and governing law.

- **Scope:** Applies to domestic and international arbitrations; international arbitration is defined by multi-jurisdictional connections.
- **Arbitral Tribunal:** Courts may appoint arbitrators where parties fail to agree; grounds for challenge mirror the Model Law.
- **Court Support:** Courts may grant interim measures; emergency arbitration is recognised.
- **Limited Judicial Intervention:** Courts intervene only as permitted by law.
- **Recognition & Enforcement:** Domestic and international awards are enforceable, consistent with the New York Convention.
- **Setting Aside:** Grounds include incapacity, invalid agreement, lack of notice, excess of jurisdiction, non-arbitrability, and public policy violations.

The law signals Myanmar's commitment to modern, internationally credible arbitration.

3.2 New York Convention

Myanmar is a contracting state to the 1958 New York Convention, facilitating cross-border enforcement of foreign awards. For construction projects with international parties, this ensures arbitral awards are enforceable both in Myanmar and abroad.

3.3 Myanmar Investment Law (Law No. 40/2016)

The Investment Law provides a framework for foreign and domestic investment, encouraging negotiation and arbitration for disputes. It does not create automatic investor-state arbitration; parties must rely on contractual arbitration clauses and applicable bilateral investment treaties. This underscores the importance of carefully drafted dispute resolution clauses in construction contracts.

3.4 Interaction of Legal Instruments

The Arbitration Law, New York Convention, and Investment Law collectively establish a coherent arbitration framework:

- **Arbitration Law:** Procedural framework for arbitration and enforcement.
- **New York Convention:** Cross-border enforceability.
- **Investment Law:** Encourages amicable resolution and relies on the Arbitration Law for arbitral procedures.

Practical implementation remains a challenge, particularly in judicial familiarity and contract drafting.

4. INSTITUTIONAL DEVELOPMENT: THE ROLE OF MIAC

4.1 Establishment and Governance

MIAC, established as a national-level association, provides institutional support for arbitration in Myanmar, including qualified arbitrators and procedural rules for multi-party and complex disputes. MIAC handled both domestic and international cases as per MIAC's Administered Arbitration Rules, prepared based on the ICC International Arbitration Rules 2021.

4.2 Construction Arbitration Capabilities

MIAC's rules accommodate complex construction arbitrations:

- **Arbitrator Expertise:** Panels include construction, engineering, and legal professionals.
- **Multi-party Claims:** Joinder and consolidation reduce parallel proceedings.
- **Structured Procedures:** Clear stages for pleadings, disclosure, expert evidence, and hearings.

4.3 Regional Perspective

Within ASEAN, MIAC is relatively young but developing rapidly. Regional cooperation, such as participation in HICAC 2026, strengthens its capabilities and visibility.

5. PRACTICAL CHALLENGES IN CONSTRUCTION ARBITRATION

5.1 Contract Clause Drafting

Ambiguous or incomplete arbitration clauses can generate protracted disputes over jurisdiction, delaying substantive resolution. While international FIDIC-based contracts typically include robust clauses, domestic contracts often lack clarity on seat, rules, or tribunal composition. In practice, such clauses have already generated preliminary jurisdictional objections in several Myanmar construction arbitrations.

5.2 Judicial Familiarity and Enforcement

Enforcement of awards can be inconsistent due to limited judicial experience with the UNCITRAL Model Law and New York Convention principles. Training, comparative studies, and publication of significant decisions are essential to enhance consistency and predictability.

5.3 Political and Economic Volatility

Post-2021 political and economic disruptions have led to supply chain delays, cost escalation, and regulatory hurdles, generating force majeure and suspension claims. In several recent construction disputes, parties invoked force majeure and hardship provisions to address delays caused by currency instability and regulatory interruptions, requiring careful tribunal assessment of risk allocation.

6. EMERGING TREADS AND BEST PRACTICES

6.1 Multi-tier Dispute Resolution Clauses

Increasingly, contracts adopt multi-tier clauses: negotiation, Dispute Adjudication Board (DAB) or Dispute Avoidance and Adjudication Board (DAAB), and arbitration if unresolved. Early engagement preserves relationships, filters minor disputes, and reserves arbitration for complex matters.

6.2 Demand for Technical Expertise

Construction arbitrators require technical competence in delay analysis, disruption claims, variations, and quantum evaluation. Training, accreditation, and engagement with CIArb, SCL, and ICCA are essential for Myanmar's developing arbitrator pool.

6.3 Digital Proceedings

Remote hearings and digital evidence management enhance efficiency and reduce costs. Myanmar's adoption of digital tools facilitates participation by international experts, though infrastructure and training remain key considerations.

