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SOCIETY OF CONSTRUCTION LAW VIET NAM
HỘI PHÁP LUẬT XÂY DỰNG VIỆT NAM

HICAC 2025

HICAC 2025 – HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Raising the Bar:

Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice

10th & 11th
APRIL 2025

REX HOTEL SAIGON
141 Nguyen Hue, District 1, Ho Chi Minh City

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2025 HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

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2025 **HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE**

Raising the Bar:

Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice

INTRODUCTION

Building on the success of the 2024 event, the Vietnam International Arbitration Centre (VIAC) and the Society of Construction Law – Viet Nam (SCLVN) co-organize the **Ho Chi Minh City International Construction Arbitration Conference – HICAC 2025**. This year's Conference main theme is "Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice".

HICAC 2025 aims to bring together professionals from the construction industry, legal experts, arbitrators, and academics to discuss the latest trends, practices, and developments in construction arbitration. Vietnam is witnessing significant growth in both construction activities and the demand for quality and efficient construction dispute resolution. This conference, featuring diverse domestic and international perspectives, will provide valuable insights into legal regulations and practical applications, helping businesses in navigating dispute resolution. In addition to informative panel discussions, the conference will provide networking opportunities to foster collaboration and promote the best practices among international delegates and enterprises. The conference will also be a timely platform to contribute to legal reform, particularly the Law on Construction and the Law on Commercial Arbitration, facilitating business activities and streamlining the dispute resolution process.

05
Content sections

39
Domestic & Foreign Expert

06
Sideline events

150+
In-person Participants

10+
Partners

MAIN EVENT

Time

Day 01
8.30 AM – 5.00 PM
10th April 2025 (Thursday)

Day 02
8.30 AM – 12.00 PM
11th April 2025 (Friday)

Venue

REX HOTEL SAIGON,
141 Nguyen Hue, Ben Nghe ward,
District 1, HCMC, Vietnam

TENTATIVE AGENDA

SECTION A *(held concurrently with Section B)*

Current Trends in ADR for Construction Projects

1.30 – 5.00 PM, 10 April 2025 (Thu)
Lotus A Meeting Room, Rex Hotel Saigon

DURATION (PM)	CONTENT
	Session A1 – Current Trends in ADR for Construction Projects
1.30 – 3.00	**The applicability of third-party funding in cross-border construction dispute settlement** **Ms. Nguyen Thi Thanh Minh** – *Special Counsel and Head of Dispute Resolution Practice of ACSV Legal*
	The Use of Artificial Intelligence in Dispute Resolution **Ms. Lynette Chew** – *Partner at CMS (Singapore)*
	Case Management Practices from Institutional Perspective - Promoting Efficiency in Construction Arbitration **Ms. Hoang Tran Thuy Duong** – *Deputy Counsel, Singapore International Arbitration Centre (SIAC)*
	Panel Discussion **Moderator: Ms. Nguyen Thi Thanh Minh** – *Special Counsel and Head of Dispute Resolution Practice of ACSV Legal*
3.00 – 3.30	**Tea-break**
	Session A2 – Alternative Dispute Resolutions for Construction- International Experiences
3.30 – 5.00	**Options for Early Resolution of Disputes in Construction Arbitration Proceedings** **Ms. Sinyee Ong** – *Legal Director at HFW*
	The Enforcement of Expert Determination in Construction Disputes: What happens if an Expert goes wrong? Perspectives from Vietnam, the United Kingdom, & Austria **Mr. Pham Duong Hoang Phuc** – *Arbitral Assistant at ADR Vietnam Chambers LLC*
	Enhancing Project Integrity and Dispute Resolution Through Early Expert Engagement and Institutional Accountability **Mr. Maximilian D. Benz** – *Quantum Expert, SJA (Singapore)*
	Panel Discussion **Moderator: Ms. Duong Thi Thu Ha** – *Managing Partner, CDR Counsels*
5.00	**End of Section A**

THE APPLICABILITY OF THIRD-PARTY FUNDING IN CROSS-BORDER CONSTRUCTION DISPUTE SETTLEMENT

MINH NGUYEN
Special Counsel – Head of Dispute Resolution Practice at ACSV Legal

CONTENTS

10 – 14 April 2025 Ho Chi Minh City, Vietnam

HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE
Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice

1. Introduction of Third-Party Funding

What is Third-Party Funding?

TPF definition from the 2018 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration:

- the involvement of an external entity without prior interest in the dispute;
- that entity provides financing to one of the parties.
- working on "non-recourse" basis.

International Adoption of Third-Party Funding

European Union - Vietnam Investment Protection Agreement

Art. 3.28(i): TPF means "*any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings* ***in return for a remuneration dependent on the outcome of the dispute****, or any funding provided by a natural or juridical person who is not a party to the dispute in the form of a donation or grant.*"

Singapore Civil Law (Third-Party Funding) Regulations 2017, revised in 2024

Art. 4.1(a): The definition of TPF is implied through the rights of third-party funders. A third-party funder is allowed to fund "*the costs of dispute resolution proceedings to which the third-party funder is not a party*".

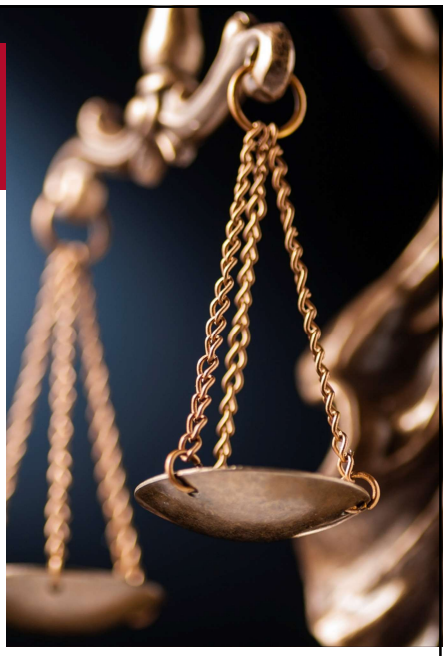
"*Dispute resolution proceedings*" therein is defined to cover **both domestic and international arbitrations and ancillary court proceedings** such as court intervention or assistance, mediation and foreign arbitral award enforcement.

Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

Art. 98G: *Third party funding of arbitration is the provision of arbitration funding for an arbitration:*

a. *under a funding agreement;*
b. *to a funded party;*
c. *by a third-party funder; and*
d. *in return for the third-party funder receiving a financial benefit* ***only if the arbitration is successful*** *within the meaning of the funding agreement.*

2. Advantages of Third-Party Funding



Financial and Justice Accessibility

✓ Provide funding to cover all arbitration-related costs.

✓ Offer a party with limited financial resources an opportunity to litigate meritorious claims.

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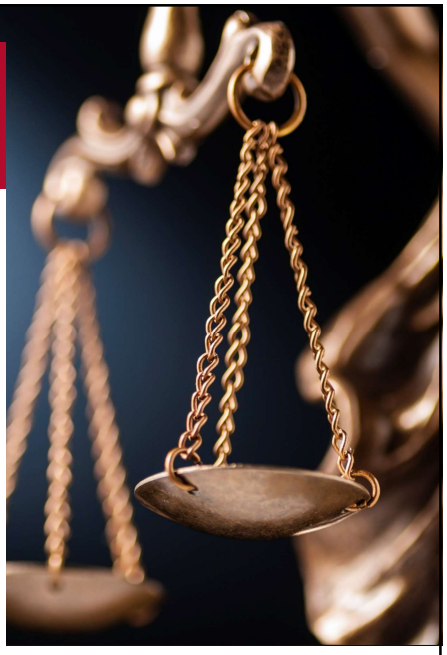
2. Advantages of Third-Party Funding



Risk Mitigation

✓ The risk of the arbitration will be transferred to Funder.

✓ Avoid excessive legal costs with an uncertain outcome.

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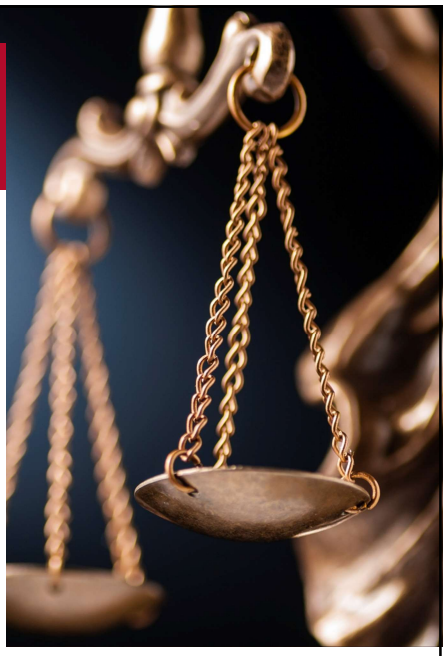
2. Advantages of Third-Party Funding



Credibility & Strategic Leverage

✓ Boosts claim credibility through the Funder's due diligence.

✓ Sends a strong signal to the opposing party.

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3. Disadvantages of Third-Party Funding

Recovery by Funder

Funders typically request a share ranging from 30% to 50% of the recovered amount.

Influence over proceedings

A funder who wants to maximize its recovery may discourage the funded party from accepting a settlement offer from the other side.

Funding threshold

Claims must be at least USD 10 million. Only a handful of funders accept to fund claims of more than USD 1 million but less than USD 10 million.

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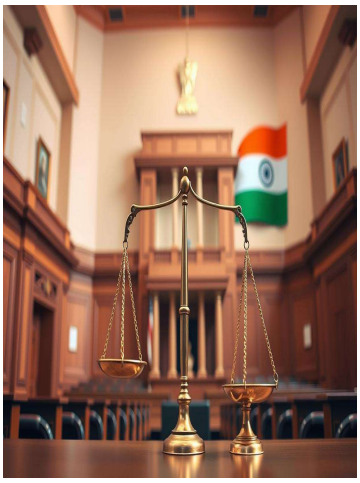
4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

SIAC Arbitration (2019):

- Claimant: C, funded by Tomorrow Sales Agency Private Limited ('**TSA**');
- Respondent: SBS Holdings Inc. ('**SBS**');
- Award: The Tribunal ordered the Claimant to pay ~USD 1 million to SBS;

→ Due to the Claimant's failure to pay, SBS initiated a lawsuit against TSA to seek to recover the awarded amount from TSA.

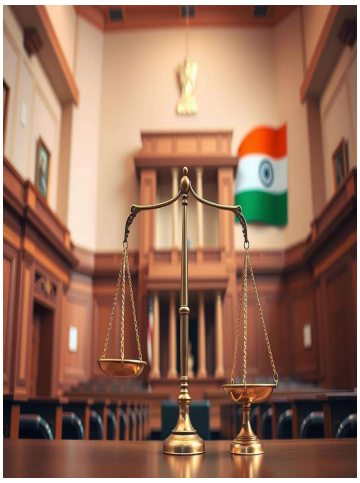


4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Indian First-Instance Court (March 2023):

- Claimant: SBS;
- Respondent: TSA;
- Cause of action:
  - SBS claimed TSA to pay the awarded amount;
- Court's ruling:
  - Awarded an interim measure order to compel TSA to (i) disclose their fixed assets and bank accounts, (ii) submit a security equivalent to the awarded amount, (iii) restrain from encumbering its assets;



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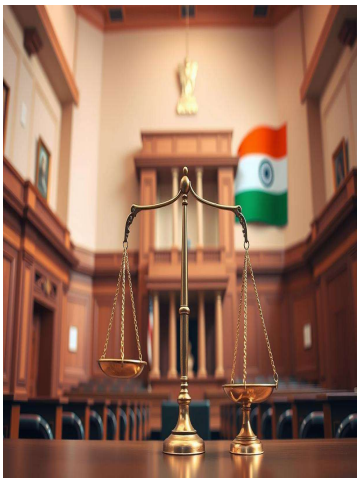
4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Indian Court of Appeal (May 2023):

- Appellant: TSA;
- Respondent: SBS;
- Cause of action: TSA appealed the interim measure order of the first-instance court
- Court's ruling: Annulled the interim measure order of the first-instance court
- Court's reasoning: Third-party funders are not liable for the awarded amount against the funded parties because they are not a party of the arbitration agreement.

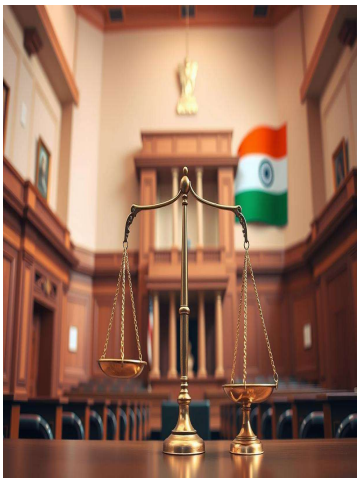


4. Case studies - India

Case #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

- ACSV's observations:
  - In the judgment, the appellate court said that an arbitral award cannot be enforced against a non-signatory funder unless it is explicitly bound by an arbitration agreement.
  - The appellate court did not opine on the validity of the third-party funding agreement (because it is not a point of contest in this case), but it did look into the terms and dispute resolution clause of the third-party funding agreement to conclude that TSA is not a party of the arbitration agreement between C and SBS.

=> The India court did not declare that the third-party funding agreement is null and void even though Indian law is silent on TPF.



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4. Case studies - India

Case #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

Funded case at the Privy Council (1872):

- Claimants: McQueen and his wife, funded by Chunder Canto Mookerjee
- Respondents: Ram Coomar Coondoo and others
- Cause of action: McQueen and his wife claimed the ownership of land that they were inherited from Mrs. McQueen's father
- Court's ruling: Dismissed the Claimants' claim and awarded the Respondents the costs of the litigation.
- Court's reasoning : The McQueens could not substantiate their claims.

4. Case studies - India

Case #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

High Court of Juricature at Fort William in Bengal (1876)

- Claimants: Ram Coomar Coondoo and another;
- Respondent: Chunder Canto Mookerjee (TPF);
- Cause of action:
  - The Claimants alleged that the TPF "'*maliciously and without reasonable cause*'" contested the will for "'*his own benefit, and he was the real mover*.'"
  - The Claimants argued that the TPF's funding agreement constituted champerty and that he should therefore be held liable for the costs incurred.

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4. Case studies - India

Case #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

High Court of Juricature at Fort William in Bengal (1876) – ctn.

- Court's ruling: Dismissed the Claimants' claims.

- Court's reasoning:
  - The Claimants cannot demonstrate that the TPF acted maliciously or without reasonable cause in funding the litigation;
  - There was no legal relationship between the Claimants and the TPF that would impose liability on the TPF for costs;
  - The financial support for a claim is not inherently against public policy: *"A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being per se opposed to public policy".*

Conclusions

Financial Support	➢ Allowing parties to pursue meritorious claims despite financial constraints.
International Recognition	➢ India sets an example for a jurisdiction recognizing the validity of TPF albeit absence of the domestic legal framework regulating the same.
Opportunities	➢ TPF arrangements can be structured to support claims of Vietnam-based companies.

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Thank you for your attention!

