Professor Renato Nazzini
King's College London
Partner, LMS Legal LLP
Independent Arbitrator

Dispute Resolution in Complex Construction Projects: Strategy and Tactics

Technically complex

Significant uncertainty as projects evolve over time

Time sensitive

Multi-party

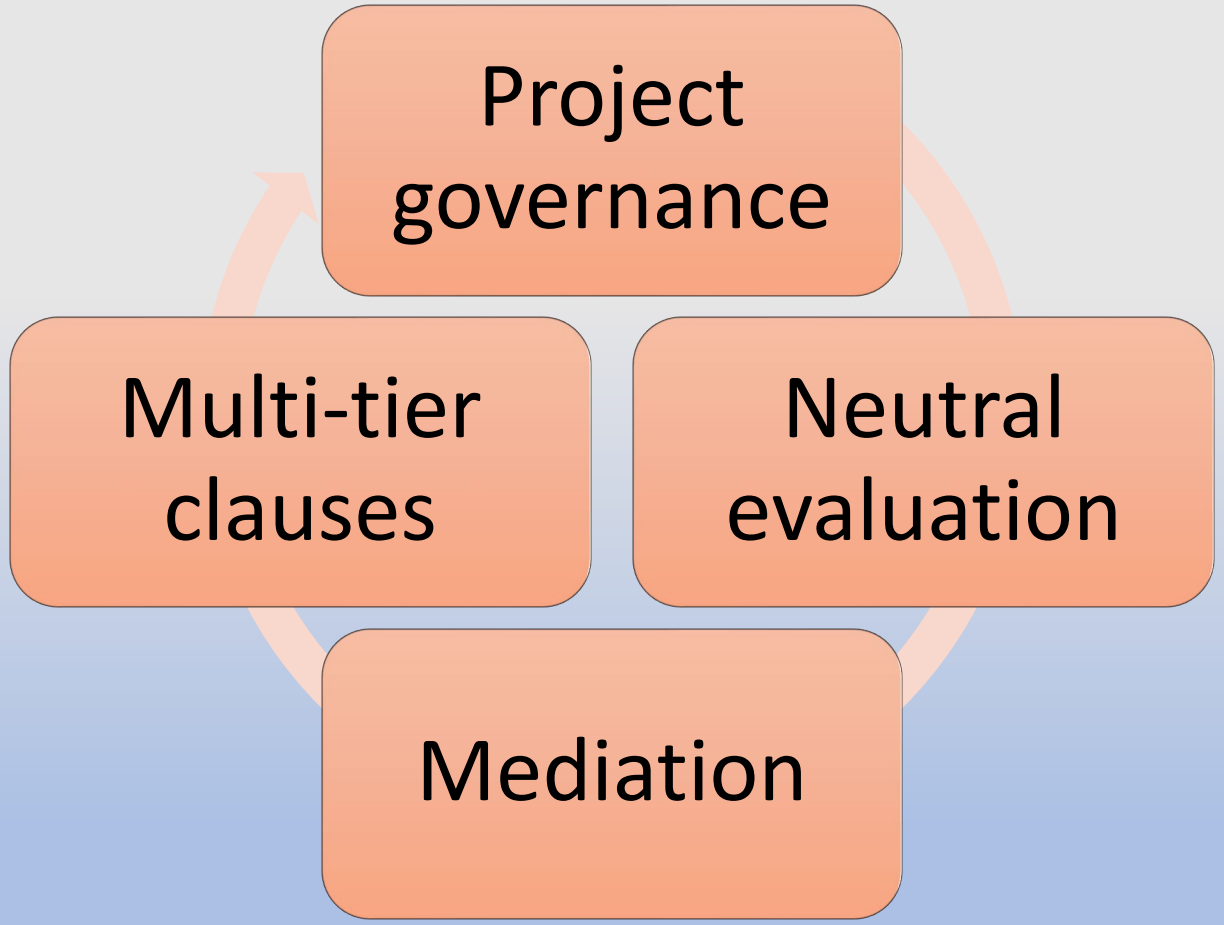
International

Reliance on standard forms

Sector specific legislation and possible public interest

The unique challenges of construction

Dispute Avoidance and Facilitative ADR



Project Governance

- Some contracts identify individuals with agreed roles and relationships e.g., ***"Core Group"*** members as named individuals in PPC2000 clause 3.3 or organisations in NEC3 (and 4) Option X12 clause X12.2(3)
- Early warning provisions appear in NEC4 clause 15, in PPC clauses 3 and 27 and in JCT Framework Agreement clause 19
- Core group meeting or other project governance fora as a means for dispute avoidance if combined with early warning duties and obligations to cooperate to find solutions to the identified risks, possibly "in good faith"?

Mediation/Conciliation

- Possible at any time by agreement
- Could be built-in in a multi-tier clause
- Parties may refer to a set of mediation rules
- Commercial approach works best

Neutral Evaluation

- At any stage, including before a dispute arises
  - could be advice by a project consultant on how to allocate a new, identified risk and what the consequences for the contract could be
  - could be more formal technical or legal opinion on a dispute that parties may take into account e.g., as the basis for settlement discussions
- Not binding

Multi-tier Clauses

- Consider, for example, the ICC standard clause for use with a Dispute Adjudication Board (DAB) and then arbitration:
  - All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the DAB in accordance with the Rules. For any given dispute, the DAB shall issue a Decision in accordance with the Rules.
  - If any Party sends a written notice to the other Party and the DAB expressing its dissatisfaction with a Decision, as provided in the Rules, or if the DAB does not issue the Decision within the time limit provided for in the Rules, or if the DAB is disbanded pursuant to the Rules, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.
- FIDIC Redbook 1999 and 2017:
