Asia Pacific Construction Contract Management

A primer on avoiding or managing disputes in construction projects in Asia Pacific
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Introduction

Construction in Asia Pacific

In recent years, there has been an exponential growth of construction activities in Asia Pacific, driven largely by the Belt and Road Initiative (BRI) — a historic marshalling of capital and a remarkable geopolitical foray into establishing and strengthening multinational trade corridors.

With over USD 440 billion of funding provided so far by Chinese financial institutions into BRI projects, a large portion of which are situated in Asia Pacific, it's an enterprise unlike anything seen on this scale for decades. It holds tremendous opportunities for business. Yet, seizing these opportunities requires a strong understanding of the economic, cultural and regulatory conditions of regional markets. This is because such opportunity will also carry with it many potential disputes, as construction is an inherently complex and risky activity.

In anticipation of these potential disputes, it is useful for all stakeholders in a construction project (e.g., the owner/employer, the engineer/architect, the contractor/subcontractor, and the project managers) to be aware of and familiar with the various legal frameworks governing construction in Asia Pacific, as well as the common issues that arise in connection with construction projects and some of the best practices to manage, if not avoid altogether, such disputes.

Objective of this primer

While it is hoped that this will be helpful to the various stakeholders involved in construction projects in Asia Pacific, this primer is nevertheless only a high-level presentation of the various features of construction laws, and of common issues encountered in construction projects, in the Asia Pacific region. It is intended to assist parties in managing and avoiding construction-related disputes in construction projects in Asia Pacific. Given the broad range of issues that may arise from the negotiation and implementation of construction projects, this primer is not intended as a substitute for seeking legal advice.
## I. Construction in Asia Pacific: the legal frameworks

### 1. Construction defined

Within Asia Pacific, construction is defined differently under national laws. The legal definitions can range from the extremely specific to no formal definition at all. An awareness of these differences is essential to any contract management strategy.

Where the law does not define construction, a careful contractual definition is necessary to clarify its scope within the agreement.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Statutory definition</th>
<th>Contractual elements</th>
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<tbody>
<tr>
<td><strong>Australia</strong></td>
<td>There is no uniform definition. For example, the Building Act 1993 (Vic) regulates “building work” with “building” defined broadly to include structures, temporary buildings, temporary structures and any part of a building or structure. Compare that to the Building and Construction Industry Security of Payment Act 2002 (Vic), which regulates the broadly defined “construction work” as including the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not), etc.</td>
<td>There are no statutory requirements on contractual stipulations.</td>
</tr>
<tr>
<td><strong>China</strong></td>
<td>The term is defined differently in various laws. There is no uniform definition.</td>
<td>There are no statutory requirements on contractual stipulations.</td>
</tr>
<tr>
<td><strong>Hong Kong</strong></td>
<td>There is no uniform definition.</td>
<td>There are no statutory requirements on contractual stipulations.</td>
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<tr>
<td><strong>Indonesia</strong></td>
<td>Under Law No. 2 of 2017 on Construction Services (&quot;Construction Law&quot;), construction services include (i) construction consultancy services and (ii) construction work. Construction consultancy services include the entire or part of the activities that include assessment, planning, supervision and management of the construction execution. The construction work includes the construction, operation, maintenance, demolition and re-building of buildings. Construction Law and Government Regulation No. 29 of 2000 on Construction</td>
<td>The following are the mandatory provisions for construction contracts: 1. clear identity of the parties 2. clear and detailed description of the scope of work, value of work, unit price, lump sum, and limitation period 3. warranty period 4. equal rights and obligations 5. use of construction workers, to include the obligation to employ certified construction workers</td>
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<td>Jurisdiction</td>
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<td>Contractual elements</td>
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| Japan        | Services Implementation, as last amended by Government Regulation No. 54 of 2016 ("GR 29/2000") provide certain provisions that must be included in construction agreements. | 6. method of payment, including guarantee of the payment therein  
7. default, to include provisions regarding liability  
8. dispute settlement  
9. termination, to include provisions relating to non-compliance  
10. force majeure  
11. building failure and corresponding provisions on the obligations of the contractor and/or project owner and warranty period  
12. workers protection  
13. third-party protection  
14. environment-related obligation  
15. guarantee to any risk that may arise and legal responsibility to other parties in the implementation of construction work or as a result of any building failure  
16. choice of construction dispute resolution  
17. insurance  
18. experts  
19. intellectual property rights  
20. for construction contracts with foreign parties, to include obligations on transfer of technology  
21. governing law, which must be Indonesian law |
<p>| Malaysia     | Construction work is defined as the civil engineering and construction work listed on the upper column of Table 1 under the Construction Business Act of Japan. There are 29 types of construction work, such as general civil engineering work, general architectural and construction work, carpentry work, etc., listed on Table 1. | The Construction Business Act requires parties to contracts for construction work to record the items, including the amount of construction fee, the timing and methods of payment, the date for the commencement and completion of the construction work, etc., in writing, sign or affix a registered seal in order to conclude contracts in equal position for each party and implement the contracts honestly in good faith. |
| Both the Construction Industry Development Board Act 1994 (CIDB) and the Construction Industry Payment and Adjudication Act 2012 (CIPAA) define “construction work” as the construction, extension, installation, repair, | The Construction Industry Payment and Adjudication Act 2012 Circular provides guidance that there is a construction contract in writing: |</p>
<table>
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</thead>
<tbody>
<tr>
<td></td>
<td>maintenance, renewal, removal, renovation, alteration, dismantling or demolition of:</td>
<td>a) if the contract is made in writing (regardless of whether or not it is signed by the parties);</td>
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<tr>
<td></td>
<td>a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level</td>
<td>b) if the contract is made by exchange of communications in writing; or</td>
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<tr>
<td></td>
<td>b) any road, harbor works, railway, cableway, canal or aerodrome</td>
<td>c) if the contract is evidenced in writing.</td>
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<td></td>
<td>c) any drainage, irrigation or river control work</td>
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<td></td>
<td>d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work</td>
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<td></td>
<td>e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work</td>
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<td></td>
<td>and includes:</td>
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<td></td>
<td>a) any work that forms an integral part of, or is preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping</td>
<td></td>
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<tr>
<td></td>
<td>b) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e)</td>
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</table>

"Construction" refers to all on-site works on buildings or altering structures, from land clearance through to completion, including excavation, erection, assembly and installation of components and equipment.