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KHẢ NĂNG ÁP DỤNG TÀI TRỢ TRANH TỤNG ĐỂ GIẢI QUYẾT TRANH CHẤP XÂY DỰNG XUYÊN BIÊN GIỚI

NGUYỄN THỊ THANH MINH – DIỄN GIẢ
Cố vấn Cấp cao và Trưởng Bộ phận Giải quyết tranh chấp tại ACSV Legal

NỘI DUNG

1. Giới thiệu về cơ chế Tài Trợ Bên Thứ Ba
2. Lợi ích của Tài Trợ Bên Thứ Ba
3. Hạn chế của Tài Trợ Bên Thứ Ba
4. Nghiên cứu bản án– Ấn Độ

10 – 14/04/2025 Tp. Hồ Chí Minh

HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ THÀNH PHỐ HỒ CHÍ MINH
Nâng cao Chuẩn mực: Tăng tầm Chất lượng Giải quyết Tranh chấp trong các Dự án Xây dựng tại Việt Nam - Kết nối Kinh nghiệm Quốc tế với Thực tiễn trong nước

1. Giới thiệu về cơ chế Tài Trợ Bên Thứ Ba

Cơ chế Tài Trợ Bởi Bên Thứ Ba (TPF) là gì?

Định nghĩa TPF theo Báo cáo của Tổ công tác ICCA-Queen Mary về Cơ chế Tài Trợ Bên Thứ Ba trong Trọng tài quốc tế năm 2018:

- Sự tham gia của một tổ chức mà trước đó không có bất kỳ lợi ích nào trong vụ tranh chấp;
- Tổ chức đó cung cấp tài chính cho một bên trong tranh chấp;
- Cơ chế "không hoàn lại".

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10 – 14/04/2025 Tp. Hồ Chí Minh

HỘI THẢO TRỌNG TÀI XÂY DỰNG QUỐC TẾ THÀNH PHỐ HỒ CHÍ MINH
Nâng cao Chuẩn mực: Tăng tầm Chất lượng Giải quyết Tranh chấp trong các Dự án Xây dựng tại Việt Nam – Kết nối Kinh nghiệm Quốc tế với Thực tiễn trong nước

Sự Chấp Nhận Của Quốc Tế Đối Với Cơ Chế Tài Trợ Bên Thứ Ba

Hiệp định Bảo hộ Đầu tư Việt Nam và Liên Minh Châu Âu (EVIPA)

Điều 3.28(i) : TPF nghĩa là "*bất kỳ nguồn tài trợ nào của thể nhân hoặc pháp nhân không phải là một bên tranh chấp nhưng có ký kết thỏa thuận với một bên tranh chấp để thanh toán một phần hoặc toàn bộ chi phí tố tụng **để đổi lại một khoản thù lao phụ thuộc vào kết quả tranh chấp**, hoặc bất kỳ nguồn kinh phí nào của thể nhân hoặc pháp nhân không phải là một bên tranh chấp dưới hình thức quyên góp hoặc viện trợ không hoàn lại.*"

Luật Dân sự Singapore (Tài trợ Bên Thứ Ba) 2017, sửa đổi, bổ sung năm 2024

Điều 4.1(a): Định nghĩa TPF được ngầm hiểu thông qua quyền của nhà tài trợ. Một nhà tài trợ có quyền tài trợ "các chi phí của quá trình giải quyết tranh chấp mà nhà tài trợ không phải là một bên trong tranh chấp".

"Quá trình giải quyết tranh chấp" theo đó được định nghĩa là **bao gồm cả trọng tài nội địa, trọng tài quốc tế và quá trình phụ trợ tại tòa án** như sự can thiệp và hỗ trợ của tòa án, hòa giải và thi hành phán quyết trọng tài nước ngoài.

Luật Trọng tài và Hòa giải Hồng Kông (Sắc lệnh sửa đổi về Tài trợ Bởi Bên Thứ Ba) 2017

Điều 98G: *Cơ chế tài trợ bởi bên thứ ba trong trọng tài được hiểu là việc cung cấp tài chính cho quá trình tố tụng trọng tài, bao gồm:*

a. Trên cơ sở một thỏa thuận tài trợ;
b. Dành cho một bên được nhận tài trợ;
c. Do một bên tài trợ thứ ba cung cấp; và
*d. Đổi lại, bên tài trợ thứ ba được hưởng lợi tài chính **chỉ khi trọng tài có kết quả thành công** theo định nghĩa trong thỏa thuận tài trợ.*

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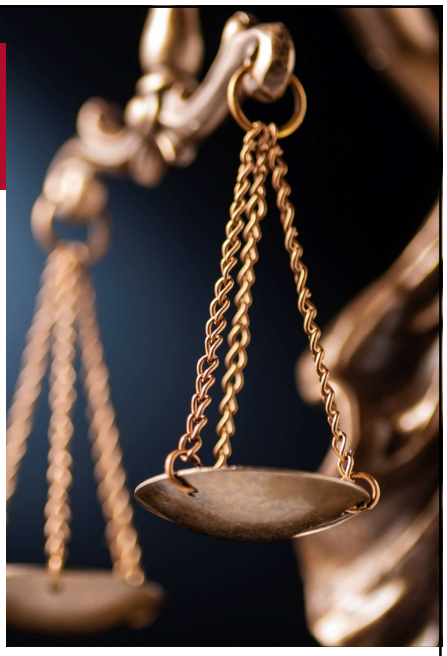
2. Lợi ích của Tài Trợ Bên Thứ Ba



Khả Năng Tiếp Cận Tài Chính và Công Lý

✓ Cung cấp nguồn tài chính chi trả cho toàn bộ chi phí trọng tài.

✓ Tạo điều kiện cho một bên có nguồn lực tài chính hạn hẹp có thể tiến hành vụ kiện chính đáng.

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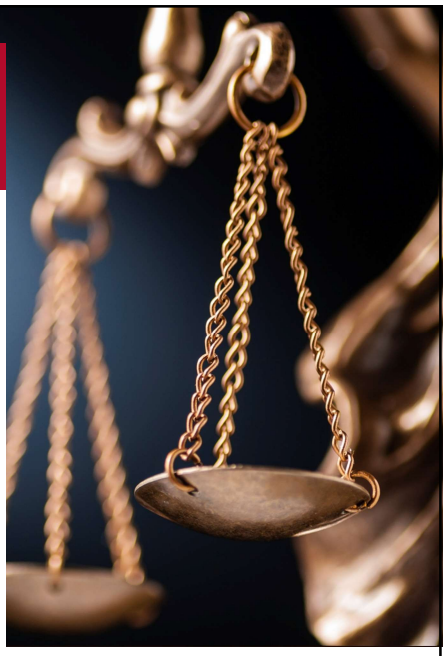
2. Lợi ích của Tài Trợ Bên Thứ Ba



Giảm Thiểu Rủi Ro

✓ Rủi ro của một vụ kiện trọng tài sẽ được chuyển sang cho Bên Tài Trợ.

✓ Hạn chế chi phí pháp lý đắt đỏ trong khi kết quả còn chưa chắc chắn.

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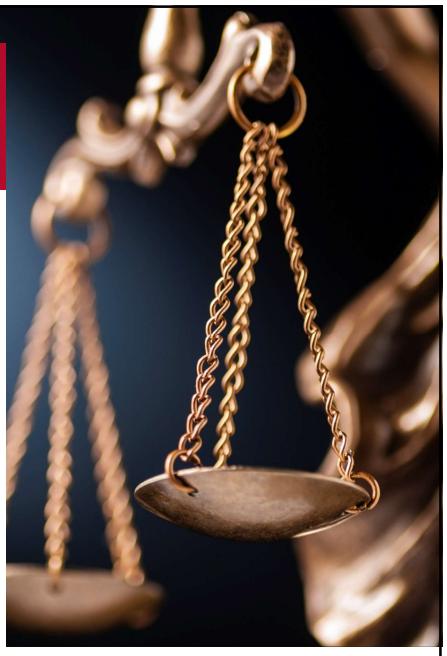
2. Lợi ích của Tài Trợ Bên Thứ Ba



Mức Độ Tin Cậy & Lợi Thế Chiến Lược

✓ Gia tăng khả năng thắng kiện của vụ kiện thông qua quá trình thẩm định của Bên Tài Trợ.

✓ Gửi tín hiệu mạnh mẽ đến bên đối trọng.

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3. Hạn Chế Của Tài Trợ Bên Thứ Ba

Khoản Thu Hồi của Bên Tài Trợ

Bên Tài Trợ thường yêu cầu nhận lại từ 30% đến 50% khoản tiền thu hồi được.

Can thiệp quá mức vào tiến trình tố tụng

Bên Tài Trợ muốn tối đa hóa khoản thu hồi của mình có thể không khuyến khích Bên Nhận Tài Trợ chấp nhận đề nghị giải quyết tranh chấp từ phía đối trọng.

Ngưỡng tài trợ

Giá trị của yêu cầu khởi kiện phải đạt tối thiểu 10 triệu USD. Chỉ một số ít Bên Tài Trợ chấp nhận tài trợ cho các yêu cầu có giá trị trên 1 triệu USD nhưng dưới 10 triệu USD.

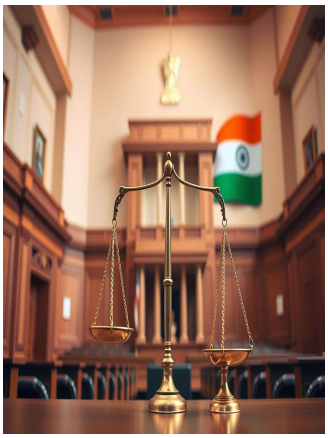
4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Vụ kiện Trọng Tài tại SIAC (2019):

- Nguyên Đơn: C, được tài trợ bởi Tomorrow Sales Agency Private Limited ('**TSA**');
- Bị Đơn: SBS Holdings Inc. ('**SBS**');
- Phán Quyết: Hội đồng Trọng tài yêu cầu Nguyên Đơn thanh toán ~1 triệu Đô La Mỹ cho SBS;

→ Vì Nguyên Đơn không trả tiền nên SBS đã khởi kiện TSA để yêu cầu TSA cho SBS số tiền được tuyên theo phán quyết.

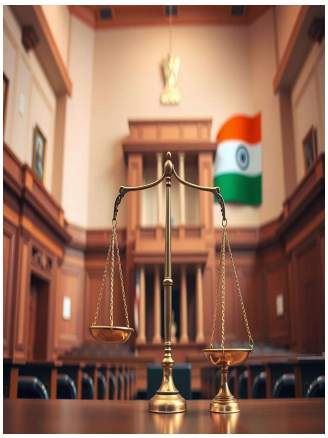


4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Tòa Sơ thẩm Ấn Độ (3/2023):

- Nguyên Đơn: SBS;
- Bị Đơn: TSA;
- Yêu cầu khởi kiện:
  - SBS kiện TSA để yêu cầu TSA thanh toán số tiền được tuyên theo phán quyết trọng tài.
- Quyết định của Tòa:
  - Ban hành Quyết định áp dụng biện pháp khẩn cấp tạm thời để yêu cầu TSA (i) cung cấp thông tin về tài sản cố định và tài khoản ngân hàng, (ii) nộp một chứng thư bảo đảm cho khoản tiền theo phán quyết, (iii) không thực hiện hành vi tẩu tán tài sản.



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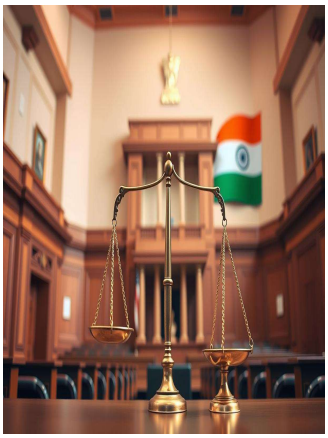
4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

Tòa Phúc thẩm Ấn Độ (5/2023):

- Người kháng cáo: TSA;
- Người bị kháng cáo: SBS;
- Yêu cầu kháng cáo: TSA kháng cáo Quyết định áp dụng biện pháp khẩn cấp tạm thời của Tòa Sơ thẩm.
- Quyết định của Tòa: Hủy Quyết định áp dụng biện pháp khẩn cấp tạm thời của Tòa Sơ thẩm
- Lập luận của Tòa: Bên Tài Trợ Thứ Ba không có nghĩa vụ đối với khoản tiền được tuyên theo phán quyết bởi vì họ không phải là một bên trong thỏa thuận trọng tài.

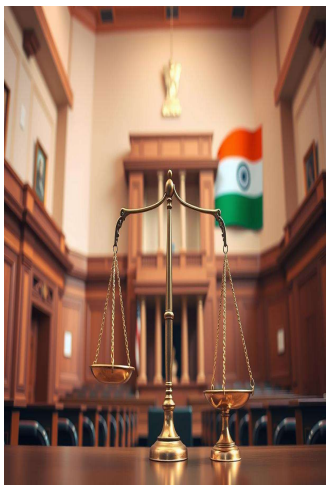


4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #1: Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)

- Nhận định của ACSV Legal:
  - Trong bản án, Tòa Phúc thẩm nhận định rằng phán quyết trọng tài không thể thi hành đối với một bên không ký kết, trừ khi họ bị ràng buộc rõ ràng bởi thỏa thuận trọng tài.
  - Tòa phúc thẩm không đưa ra ý kiến về tính hợp pháp của thỏa thuận tài trợ bởi bên thứ ba (do đây không phải là vấn đề tranh chấp trong vụ án này), nhưng đã xem xét các điều khoản và điều khoản giải quyết tranh chấp của thỏa thuận tài trợ để kết luận rằng TSA không phải là một bên trong thỏa thuận trọng tài giữa C và SBS.

→ Tòa án Ấn Độ không tuyên bố rằng thỏa thuận tài trợ bởi bên thứ ba là vô hiệu, dù luật pháp Ấn Độ không có quy định cụ thể về vấn đề này.



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4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

Vụ kiện được tài trợ tại Privy Council (1872):

- Nguyên đơn: Ông McQueen và vợ, được tài trợ bởi Chunder Canto Mookerjee;
- Bị đơn: Ram Coomar Coondoo và những người khác;
- Yêu cầu khởi kiện: Ông McQueen và vợ kiện đòi quyền sở hữu đất mà họ cho rằng được thừa kế từ bố của bà McQueen;
- Quyết định của Tòa: Bác bỏ yêu cầu khởi kiện của Nguyên đơn và yêu cầu Nguyên đơn thanh toán chi phí tố tụng của Bị đơn;
- Lập luận của Tòa: Gia đình McQueen không chứng minh được yêu cầu khởi kiện.

4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

Tòa án Tư pháp Tối cao tại tại Fort William, Bengal(1876):

- Nguyên đơn: Ram Coomar Coondoo và những người khác;
- Bị đơn: Chunder Canto Mookerjee;
- Yêu cầu khởi kiện:
  - Các Nguyên đơn cáo buộc rằng Bên Tài Trợ đã "*hành động một cách ác ý và không có lý do chính đáng*" khi tranh chấp di chúc nhằm phục vụ "*lợi ích cá nhân của mình, đồng thời chính ông ta là người đứng sau thúc đẩy vụ kiện*";
  - Nguyên đơn lập luận rằng thỏa thuận tài trợ của Bên Tài Trợ cấu thành hành vi xúc giục kiện tụng (champerty) và do đó, ông ta phải chịu trách nhiệm về các chi phí phát sinh.