  - If either party gives a notice of dissatisfaction relating to the DAB's/DAAB's Decision then the contract provides that 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 fifty-sixth day after the day on which notice of dissatis-faction was given, even if no attempt at amicable settlement has been made
- Bespoke multi-tier clauses may provide for attempts at settling the dispute between the parties (at different levels within the companies, starting from those involved in the project up to CEOs, for example), then mediation, then arbitration

Binding but not final resolution of dispute: s 108 of HGCRA 1996 (as amended by LDEDCA 2009) in the UK

Binding resolution of dispute which becomes final if neither party serves a notice of dissatisfaction: FIDIC regime

Non-binding recommendation that may become final and binding: ICC 2015 Dispute Board Rules, r 4 (Dispute Review Boards) and r 6 (Combined Dispute Boards) (when the CDB issues a recommendation)

Disputes Boards and Adjudication

Interim measures ordered by the tribunal

- UNCITRAL Model Law, Art 17 Power of arbitral tribunal to order interim measures

  (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures

- Arbitration Act 1996, s 38
  - Parties free to give tribunal powers that they think fit
  - By default, the tribunal has the power to order security for costs, to give directions in relation to any property which is the subject matter of the proceedings or as to which an issue arises in the proceedings (e.g., inspection or taking of samples) and to give directions for the preservation of evidence
- Rules give tribunal broad powers
- Exceptionally, some countries still prohibit arbitral tribunals from ordering interim measures

Emergency Arbitrator

- Speed
  - ICC will appoint in as short a time as possible, ‘normally’ within two days of arbitration notice. Decision must be given 15 days from appointment
  - LCIA envisages appointment 3 days after notice of arbitration. Decision made 14 days after appointment
- Relief granted
  - generally as wide as arbitral tribunal could grant
- Not *ex parte* other than in Swiss Rules in exceptional circumstances
- Order or award?
  - either: LCIA Rules
  - order: ICC Rules, Appendix V, Art 6

Court-ordered interim measures

- UNCITRAL Model Law, Art 17 J

  A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration

- Could be the only option when a third party is involved i.e., order to prevent the bondsman to pay the bond – EA or arbitral tribunal can only order a party (generally the employer) not to call on the bond