A construction contract is considered a contract for "a piece of work." Article 1713 of the Philippine Civil Code states that "[b]y the contract for a piece of work, the contractor binds himself to execute a piece of work for the employer, in consideration of a certain price or compensation." The contractor in a contract for a piece of work may either employ only his/her labor or skill, or also furnish the material. Unless the parties provide for specific and contrary stipulations, the provisions of the Civil Code and applicable jurisprudence are deemed written into the contract.
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<tr>
<th>Jurisdiction</th>
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<tbody>
<tr>
<td>Singapore</td>
<td>Section 3 of the Building and Construction Industry Security of Payment Act (Chapter 30B) (&quot;Security of Payment Act&quot;) defines &quot;construction work&quot; as:</td>
<td>There are no statutory requirements on contractual stipulations.</td>
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<td></td>
<td>a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures (whether permanent or not) that form, or are to form, part of the land</td>
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<tr>
<td></td>
<td>b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works that form, or are to form, part of the land, including walls, roadworks, power lines, telecommunication apparatus, aircraft runways, docks and harbors, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plants and installations for the purpose of land drainage, coast protection or defense</td>
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<td></td>
<td>c) the installation in any building, structure or works of fittings that form, or are to form, part of the land, including systems of heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, and security or communications systems</td>
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<td>d) any operation that forms an integral part of, is preparatory to or is for rendering complete, works of the kind referred to in paragraph (a), (b) or (c), including:</td>
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<td></td>
<td>i) land reclamation</td>
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<td></td>
<td>ii) site clearance, earth-moving, excavation, tunneling and boring</td>
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<td>iii) the laying of foundations</td>
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<td>iv) the erection, maintenance or dismantling of scaffolding</td>
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<td>v) the prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere</td>
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<td></td>
<td>vi) site restoration, landscaping and the provision of roadways and other access works</td>
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<td></td>
<td>e) the external or internal cleaning of buildings, structures or works, so far as</td>
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<tr>
<td>Jurisdiction</td>
<td>Statutory definition</td>
<td>Contractual elements</td>
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<tr>
<td>Taiwan</td>
<td>There is no specific legal definition for “construction” for overall works under Taiwan’s jurisdiction. However, the Government Procurement Act (GPL) has a definition for construction for public works. The GPL defines construction for public works as “the activities performed above or underneath the ground for building, augmenting, altering, repairing, or dismantling structures and their respective auxiliary equipment/facilities, or reforming the natural environment, including architectural, civil, hydraulic, environmental, transportation, mechanical, electrical and chemical construction works and others as determined by the responsible entity” (Paragraph 1 Article 7 of the GPL). Given the definition above, which can be tailored and be applicable to construction for private works, the industry often regards Paragraph 1 Article 7 of the GPL as a good reference for the legal definition of construction for private works.</td>
<td>A construction agreement consists of the following elements:</td>
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<tr>
<td></td>
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<td>a) the parties</td>
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<td></td>
<td>b) the specified construction work</td>
</tr>
<tr>
<td></td>
<td></td>
<td>c) the contract price and payment terms</td>
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<tr>
<td></td>
<td></td>
<td>d) the construction period</td>
</tr>
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<td></td>
<td></td>
<td>e) the liability for a default of the construction</td>
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<td></td>
<td></td>
<td>f) the acceptance and handover of the construction</td>
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<td></td>
<td></td>
<td>g) the termination clause</td>
</tr>
<tr>
<td>Thailand</td>
<td>The Building Control Act B.E. 2522 (1979) defines “Construction” as the construction of a new entire building regardless of whether it is constructed in replacement of an old building or not. The Building Control Act B.E. 2560 (2017) for government bidding/procurement defines “Construction work” as construction work for a building, construction work for a public utility or any other structure and a repair, extension, improvement, demolition or any other act of a similar nature toward such building, public utility or structure, including a service integrated into such construction work, provided that the value of the service must not exceed the value of such construction work.</td>
<td>There are no statutory requirements on contractual stipulations.</td>
</tr>
</tbody>
</table>
“Construction” can mean either the act of building or a physical building. Both of these terms are defined by the Construction Law 2014 as follows:

a) Article 3.10 of the Construction Law: A construction work means a product created with human labor, building materials and equipment installed therein, affixed to land, which may include underground and aboveground components, underwater and above-water components, and constructed according to design. Construction works include civil works, industrial works, traffic works, agricultural and rural development works, technical infrastructure works and other works.

b) Article 3.21 of the Construction Law: Construction activities include construction planning, formulation of an investment project to construct a work, construction survey, construction design, construction supervision, project management, selection of contractors, acceptance test, handover of the work for exploitation or use, warranty and maintenance, and other activities related to construction.

Article 138 of the Construction Law 2014, which provides general regulations on construction agreements, indicates that a construction agreement must be made in writing and its language must be in Vietnamese. If a party to the construction agreement is a foreign individual/entity, parties may agree to sign the construction agreement in foreign languages, in addition to Vietnamese.

Pursuant to Article 141 of the Construction Law 2014, a construction agreement may include the following contents:

- Applicable legal bases
- Language
- Content and scale of the work
- Quality, technical requirements of the work, acceptance test and handover
- Contract implementation duration and schedule
- Contract price and payment, advance payment and currency used in payment
- Contract performance security and contract advance guarantee
- Adjustment of the contract, e.g., quantity, unit price, contract implementation progress or contractual price
- Rights and obligations of the parties
- Liability for violations of the contract, rewards and fines for violations
- Suspension and termination
- Settlement of disputes
- Risks and force majeure events
- Settlement and liquidation

2. Governing laws for the resolution of construction disputes

For most Asia Pacific jurisdictions, a mechanism is provided for in the resolution of construction disputes. However, this is not universal and care must be taken to verify if there is an existing legal framework governing construction disputes and the extent to which parties may specify a particular mode of dispute resolution in their contracts. Laws may vary from a standard recourse to litigation, to a specialized construction body or party autonomy in the choice of a tribunal. It may even be a combination of any of these.
There are numerous pieces of federal and state legislation that govern construction and the resolution of construction disputes in Australia. The following are the main acts for each state and territory:

- The Building Act 2004 (ACT)
- Environmental Planning and Assessment Act 1979 (NSW)
- Home Building Act 1989 (NSW)
- Building Act 1993 (NT)
- Building Act 1975 (Qld)
- Building Work Contractors Act 1995 (SA)
- Building Act 2000 (Tas)
- Building Act 1993 (Vic)
- Building Act 2011 (WA)

Also important are the following security of payment legislation in each state providing for an adjudication procedure to ensure proper payment to contractors and subcontractors:

- Building and Construction Industry Security of Payment Act 1999 (NSW)
- Building and Construction Industry Security of Payment Act 2002 (Vic)
- Building and Construction Industry Security of Payment Act 2009 (SA)
- Building and Construction Industry (Security of Payment) Act 2009 (TAS)
- Construction Contracts (Security of Payments) Act 2004 (NT)
- Construction Contracts Act 2004 (WA)
- Building Industry Fairness (Security of Payment) Act 2017 (QLD)

While attempts are being made at harmonization, the Australian federal system results in the need to comply with potentially different obligations in each state jurisdiction, in addition to overarching federal laws (e.g., workplace health and safety employment law, environmental approvals and security of payment).