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4. Nghiên Cứu Bản Án – Ấn Độ

Bản án #2: Ram Coomar Coondoo and Others v. Chunder Canto Mookerjee (1876)

Tòa án Tư pháp Tối cao tại tại Fort William, Bengal(1876):

- Quyết định của Tòa: Bác bỏ yêu cầu khởi kiện của Nguyên đơn;
- Lập luận của Tòa:
  - Nguyên đơn không thể chứng minh rằng Bên Tài Trợ đã hành động một cách ác ý hoặc không có lý do chính đáng khi tài trợ cho vụ kiện;
  - Không tồn tại mối quan hệ pháp lý giữa Nguyên đơn và Bên Tài Trợ có thể khiến Bên Tài Trợ phải chịu trách nhiệm về chi phí tố tụng;
  - Việc hỗ trợ tài chính cho một vụ kiện không mặc nhiên đi ngược lại chính sách công: "*Một thỏa thuận công bằng về việc cung cấp tài chính để theo đuổi một vụ kiện nhằm đổi lấy một phần tài sản thu hồi được, nếu có thể, không nên bị coi là trái với chính sách công*."

Kết Luận

Hỗ Trợ Tài Chính	➢ Cho phép các bên theo đuổi những vụ kiện chính đáng mặc cho những khó khăn về tài chính.
Công Nhận Quốc Tế	➢ Ấn Độ là một ví dụ về hệ thống pháp luật công nhận tính hợp lệ của tài trợ tố tụng dù chưa có khung pháp lý nội địa để điều chỉnh.
Cơ Hội	➢ Các thỏa thuận Tài Trợ Bên Thứ Ba có thể được thiết kế để hỗ trợ các vụ kiện của các doanh nghiệp có trụ sở tại Việt Nam.

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HICAC 2025

ACSV LEGAL

Trân trọng cảm ơn!

ACSV LEGAL

Nguyễn Thị Thanh Minh

Địa chỉ: Tầng 9, Lim Tower 3, Số 29A Nguyễn Đình Chiểu, Phường Đa Kao, Quận 1, Thành phố Hồ Chí Minh

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Email: Minh.Nguyen@acsvlegal.com


CMS
law·tax·future
The use of AI
in dispute resolution


Will AI replace large swathes of the litigation process by making them redundant or undertaking them entirely itself?
Or will it be a tool used by litigators, but not replacing them at any stage? Human + machine?
Are we culturally ready to embrace AI fully in our dispute resolution procedures?
2

The different types of AI tools

Machine learning software

Advanced computer application that employs massive datasets and complex algorithms to train itself, apply knowledge and develop its capability to predict e.g. Harvey, Kira, Relativity One.

GenAI

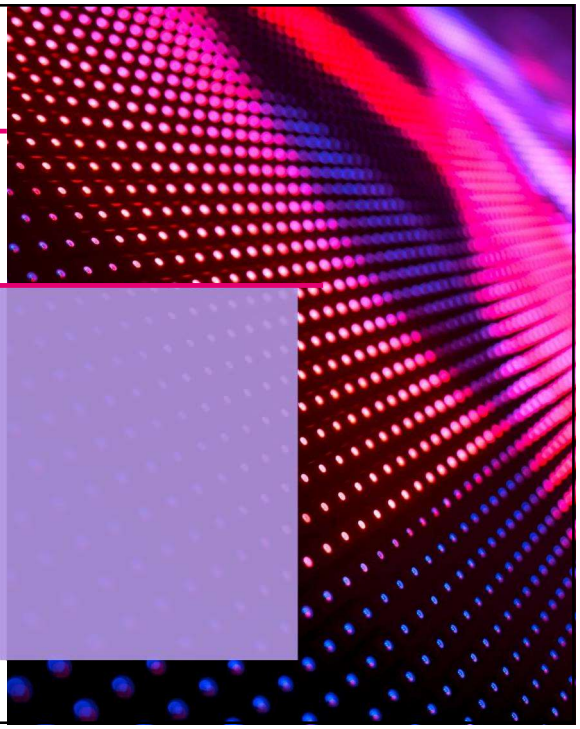
AI systems capable of generating new content, ideas, or data that mimic human-like creativity e.g. ChatGPT, Copilot.

3

Harvey

Built for the legal industry, Harvey aids document review, due diligence, legal drafting and regulatory compliance

- Summarises case law and legal developments
- Document comparison
- Drafting first drafts of any legal document
- Identifies trends in large volumes of documents.



4

RelativityOne

Supercharges eDiscovery and investigation reviews

Investigations

- Identify communications and information to explain how and why an event occurred.
- Identify participants material to case.

4

DeepL

Translation tool to translate text and documents from one language to another

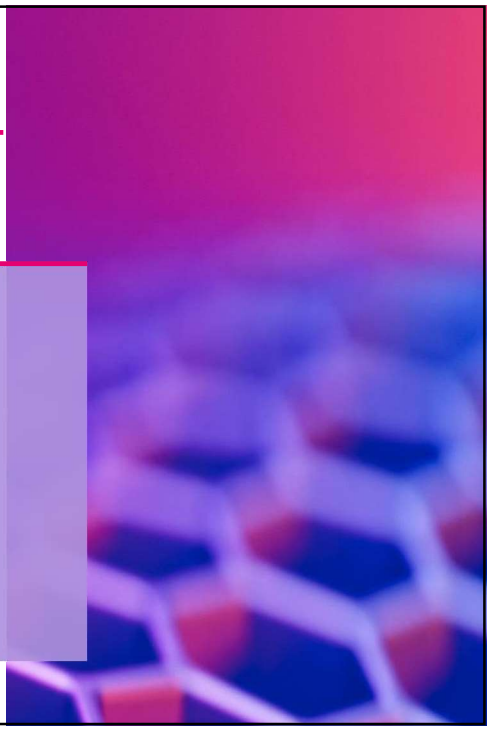
- Translates documents of all types including pdf and excel
- Translate contracts, briefs and court filings

6

Copilot

genAI embedded into Microsoft 365 to include private and public data

- Review and analyse documents, case law and reports to extract relevant information and propose arguments.
- Analyse past settlements in similar cases
- Compare hearing transcripts with written evidence for cross examination and submissions
- Summarising calls
- Automate repetitive tasks
- Highlight risky language in legal briefs
- Turn long documents into PowerPoint presentations.



7

What can AI really help with in dispute resolution?

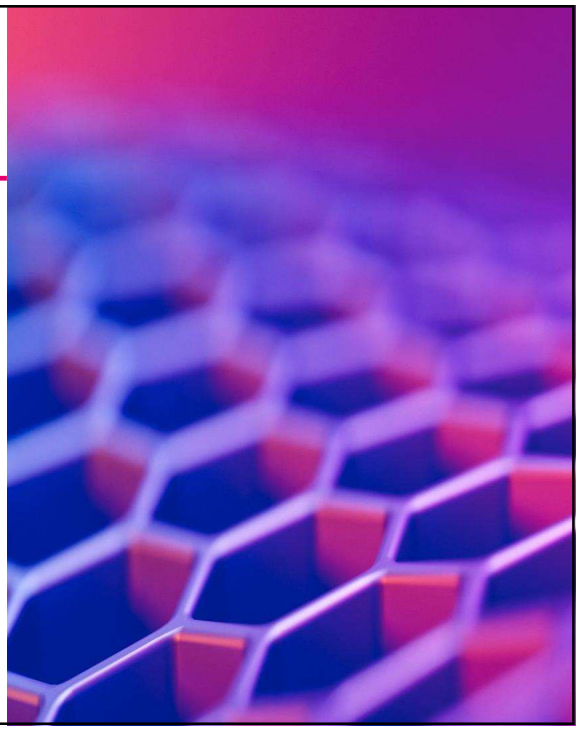
Document review

- Summary of documents
- Create workflows for review
- Document comparison
- Disclosure of documents.

Legal research e.g.

- Case law
- Relevant experience of experts

- Summarise case law and legal developments
- Taking meeting notes
- Drafting emails
- Suggest edits and improvements
- Translate from one language to another
- Help generate ideas



8

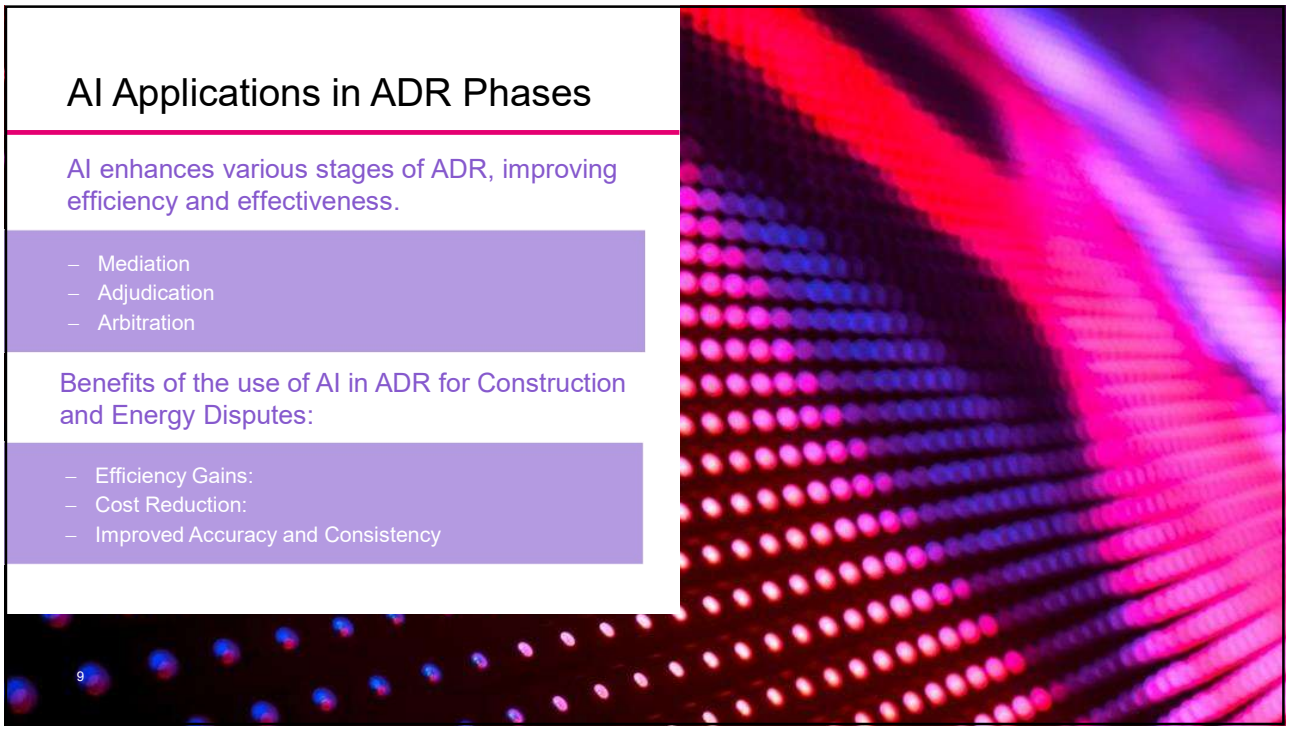
AI Applications in ADR Phases

AI enhances various stages of ADR, improving efficiency and effectiveness.

- Mediation
- Adjudication
- Arbitration

Benefits of the use of AI in ADR for Construction and Energy Disputes:

- Efficiency Gains:
- Cost Reduction:
- Improved Accuracy and Consistency



9

Harvey in action at CMS

Real estate and construction

- Research on cases for a planning breach
- Support in a lease review exercise to extract provisions on forfeiture or service charge cap
- Monitor evolving regulations to ensure a particular business remains compliant with relevant laws and industry standards.
- Uploaded a FIDIC and JCT contract that is no longer under licence and summarise it, answering questions about specific clauses.

10

Harvey in action at CMS

Energy

Saving 50 hours of lawyer time

- Supply contract dispute involving complex equipment installations worldwide.
- Harvey reviewed 20 documents, summarised the multiple complaints from different jurisdictions and provided a detailed analysis.
- Lawyer time was freed up to focus on legal analysis of the entire matter and enabling the detailed analysis to be incorporated into advice.
- 50 hours of lawyer time saved.
- Average user saving 5.25 hours per month.
- This is a significant return on investment.

11

RelativityOne in action at CMS

CMS is the only firm in the UK to have the early release of Relativity's new GenAI powered system.

RelativityOne gives CMS an average 50% reduction in the number of documents a team must review during disclosures, investigations, or audits.

RelativityaiR live use on client work.

Example for a first-pass review (real case but * numbers estimated):

	Manual Review	aiR for Review
Number of documents	78,000	78,000
Working days	104	3
SME lawyer time (hrs)*	125	24
Review lawyer/paralegal time	624	0

12

Limitations and Ethical Considerations

- Hallucinations

- The phenomenon of AI-generated errors are commonly referred to as "hallucinations."

- Transparency and Explainability

- 'Black box' decisions by adjudicators or arbitrators
- Bias in Data and Decision-Making

- Data Privacy and Security

- Handling sensitive information

13

Your CMS contact

Lynette Chew
Partner – Singapore
Infrastructure, Construction
and Energy Disputes

T +65 9889 8694
E lynette.chew@cms-cmno.com

Lynette Chew is a Partner in CMS Singapore. She is Co-Head of the Infrastructure, Construction and Energy Disputes practice in Singapore.

Lynette's area of practice encompasses a wide range of contentious and non-contentious work in the infrastructure, construction and energy sectors in Asia. She specialises in high-value and complex projects in Singapore and Asia.

Lynette is the only woman lawyer to be accredited by the Singapore Academy of Law as Senior Accredited Specialist for Building and Construction Law and has been recognised by legal directories for her expertise in construction, projects and energy. These include Chambers Asia Pacific, Legal 500, AsiaLaw, Asian Legal Business, and Benchmark Litigation.