6.4 Dispute Avoidance and Early Warning

Proactive mechanisms, such as clear contracts, change management procedures, joint site meetings, and early warning systems (as in FIDIC 2017), reduce escalation and enable collaborative problem-solving.

7. INSTITUTIONAL AND REGIONAL OPPORTUNITIES

7.1 Capacity Building

Judges, practitioners, and arbitrators benefit from training in arbitration law, UNCITRAL Model Law principles, and construction-specific procedures. Awareness programs for project owners and contractors strengthen the ecosystem.

7.2 Publication of Anonymised Awards

Publishing anonymised awards enhances jurisprudential consistency and transparency, providing guidance on FIDIC clauses, delay claims, force majeure, and loss quantification.

7.3 Regional Cooperation within ASEAN

Cooperation with SIAC, THAC, VIAC, and AIAC can strengthen procedural standards, cross-border enforcement, and institutional capacity. Knowledge sharing and joint training programmes accelerate development of Myanmar's arbitration community.

8. CONCLUSION

Construction arbitration in Myanmar has progressed rapidly, with a modern legal framework, MIAC's institutional support, and international credibility. Challenges remain in contract drafting, award enforcement, and capacity development. By embracing multi-tier dispute resolution, technical expertise, digital proceedings, and dispute avoidance, Myanmar can consolidate its position as a reliable venue for construction arbitration, while benefiting from regional cooperation and knowledge sharing.

9. REFERENCES

Primary Legal Instruments

- Myanmar Arbitration Law, Law No. 5/2016
- Myanmar Investment Law, Law No. 40/2016
- New York Convention, 1958

- UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006)

Institutional Sources

- Myanmar International Arbitration Centre (MIAC), Arbitration Rules

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CONSTRUCTION DISPUTE RESOLUTION IN MYANMAR

Nay Yee Lynn
Advocate and Arbitrator (Myanmar International Arbitration Centre - MIAC)

Ho Chi Minh City International Construction Arbitration Conference – HICAC 2026
9 to 10 April 2026

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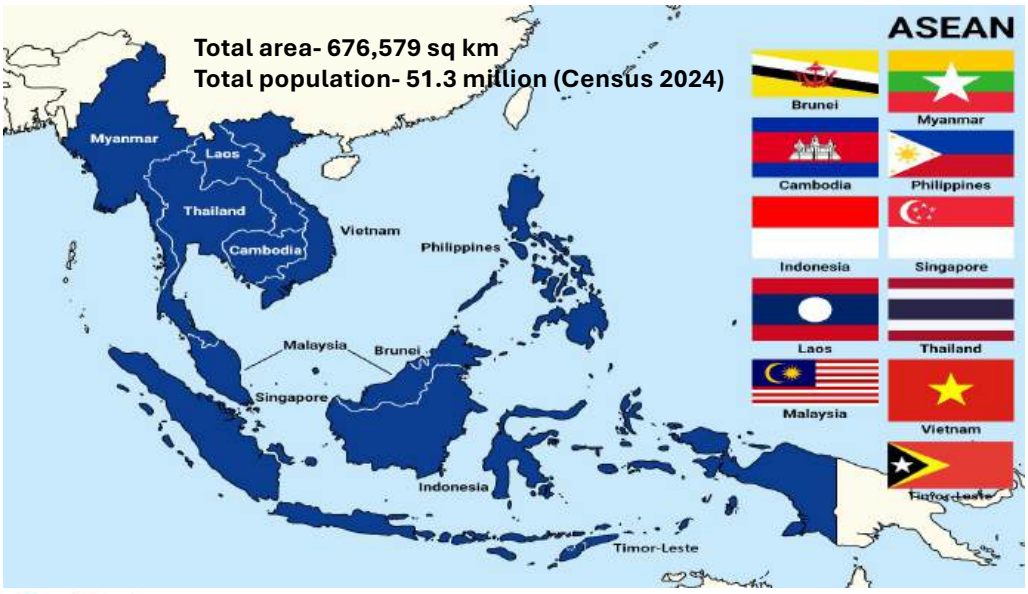

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2. Myanmar Perspective
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LEGAL FRAMEWORK

Arbitration Law (Law No. 5/2016)

Myanmar's Arbitration Law, effective 5 January 2016, replaced the 1944 Arbitration Act and aligns closely with the UNCITRAL Model Law.