Separate laws govern construction disputes:

- Construction law
- Tender and bid law
- Contract law
- Property law
- Urban real property administration law
- Various regulations

There are no specific laws governing construction and the resolution of construction disputes. Parties may agree on arbitration in their contracts.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Body</th>
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<tbody>
<tr>
<td>Indonesia</td>
<td>In general, construction in Indonesia is regulated under the Construction Law and its implementing regulations, which includes various regulations by the minister of public works and housing. The Construction Law provides that any dispute arising from a construction contract must be settled with the principle of deliberation with the aim to achieve an agreement. However, this is very broad and does not specify any particular form, and in general, when a dispute arises, this would be the default step taken by parties in any type of contract. The Construction Law further provides that a dispute resolution may include stages such as mediation, conciliation and arbitration, or the formation of a dispute settlement board (DSB). A DSB is defined as a team formed by the parties to prevent and mediate disputes arising from the construction contract. The Construction Law and its implementing regulations do not oblige parties in a construction contract to adopt a particular dispute resolution mechanism. In practice, the parties may agree among themselves on the forum that they wish to use in the event of a dispute. In general, contractual disputes in Indonesia can be solved by way of mediation, conciliation, arbitration or through a court proceeding. Mediation, conciliation and arbitration are governed under Law No. 30 of 1999 on Arbitration and Dispute Settlement. Civil court proceedings follow the Indonesian Civil Code and the Indonesian Civil Proceeding Code.</td>
</tr>
<tr>
<td>Japan</td>
<td>Construction disputes are primarily governed by the Construction Business Act. Public works are also governed by the Act for Promoting Proper Tendering and Contracting for Public Works and the Act on Promoting Quality Assurance in Public Works.</td>
</tr>
</tbody>
</table>
Jurisdiction | Body
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Philippines | Executive Order No. 1008 established the Construction Industry Arbitration Commission (CIAC). The CIAC has original and exclusive jurisdiction over construction disputes, which include "those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, fabricator, project manager, design professional, consultant, quantity surveyor, bondsman or issuer of an insurance policy in a construction project."

The CIAC is a hybrid of voluntary and compulsory arbitration. The Philippine Supreme Court has held that "as long as the parties agree to submit their dispute to voluntary arbitration, regardless of what forum they may choose, their agreement will fall within the jurisdiction of the CIAC, such that, even if they specifically choose another forum, the parties will not be precluded from electing to submit their dispute before the CIAC because this right has been vested by law."

If the parties did not agree to arbitration, the dispute may be resolved through the regular courts, applying the rules on civil procedure.

Singapore | The Security of Payment Act provides an adjudication process to help resolve payment disputes between parties. It gives parties a cost-effective and efficient process to seek redress for the payment of work done and services rendered.

Taiwan | Construction works can be categorized into public works and private works with separate legal regimes for each.

The public works development is a multistage process including a bidding procedure and contract performance. This results in dual governance laws for the disputes of public works, the GPL and the Civil Code. The GPL is the governance law of relevant disputes of the bidding procedure. Disputes of a contract performance are governed by the Civil Code.

The Civil Code also plays a role in the governance law of private works.

Thailand | The following laws govern construction disputes:

- The Town Planning Act B.E. 2562 (2019)

Vietnam | There are notable regulations governing construction, including:

- Civil Code No. 91/2015/QH13, dated 24 November 2015, of the national assembly ("Civil Code 2015")
- Construction Law No. 50/2014/QH13, dated 18 June 2014, of the national assembly ("Construction Law 2014"), applicable to construction work and construction activities as from 1 January 2015
- Bidding Law No. 43/2013/QH13 dated 26 November 2013, of the National Assembly ("Bidding Law 2013"), effective from 1 July 2014
Notable regulations governing construction disputes include:

- Decree No. 37/2015/ND-CP of the government dated 22 April 2015 on construction contracts ("Decree 37"), effective from 15 June 2015
- other decrees of the government and circulars of the Ministry of Construction, detailing and guiding the implementation of the Construction Law 2014

Notable decrees of the government and circulars of the Ministry of Construction, detailing and guiding the implementation of CPC 2015:

- Civil Procedure Code No. 92/2015/QH13, dated 25 November 2015, of the national assembly ("CPC 2015")
- Law on Commercial Arbitration No. 54/2010/QH12, dated 17 June 2010, of the national assembly ("Law on Commercial Arbitration")
- Decree on Commercial Mediation No. 22/2017/ND-CP, dated 24 February 2017, of the government ("Decree 22")
- Resolutions of the Council of Judges of the People's Supreme Court of Vietnam, detailing and guiding the implementation of CPC 2015.
II. Construction contracts: essential features and common issues

Where there are no stipulations required under statute, or to supplement those elements that are already required, a construction contract should set out the parties’ agreement on the following:

(a) The project’s cost/price
(b) The scope of work
(c) The time of completion and the consequences of delay
(d) Changes to work, price and time
(e) The framework for remedying defects
(f) The resolution of disputes

These aspects of a construction contract are generally the very areas where disputes commonly arise. The discussion below aims to provide stakeholders with an overview of the typical contractual provisions relating to these areas and the considerations to be taken into account when drafting them.

1. Cost/price

Parties usually choose among three types of pricing/costing: lump-sum, cost-plus, or unit price.

Lump-sum

In lump-sum pricing, the project owner pays the contractor a fixed sum for the construction of all of the works.

Given its simplicity and predictability, lump-sum costing is generally appealing to the project owner. On the other hand, a contractor that receives a lump sum might be exposed to lesser profit margins, especially if costs of materials escalate or are miscalculated. To manage this exposure, a contractor may try to bargain for the inclusion of additional grounds allowing for the increase of the lump-sum cost.

Cost-plus

Under the "cost-plus" model, the contractor will be paid the cost it actually incurred for completing the works, and a fee for providing the work, which usually corresponds to a percentage of the cost. The fee will represent the contractor’s mark-up or profit for the project.

Using the cost-plus approach provides better clarity and transparency to the project owner as to the costs incurred, as opposed to lump-sum costing. However, the downside of this approach is that it may give rise to issues as to whether a particular expense is part of the project cost. In addition, this approach may be more burdensome on the parties. The contractor will have to track and report costs more extensively, while the project owner must examine the costs to ensure accuracy.

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**Unit price**

In this method, the parties agree on an amount that will be paid for every cost type.\(^3\) This method would be appropriate for projects that are relatively homogenous, such as road tollways, expressways and railways.

Regardless of the method of computing or determining the contract cost or price, parties may contractually agree on their preferred payment terms. The typical payment terms found in construction contracts include the following:\(^4\)

(a) Advance payment: The contract may require the contractor to make an initial advance payment to help the contractor with start-up costs and payments for materials.

(b) Progress or milestone payments: The contract may provide that the contract price/cost will be paid to the contractor based on its progress or the achievement of specified milestones. For progress payments, the contractor may submit a summary of the work completed to the project owner, who will then conduct a valuation. For milestone payments, the amount attributable to the specified milestone will be paid once the same is achieved.