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SIAC

Content

2

Who We Are

Overview of SIAC

History

- Over 3 decades. Commenced operations in July 1991
- Independent and not-for-profit organisation

Proven Record for Enforcement

- SIAC Awards have been enforced, among others, in Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA, and Vietnam

Caseload Statistics

- Average new caseload of 400-600 cases annually and an active caseload of 800-1,000 cases
- Over 90% of SIAC's cases are international
- Parties are from more than 100 jurisdictions over the last 5 years

Our Rules

- Rules ensure efficiency, cost effectiveness and flexibility
- Rules are easily acceptable to both Civil and Common Law practitioners/ arbitrators

3

Who We Are

Global

SIAC's Global Offices

4

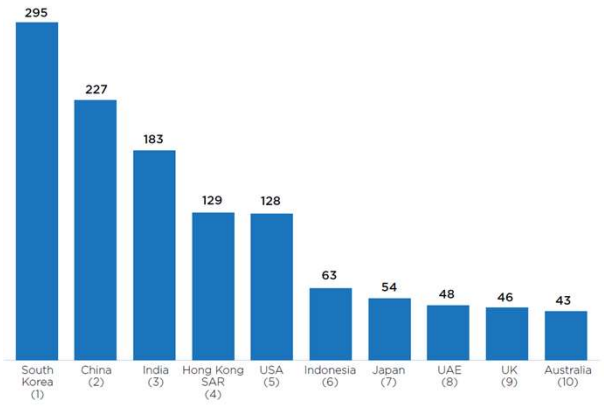
Who We Are
Global

Users from Over 100 Jurisdictions Over the Last Five Years

1. Afghanistan
2. Albania
3. Antigua and Barbuda
4. Argentina
5. Armenia
6. Australia
7. Austria
8. Azerbaijan
9. Bahamas
10. Bangladesh
11. Belarus
12. Belgium
13. Belize
14. Bermuda
15. Brazil
16. British Virgin Islands
17. Brunei
18. Cambodia
19. Cameroon
20. Canada
21. Cayman Islands
22. Chile
23. Colombia
24. Cook Islands
25. Curacao
26. Cyprus
27. Denmark
28. Egypt
29. Estonia
30. Fiji
31. Finland
32. France
33. Georgia
34. Germany
35. Republic of Ghana
36. Gibraltar
37. Greece
38. Hong Kong SAR
39. India
40. Indonesia
41. Iran
42. Ireland
43. Isle of Man
44. Israel
45. Italy
46. Ivory Coast
47. Japan
48. Jersey
49. Kazakhstan
50. Kenya
51. Kingdom of Tonga
52. Kuwait
53. Kyrgyzstan
54. Laos
55. Lebanon
56. Liberia
57. Lithuania
58. Luxembourg
59. Macao SAR
60. Madagascar
61. Mainland China
62. Malaysia
63. Maldives
64. Malta
65. Marshall Islands
66. Mauritius
67. Mexico
68. Monaco
69. Mongolia
70. Morocco
71. Mozambique
72. Myanmar
73. Namibia
74. Nepal
75. Netherlands
76. New Zealand
77. Nigeria
78. Norway
79. Oman
80. Pakistan
81. Panama
82. Papua New Guinea
83. Philippines
84. Portugal
85. Qatar
86. Romania
87. Russia
88. Saint Kitts and Nevis
89. Saint Lucia
90. Saudi Arabia
91. Seychelles
92. Singapore
93. Slovenia
94. Solomon Islands
95. South Africa
96. South Korea
97. Spain
98. Sri Lanka
99. Sweden
100. Switzerland
101. Taiwan
102. Thailand
103. Timor Leste
104. Tunisia
105. Türkiye
106. Uganda
107. Ukraine
108. United Arab Emirates
109. United Kingdom
110. USA
111. Uzbekistan
112. Vanuatu
113. Vietnam

Who We Are
Global

Top 10 Foreign Users (2024)



**Parties from South Korea topped the foreign user rankings for the first time due to a pack of related cases.*

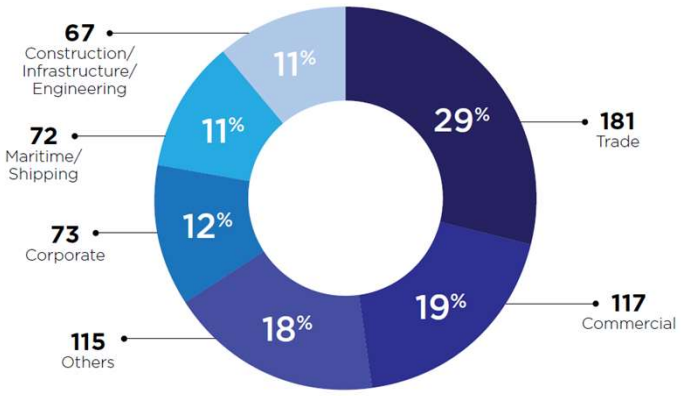
Who We Are
Global

Vietnamese Parties Arbitrating at SIAC (2022–2024)

Year	Total Number of Vietnamese Parties
2022	25
2023	23
2024	28

Who We Are
Global

Categories of Disputes (2024)



Who We Are
Expertise

Board of Directors

Mr Davinder Singh, SC
Chairman

Mr Chong Yee Leong
Deputy Chairman

Mr Siraj Omar, SC

Mr Gerald Singham

Dr Michael Moser

Ms Lucy Reed

Mr Cyril Shroff

Mr Luke Sobota

Mr Tham Sai Choy

Mr Cao Lijun

Who We Are
Expertise

Court of Arbitration (as of 31 Dec 2024)

Ms Lucy Reed, President

Mr Cavinder Bull, SC Vice President

Mr Toby Landau KC Vice President

Ms Olufunke Adekoya

Ms Catherine Amirfar

Dr Claudia Annacker

Mr John P. Bang

Ms Yas Banifatemi

Mr Pierre Bienvenu

Mr Nigel Blackaby KC

Prof Lawrence Boo

Mr Cao Lijun

Mr Chan Hock Keng

Mr Minh Dang

Mr Dmitry Dyakin

Ms Jessica Fei

Ms Karina Goldberg

Prof Bernard Hanotiau

Mr Eri Hertiawan

Mr Benjamin Hughes

Mr Tejas Karia

Mr Darius Khambata, SC

Ms K. Shanti Mogan

Dr Eun Young Park

Mr Philippe Pinsolle

Mr Harish Salve KC

Mr Michael E. Schneider

Mr Vijayendra Pratap Singh

Ms Abby Cohen Smutny

Mr Thomas Snider

Mr Guido Tawil

Mr Hiroyuki Tezuka

Mr Alan Thambiayah

Mr Gaetan Verhoosel KC

Who We Are
Expertise

SIAC Secretariat

Team of international arbitration lawyers qualified in 13 jurisdictions (Singapore, China, Ecuador, Georgia, India, Indonesia, Malaysia, Nepal, Nigeria, Russia, Sri Lanka, USA, and Vietnam)

Vivekananda Neelakantan
Registrar

Samuel Leong
Supervising Counsel

Lynnette Lee
Counsel

Rishabh Malaviya
Counsel

Sherly Gunawan
Counsel

Duong Hoang
Deputy Counsel

Vakhtangi Giorgadze
Deputy Counsel

Wang Xuanzhong
Deputy Counsel

Snigdha Bhatta
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Deputy Counsel

Nguyen Thi Mai Anh
Deputy Counsel

Margarita Drobyshevskaia
Deputy Counsel

Jo-Ann Heng
Deputy Counsel

Olusola Odunsi
Deputy Counsel

Why SIAC
Expertise

Panel of Arbitrators

Rigorous Admission Process

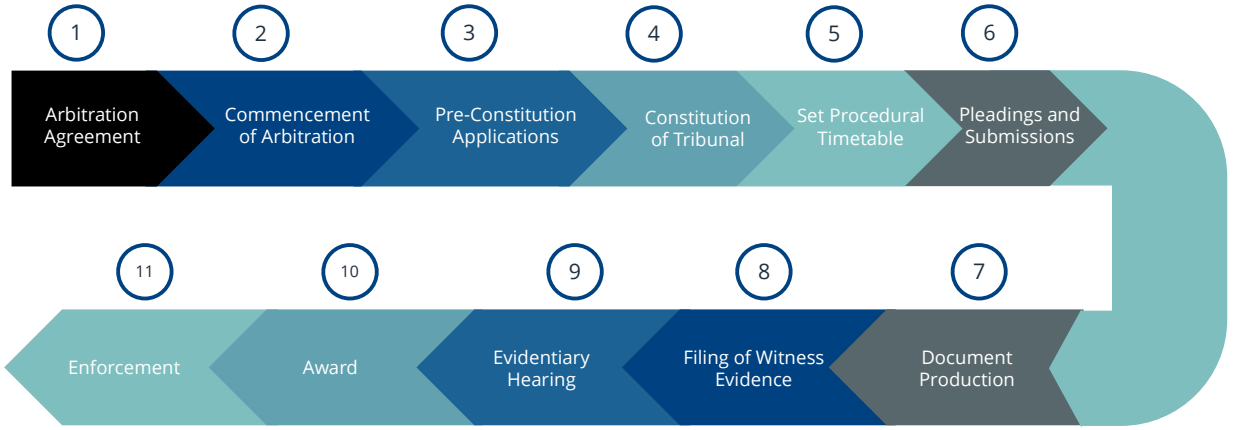
600+
Expert arbitrators from over **40** jurisdictions

100+ arbitrators experienced in **Energy, Engineering, Procurement** and **Construction**

Specialist IP Panel

Arbitrating at SIAC

International Arbitration Lifecycle



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Arbitrating at SIAC

Functions of the Secretariat

Appointment of Arbitrators

Supervising Case Progress

Financial Management

Scrutiny of Draft Awards

14

Why SIAC

Cost Efficient

	Median duration of arbitration for all tribunals (months)	Median total costs of arbitration for all tribunals (USD)
SIAC	**11.7**	**USD 29,567**
HKIAC	13	USD 64,606
LCIA	16	USD 97,000
SCC	13.5	Undisclosed

**Total costs of arbitration comprise the combined sum of tribunal fees and administration fees disclosed only.*

Sources:
LCIA - http://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx
SCC - http://www.sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf
HKIAC - http://www.hkiac.org/content/costs-duration
CMS - https://www.cms-holbornasia.law/en/sgh/publication/costs-and-duration-a-comparison-of-the-hkiac-lcia-scc-and-siac-studies

> SIAC remains the most cost-competitive option for both sole-arbitrator and three-arbitrator cases. For three-arbitrator cases in particular, SIAC remains significantly cheaper than LCIA and SCC where the costs extend to six-digit figures.
>
> CMS Holborn Asia

Why SIAC

Innovation through the SIAC Rules

- Emergency Arbitrator
  - Protective Preliminary Order
- Preliminary Determination
- Early Dismissal
- Consolidation
- Coordinated Proceedings
- Joinder
- Arb-Med-Arb

Innovative Procedural Tools to Reduce Time & Costs

- Expedited Procedure
- Streamlined Procedure

Why SIAC

Streamlined Procedure (SP) – Rule 13, Schedule 2

When does SP apply?

- SP applies automatically when the parties agree, unless expressly excluded
- SP applies automatically when the sum in dispute does not exceed SGD 1,000,000 unless the President determines on the basis of an application by a party that the SP shall not apply
- Useful for lower-value, less complex disputes

What happens when SP applies?

- Matter is referred to a sole arbitrator; faster timelines for nomination, appointment and challenge
- Tribunal may limit interlocutory applications
- Documents-only, no document production, no fact / expert evidence; any hearing is typically virtual (unless the Tribunal determines otherwise)
- Rule 46 (preliminary determination) or Rule 47 (early dismissal) not applicable
- Award to be made within 3 months
- Tribunal and SIAC fees capped at 50% of Schedule of Fees

"The headline innovation in the 2025 Rules in the introduction of the Streamlined Procedure. This recognises that a one size fits all approach is not appropriate and will help make arbitration a viable option for smaller claims".

Harry Elias Partnership

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Why SIAC

Expedited Procedure (EP) – Rule 14, Schedule 3

When may a Party apply for EP?

- When sum in dispute does not exceed SGD 10,000,000 (up from SGD 6,000,000) but exceeds SGD 1,000,000; or
- When the sum in dispute does not exceed SGD1,000,000 but President of Court of Arbitration determines that Streamlined Procedure does not apply; or
- When parties agree; or
- The circumstances of the case warrant it (amended from 2016 version which referred to cases of exceptional urgency)
- President of Court of Arbitration determines application on whether case proceeds via EP where there is no prior agreement.

What happens when EP applies?

- Matter is referred to a sole arbitrator; normal timelines for nomination, appointment and challenge
- Tribunal may disallow document production and limit written evidence
- Any hearing is typically virtual
- Award to be made within 6 months

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Why SIAC

Comparison – Streamlined v Expedited Procedure

	Streamlined Procedure	Expedited Procedure
Criteria	▪ SP applies automatically when the parties agree, unless expressly excluded ▪ Appplies automatically when the sum in dispute does not exceed SGD 1,000,000 unless the President determines on the basis of an application by a party that the SP shall not apply	▪ When sum in dispute does not exceed SGD 10,000,000 but exceeds SGD 1,000,000; or ▪ When the sum in dispute does not exceed SGD1,000,000 but President of Court of Arbitration determines that Streamlined Procedure does not apply; or ▪ When parties agree; or ▪ The circumstances of the case warrant it
Procedure	▪ Matter is referred to a sole arbitrator; faster timelines for nomination, appointment and challenge ▪ Tribunal may limit interlocutory applications ▪ Documents-only, no document production, no fact / expert evidence; any hearing is typically virtual ▪ Rule 46 (preliminary determination) or Rule 47 (early dismissal) not applicable ▪ Tribunal can order that the case be taken off the SP in consultation with parties and with the approval of the Registrar	▪ Matter is referred to a sole arbitrator; normal timelines for nomination, appointment and challenge ▪ Tribunal may disallow document production and limit written evidence ▪ Any hearing is typically virtual ▪ Tribunal can order that the case be taken off the EP in consultation with the parties and the Registrar
Timeline	Award to be made within 3 months	Award to be made within 6 months
Costs	Tribunal and SIAC fees capped at 50% of Schedule of Fees	Normal Schedule of Fees

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Why SIAC

Joinder, Consolidation and Coordination

Joinder
(Rule 18)

- Allows both parties and non-parties to be joined in pending arbitration proceedings under these Rules
- Where all parties – including party to be joined – have agreed or the additional party is *prima facie* bound by the arbitration agreement

Consolidation
(Rule 16)

- After arbitration proceedings have been commenced, any party may make an application for consolidation of multiple arbitrations
- (a) Where all parties have agreed; (b) all claims in two or more arbitrations pending under SIAC administration are under the same arbitration agreement; or (c) arbitration agreements are compatible and (i) disputes arise from same legal relationship, (ii) from principal and ancillary contracts, (iii) same or series of transactions.