DABs/DAABs AND THE COURTS

DABs and Subsequent Litigation

Swiss Supreme Court, decision 4A_124/2014

- Court recognised that the DAB procedure under Clause 20 of the FIDIC Red Book was mandatory - same would apply to clause 21 of the 2017 FIDIC Red Book
- However, it rejected the argument that the award should be set aside because the DAB procedure was not complied with
- Clause 20.8 – now clause 21.8 of the 2017 FIDIC Red Book - contemplated special circumstances in which the principle of good faith would prevent a party from objecting to the commencement of arbitration because of the failure to exhaust the DAB procedure
- For there to be a DAB in place a dispute adjudication agreement had to be signed by all parties and members of the DAB. If a party fails to sign the agreement, the only option open to the other party is to issue arbitration proceedings without having previously exhausted the DAB procedure – see now clause 21.2 of the 2017 FIDIC Red Book
- On the facts, the appellant had refused to cooperate in the appointment of the DAB so that when arbitration was commenced the DAB was not 'in place' within the meaning of Clause 20.8 of the FIDIC Red Book
- The DAB contemplated in the contract was an ad hoc DAB. Contrast with *Peterborough City Council* where the judge held that Clause 20.8 could only logically apply to a standing DAB because an ad hoc DAB was by definition not in place when the dispute arose

DAB Decisions Enforceability in Subsequent Litigation

- *Peterborough City Council*, *per* Edwards-Stuart J, para 27: "I can see no reason why the court could not intervene at the instance of one of the parties by ordering specific performance of the obligation to comply with a decision of the DAB" – His Lordship was referring to a binding but not final DAB decision so this applies *a fortiori* to a final DAB decision
- English case law on statutory adjudication suggests that successful party could issue a claim based on the DAB decision and apply for summary judgment and, in the alternative, interim payment. If the dispute is limited to whether the DAB decision should be promptly given effect to, the defences against such as claim may be limited to lack of jurisdiction and breach of natural justice. The paying party can counterclaim or issue fresh proceedings for the determination of the underlying dispute. The judgment in enforcement proceedings should not give rise to estoppel beyond the elements of the cause of action (existence of a contract, dispute, appointment of DAB and giving by DAB of requisite decision): see *Elanay Contracts v The Vestry* [2001] BLR 33 (on statutory adjudication)

DABs/DAABs AND ARBITRATION

1999 FIDIC Red, Yellow and Silver Books, Clause 20

- **Neither party issues notice of dissatisfaction. Decision becomes "final and binding". Under Clause 20.7 if a party does not comply with the decision, the other party may refer "the failure itself" to arbitration. Sub-Clauses 20.4(Obtaining DAB's Decision) and 20.5 (Amicable Settlement) do not apply**
- **A party serves a notice of dissatisfaction. Clause 20 is silent. But, is there a gap?**

Enforcing binding DAB decisions:

- ICC Case 10619 – enforcing an engineer's decision by way of interim award prior to 1999 Red book
- *DBF* case (reported in DBF Newsletter Sep 2010)
- ICC Case 15751/JHN – partial award requiring party to pay the DAB award plus interest from date of decision
- ICC Case 16948/GZ – enforcing a binding DAB decision through a final award

Declining to enforce binding DAB decisions:

- ICC Case 11813/DK – declining application to order interim measures on the basis that this is not provided for in the contract
- ICC Case16119/GZ – declining to issue partial award without considering the merits of dispute
- ICC Case 16949/GZ – declining to award damages for sum adjudged due by the DAB decision, without considering the merits

The *Persero 1* Litigation

- Binding but not final DAB decision under 1999 FIDIC Red Book
- First arbitral tribunal, by majority, made a final award finding that respondent had an obligation to pay the sum awarded by the DAB and that the argument that the sum was not due failed as a defence but it was open to the respondent to commence fresh arbitration proceedings asking the new tribunal to open up the DAB decision
- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202: the Singapore High Court set aside the award on the basis that, under Clause 20.6, the arbitral tribunal had no power to make an award on the DAB decision without opening up the merits of the decision and that the tribunal had no power to make a final award ordering respondent to pay the sum awarded in the DAB decision. The court considered, *obiter*, that the proper course that the winning party in the DAB procedure could take was to issue arbitration proceedings to confirm the DAB decision and apply for an interim award to order payment
- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2011] SGCA 33: The appeal was dismissed on the basis that the tribunal should not have issued a final award without consideration of the merits. The Court noted, *obiter*, the practice to issue a interim award enforcing a DAB decision, reserving the consideration of the merits for a final award in the same arbitration.