(c) Fixed schedule of payments: The contract may provide for the payment of the contract price in specified installments regardless of progress. While this minimizes the administrative burdens of evaluating progress or the achievement of milestones, it does not incentivize contractors to achieve progress.

2. **Scope of work**

The scope of the contractor’s work is arguably the most essential part of a construction contract. The scope can be set out in a variety of ways, although typically this can be done either through a general description in the provisions of the contract itself or through technical documents appended and integrated into the contract.

To minimize the risk of disputes, it is ideal to define the scope in a specific and itemized manner, to the extent possible, particularly with respect to the design, materials and workmanship of the project. The scope should also specify the level of the duty required of the contractor (and the project manager if any) in performing the scope of work. For instance, the contract may specify that the contractor has the absolute duty to complete the scope of work. Alternatively, it may state that the contractor only has the duty to exercise “due diligence” or “reasonable skill.”

3. **Time — completion and delays**

A construction contract should specify the time within which work must be completed. In some contracts, this is referred to as the Contract Time or Completion Time.

While it is definitely possible for a contractor to complete the work within the Contract Time, delay has always been one of the primary risks in any construction project. As such, construction contracts over the years have included remedies to mitigate the risks arising from delay, such as the payment of liquidated damages and termination for delay.

Perhaps the most common remedy for contractor delay is the payment of liquidated damages. Conceptually, liquidated damages are those agreed on by the contracting parties to be paid in the case of a breach. It may be recovered without proof of actual loss, as long as the breach that triggers the payment of liquidated damages (e.g., delay) is established.

In the context of delay, where the contractor fails to complete the work within the specified contract time, the contractor will be liable to pay the project owner liquidated damages in the amount stipulated in the contract.

\(^3\) Ibid.

\(^4\) See Pritchard and Scriven, pp. 25-27.
Parties are free to set the amount of liquidated damages payable for each day of delay. While there is no hard and fast rule as to what is considered iniquitous or unconscionable, construction industry practice sets the maximum amount of liquidated damages at 10% of the contract price.

In addition to the payment of liquidated damages, the contract may also state that the project owner may terminate the contract on account of the contractor’s delay. However, unlike the payment of liquidated damages, this remedy is exercised as a last resort since it usually results in further delays to the project. The process of replacing a contractor can be tedious.

Aside from identifying the contract time and the consequences arising from a delay in completion, contracts usually set out instances or events where delay is excused. Generally, these are events that cannot be predicted or foreseen by the parties, and are thus denominated as force majeure. In some cases, contracts can also provide for delays caused wholly or partly by the project owner as excusable.

4. Changes

Anyone who has been involved in construction projects knows that it is extremely rare to be able to carry out a project from beginning to end without any changes. Ironically, construction contracts are often accompanied by detailed timelines, milestone plans and specifications, only for these to later be changed by the parties. Given this reality, it is essential for any construction contract to set out an appropriate mechanism to allow for these changes. The two most common mechanisms are variation (sometimes known as a variation order or a change order) ("Variation") and extension of time.

**Variation**

A Variation is a change or alteration of the scope of work of a particular construction contract. A Variation may be an addition, subtraction or modification of the original scope of work. Usually, a Variation can arise under either of the following processes:

(a) The project owner itself or its representative issues a Variation. Upon issuance, the Variation will be valued by agreement of the parties or through a third party (e.g., an independent engineer).

(b) The contractor proposes a Variation to be approved by the project owner. Once approved, the Variation will then be valued by the parties by agreement or through a third party.

Thus, from the contractor’s perspective, it is essential that any Variation that would entitle the contractor to an increase in payment must be in writing and indicate the parties’ agreement.

In most cases, a Variation will not only result in an increase in the contract cost (although in some cases it can also result in reduction), but also in an extension of the contract time (or sometimes a shortening thereof). As such, regardless of how the Variation process is commenced, the contract can also provide that an approved Variation would be a ground to adjust the contract time.

Some construction contracts provide for a third party, such as a project manager or an "Engineer," who oversees the entire construction process. The contract may provide that the project manager or "Engineer" has the power to grant a Variation. For example, the 2017 edition of the FIDIC Red and Yellow Books provide that the Engineer may issue a Variation to the contractor or confirm that an earlier instruction is a Variation if the contractor gives a notice that it believes the instruction is a Variation.

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5 See Pritchard and Scriven, p. 49.
6 Id.
**Extension of time**

As mentioned above, construction contracts usually state that the works should be completed within the contract time. Nevertheless, they also recognize that, under certain circumstances, completion cannot be attained within the originally contemplated time. Consequently, contracts frequently provide for certain events that would allow the contract time to be extended without the contractor being held liable for delay.

Typical grounds for an extension of time include:

(a) Variations (see discussion above)

(b) Force majeure or events that cannot be predicted or foreseen by the parties

(c) Changes in law

(d) Delays in obtaining regulatory requirements despite the contractor taking reasonable steps to prevent such delays

Similar to a Variation, the procedure for claiming an extension of time is usually set out in detail in construction contracts. Normally, the contractor would send a written request for an extension of time to the project owner, which should indicate the ground for the extension. The contractor should also explain why the ground being cited directly causes delay, in order to increase the probability that the extension will be granted. To facilitate the preparation of such requests or claims for an extension of time, it would be strongly prudent for the contractor to be very meticulous and thorough in contemporaneously tracking the progress of the work as well as actual and potential delays.

As with a Variation, extensions of time may be granted by a designated third person in the construction contract, such as the project manager or the Engineer, instead of the project owner itself. If a claim for an extension of time is granted, the point at which liquidated damages for delay would accrue would be moved accordingly.

**5. Defects**

In the same way that it is nearly impossible to have an on-time, within-budget construction of a project, it is almost always inevitable that defects may arise during and after construction. Thus, it is extremely important that a construction contract outline the framework by which these defects are to be managed, corrected and rectified.

The parties should first consider how to define what a "defect" is. As defining defects is essentially contractual in nature, the parties can choose to use standards such as "works not carried out in a workmanlike manner" or "works not in accordance with industry standards." They can also opt not to include an express definition, in which case work will be considered defective if it does not conform to the design or workmanship provisions of the contract.

Construction contracts usually provide that during the construction period or prior to project completion, the project owner has the right to conduct an inspection of the works. Such right of inspection may include the right to uncover work that has been covered up or conduct testing of materials or completed portions of the works.

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9 See Pritchard and Scriven, p. 67.

10 Id.

project. Generally, the cost of inspection and uncovering is borne by the project owner, except if it is shown that the works inspected are defective (in which case the contractor will answer for such cost).\textsuperscript{12}

The presence of defects does not necessarily preclude completion or the handover of the project to the owner. As mentioned above, the parties, following construction industry practice, may agree to incorporate the rule of “substantial completion” (or “practical completion” as known in other jurisdictions).