Coordination
(Rule 17)

- Newly introduced provision: a party may apply for two or more arbitrations to be conducted concurrently or sequentially; heard together with any procedural aspects aligned; or have any of the arbitrations suspended pending determination of any of the other arbitrations
- Where the same tribunal is constituted in two or more arbitrations; and a common question of law or fact arises out of or in connection with all the arbitrations

- An application for joinder or consolidation may be made to the Registrar for determination by the SIAC Court of Arbitration (before Tribunal has been constituted) or to the Tribunal directly (after constitution of Tribunal).
- The 2025 Rules now also provide for the President to make an order for joinder or consolidation 'by consent' where all the parties are in agreement on the same

- An application for coordination made directly to the Tribunal (after constitution of Tribunal)

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Why SIAC

Early Dismissal (ED) and Preliminary Determination (PD)

Early Dismissal (Rule 47)	Preliminary Determination (Rule 46)
▪ First of its kind amongst major institutional rules for commercial arbitration	▪ Codification and added clarity on scope of Tribunal's powers to make a final and binding preliminary determination of any issue

▪ Parties may apply to Tribunal for Early Dismissal if claim/defence is:
  ▪ Manifestly without legal merit; or
  ▪ Manifestly outside jurisdiction of the Tribunal
	▪ Parties may apply to Tribunal if:
	  ▪ The parties agree; or
	  ▪ Applicant can demonstrate it would contribute to time and costs savings and efficient, expeditious resolution of dispute
	  ▪ Circumstances of the case warrant it

- Procedures have potential to provide significant savings of time and cost
- As a safeguard against unmeritorious applications, Tribunal retains discretion to decide whether an application for early dismissal or preliminary determination should be allowed to proceed

Why SIAC

Emergency Arbitration (EA) – Rule 12, Schedule 1

The ex parte PPO application represents a significant step by SIAC to broaden and strengthen the scope of an EA's powers. It showcases SIAC's willingness to pioneer procedural mechanisms to address the needs of arbitration users.

Watson, Farley & Williams

1. Application in Writing to Registrar
2. Acceptance of EA application by President of SIAC Court of Arbitration
3. Appointment of EA
4. Consideration of Application

1
- Application typically made concurrently with a Notice of Arbitration
- As of 2025, a party may apply for a protective preliminary prior to a Notice of Arbitration without notifying counterparties *(PPO)*.
- President of the SIAC Court of Arbitration will determine if an EA application will be accepted
- EA applications must be accompanied by payment of EA filing fee and requisite deposits

2
- Appointment is made **within 24 hours** of receipt by Registrar of application or payment of filing fee and deposits, whichever is later
- Appointment will be made without notice to other parties in the case of an application for a PPO if accepted by the President

3
- Any challenge to appointment must be made **within 24 hours** (previously 2 days) of communication by Registrar of EA appointment; *or from the date that circumstances for challenge (specified in Rule 26.1) became known or should reasonably have been known to the party.*

4
- In the case of a PPO, an order is made within **24 hours** of appointment after which it is transmitted by SIAC to all other parties
- Applicant must deliver all case papers within 12 hours to all parties or provide a statement explaining the steps taken to do so if unable to deliver, failing which the PPO will lapse 3 days from the date on which it was issued
- In all other EA cases: Schedule for consideration of application by EA is made **within 24 hours** (previously 2 days) from appointment; and order or award made within **14 days** from appointment

Why SIAC

Innovation through the SIAC Rules – Other New Rules

Third Party Funding (Rule 38)

Introduction of disclosure requirements to mitigate risk of conflicts

Prima Facie Jurisdictional Objections (Rule 8)

Registrar may refer issue of jurisdiction for prima facie determination to SIAC Court of Arbitration prior to constitution of Tribunal

Administrative Conferences (Rule 11)

Convened prior to constitution of Tribunal at Registrar's discretion to discuss procedural or administrative directions

Mediation Provisions (Rules 32.4; 50.2)

Multiple prompts to parties to consider including via SIAC-SIMC AMA Protocol

Innovative Procedural Tools to Reduce Time & Costs

Why SIAC

Arbitration-Mediation-Arbitration Protocol

SIAC-SIMC Arb-Med-Arb Service is a one-stop process where a dispute is first referred to arbitration before mediation is attempted

Arbitration → Mediation → Arbitration

- If mediation is successful, parties may request their mediated settlement be made a consent arbitral award with advantages of enforceability under New York Convention
- If mediation is unsuccessful, parties may proceed with arbitration
- The average settlement rate for mediation at SIMC is more than 70%

Why SIAC

Applications under the SIAC Rules

Expedited Procedure (EP) applications

- **143** in 2024 (66 accepted)
- **1,039** since 2010 (598 accepted)

Joinder applications

- **13** in 2024 (4 granted)
- **78** since 2010 (37 granted)

Consolidation applications

- **101** in 2024 (64 granted)
- **533** since 2016 (355 granted)

Early Dismissal (ED) applications

- **13** in 2024 (7 allowed to proceed under Rule 29.3 of SIAC Rules 2016)
- **78** applications since 2016 (40 allowed to proceed under Rule 29.3 of SIAC Rules 2016; 16 granted (8 in whole, 8 in part))

Emergency Arbitrator (EA) applications

- **21** in 2024 (all accepted)
- **173** since 2010 (all accepted)

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SIAC Model Clause

(Revised as of 9 Dec 2024)

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____ arbitrator(s).^

The language of the arbitration shall be _____.

The law governing this arbitration agreement shall be ____. #

[In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court ("the SICC"); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC.] **
Parties should also include an applicable law clause. The following language is recommended:

APPLICABLE LAW

This contract is governed by the laws of ____. ^^

* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").
^ State an odd number. Either state one, or state three.
# State the country or jurisdiction. We recommend that parties agree on the law governing the arbitration agreement. This law potentially governs matters including the formation, existence, enforceability, legality, scope, and validity of the arbitration agreement, and the arbitrability of disputes arising from it.
** Parties may wish to agree to the supervisory jurisdiction of the Singapore International Commercial Court (SICC) for international commercial arbitrations where Singapore is chosen as the seat of arbitration.
^^ State the country or jurisdiction.

Reference: SIAC Model Clause - Singapore International Arbitration Centre

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The Singapore Experience

Leading Arbitral Seat

- Progressive Pro-Arbitration Legislation
- Experienced and Supportive Judiciary
- Neutral, Politically Stable, and Independent
- Robust Dispute Resolution Ecosystem

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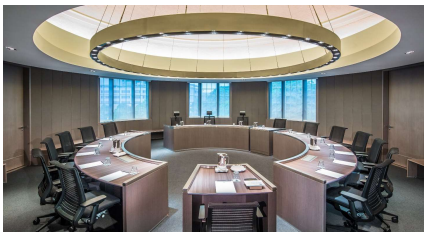
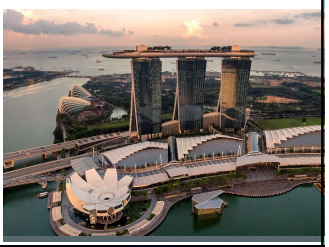
The Singapore Experience

World-Class Venue

- State-of-the-Art Facilities
- Excellent Connectivity and Infrastructure
- Vibrant and International City





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HICAC 2025

Thank you for your attention!

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Speaker's image

Options for Early Resolution of Construction Arbitration Disputes

Sinyee Ong
Legal Director, HFW

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ISSUES/CONTENTS

1. Multi-Tiered DR Clauses
2. Early Dismissal
3. Preliminary Determination
4. Bifurcation of Proceedings

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Multi-Tiered DR Clauses
Overview

- Requirement to undertake certain steps (i.e., dispute board / settlement) in an attempt to resolve the dispute amicably before arbitration may be commenced

- Pros & Cons

  ✓ Preserves the long-term relationships between employers, contractors, engineers & other professionals

  ✓ Reduces the aggregate number of issues to be resolved by arbitration

  ✗ Deadlock → Going through the motion → Waste of resources

3

Multi-Tiered DR Clauses
FIDIC

- Clause 21, FIDIC Red Book (2017)

  - Cl 21.3 Avoidance of Disputes

    If the Parties so agree, they may jointly request ... 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.

  - Cl 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 ...

4

Multi-Tiered DR Clauses
FIDIC

- Cl 21.4.4 Obtaining DAAB's Decision ['Pay now, argue later']

  The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision ...

- Cl 21.5 Amicable Settlement

  Where a NOD has been given under Sub-Clause 21.4 ... 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 attempts at amicable settlement has been made.

- Cl 21.6 Arbitration

  Unless settled amicably, and subject to Sub-Clause 3.7.5 ... Sub-Clause 21.4.4 ... Sub-Clause 21.7 ... and Sub-Clause 21.8 ... any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.

Multi-Tiered DR Clauses
Legal Precedents

- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30
  - FIDIC Red Book (1999) contract
  - DAB ordered Employer to pay Contractor
  - Employer issued Notice of Dissatisfaction; refused to comply
  - Contractor commenced 1st arbitration → Tribunal issued award requiring Employer to comply and pay → SGHC set aside award (upheld by SGCA)
  - Contractor commenced 2nd arbitration → Tribunal issued interim award requiring Employer to comply and pay → SGHC upheld interim award (confirmed by SGCA)

**Pay now and cost more later?

Multi-Tiered DR Clauses
Legal Precedents

- *International Research Corporation Plc v Lufthansa Systems Asia Pacific Ltd & Anor* [2013] SGCA 55
  - Non-construction/FIDIC dispute
  - Contract provided for a multi-tiered dispute resolution clause requiring a specified mediation process to be attempted before disputes may be referred to arbitration
  - Parties attempted some commercial negotiations (but not in line with specified mediation process)
  - SGCA: Preconditions to arbitration had to be precisely complied with before arbitration may be commenced

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Multi-Tiered DR Clauses
Legal Precedents

- *CZQ and CZR v CZS* [2023] SGHC(I) 16
  - FIDIC Yellow Book (1999)
  - Amicable settlement provision (Cl 20.5) was not followed
  - Claimants commenced arbitration; Tribunal determined it had jurisdiction
  - Respondents applied to SG Courts for determination
  - SICC: Cl 20.5 was not a condition precedent to the commencement of arbitration
  - SICC: Cl 20.5 did not restrict parties to settling disputes only through the amicable settlement procedure & did not require parties to *first* go through the amicable settlement procedure before going to arbitration

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Early Dismissal Overview

- Dismiss a claim (or part of a claim) early in the proceedings without a full hearing on the merits
- Pros & Cons:
  - ✓ Efficient disposal of unmeritorious claims
  - ⨯ Strategic abuse → Increase costs + time

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Early Dismissal Institution Rules

- SIAC Rules

A party may apply to the Tribunal for the early dismissal of a claim or defence where:
(a) a claim or defence is manifestly without legal merit; or
(b) a claim or defence is manifestly outside the jurisdiction of the Tribunal

[Rule 47.1]

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Early Dismissal
Institution Rules

- ICC Rules

Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction ("application"). The application must be
made as promptly as possible after the filing of the relevant claims or defences.

[ICC Practice Note to Parties & Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, Para 110]

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Early Dismissal
Legal Precedent

- *DBO and others v DBP and others* [2024] SGCA(I) 4
  - Claimant commenced arbitration claiming that loan agreement was discharged by frustration
  - Respondent applied for early dismissal under SIAC Rules (frustration claim was manifestly without merits)
  - Tribunal issued partial award dismissing the Claimant's claim
  - Claimant applied to SG Courts to set aside partial award
  - SICC: Rejected set aside; partial award valid

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Preliminary Determination Overview

- Tribunal decides on a specific issue before the final award is issued
  - I.e., jurisdiction challenges
  - I.e., governing law / applicable rules
- Pros & Cons:
  - ✓ Early resolution of critical issues
  - ⨯ Potential for delays and increased costs

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Preliminary Determination Institution Rules

- SIAC

A party may apply to the Tribunal for a final and binding preliminary determination of any issue that arises for determination in the arbitration where:

(a) the parties agree that the Tribunal may determine such an issue on a preliminary basis;

(b) the applicant is able to demonstrate that the determination of the issue on a preliminary basis is likely to contribute to savings of time and costs and a more efficient and expeditious resolution of the dispute; or

(c) the circumstances of the case otherwise warrant the determination of the issue on a preliminary basis.

[Rule 46.1]

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Preliminary Determination
Institution Rules

- ICC Rules

  In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

  [Article 22(2)]

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Bifurcation
Overview

- Dividing the arbitration proceedings into separate phases or stages
  - Liability & Quantum
- Pros & Cons
  - ✓ Efficiency + Cost Savings
  - × Delays + Additional Costs

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Bifurcation
Institution Rules

- SIAC Rules:

The Tribunal shall have the power to direct and schedule the order of proceedings, bifurcate proceedings, order page limits on submissions, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the determination of which could dispose of all or part of the case.

[Rule 32.6]

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Bifurcation
Institution Rules

- ICC Rules:

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.

[Appendix IV]

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Bifurcation
Legal Precedents

- *CFJ and another v CFL and another and other matters* [2023] 3 SLR 1; [2023] SGHC(I) 1

  - Tribunal bifurcated the arbitration into liability phase and quantum phase
  - Tribunal issued three partial awards (on liability; with quantum to be determined subsequently)
  - 3rd Partial Award, CFJ alleged that Tribunal had exceeded its jurisdiction by purporting to pre-determine how damages were to be assessed (notwithstanding the agreement to bifurcate proceedings)
  - SICC → Not really exceeded jurisdiction
    → Not really provided definitive view on appropriate quantum

Bifurcation
Legal Precedents

- *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251

  - Disputes regarding questions of interpretation or application of the contract → Courts
  - All other disputes (including differences in quantum) → Arbitration

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Thank you for your attention!

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The Enforcement of Expert Determination in Construction Disputes: What happens if an Expert goes wrong? Perspectives from Vietnam, the United Kingdom, and Australia

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Abstract.
Expert determination is an alternative dispute resolution mechanism in construction, where an independent and impartial expert is appointed to resolve technical or specialized issues. Due to the inherently complex and technical nature of construction disputes, expert determination is widely used to address matters such as engineering specifications, project delays, cost overruns, and the quality of materials. This is distinguished from non-binding forms as expert appraisals, expert assessments used along with the arbitral process. In practice, expert determination clauses have been mentioned since the Property Council of Australia Standard Form Contract, FIDIC form 1999, or ICC Rules for the Administration of Expertise Proceedings 2015.
Nevertheless, as a creature of contract, expert determination does not carry the same "res judicata" effect as an arbitral award. Expert determination is generally binding under the terms agreed upon by the parties under an expert determination clause. Therefore, the judge or arbitrator will not serve the jurisdiction to reassess the facts or decisions determined by the expert. Currently, the ability to set aside or enforce expert determinations is largely dependent on the jurisdiction and the applicable national laws, as there is no international framework akin to the New York Convention 1958 to provide uniform enforcement.
In Vietnam, there are no explicit regulations on setting aside or enforcing an expert determination. This then begs for the question of what happens if an expert determination is found to be incorrect. In some jurisdictions, such as Austria and Germany, expert determinations may be not binding and set aside in case of coercion, deceit or error, if the principle of equal treatment or the right to be heard was violated or if the result is grossly incorrect (at least 50%). Meanwhile, in England, there is no specific numerical margin standard. Instead, English law uses the concept of "manifest error or fraud", which is narrow in its application. In Flowgroup Plc v. Co-operative Energy Ltd [2021], the High Court considered whether an expert's determination in respect of a completion accounts dispute arising in the context of a share purchase agreement should be set aside on the grounds of manifest error.
According to statistics from the Vietnam International Arbitration Centre (VIAC) for the period 2020-2023, construction disputes consistently ranked among the top three most disputed areas, often involving complex technical issues. Therefore, there would be disputes with the role of expert determination over arbitration. As a result, this paper focuses on two central questions: What happens if an expert determination goes wrong; and the suggests for Vietnam when drafting the Expert Determination Clause? Accordingly, the author will introduce the ICC's Rules for the Administration of Expert Proceedings 2015
This study aims to provide a comparative analysis of expert determination practices in Vietnam, the United Kingdom, and Austria, offering recommendations for the Vietnamese legal framework on expert determination, especially regarding its enforcement and potential grounds for setting aside determinations.