The *Persero 2* Litigation

- CRW started new arbitration proceedings asking the tribunal to make an interim award to enforce the DAB decision and to determine the merits in a final award. The arbitral tribunal, by majority, enforced the DAB decision by way of an interim award
- In 2013 FIDIC issued a Guidance Memorandum clarifying the intention in Clause 20 of the Red, Yellow and Silver books: failure to comply with DAB decision may in itself to referred to arbitration without engaging Clause 20.4 and Clause 20.5
- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2014] SGHC 146: the interim award would be enforced as it was final and binding in that it ordered the respondent to pay the sum awarded in the DAB decision. The contractual obligation of respondent would never cease to have effect
- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30
  - A DAB decision is immediately binding once it is made… The corollary of a DAB decision being immediately binding once it is made is that the parties are obliged to promptly give effect to it until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award … the issuance of an NOD self-evidently does not and cannot displace the binding nature of a DAB decision or the parties' concomitant obligation to promptly give effect to and implement it
  - The Court of Appeal in *Persero 1* was wrong to say that a dispute over the merits of a DAB decision was a defence to a claim for the enforcement of the decision. The successful party can start arbitration with the sole purpose of enforcing the DAB decision. It is incumbent on the unsuccessful party either to counterclaim in the same arbitration or to start fresh arbitral proceedings over the merits of the DAB decision (paras 83 – 87)

2017 FIDIC Red, Silver and Yellow Books

- Clause 21.7: In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may … refer the failure itself to arbitration and Sub-Clause 21.4 (Obtaining DAAB's Decision) and Sub-Clause 21.5 (Amicable Settlement) do not apply
- Arbitral Tribunal has power to grant an interim or provisional measure or an award
- Arbitral Tribunal may award damages or other relief

DABs/DAABs – Conclusions on Enforceability

- Issue turns on the terms of the contract and the relevant legal framework in arbitration or litigation but, generally
  - ➢ Courts may enforce decision by way of summary judgment
  - ➢ Arbitral tribunal may enforce decision by way of interim measure or award in proceedings where the merits of the dispute are before the tribunal by way of claim or counterclaim by unsuccessful party but also by way of interim measure or award in proceedings where the only claim is the contractual claim for specific performance of the obligation to comply with the DAAB decision – certainly under 2017 editions but possibly also under 1999 edition

DABs/DAABs – Conclusions on Enforceability

- Is an award ordering payment of sum due under the DAB/DAAB decision final and binding so that it can be enforced under the New York Convention?
  - This may depend on whether award is final. The strongest argument in favour of enforceability is probably that the cause of action is the obligation to comply with the DAB/DAAB decision. If then the arbitral tribunal rules on the underlying cause of action, it will not be able to vary the award on the DAB/DAAB decision but will order the repayment of sums paid. However, there are difficulties with this approach: see dissenting opinion of Chan Sek Keong in *Persero 2* in the Singapore Court of Appeal
- If Tribunal orders interim measures, then the enforceability issue is the same as for any other arbitral interim measure

DABs/DAABs and Emergency Arbitration

- In principle, there is no reason why emergency arbitration cannot be used in conjunction with DABs/DAABs, however this may depend on the terms of the contract and on rules
- Contract: 1999 FIDIC suite Clause 20.4 and 2017 FIDIC suite Clause 21: can a party apply for EA?
- Note that under both editions, DABs/DAABs have the power to grant interim relief
- Advantages of EA?

ARBITRATORS AND COURTS

Courts and arbitration in national legislation

- AA96, s 44
  - (1) Courts to have the same powers as they have in relation to court proceedings in respect of matters listed in subsection 2
  - (3) **If the case is one of urgency**, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets
  - (4) **If the case is not one of urgency**, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties
  - **(**5) **In any case** the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

- Singapore International Arbitration Act, s 12(A)
  - (6) **In every case**, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- French Code of Civil Procedure, Art 1449
  - (1) The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures.