For the period after completion, construction contracts typically provide for a warranty or defects liability period. During the warranty or defects liability period, the contractor is obligated to remedy defects that may arise during such period. Contractors will usually try to limit their liabilities for defects during the warranty period, but it is almost always expected that the project owner will not agree. Once the defects liability period expires, the contractor may still be held liable for the cost of the defects pursuant to applicable law, although it will no longer be obliged to remedy the defects itself.

6. Resolution of disputes

As discussed below, the current trend is to provide for preconditions to arbitration or litigation (which is usually chosen as the ultimate mode of dispute resolution) with a view to resolving disputes in a much quicker and cost-effective manner. Typically, these preconditions may constitute one or a combination of any of the following:

(a) Resolution by an engineer or contract manager

(b) Negotiation

(c) Expert determination

(d) Dispute review boards

(e) Mediation.

Unfortunately, the inclusion of these preconditions may not readily achieve its ultimate purpose unless there are definite timelines and standards in measuring whether a particular pre-condition has been met. For instance, clauses that simply provide for arbitration as the final mode of dispute resolution after “unsuccessful negotiations” may be difficult to enforce, since there are no measurable standards to define the absence of success in negotiations.

7. Frequent issues in construction projects

Many issues can arise in a complex undertaking like construction. Construction disputes most commonly involve one or more of time, quality or cost. In Asia Pacific, the following are representative examples of issues in construction projects:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Issues</th>
</tr>
</thead>
</table>
| Australia    | 1. Delay to completion  
2. Defective work or defective design  
3. Variation claims  
4. Non-payments  
5. Failure to properly administer the contract, including compliance with contractual notice provisions |

\textsuperscript{12} See Pritchard and Scriven, p. 68.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Issues</th>
</tr>
</thead>
</table>
| China         | 1. Default in payment  
                        2. Time claims  
                        3. Quality claims  
                        4. Rising costs claims                                                                 |
| Hong Kong     | 1. Claims for time and cost for variation and additional works  
                        2. Non-compliance with the terms of agreement, particularly delays in completing the works |
| Indonesia     | 1. Delay in completing the work  
                        2. Construction not in accordance with the specifications or defective  
                        3. Disagreement in variation of contract                                                                 |
| Japan         | 1. Poor contract drafting  
                        2. Non-compliance with the terms of the agreement  
                        3. Insufficient documentation  
                        4. Failure to determine actual progress  
                        5. Payment between contractors and subcontractors in construction agreements |
| Malaysia      | 1. Payment issues, e.g., non-payment or delayed payment by the employer and conditional payment clauses  
                        2. Delay issues, e.g., entitlement to an extension of time and entitlement to liquidated ascertained damages  
                        3. Defect issues, e.g., latent defects and defects arising during the defects liability period |
| Philippines   | 1. Poor contract drafting  
                        2. Non-compliance with the terms of the agreement  
                        3. Insufficient documentation  
                        4. Failure to determine actual progress  
                        5. Acceptance and waiver of claims for delay  
                        6. Application of industry practices  
                        7. Jurisdiction for the resolution of disputes                                                                 |
| Singapore     | 1. Payment disputes resulting from unpaid invoices or payment delays  
                        2. Liquidated damages from late or non-performance of the obligations under a construction agreement  
                        3. Construction defects  
                        4. Variation claims  
                        5. Omissions                                                                                                                                 |
Asia Pacific Construction Contract Management

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>6. Acceleration of works</td>
</tr>
<tr>
<td>Taiwan</td>
<td>1. Poor contract drafting</td>
</tr>
<tr>
<td></td>
<td>2. Non-compliance with the terms of the agreement</td>
</tr>
<tr>
<td></td>
<td>3. Insufficient documentation</td>
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<tr>
<td></td>
<td>4. Failure to determine actual progress</td>
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<tr>
<td></td>
<td>5. Extension of construction period</td>
</tr>
<tr>
<td></td>
<td>6. Deduction of contract price due to contract change and/or difference in opinion on the quality of the construction</td>
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<tr>
<td></td>
<td>7. Improper contract change order</td>
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<tr>
<td></td>
<td>8. Delay in construction work</td>
</tr>
<tr>
<td>Thailand</td>
<td>1. Failure to determine actual progress/delay</td>
</tr>
<tr>
<td></td>
<td>2. Non-compliance with the terms of the agreement</td>
</tr>
<tr>
<td></td>
<td>3. Poor contract drafting</td>
</tr>
<tr>
<td>Vietnam</td>
<td>1. Poor contract drafting</td>
</tr>
<tr>
<td></td>
<td>2. Non-compliance with the terms of the agreement</td>
</tr>
<tr>
<td></td>
<td>3. Insufficient documentation</td>
</tr>
<tr>
<td></td>
<td>4. The terms of the agreement are not consistent with relevant regulations of construction laws</td>
</tr>
<tr>
<td></td>
<td>5. Management of construction projects involving government capital or state authorities</td>
</tr>
</tbody>
</table>
III. Avoiding or managing construction disputes: best practices and considerations

Construction disputes are probably among the most complex types of disputes, especially given the large scale of the work, the number of parties involved, the volume of the documents and reports usually prepared in the course of a particular project, and various other factors. They also cost the parties significant time and money, and cause delays in the completion of the project.

Given these considerations, it is essential for the parties to a construction contract to carefully manage and administer the performance of the contract and incorporate mechanisms to avoid disputes. This section sets out a number of best practices that the parties may consider applying in their respective construction contracts.

1. Choosing the right contractual form/framework

Perhaps one of the most important practices in preventing disputes is to select the right contractual form or framework. This will depend on the most appropriate method in constructing and delivering the project. These methods include design-build (DB), design-bid-build (DBB) and construction manager at risk.  

1.1 Design-build

In a DB project, the project owner contracts with one entity/contractor to deliver the project from beginning to end. In this scheme, pricing changes are seldom and may occur only when there are unknown conditions or if the project owner requests such change. The DB method is usually used when time is of the essence for the project and there are no substantial issues regarding project design.

1.2 Design-bid-build

The most traditional of all project methods, a DBB scheme separates the design and the construction process.

At the start, an architect or engineer is hired by the project owner to create the project design. After the design documents are completed, the project owner will issue a bid tender requesting contractors to submit proposals for the construction based on the design.

The DBB method usually works for simple, low-budget projects that are not under strict time constraints. However, the downside is that there is a risk of increased cost during construction since the contractor might not be able to fully carry out the construction based on the design specifications.

1.3 Construction manager at risk

In this method, the project owner engages a construction or project manager who will exercise overall supervision, management and coordination over the project. Typically, the design and the construction of the project under this method are contracted separately.

The construction or project manager provides input on all aspects of the project, such as design, cost and timeline. It may also be engaged in the procurement of contractors for particular project phases. This method is appropriate for large complex projects where the oversight of a project manager is highly recommended.