Keywords: Expert determination, Alternative dispute resolution, Enforcement.

1 The concept of Expert Determination – Perspectives from England and Wales, Australia and Vietnam

1.1 Defining Expert Determination

Expert determination is a dispute resolution mechanism particularly suitable for matters involving technical expertise, such as the valuation of company shares, price adjustment calculations in M&A transactions, or quality assessments in construction and infrastructure projects.[1] This is distinguished from non-binding forms as expert appraisals, expert assessments used along with the arbitral process.[2] The core of the expert determination mechanism focuses on the role of experts who shall be engaged by the parties to act as a valuer, assessor, or certifier, depending on the nature of the dispute. Lord Esher MR in Re Dawdy (1885) explained the difference between an arbitrator and an expert is that while the arbitrator follows the judicial laws to hear parties and evidence, the expert is appointed to make valuation solely by his knowledge and skill.[3] He then concluded "*The expert is using the skill of a valuer, not of a judge*".

There are differences between the Expert determination and Dispute boards. In Expert determination, a single neutral expert is appointed to hear and assess evidence from both parties and to render a decision on a defined issue, typically technical, financial, or quantitative in nature. Despite sharing many similarities, the Dispute Board is a group of experts who are selected by the contract parties from the execution to the conclusion of the contract. The Dispute Board gets familiar with the terms, context, and subject matter of the project. Dispute boards are commonly used in long-term and complex contracts, particularly in sectors such as construction and infrastructure.[4] In summary, while Expert determination is used for specific technical or specialized matters, the Dispute Board consists of a panel of experts that could be appointed at the beginning of the contract and become familiar with the contract and the project.[5]

Expert determination is distinct from Adjudication. According to the UNCITRAL Model Clause on Adjudication 2024, adjudication is a form of alternative dispute resolution where an adjudicator makes a determination through a simplified procedure and within a short timeframe.[6] If a party disagrees with the adjudicator's determination, they may refer some or all of the dispute to arbitration. However, they must abide by the adjudicator's determination unless the arbitration reaches a different resolution. Adjudication is commonly used in substantial construction contracts. In England and Wales, adjudication is a statutory process for construction disputes, meaning it can be used as a dispute resolution method in construction contracts.[7] As a result, the adjudicator's decision is final and binding, like a court judgment.

In 2024, UNCITRAL also introduced its Model Clause on Technical Advisers. Similarly to Expert determination, Technical Advisers are used in specialized, technical types of disputes.[8] However, unlike independent Alternative Dispute Resolution (ADR) methods, Technical Advisers provide opinions that are advisory in nature and not final or binding. Their primary role is to assist the arbitral tribunal in understanding the technical aspects of

[1] Doug Jones, 'Is Expert Determination a "Final and Binding" Alternative?' (1997) 63 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 213, 215.

[2] Douglas Jones, 'Expert Determination and Arbitration' (2001) 67 The Journal of the Chartered Institute of Arbitrators 17

[3] Re Dawdy [1885] 15 QBD; 54 LJQB 574; 53 LT 800 cited in Doug Jones (n 1) 214.

[4] 'What Is Dispute Resolution' (*The Chartered Institute of Arbitrators*) <https://www.ciarb.org/dispute-services/what-is-dispute-resolution/> accessed 26 March 2025.

[5] The 2017 2nd Edition of FIDIC Red Book, Yellow Book, and Silver Book.

[6] 'UNCITRAL Model Clause on Adjudication' (*United Nations*, 2024) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf> accessed 27 March 2025.

[7] 'What Is Dispute Resolution' (*The Chartered Institute of Arbitrators*) <https://www.ciarb.org/dispute-services/what-is-dispute-resolution/> accessed 26 March 2025.

[8] 'UNCITRAL Model Clause on Technical Advisers' (*United Nations*, 2024) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc_techadvisers_2419437e-ebook.pdf> accessed 27 March 2025.

the dispute, primarily through explanations. Notably, Technical Advisers differ from Experts appointed by the arbitral tribunal (already governed by Article 29 of UNCITRAL Arbitration Rules). While experts appointed under Article 29 prepare written reports and offer opinions on the issues the tribunal must resolve, the role of a Technical Adviser is more limited. The Technical Adviser's function is confined to helping the tribunal better understand the technical issues raised by the parties, including those presented by the expert appointed by the tribunal.[9]

In 2001, Professor Doug Jones, an International Judge of the Singapore International Commercial Court (SICC), referenced various expert determination clause models in Australia, which includes: Head Contract for the Construction of Facilities standard contract (1993),[10] The Property Council of Australia Standard Form Contract,[11] New South Wales Government's C21 Construction Contract Condition (1996).[12] Currently, the Queensland Law Society also introduces the ADR Practitioners with the Model Clause for Expert Determination.[13] Under these frameworks, expert determination is described as a contractual process whereby parties agree to appoint a qualified expert to resolve a specific dispute. The expert's determination may be either final and binding or non-binding, depending on the parties' agreement.

1.2 The differences between Expert Determination and Arbitration – The enforcement of Expert Determination

1.2.1 The Courts' refusal to accept cases in which there is an expert determination clause?

In arbitration, courts have the authority to stay proceedings to allow arbitration to proceed, thereby ensuring the enforceability of arbitration agreements. However, the court lacks statutory framework for staying court proceedings to allow the expert determination to proceed without interference.[14] In *Barclays Bank v Nylon Capital (2011)*, Thosmas LJ contends that "*expert determination is a very different form of dispute resolution to which neither the Arbitration Act 1996 nor any other statutory codes apply*".[15]

For example, in the Law on Commercial Arbitration 2010 ("**LCA 2010**") of Vietnam, in case the disputing parties have reached an arbitration agreement, but one party initiates a lawsuit at a court, the court shall refuse to accept the case, unless the arbitration agreement is invalid or unenforceable.[16] However, there is no provision in Vietnamese law providing that the court shall stay proceedings where the parties have agreed an expert determination clause in their contract.

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[9] Explanatory notes, paragraph 1.1, ibid.

[10] Currently, Head Contract Template of the Department of Defence of Australia Government has been updated with Clause 15.2 (Expert Determination): "*Unless otherwise agreed between the parties, to the extent the dispute or difference is in relation to a direction of the Contract Administrator under one of the clauses specified in the Contract Particulars and is not resolved within 14 days after a notice is given under clause 15.1, the dispute or difference must be submitted to expert determination*.", 'Head Contract Templates' (Department of Defence (Australia Government), 2024) <https://www.defence.gov.au/business-industry/procurement/contracting-templates/suite-facilities-contracts/head-contract-templates> accessed 26 March 2025.

[11] Sergio Capelli, The Property Council Of Australia Standard Form Contract - A User's Guide, <https://classic.austlii.edu.au/au/journals/AUConstrLawNlr/1999/31.pdf>, assess 26 March 2025. Article 15 (Disputes): "*PC-I's dispute resolution provisions include expert determination, executive negotiation, and commercial arbitration…15.3. In the event that a dispute or difference arises in relation to one of those specified directions, the dispute is submitted to expert determination by a pre-agreed industry expert or by such independent industry expert appointed by a pre-agreed person. The expert determination is expressly stated not to be an arbitration and the expert is not to perform the functions of an arbitrator*."

[12] C21 Conditions of Contract, https://www.austlii.edu.au/au/journals/AUConstrLawNlr/1996/95.pdf, assess 26 March 2025.

[13] 'ADR Practitioners - Model Clause for Expert Determination' (*Queensland Law Society*) <https://www.qls.com.au/Practising-law-in-Qld/ADR/Alternative-Dispute-Resolution/ADR-Practitioners> accessed 26 March 2025.

[14] Margaret J. Hughe, 'Expert Determination: A Suitable Dispute Resolution Technique for Offshore Construction Project Disputes? Part II' (2004) 3 Journal of International Trade Law and Policy 3, 7.

[15] Barclays Bank v Nylon Capital [2011] EWCA Civ 826.

[16] Article 6 of LCA 2010.

In England and Wales, in *Thames Valley Power Ltd. V Total Gas & Power Ltd (2005)*, the judge declined to grant a stay so that the dispute could referred to expert determination because (i) the issue was related to the interpretation of an agreement, which had already been examined and concluded by the court; (ii) using an expert could lead to duplication of effort and unnecessary costs; and (iii) it could cause unnecessary delays. The court concluded that the appointment of a nominated expert should depend on suitability.[17]

In Australia, the court have the tendency to enhance the autonomy of parties in the contract. Accordingly, the court would not interfere in the expert determination agreements unless the expert acted beyond his jurisdiction set out in the contract.[18] In *Bauldersrone Hornibrook Engineering Lrd v Kuyah Holding Pry Lrd (1997)*, the Supreme Court of Australia declared an expert determination was void because the case involved complicated questions of law, which is not suitable for an expert determination as a dispute resolution.[19]

1.2.2 The interaction of court in appointing experts

The expert determination clause becomes ineffective if the parties are unable to mutually agree on the appointment of an expert. In arbitration, however, the court or the arbitration center may intervene and assist when such a situation arises. Under the UNCITRAL Model Law on Commercial Arbitration (Model Law), any party can request the court to take necessary measures if the parties cannot agree on the appointment procedure (including the appointment of arbitrators or an arbitration institution).[20]

For example, in Vietnam, for ad-hoc arbitration, unless otherwise agreed by the parties, the claimant may request a competent court to designate an arbitrator for the respondent if he fails to select an arbitrator.[21] Regarding institutional arbitration, unless otherwise agreed by the parties, the president of arbitration center shall appoint an arbitrator for the Respondent if he fails to select on his own within the time limit.[22] Such provisions is to enhance the efficiency of the arbitration process when there is a party delay or do not attend the arbitral process on purpose.

However, similar provisions do not exist for expert determination. This raises the question of whether the court has the authority to "fill the gap" in such situations. The answer to this depends on the statutory legislation of each country, presenting a challenge to the practice of expert determination. For example, in Queensland Law Society in Australia, under its Model Clause for Expert Determination, the parties may agree to appoint a particular expert. Failing agreement between the parties, either party may request the President for the time being of the Queensland Law Society to appoint the expert. [23]

1.2.3 The independence and impartiality of an expert

In Vietnam there are no requirements regarding the qualifications of an expert. Under the Commercial Arbitration Law 2010 (LCA 2010), an arbitrator shall be independent, objective, and impartial[24] as well as satisfy all criteria of an arbitrator required under Article 20 of LCA 2010. However, there is no similar provision applied to an expert. This thus begs the question about the independence and impartiality of an expert if he acts as an audit expert to value shares in a company which he has a close connection with the shareholders, or if he acts as a certifier in a construction dispute which he has a close connection with the building owner. The independence and impartiality of experts are essential as they serve as grounds for challenging the experts or invalidating their determination.

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[17] Thames Valley Power Ltd. v Total Gas & Power Ltd. [2005] EWHC 2208 (Comm)

[18] Douglas Jones, 'Expert Determination and Arbitration' (2001) 67 The Journal of the Chartered Institute of Arbitrators 17, 22.

[19] The Supreme Court of Australia Bauldersrone Hornibrook Engineering Lrd v Kuyah Holding Pry Lrd (1997)

[20] Article 11.4 of UNCITRAL Model Law

[21] Article 41.1 of LCA 2010.

[22] Article 40.1 of LCA 2010.

[23] Clause 1.4 (Appointment of expert), 'ADR Practitioners - Model Clause for Expert Determination' (n 13).

[24] Article 4 of LCA 2010.

In England and Wales, if an expert is found to have actual bias, the court may set aside the expert determination.[25] In *Marco v Thomson (1997)*, Rober Walker J stated that when assessing a decision made by an expert, as opposed to an arbitrator (who has quasi-judicial powers), the court will focus on "actual partiality" rather than just the "appearance of partiality".[26] f the court only considers the appearance of partiality, an auditor with a long-standing relationship with one of the parties to the contract could be unfairly disadvantaged in continuing their professional duties to their clients.

1.2.4 The enforcement of an expert determination – What happens if an expert determination goes wrong?

There is no universal convention for the international enforcement of expert determinations, in contrast to arbitration, which is governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958). Under the New York Convention, arbitral awards can be recognized and enforced in contracting states.

In practice, as noted by Douglas Jones, international organizations often use expert determination as a binding interim dispute resolution method, allowing parties to move to arbitration if they wish to challenge or enforce an expert determination.[27] The Dispute Board clause in FIDIC Red Book shares same approach at Clause 20.7 providing that failure to comply with Dispute Board's decision, then the other party may refer the dispute to arbitration under its Clause 20.6.

Domestically, expert determination can be viewed as a contractual matter. If a party fails to comply with the expert's decision, the prevailing party may bring the case before a competent court or arbitration due to a breach of contract, seeking to enforce the value of the expert determination as an outstanding debt. Therefore, while the contractual text may state that the expert determination is final and binding, the court will not enforce it if there is fraud, a serious mistake of law, or if it contravenes public policy.[28]

An expert has no authority to make a binding decision on a dispute unless such authority is explicitly conferred by the parties. In England and Wales, there is no specific legislation governing expert determination. The jurisdiction of an expert is defined by the express terms of the contract between the parties. As such, the court will not enforce an expert determination if (i) the decision was made by someone else other than the expert selected by the parties, (ii) the expert exceeded its jurisdiction, (iii) the expert materially departed from instructions from the parties.[29]

For instance, in Austria and Germany, expert determinations may be set aside if they are clearly incorrect. For an error to be deemed "obvious," it must be easily detectable. Additionally, the error must deviate by at least 10%, with a 25% margin typically required to justify legal intervention in practice.[30] These standards are indicative and offer considerable flexibility in their application. Similarly, in Switzerland, courts apply a comparable standard, requiring a deviation of at least 25%.[31]

In England & Wales, the court could grant summary judgement to enforce expert determination.[32] An expert determination could be challenged on limited grounds:

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[25] Adham Kotb, 'Alternative Dispute Resolution: Arbitration Remains a Better "Final and Binding" Alternative than Expert Determination' (2017) 8 Queen Mary Law Journal 125, 131.

[26] Marco v Thomson [1997] 2 BCLC 354.

[27] Douglas Jones (n 18) 24.

[28] Margaret J. Hughe (n 14) 10.

[29] Filip De Ly and Paul-A. Gélinas, 'Chapter 2 Expert Determination', *The common law perspective, Dispute Prevention and Settlement through Expert Determination and Dispute Boards* (ICC Institute Dossier XV 2017).