Even when legislation is silent, courts may be reluctant to intervene

- UNCITRAL Model Law, Art 9 Arbitration agreement and interim measures by court

  It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

- *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* (Hong Kong HC), para 35:

  ... notwithstanding that the plaintiff's action is referred to arbitration, the court has jurisdiction to deal the applications for interim relief. The question is whether or not the court should exercise this jurisdiction when the arbitral tribunal has the same powers. For a long time now, the courts have leaned in favour of making the parties who have agreed to settle their disputes by arbitration stick to that method of dispute resolution rather than resorting to litigation when it suits them to do so … The legislature has provided for the intervention of the courts, but, in my view, this jurisdiction should be exercised sparingly, and only where there are special reasons to utilise it … there is, in this case, no valid reason why the main dispute should be referred to arbitration, but the dispute regarding interim relief should be decided by the courts. The tribunal has the power to grant all the relief claimed

Court and arbitration in the rules

- Rules recognise role of the courts
  - SCC Rules, r 37(5) (simply stating that application to a court for interim measures is not incompatible with the rules)
  - ICC Rules, r 28(2) ("Before the file is transmitted to the arbitral tribunal, and **in appropriate circumstances** even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures" – notification to the Secretariat who then informs the Tribunal)
  - SIAC Rules, r 45(2) ("A request for interim or conservatory relief made by a party to a judicial authority is not incompatible with these Rules and shall not be considered a breach or waiver of the arbitration agreement. Any such application to a judicial authority and any decision taken thereon must be promptly notified to the Tribunal and the Registrar")
  - LCIA Rules, r 25(3) (requiring **authorisation** of the tribunal after the tribunal is constituted)

Availability of EA may sway the courts to decline interim measures. See *obiter dicta* in *Middle East FZE v Drake & Scull International SA Co* [2013] EWHC 4350 (TCC):

- Although this is a matter where there is arbitration under the ICC Rules, it is not subject to the recent change in those rules in the form of the introduction of an emergency arbitrator to deal with applications. Therefore, there is no power for the time being for an ICC arbitral tribunal to act effectively. Whether an emergency arbitrator would be able to act effectively is not a matter which I therefore need to consider

Court would still intervene if the EA has no power or is unable for the time being to act effectively

- need for *ex parte* application (e.g., freezing order)
- order against a person who is not party to the arbitration agreement
- query whether arguments concerning problems with enforceability of EA-ordered interim measures, especially if rules provide only for order and not award (e.g., 2012 ICC Rules) will be sufficient or court will apply the presumption that parties will be held to their bargain

EA and court-ordered interim relief

EA and court-ordered interim relief

- *GigSky APS v Vodafone Roaming Services Sarl*, 16 October 2015, unreported, where HHJ Waksman QC held that
  - whether the arbitral tribunal or other arbitral institution is in place and able to act effectively falls to be determined at the time of the application to the court – so it was immaterial that the applicant could have applied for the appointment of an emergency arbitrator earlier
  - at the time of the application, it would have taken 11 days to appoint an emergency arbitrator and hold a hearing – so an application to the court was a faster process

Limited case law currently. Similar issues to interim measures

Yahoo! v Microsoft 983 F Supp 2d 310 (2013) (US District Court, SD New York) – court enforced EA decision on the ground that EA had the power to grant the relief that he did. Court rejected the argument that the EA granted final relief that he was not empowered to grant

Contrast with *Chinmax Medical Systems v Alere San Diego* (2011) (US District Court, SD Cal) – court refused to review emergency arbitrator award on the ground that the award was expressly subject to review by the full panel of arbitrator and court would not review awards that are not final save in "extreme" cases

Some jurisdictions have clarified that emergency arbitration awards are enforceable, e.g. Singapore and Hong Kong

EA - Enforceability

Final Determinations

Arbitration

Litigation

Expert determination in appropriate cases

Final Determination

CONCLUSIONS

Thank you

KING'S College LONDON