Key Features:

- Party Autonomy: Parties choose number of arbitrators, seat, procedural rules, and governing law
- Arbitral Tribunal: Courts may appoint arbitrators where parties fail to agree; challenge grounds mirror the Model Law
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Supporting Legal Instruments

New York Convention (1958)

- Myanmar is a contracting state, facilitating cross-border enforcement of foreign arbitral awards
- Awards obtained in one contracting state are enforceable in all other contracting states
- Critical for construction projects with international contractors and financiers

Myanmar Investment Law (2016)

- Provides the framework for foreign and domestic investment
- Encourages negotiation and arbitration as preferred dispute resolution methods
- Parties must rely on contractual arbitration clauses and applicable bilateral investment treaties
- Underscores the importance of carefully drafted dispute resolution clauses in construction contracts

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MYANMAR PERSPECTIVE

Myanmar's construction sector is growing fast. With more projects come more disputes. Construction disputes are among the most frequently arbitrated disputes in Myanmar's growing infrastructure sector. Having the right dispute resolution process in place is now more important than ever.

What Contract Parties Should Know:

- Step-by-Step Dispute Resolution – Where construction contracts include multi-tiered dispute resolution clauses, Myanmar's Arbitration Law 2016 recognizes and enforces those steps — requiring negotiation and/or mediation before arbitration can commence. These steps must be clearly written into the contract.
- Follow the Contract Process First – Parties are contractually bound to complete all agreed dispute resolution steps before proceeding to arbitration. Failure to do so may affect the validity or timing of arbitration proceedings.
- Use of FIDIC Contracts & DAABs – Many Myanmar infrastructure projects (funded by World Bank, ADB) use FIDIC contracts. Under FIDIC 2017, parties are encouraged to set up a Dispute Avoidance and Adjudication Board (DAAB), a small standing panel that helps resolve issues on the spot before they become full disputes.

Institutional Options: Parties may choose between MIAC (primary domestic institution), SIAC, or other international centre for construction disputes.

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INSTITUTIONAL DEVELOPMENT

MIAC: ESTABLISHMENT & GOVERNANCE

- Established as a national-level association providing institutional arbitration support
- Administers arbitration under MIAC's Administered Arbitration Rules, modelled on the ICC International Arbitration Rules 2021
- Handles both domestic and international construction disputes
- Arbitrator panel includes construction, engineering, and legal professionals

MIAC: Regional Position

- Active cooperation with regional centres: SIAC, THAC, VIAC, AIAC, BICAM, HKIAC, JCAA, and CIETAC
- Participation in forums such as HICAC 2026 strengthens visibility and procedural standards
- Knowledge sharing and joint training accelerate capacity development

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Motto of Myanmar International Arbitration Centre (MIAC)

Myanmar International Arbitration Centre MIAC

Transparency Honesty Righteousness

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In Arbitration: "Solar Grid Construction Case"

- ABC Company got a government tender to build a solar grid.
- ABC subcontracted to XYZ Company.
- They had a Frame Agreement with a clear arbitration clause, stating that any disputes would be resolved by MIAC, whose decisions are final and binding.
- Payments were linked to milestone completion and quality checks.
- XYZ completed work, but ABC delayed payments, causing a dispute.
- ABC stated that the work did not meet their quality standards, so they withheld payment.

Outcome

- MIAC resolved the dispute and issued the final decision.

Key Point

- A clear agreement with a precise arbitration clause makes dispute resolution faster, fairer, and easier.

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PRACTICAL CHALLENGES

Contract Clause Drafting

- Unclear arbitration clauses can cause delays and arguments
- International contracts usually have clear rules. However, domestic contracts in Myanmar often miss important details, such as: where the arbitration takes place; what rules to follow; who makes up the tribunal; and a step-by-step dispute process
- These gaps have already caused disputes over jurisdiction in some Myanmar construction cases

Judicial Familiarity & Enforcement

- Courts are still gaining experience with the UNCITRAL Model Law and the New York Convention
- Enforcement of awards can sometimes take time or be based on a case-by-case basis
- Ongoing judicial training, study of international practices, and sharing key decisions help strengthen the system.

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Rooms to Improve

- Write contracts more clearly and simply
- Understand arbitration laws better
- Improve how to enforce arbitral awards
- Enhance the readiness to deal with force majeure and hardship
- Build capacity of the arbitrators and practitioners
- Promote regional cooperation to work together to improve dispute resolution

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Myanmar International Arbitration Centre MIAC

THANK YOU FOR YOUR KIND ATTENTION!

- **My sincere thanks go to our Myanmar team for this presentation.**
- **We would like to warmly welcome you to visit us to explore more opportunity and experience in Myanmar.**
- **We are looking forward to build strong and mutual partnerships.**

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