[30] C Klausegge, 'Chapter III: Ad Hoc Expert Determination – Useful Tool or "Too Much of a Headache"', *Austrian Yearbook on International Arbitration* (2013). Cited in Wolfgan Peter and Daniel Greineder, 'Conflicts between Expert Determination Clauses and Arbitration Clauses', *The Guide to M&A Arbitration* (5th edn, Global Arbitration Review 2024) 42.

[31] Swiss Supreme Court decision ATV N29 III 535, c. 2.N• R Tsch:ni, U Vrey and J Möller, op. cit. note 6, NNN

[32] Filip De Ly and Paul-A. Gélinas (n 29).

(i) **Excess of jurisdiction:**
An expert generally does not have the authority to decide questions of law, such as interpreting the contract. The court will assess whether the expert could rule on legal questions by considering: (i) whether the contract specifies which matters can be adjudicated by the expert; (ii) whether the expert's interpretation aligns with the parties' intention; and (iii) the legal qualifications of the expert.

(ii) **Material departure from the terms of the contract:**
For example, if the appointment or nomination of the expert goes against the parties' agreements or if the expert misinterprets the terms of the contract. Filip Dely and Paul A Gelinas stated that "*When the contract says very little about what the expert must do, it will be harder to allege that the expert has failed to act in accordance with the requirements of the contract*".[33]

(iii) **Error of law:**
If an expert answers the wrong question due to negligence, the determination will not be binding. Accordingly, the decision is not binding. In Nikko Hotel (UK) Ltd v. NEPC plc (1991), the English court stated that if an expert answers a question incorrectly, their decision is binding. However, if the expert answers the wrong question altogether, the decision will be null and void.[34] This means that the expert's role is limited to answering the questions agreed upon by the parties. If the expert answers a question outside of their jurisdiction, they may be deemed to have made an error of fact or law.[35] Courts will not intervene unless the expert materially departs from their instructions, such as when they incorrectly value an asset.[36]

(iv) **The expert is not independent:**
Experts must not act fraudulently or collude with one of the parties. While there is no uniform rule requiring experts to be independent and impartial, if an expert's conduct gives rise to justifiable doubts about their independence or impartiality, and appears biased, their decision can be challenged.

(v) **Unfair process:**
As Adham Kotb notes, the principle of due process in arbitration is connected to the principles of natural justice in common law jurisdictions, including: (i) the right to be heard (audi alteram partem) and (ii) no person may be a judge in their own cause (nemo judex in causa sua). Kotb argues that the "right to be heard" is not applicable in expert determination.[37]. In *AMEC Civil Engineering Ltd v Secretary of State for Transport (2005)*,[38] the Highways Agency submitted its opinion to the expert, but the expert did not allow AMEC the opportunity to make submissions before issuing the determination. The Court of Appeal concluded that the expert was not required to provide AMEC an opportunity to respond, as the principles of natural justice do not apply to expert determination. Consequently, there is no uniform standard for assessing the fairness of an expert determination process, which depends on the interpretation of the national court.

2 Why Expert Determination? The combination of Expert Determination and Arbitration in Multi-tiered Dispute Resolution Clause

Despite the disadvantages of expert determination mentioned above, expert determination when combined with arbitration throughout a multi-tiered dispute resolution clause could maximize its advantage.[39] Accordingly, the

[33] ibid.
[34] Nikko Hotel (UK) Ltd v. NEPC plc (1991) 28 EG 86.
[35] Adham Kotb (n 25) 128.
[36] Jones v Sherwood [1992] 1 WLR 277
[37] Adham Kotb (n 25) 128.
[38] AMEC Civil Engineering Ltd v Secretary of State for Transport [2005] 1 WLR 2339.
[39] Douglas Jones (n 18) 27.

expert determination would be the first filter before arbitration, in which complex and technical dispute has been resolved before arbitration. This would reduce the pressure on the arbitrator to solve the problems and save extra expenses and time. Furthermore, parties may have motivations to negotiate after receiving expert determination. That is to say, regarding expert determination, parties seem more likely to achieve a commercial rather than legal settlement. If practice, in M&A disputes, an expert is appointed by the parties to value companies or shares, or to set the final purchase price. Most M&A transactions are complicated so that the contract may not be clear as to the price adjustment mechanism.[40]

The expert determination is cost-effective and speedy to solve technical problems in complex contracts that an arbitrator may ask for an expert witness' assistance besides hearing and examining the evidence submitted by disputed parties. However, arbitration is praised for its certainty, efficiency, and fairness with the support from harmonized instruments such as the New York Convention 1958.

Furthermore, in arbitration, parties or arbitrators shall appoint a requisite expert when deciding complex technical issues which may require specific knowledge or experience. The process of appointing an expert witness is not simple, which requires mutual agreements among parties and the jurisdiction of an arbitrator to hear and examine the evidence provided by the expert.[41] It is not to mention that the arbitrator may need hot-tubbing, expert cross examination, witness statements or even evidence hearing. Douglas Jones opined that in Asia, confrontational dispute resolution is traditionally avoided, so that the expert determination has a potential to develop as an alternative.[42]

A dispute in the construction or M&A sector involves many aspects that need to be addressed, ranging from contract interpretation, examining whether the parties have fulfilled their contractual rights and obligations, to specific issues such as payment terms, construction milestone completion for construction contracts, and precedent conditions for M&A agreements. Additionally, there are matters related to damage and their quantum. Requiring an expert who may not be trained in law to resolve these issues could be an unreasonable expectation. However, if expert determination is considered as a filtering mechanism for technical and specialized issues, this is a reasonable expectation.

For example, when an expert decides on a construction dispute related to an unforeseen incident, where both parties claim the other is at fault. After the expert determines who is at fault, or how the fault is to be allocated between the parties, both sides will respect the expert's determination and engage in good-faith negotiations. Even if one of the parties disagrees and initiates arbitration, the tribunal would be relieved from acting as an expert or having to appoint another expert, thus avoiding unnecessary delays in the dispute resolution process.

3 The suggestions for Vietnam when drafting Expert Determination Clause – Insights from ICC's Rules for the Administration of Expertise Proceedings 2015

In Vietnam, expert determination is not popular. Normally, experts will appear as expert witnesses in arbitration proceedings. Furthermore, there are no explicit regulations on how to conduct and enforce the expert determination in Vietnam. However, according to statistics from the Vietnam International Arbitration Centre (VIAC) for the period 2020-2023,[43] construction disputes and M&A consistently ranked among the top four most disputed areas, often involving complex technical issues. Therefore, expert determination will soon appear in contracts, especially cross-border transactions, as an alternative dispute resolution besides arbitration.

[40] Wolfgan Peter and Daniel Greineder (n 30).

[41] 'International Arbitration Practice Guideline on Party-Appointed and Tribunal-Appointed Experts' (*The Chartered Institute of Arbitrators*) <https://www.ciarb.org/media/zvijl3kx/7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf>.

[42] Douglas Jones (n 18) 27.

[43] VIAC Annual Report 2023, https://www.viac.vn/images/Resources/Annual-Reports/2023/Bao-cao-thuong-nien-2023---EN_240829.pdf

Currently, the Dispute Boards is regulated by the Decree No. 37/2015/ND-CP on construction contract and Law on Construction 2015 as a dispute resolution method,[44] if a party does not agree with the determination from the Dispute Board, it could bring its dispute to arbitration or court. Otherwise, the result shall be deemed as agreed by the parties.[45] However, unlike the Dispute Boards, Expert determination is legally unclear of how to enforce in Vietnam. Notably, expert determination is a contract in nature. Therefore, an expert determination could be deemed as a contract under Article 385 in Civil Code 2015 of Vietnam. If a party breaches the expert determination, the other could bring their case to the court or arbitration due to breach of contract. If parties carefully draft expert determination cause and consider combining it as the first tier before arbitration in multi-tiered dispute resolution clause, the disadvantages of expert determination could be reduced.

According to the instruction of GAR (Global Arbitration Review), a well-drafted expert determination clause should identify the expert's functions. That is to say, the clause should define the mandate or authority of an expert "precisely and narrowly" such as to identify the liability issues or damage quantum in construction disputes.[46] That is to say, the expert determination clause should not push an expert into making complex legal reasoning such as interpreting the legal norms, torts and so on. Additionally, the clause should briefly describe the procedural rules of (i) the number of experts, (ii) whether members of a panel of experts may reach the majority decisions, possible timeline or cost allocation.

In 2015, ICC published its Rules for the Administration of Expertise Proceedings ("The Rules").[47] When disputes happen, parties may refer to an expert providing their findings on specified issues through expert proceedings administered by the ICC. The Rules cover the selection of experts, the impartiality and independence of experts, the replacement, procedural timetable, duties and responsibilities of the parties and experts and so on.

Accordingly, ICC has suggested four model clauses referring to the Rules when Parties want to draft expert determination,[48] in which Clause C is appropriate when the parties want to be contractually bound by the expert's findings:

- **Clause A (Optional administered expert proceedings)**: "*The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with [clause X of the present contract] to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce*."
- **Clause B (Obligation to submit dispute to non-binding administered expert proceedings)**: "In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce."
- **Clause C (Obligation to submit dispute to contractually binding administered expert proceedings):** "In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. The parties agree that the findings of the expert shall be contractually binding upon them."
- **Clause D (Obligation to submit dispute to non-binding administered expert proceedings, followed by arbitration if required)**: "In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert

[44] Article 146.8.b of Law on Construction 2014.

[45] Article 45.2.b of Decree No. 37/2015/ND-CP.

[46] Wolfgan Peter and Daniel Greineder (n 30).

[47] The ICC Rules for the Administration of Expert Proceedings 2025, https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/experts/administration-of-experts-proceedings/rules-for-the-administration-of-expert-proceedings/

[48] 'Suggested Clauses Referring to the ICC Rules for the Administration of Expert Proceedings' (*ICC - International Chamber of Commerce*) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/experts/administration-of-experts-proceedings/suggested-clauses-referring-to-the-icc-rules-for-the-administration-of-expert-proceedings/> accessed 28 March 2025.

proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR's notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, 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."

4 Conclusion

In conclusion, expert determination offers a specialised and efficient dispute resolution mechanism, particularly suitable for complex, technical issues in fields such as construction and M&A transactions. While it provides distinct advantages in terms of cost-effectiveness and speed, its application is not without challenges, particularly regarding its enforceability and the limitations posed by the lack of a uniform framework across jurisdictions. The comparative analysis of expert determination in various legal systems, including those of England and Wales, Australia, and Vietnam, highlights the varying levels of acceptance and the complexity of its integration into contractual agreements.

Combining expert determination with arbitration can serve as an effective filter, resolving technical issues before they escalate to full arbitration, thereby saving both time and resources. Furthermore, the need for precise drafting of expert determination clauses cannot be overstated. Clear definitions of the expert's role, authority, and procedural rules are essential to ensure the smooth functioning of this mechanism and to prevent potential disputes regarding its scope and enforceability.

In Vietnam, although expert determination is not yet widely used, its potential as an alternative dispute resolution method in cross-border transactions is evident, especially in the face of increasing construction and M&A disputes. By carefully drafting expert determination clauses and incorporating them into multi-tiered dispute resolution frameworks, parties can mitigate the disadvantages and maximize the benefits of expert determination. Adopting international standards, such as those outlined in the ICC's Rules for the Administration of Expertise Proceedings 2015, will further strengthen the legal infrastructure and facilitate the wider acceptance of expert determination as a legitimate and effective dispute resolution method in Vietnam.

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The Enforcement of Expert Determination in Construction Disputes: What happens if an Expert goes wrong? Perspectives from Vietnam, the United Kingdom, and Australia

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Construction and M&A disputes consistently ranked among the top five most disputed areas, often involving complex technical issues in VIAC

18,6%

Construction

3,3%

Shares Transfer

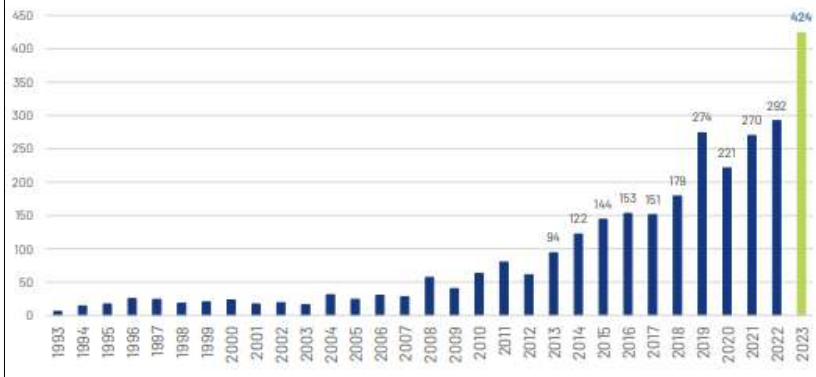
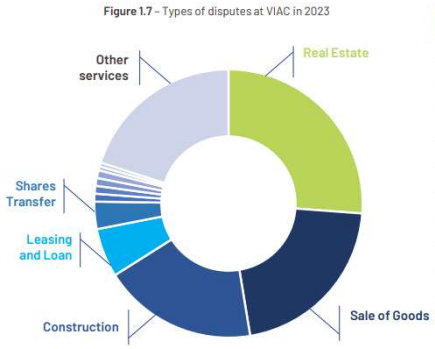


Figure 1.1 - The number of cases handled at VIAC (1993 - 2023)



Types of disputes		
1	Real Estate	26.2%
2	Sale of Goods	21.2%
3	Construction	18.6%
4	Leasing and Loan	5.9%
5	Shares Transfer	3.3%
6	Security	0.9%
7	Insurance	0.9%
8	Investment	0.9%
9	NDA, NCA	0.9%
10	Finance	0.5%
11	Logistics	0.5%
12	Other services	20%

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"The Expert is using the skill of valuer, not of a judge" (Lord Esher MR in Re Dawdy)

Expert Determination

1. The concept of Expert Determination

1.1. What is Expert Determination?

- Expert determination is a dispute resolution mechanism particularly suitable for matters involving technical expertise, such as the valuation of company shares, price adjustment calculations in M&A transactions, or quality assessments in construction and infrastructure projects (Prof. Doug Jone, International Judge of the Singapore International Commercial Court).
- Expert determination is distinguished from non-binding forms as expert appraisals, expert assessments used along with the arbitral process.
- Example of expert determination clause in Australia:
  - Head Contract for the Construction of Facilities standard contract (1993)
  - The Property Council of Australia Standard Form Contract
  - New South Wales Government's C21 Construction Contract Condition (1996)
  - The Queensland Law Society's ADR Practitioners with the Model Clause for Expert Determination

"The Expert is using the skill of valuer, not of a judge" (Lord Esher MR in Re Dawdy)

1. What is Expert Determination?

- Expert determination
- Dispute Adjudication Board (DAB)
- Technical Advisers
- Adjudication

Source:

- 'UNCITRAL Model Clause on Adjudication' (United Nations, 2024) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf
- 'UNCITRAL Model Clause on Technical Advisers' (United Nations, 2024) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc_techadvisers_2419437e-ebook.pdf>
- 'What Is Dispute Resolution' (The Chartered Institute of Arbitrators) <https://www.ciarb.org/dispute-services/what-is-dispute-resolution/>

1.2. The difference between Expert Determination and Arbitration

a. The Courts' refusal to accept cases in which there is an expert determination clause?