To aid contracting parties in adopting the right form of contract for their chosen project delivery method, a number of standard forms have been created by various construction organizations and associations. Foremost and perhaps the most well known are the FIDIC Suite of Contracts written by the FIDIC.

Other known standard forms of contract in the market are the NEC Contracts and the Joint Contracts Tribunal Standard Forms of Contract.

2. Contract drafting

As with all other contracts, disputes arising from construction contracts can be avoided and prevented through the very careful drafting of clauses. Given the complex nature of a construction project and the numerous variables that may arise during contract implementation, it is best practice to include strict controls and procedures in the contract, especially in respect of the areas where issues commonly arise.

For instance, and as discussed above, parties frequently encounter issues relating to changes in the scope of work, the contract time and the contract cost/price. To minimize disputes arising from these changes, there should be contractual clauses stating that changes or instructions to effect changes initiated by the project owner be in writing. Similarly, the contract should state that changes proposed by the contractor can only be implemented with the express written approval of the project owner.

Taking this a step further, and to remove any doubt as to the existence of the project owner’s approval, the parties can agree that particular standard approval forms must be used by the project owner.

Moreover, to avoid disputes relating to possible inaction by the project owner on the contractor’s proposal for changes, the parties may wish to expressly agree that inaction of the project owner within a specific period will be deemed an approval that can no longer be questioned by the project owner.

Another area where careful drafting can help prevent disputes relates to a delay in project completion. A project owner that would like to require full completion within the contract time may wish to insist a provision stating that: (a) the project must be fully completed within the contract time; and (b) for the purposes of determining delay and liability for liquidated damages, the rule expressed in some court decisions that 95% completion is “substantial completion” does not apply. Such a clause would also remove doubts regarding the start and duration of the warranty or the defects liability period, should the contract provide for one.

With respect to the contract costs, the contract should provide for clear steps for invoicing/valuation (especially for cost-plus and unit price projects) and payment. For example, in a cost-plus contract, there should be a provision setting out the specific requirements and procedures that the contractor should follow in order to substantiate the costs being claimed and obtain payment therefor.

3. Adopting an effective and enforceable dispute resolution process

Arbitration is a recommended mechanism for resolving disputes in construction contracts, since it:

(a) is speedier compared to court litigation

(b) allows parties to choose or craft the rules that will govern the proceedings

(c) affords parties the opportunity to choose arbitrators that are knowledgeable in the subject matter.

The current trend is to provide for preconditions to arbitration or litigation with a view to resolving disputes in a much quicker and cost-effective manner. The parties have the freedom to set their preferred pre-conditions, otherwise known as tiers of the dispute resolution process. The most typical of these are:

(a) resolution by an engineer or contract manager

(b) negotiation
Below is a brief survey of available mechanisms for dispute resolution in Asia Pacific.

3.1 Resolution by engineer or contract manager

The construction contract may provide for the appointment of an engineer before whom any dispute or claim will be first referred for resolution. The contract can provide for the scope of the engineer's authority, but these would usually cover all technical issues during the project. The engineer may also be given administrative authority to issue certifications of compliance with technical specifications, which can be questioned further in arbitration or litigation.

The main criticism about this option is that the engineer's independence is subject to question, given the project owner's role in appointing and compensating the engineer. As a result, contracts nowadays are less likely to provide the engineer a role in resolving disputes.

3.2 Negotiation

Another possible pre-condition to arbitration or litigation is requiring the parties to engage in high-level negotiations within a definite period. Normally, contracts will state that each party has the duty to designate or appoint one of its senior officers to represent it in the negotiations.

However, to be an effective and enforceable pre-condition, the contract should provide for a definite negotiation period, the lapse of which will entitle any party to commence arbitration or litigation should no amicable settlement be had.

3.3 Expert determination

The parties can provide that a particular set of issues — particularly those technical in nature — would be referred to an independent expert. Whether the expert's decision on these issues would be final and binding is completely up to the parties' agreement, although the likelihood of this usually depends on how technical the issues are.

The contract can also provide for a specific method of appointing the expert, such as the expert will be appointed pursuant to the parties' agreement. Failing such agreement, the parties can designate an institution that will appoint the expert, such as the International Chamber of Commerce International Centre for Expertise or the Chartered Institute of Arbitrators. The parties may also require particular qualifications for the expert.

Once a claim or dispute is referred, the expert can conduct the proceedings as he or she deems fit, unless the contract requires a particular procedure.

3.4 Dispute boards

Perhaps the most common dispute resolution tier that is incorporated by parties to a construction contract nowadays is the referral of disputes to a dispute board (DB). The prevailing trend is that parties may choose to refer to either a dispute adjudication board (DAB) or a dispute review board (DRB).

A DAB has the power to issue a binding decision, which stands unless superseded by agreement, arbitration or a court judgment. 14 A party that does not accept the DAB's decision may submit the dispute to arbitration.

14 2014 CIARB Dispute Board Rules, Article 4.3.
or the courts (depending on the parties’ agreement), but such decision must be complied with pending a ruling by the arbitral tribunal or the court. 15

In contrast, the DRB issues non-binding recommendations. A party that disagrees with any recommendation may question the same further through arbitration or litigation (again, depending on the parties’ contract). However, unlike DAB decisions, parties are not required to comply with DRB recommendations pending a ruling by the arbitral tribunal or the court, although they may voluntarily choose to do so. 16

In most construction contracts, the DB, which may consist of either one or three members, is constituted at the start of the project. 17 Although the parties can prescribe a procedure for appointing the DB members, the first two members are typically chosen by the parties and the third member (the chairperson) is selected by the two members. The DB has the power to conduct proceedings as it wishes, including calling meetings, questioning witnesses and visiting the project site.

This has contributed to the popularity of DBs as a form of "real-time" dispute resolution, 18 with many DBs conducting hearings and resolving disputes on-site. The DB may likewise intervene even before a dispute arises between the parties, subject to any contrary stipulation in the contract.

More recently, the International Chamber of Commerce Dispute Board Rules ("ICC DB Rules") provided for a third type of DB — the Combined Dispute Board (CDB). CDBs normally issue recommendations but may also issue binding decisions when it is requested by a party without objections from the other party, or the DB decides to render a decision over the objection of the other party based on criteria set out in the ICC DB Rules (i.e., urgency, prevention of disruption or necessity to preserve evidence). 19 A similar type of DB may also be found under the FIDIC’s 2017 Edition of Contracts, which is called the Dispute Avoidance and Adjudication Board (DAAB).

3.5 Mediation

Mediation is a form of alternative dispute resolution in which the parties meet with an independent third party — the mediator — who will assist and facilitate the parties in working toward an amicable resolution of the dispute. However, as opposed to an arbitrator in an arbitration, the mediator has no power to issue binding decisions that can be enforced against the parties.