- In arbitration, Courts have the authority to stay proceedings to allow arbitration to proceed, thereby ensuring the enforceability of arbitration agreements (E.g.: Article 6 of Law on Commercial Arbitration 2010 of Vietnam, Article 5 of UNICITRAL Model Law)
- Whether the court shall stay proceedings where the parties have agreed an expert determination clause in their contract? **UNCLEAR!**
  - In England and Wales, The judge considers (i) the issue was related to the interpretation of an agreement, which had already been examined and concluded by the court; (ii) using an expert could lead to duplication of effort and unnecessary costs; and (iii) it could cause unnecessary delays. *(Thames Valley Power Ltd. V Total Gas & Power Ltd (2005)*
  - In Australia, the court have the tendency to enhance the autonomy of parties in the contract. Accordingly, the court would not interfere in the expert determination agreements unless the expert acted beyond his jurisdiction set out in the contract *(Baulderstone Hornibrook Engineering Lrd v Kuyah Holding Pry Lrd (1997)*

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1.2. The difference between Expert Determination and Arbitration

b. The interaction of court in appointing experts

- Under Article 11.4 of UNCITRAL Model Law, any party can request the court to take necessary measures if the parties cannot agree on the appointment pro-cedure (including the appointment of arbitrators or an arbitration institution)
- Whether the court has the authority to "fill the gap" in situations when the parties are unable to mutually agree on the appointment of an expert?
  - ➢ Cannot appoint an expert => Expert Determination Clause is meaningless.
  - ➢ Queensland Law Society's Model Clause for Expert Determination (Clause 1.4): *the parties may agree to appoint a particular expert. Failing agreement between the parties, either party may request the President for the time being of the Queensland Law Society to appoint the expert.*

1.2. The difference between Expert Determination and Arbitration

c. The independence and impartiality of an expert

- Article 4 of Law on Commercial Arbitration 2010 (LCA 2010) of Vietnam, an arbitrator shall be independent, objective, and impartial and satisfies all criteria of an arbitrator required under Article 20 of LCA 2010.
- No similar provision applied to an expert.
- For example: The question about the independence and impartiality of an expert if he acts as an audit expert to value shares in a company which he has a close connection with the shareholders, or if he acts as a certifier in a construction dispute which he has a close connection with the building owner?
  - ➢ Rober Walker J stated that when assessing a decision made by an expert, as opposed to an arbitrator (who has quasi-judicial powers), the court will focus on "actual partiality" rather than just the "appearance of partiality" *(Marco v Thomson [1997] 2 BCLC 354)*

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1.2. The difference between Expert Determination and Arbitration

d. The enforcement of an expert determination – What happens if an expert determination goes wrong?

- There is no universal convention for the international enforcement of expert determinations like New York Convention 1958 (as to arbitration).
- How to challenge or unrecognize & unenforce an expert determinations.
- Expert Determination = Contractual matter (in nature)
- If a party fails to comply with the expert's decision, the prevailing party may bring the case before a competent court or arbitration due to a breach of contract, seeking to enforce the value of the expert determination as an outstanding debt.

1.2. The difference between Expert Determination and Arbitration

d. The enforcement of an expert determination – What happens if an expert determination goes wrong?

- In England and Wales, Expert Determination would not be enforced due to some limited grounds:
  - Excess of jurisdiction
  - Material departure from the terms of the contract
  - Error of law: the English court stated that if an expert answers a question incorrectly, their decision is binding. However, if the expert answers the wrong question altogether, the decision will be null and void - *Nikko Hotel (UK) Ltd v. NEPC plc (1991) 28 EG 86*
  - The expert is not independent and impartial
  - Unfair process: the principles of natural justice - (i) the right to be heard and (ii) no person may be a judge in their own cause => Whether to apply for expert determination

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1.2. The difference between Expert Determination and Arbitration

Expert Determination	Arbitration
There is no statutory basis for stay court proceedings	The court has a statutory power of stay proceedings in favour of arbitration
The grounds for challenging/not recognizing & enforcing expert determination are not of worldwide acceptance.	Article V of New York Convention 1958 UNCITRAL Model Law (Article 34 – set aside, Article 36 – refuse recognition or enforcement)
The expert determination can be enforced contractually on the basis of a breach of contract	New York Convention 1958 and National arbitration legislation
The expert has limited power to prevent a party from manipulating the process and causing delay	The arbitrator has statutory power to combat a party's dilatory tactics

2. Why Expert Determination?

- An increasing focus on ADR
- The technical nature of disputes
- Difficulty of avoiding enforcement of a contractual expert agreement
- Difficulty of challenging an expert's decision

- International enforcement issues
- Absence of due process
- A key factor – the importance of contract – drafting matters

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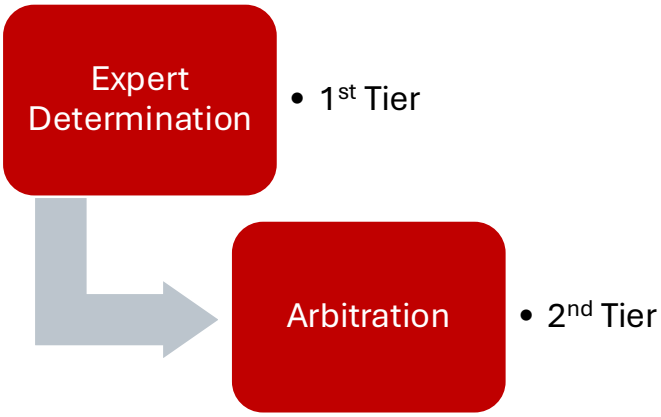
3. The suggestions for Vietnam when drafting Expert Determination Clause

3.1. The combination of Expert Determination and Arbitration in Multi-tiered Dispute Resolution Clause



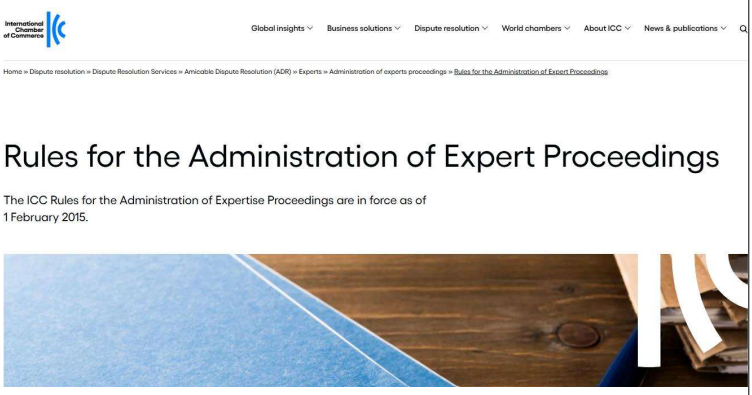
- The expert determination would be the first filter before arbitration, in which complex and technical dispute has been resolved before arbitration
- Solve technical problems + times
- Motivation to negotiate after receiving expert determination
- Expert Determination is to achieve a commercial rather than a legal settlement.

3. The suggestions for Vietnam when drafting Expert Determination Clause

3.2. Insights from ICC's Rules for the Administration of Expertise Proceedings 2015

- **Clause A (Optional administered expert proceedings)**: "*The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with [clause X of the present contract] to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce.*"

- **Clause B (Obligation to submit dispute to non-binding administered expert proceedings)**: "*In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce.*"

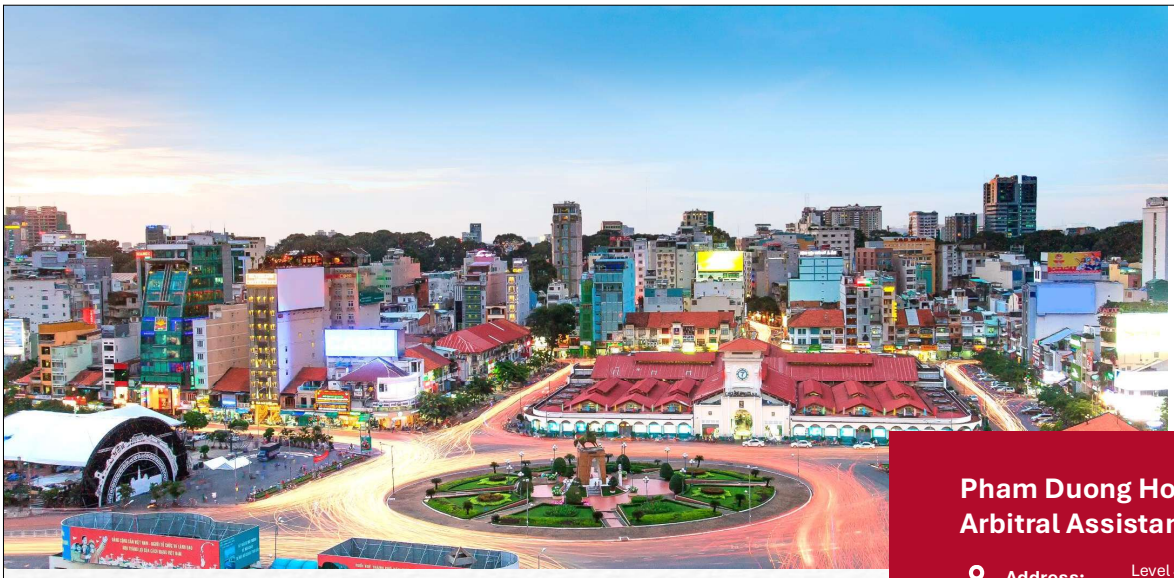


3. The suggestions for Vietnam when drafting Expert Determination Clause

3.2. Insights from ICC's Rules for the Administration of Expertise Proceedings 2015 and

- **Clause C (Obligation to submit dispute to contractually binding administered expert proceedings)**: "*In the event of any dispute arising out of or in connection with [clause X of the present con-tract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. The parties agree that the findings of the expert shall be contractually binding upon them.*"

- **Clause D (Obligation to submit dispute to non-binding administered expert proceedings, followed by arbitration if required)**: "*In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR's notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, 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.*"



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Thank you for your attention!

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1 Abstract – Maximilian Benz

1.1 Early Expert Engagement

Early engagement of expert witnesses in disputes or contentious matters provides significant strategic and procedural advantages. Engaging an expert at the outset allows parties to gain an early and independent understanding of the strengths and weaknesses of their case. This early insight can prevent the entrenchment of positions and help determine whether a claim is viable—sometimes revealing that a matter may be a "no go."

One of the most valuable benefits of early expert involvement is the ability to identify areas outside the expert's scope of expertise. This gives parties time to procure the necessary specialist input, address documentary gaps, and refine the scope of expert evidence. Moreover, it facilitates the development of a clear roadmap that outlines timelines, evidentiary requirements, and roles.

Despite these benefits, early engagement comes with responsibilities. The expert must maintain independence and avoid becoming an advocate for the client's position. Experts should not draft or develop claims on behalf of the parties; their role is to assess, not create, the substance of claims. Timeframes also need to be carefully managed to ensure that the expert has adequate time to conduct their work thoroughly and meet procedural deadlines. Commercial consistency throughout the process—between legal teams, consultants, and experts—is also essential to avoid misalignment.

Ultimately, early engagement reduces exposure to risk, enhances procedural clarity, and fosters a more efficient resolution process.

1.2 Institutional Accountability

Institutional accountability ensures that expert witnesses adhere to high standards of independence, ethics, and competence. Professional bodies such as the Royal Institution of Chartered Surveyors (RICS), The Academy of Experts (TAE), the Expert Witness Institute (EWI), and the Society of Construction Law (SCL) provide training, certification, and ethical guidelines that govern expert conduct.

RICS, for example, has introduced the "RICS Registered Expert" designation, which imposes a structured standard on expert practitioners. This designation serves as a benchmark for quality, requiring adherence to codes of conduct and procedural guidance. Non-compliance may result in disciplinary action, thereby reinforcing accountability and trustworthiness. For clients and instructing parties, this provides assurance that appointed experts are not only technically capable but also ethically and procedurally reliable.

The benefits of institutional oversight include global recognition of expertise, heightened credibility in legal proceedings, and a consistent framework for expert behaviour. Moreover, institutions such as CIArb provide codes of ethical practice and guidance on procedural conduct, reinforcing the impartial role experts play in dispute resolution.

Institutional accountability gives clients peace of mind, knowing their experts have been subject to rigorous scrutiny and are committed to the highest professional standards and promotes fairness and impartiality in the expert process providing integrity to the dispute processes.

Enhancing Project Integrity Through Early Engagement of Experts and Institutional Accountability

Maximilian Benz
Quantum Expert, SJA

ISSUES/CONTENTS

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Early Engagement – Project Perspective

- Benefits
  - Independent Expert Engagement has been seen in a number of contracts such as FIDIC.
  - This provides opportunity for an impartial, independent position.
  - Can alleviate disputes early on.
  - Either as a dispute board function or as external consultants.
  - Provides a clear road map, that allows a project to go on, Rather than get stuck in a dispute.

- Issues
  - Independence needs to be maintained – Cannot develop claims.
  - Clients / Contractors should bring well substantiated and fair claims to the table.
  - Payment of such services.
  - Contractual engagement.
  - Depending on the above then independence needs to be considered.
  - Conflicts.

Early Engagement – Disputes Perspective

- Benefits
  - Provides clear understanding of the expert witness process.
  - Allows understanding of time frames
  - Irons out issues that may be raised in relation to areas outside of their expertise.
  - Provides clear positions. The case / matter may be a no go…
  - Provides an independent opinion out of any engrained positions.
  - Allows a clear road map and irons out issues such as records etc.
  - If there are issues, then there is time to discuss these and resolve these i.e. other expertise required.
- Issues
  - Independence needs to be maintained – Cannot develop the clients claims for them.
  - Proper timeframes need to be allocated and maintained.
  - Commercial management of the matter needs to be consistent.
  - Could affect legal strategy depending on preliminary findings.
  - Conflicts

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Institutional Accountability

- RICS
  - RICS Registered Experts.
  - This course provides guidance and knowledge to experts providing a minimum standard.
  - Standards must be maintained not adhering to standards can lead to disciplinary action.
  - This creates a understanding by clients on independence, impartiality.
  - Key Benefits include:
    - Global Recognition.
    - High Professional Standards.
    - Mandates on Independence.
    - RICS Structured Approach.
    - Confidence.

- CIArb
  - Code of ethical practice.
  - Procedural awareness.
  - Trusted by legal parties.
  - Impartial mindset.

- Others
  - TAE
  - EWI
  - SCL

Summary

- Early Engagement
  - Allows for a continuation of a Project.
  - Provides who independent position to those who may be entrenched.
  - Provides clarity early in the matter.
  - Can give a good insight of a position early on that may not be known.
  - Reduces exposure to risk.

- Institutional Accountability
  - Allows for high professional standards to be adhered to.
  - Provides a peace of mind.
  - Gives clients an understanding that their experts have been through rigorous training.

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