Mediation can be a very cost-effective mode of resolving construction disputes. Mediation proceedings can be completed faster than litigation or arbitration proceedings. In addition, mediation is a good way of bringing all stakeholders together in one proceeding, which may not be possible in an arbitration or litigation due to jurisdictional or legal constraints. With all stakeholders participating in a singular, non-adversarial process, the chances of arriving at a solution that is universally acceptable would be much higher.

The success of mediation, however, largely rests on the competence of the mediator. Thus, while the parties are free to choose whom they would like to mediate, it is highly recommended that the mediator of a construction dispute have experience in the construction industry and a solid understanding of the roles of each stakeholder and the interactions between all parties involved. To help them choose the most appropriate mediator, the parties may opt to conduct the mediation through notable institutions, such as the Centre for Effective Dispute Resolution, the International Chamber of Commerce, the Hong Kong

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15 Id., Article 4.5.
16 Id., Articles 3.1 and 3.5.
18 2014 CIARB Dispute Board Rules, Article 6.3.
As shown above, the parties have a variety of pre-arbitration or pre-litigation dispute resolution mechanisms to choose from in order to avoid a prolonged, costly dispute. To ensure the effectiveness of these mechanisms, the parties should ensure that compliance with each dispute resolution tier is mandatory (e.g., by using mandatory language like "must" or "shall," instead of "may"). Otherwise, the pre-arbitration or pre-litigation dispute resolution mechanism may not be considered enforceable.

4. Documentation and strict implementation

Proper choice and careful drafting of contract, however, is not enough. A well-drafted construction contract is essentially useless, unless the parties make a conscious effort to strictly implement the same. Hence, given the complexity of construction projects, it would be advisable for both the owner and the contractor to designate a competent contract management team to closely monitor implementation and compliance with the prescribed procedures and requirements. Ideally, the team should include a technical person and a lawyer who are both well-versed and experienced in dealing with construction disputes, so that potential problem areas can be readily identified and the risk of disputes relating to these areas can be carefully managed and mitigated.

Further, the simplest and yet perhaps the most effective way of avoiding or managing disputes is to document and memorialize every action, event and milestone during contract implementation.

Documentation or memorialization should be done contemporaneously, i.e., during or after the event; otherwise, it may not be given any weight later on by the court or the arbitral tribunal. The documentation can be through videos, photos, letters, notices, emails and even SMS messages, as long as they can be readily identified by witnesses that have personal knowledge of the same. Accurate, comprehensive and detailed documentation, especially if they bear the conformity of both parties, would remove any doubts that could give rise to a dispute in respect of a particular issue.
# Annex A - ADR mechanisms in Asia Pacific

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Common DR methods</th>
<th>Dispute boards</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australia</strong></td>
<td>Alternative dispute resolution models, including mediation and expert determination, are widely adopted. International arbitration is increasingly common, especially for large-scale infrastructure and resources projects. The national courts remain a popular mechanism for resolving disputes, with most Supreme Courts having dedicated specialist construction lists. These mechanisms are commonly preceded by contractual requirements for conferences and executive negotiation. Security of payment legislation requires adjudication as a procedure for the interim resolution of contractor payment claims. For larger-scale disputes, international arbitration is an increasingly prevalent forum, especially where international principals and/or contractors are involved. The Australian Centre for International Commercial Arbitration (ACICA) is the leading Australian arbitration body. However, litigation through the courts remains a popular mechanism to resolve construction disputes. Expert determination is also a widespread contractual mechanism, in which the decision of an expert is final and binding on the parties. Construction contracts usually require the parties to first exhaust alternative dispute resolution procedures, e.g., conferences, executive negotiation and/or mediation.</td>
<td>Dispute Resolution Boards (DRBs) are emerging as an alternative dispute resolution forum, and are most commonly used on major public infrastructure projects, e.g., desalination plants, waste treatment facilities, port expansions, motorway upgrades, etc. DRBs are an entirely contractual mechanism and there are no special laws or regulations governing their operation. A common approach involves the principal and the contractor each selecting a member, and then these members selecting the final member. Once selected, the DRB members act independently and impartially, and do not advocate for the parties who nominated them. Further, the members are selected soon after the contract is executed and are actively involved in the project, not just when disputes arise. This ongoing role allows the DRB to identify and resolve disputes at an early stage, preventing the likelihood of litigation and arbitration.</td>
</tr>
<tr>
<td><strong>China</strong></td>
<td>Court litigation is the common mechanism. This is sometimes used, though not quite common.</td>
<td></td>
</tr>
<tr>
<td><strong>Hong Kong</strong></td>
<td>Save for a small portion of main contracts and low-tier subcontracts, mostly arbitration. The majority of the construction disputes would be resolved by arbitration, if not negotiation. Only very few construction disputes will be litigated. HKIAC is the most commonly used arbitral body in Hong Kong.</td>
<td>Dispute boards are rarely used except for some large government projects.</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Common DR methods</th>
<th>Dispute boards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>In practice, arbitration is the most commonly used method to resolve disputes in the construction industry. This is particularly more preferable when (i) a foreign party or foreign direct investment company is involved, or (ii) the contract involves advanced technology, high risk or high value. This is generally due to the level of comfort and confidence of foreign investors in court institutions in Indonesia and in the capacity and experience of the case adjudicator. There is a privately established arbitration body that focuses on adjudicating and resolving construction disputes. The BADAPSKI (Indonesian Body for Arbitration and Alternative Dispute Resolution for Construction Disputes — Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia). It has jurisdiction over a dispute only if the parties have agreed to refer disputes arising from their construction contracts to BADAPSKI.</td>
<td>This practice is not very common in Indonesia. Parties would usually agree to an independent third-party expert to give an opinion on an issue, but rarely specifically form a board to settle disputes.</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Arbitration is commonly used for resolving disputes in the construction industry. The arbitral bodies in Malaysia for construction disputes include AIAC, PAM and IEM.</td>
<td>Dispute boards are not common.</td>
</tr>
<tr>
<td>Philippines</td>
<td>Arbitration and litigation are still the more common methods of resolving construction disputes in the Philippines. Commercial arbitration is a recommended mechanism for resolving disputes in construction contracts. However, in drafting arbitration clauses for construction contracts, the parties should be mindful that under Philippine law, disputes arising out of a construction contract that contains an arbitration clause fall within the original and exclusive jurisdiction of the CIAC. Such jurisdiction subsists even if the parties choose a different arbitral institution. Should the parties prefer a different set of arbitration rules, they may wish to include a provision to the effect that: (a) the commencement of CIAC arbitration is a breach of the contract and renders the commencing party liable for damages; and (b) the commencing party will answer for all costs, including the other party's legal fees. There is no guarantee that</td>
<td>Dispute boards are not commonly used in the Philippines. However, they are often used in large government projects. In most construction contracts, the DB, which may consist of either one or three members, is constituted at the start of the project. Although the parties can prescribe a procedure for appointing the DB members, the first two members are typically chosen by the parties and the third member (the chairperson) is selected by the two members. The DB has the power to conduct proceedings as it wishes, including calling meetings, questioning witnesses and visiting the project site.</td>
</tr>
</tbody>
</table>
Singapore

Arbitration and litigation are the most commonly used formal dispute resolution mechanisms for construction disputes.

Most standard form construction contracts, such as the SIA and FIDIC, will include an arbitration clause.

Construction disputes that follow the litigation path are heard in the Singapore High Court and commonly relate to the setting aside of an arbitral award or a restraint on a performance bond.

The Security of Payment Act provides for statutory adjudication of disputes relating to payment of work done, which provides a cost-effective method. A decision that is obtained by adjudication is binding on the parties. However, if the adjudication determination is decided by arbitration or a court of law, then the parties will be bound by the decision of the arbitral award or court judgment.

Most recently, mediation has been promoted as an avenue for resolving construction disputes. The Singapore Contractors Association has set up a Singapore Construction Mediation Centre for its members to resolve construction disputes, including disputes relating to payment, defects and liquidated damages.

Taiwan

Arbitration is available as a method of dispute resolution. In Taiwan, the parties that agree to go for arbitration often rely on the Chinese Arbitration Association (CAA), which is the local arbitral body in Taiwan.

The mediation mechanism of the Public Construction Commission could be regarded as a special dispute resolution mechanism for contract performance disputes of public works.

Dispute boards are not widely used. However, the mediation mechanism of the PCC for contract performance disputes of public works is shaped in the concept of the DBs. To be specific, the mechanism consists of one to three members who are experts in construction laws and/or civil works and engineering. The members will try to reach the parties’ consensus and come up with a decision, which is in the form of administrative adjudication. The parties can either accept the decision or
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Common DR methods</th>
<th>Dispute boards</th>
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</thead>
<tbody>
<tr>
<td>Thailand</td>
<td>Arbitration is conducted by the Thai Arbitration Institute (TAI) and Thailand Arbitration Center (THAC).</td>
<td>Dispute boards are not commonly in use.</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Arbitration is becoming more popular for settling construction disputes. However, Vietnamese arbitral awards must conform in all respects with the laws and regulations of Vietnam in order to ensure its enforcement by a competent court in Vietnam. Commercial mediation is likewise emerging, recently introduced by Decree 22/2017/ND-CP, which is based on the UNCITRAL Model Law on International Commercial Conciliation. In December 2018, the Ministry of Justice established the Vietnam International Commercial Mediation Centre (VICMC) to facilitate the use of mediation as an alternative dispute resolution mechanism.</td>
<td>Dispute boards are not commonly in use.</td>
</tr>
</tbody>
</table>
# Annex B - Template Construction Contracts

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Template contract</th>
</tr>
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</table>
| **Australia** | Standard contracts are used extensively in Australia, although they are generally heavily amended to reflect particular project issues, changes to risk allocation and statutory and case law changes. The Australian Standard form series is the most widely used. Other standard forms in use in Australia include the Australian Building Industry Contract (ABIC) Suite and the International Federation of Consulting Engineers (FIDIC) Suite, which includes:  
  a) "Red Book" (Conditions of Contract for Construction for Building and Engineering works designed by the Employer)  
  b) "Yellow Book" (Conditions of Contract for Plant and Design-Build)  
  c) "Orange Book" (Conditions of Contract for Design-Build and Turnkey)  
  d) "Silver Book" (Conditions of Contract for EPC/Turnkey Projects)  
  e) DBO Contract (Conditions of Contract for Design, Build and Operate Projects) |
| **China** | Templates are in use. Several versions have been formulated and published by the Ministry of Construction for guidance purposes only. FIDIC form contracts are also used. |
| **Hong Kong** | For private projects, the common template contracts are the Standard Form of Building Contract published by the Hong Kong Institute of Architects, the Hong Kong Institute of Construction Managers and the Hong Kong Institute of Surveyors.  
For public projects, government forms are used. There is a recent trend of the government using NEC4 contracts for public projects. |
| **Indonesia** | The Construction Law and GR 29/2000 provide a list of items that must be covered in a construction contract. However, the laws do not mandate if a construction contract should follow a particular template.  
FIDIC contracts or contracts adopting FIDIC forms are commonly used in Indonesia. It is also common for parties not to use any particular standardized form of construction contract. |
| **Malaysia** | The most commonly used standard forms on construction contracts are:  
  a) the Public Works Department (JKR) form for infrastructure and public works  
  b) the Malaysian Institute of Architects (PAM) and Institute of Engineers Malaysia (IEM) forms for private contracts  
  c) FIDIC forms are sometimes used.  
The Construction Industry Development Board (CIDB) and Asian International Arbitration Centre (AIAC) have also issued standard forms of construction contracts. |
| **Philippines** | For large government projects, particularly those that are funded through ODA loans, they would typically use one of the FIDIC contracts.  
It is also not uncommon for parties to adopt the provisions of FIDIC and other standard contract forms. |
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Template contract</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Parties to a construction contract may also consider adopting CIAP Document 102 but this is quite rare.</td>
</tr>
<tr>
<td>Singapore</td>
<td>The following templates are used for constructions contracts in Singapore:</td>
</tr>
<tr>
<td></td>
<td>a) Public Sector Standard Conditions of Contract for Design and Build</td>
</tr>
<tr>
<td></td>
<td>b) Real Estate Developer’s Association, Singapore Design and Build Conditions of Contract</td>
</tr>
<tr>
<td></td>
<td>c) the new SIA Building Contract 2016 (Design and Build)</td>
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<td>The following are more commonly used for international projects:</td>
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<td>a) the FIDIC Suite of Contracts</td>
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<td>b) the Joint Contracts Tribunal Suite of Standard Form Contracts</td>
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<td>c) Engineering Procurement and Construction Contracts</td>
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<td>d) Institute of Civil Engineers Contracts</td>
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<td>Taiwan</td>
<td>For fit-out construction work, there is a government-prescribed template. For other construction works, though internationally recognized and used, the parties are less keen to use the global template construction contracts, e.g., FIDIC. As a matter of practice, the parties rely on their own samples or local templates, e.g., in public works, the template construction contract for public works published by the Public Construction Commission (PCC), the competent authority of the public works, is often adopted by the parties.</td>
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<td>Thailand</td>
<td>A template contract is not usually used. Only some major government projects use template construction contracts according to the Public Procurement and Supplies Administration Act B.E. 2560 (2017) for government bidding/procurement.</td>
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<td>Vietnam</td>
<td>The template construction agreement applicable for construction projects invested by the government or state-owned enterprises, or funded by Official Development Assistance (ODA) is provided in Circular 09. In addition, FIDIC contracts are also regularly used, especially for projects involving foreign parties.</td>
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</tbody>
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