

Pakistan Construction Disputes Report 2022

May 2022

PCDR
PAKISTAN CONSTRUCTION
DISPUTES REPORT

Report by

MK
CONSULTUS

Supported by



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— ADR CENTRE —

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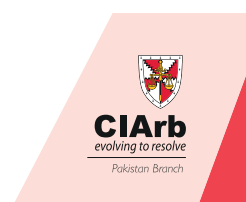
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Acknowledgements

Khush Amdeed and welcome to Pakistan's first Construction Disputes Report (PCDR)¹.

It has been almost 7 years since we (Mian Sheraz Javaid² and Nasir Khan MBE³) spoke at the Construction Law Master's program at King's College to find ways to improve Alternative Dispute Resolution (ADR) in Pakistan. As construction and engineering claims practitioners and promoters of ADR, it was important for us to understand the key reasons for disputes before we could identify suitable resolution options or recommend commercial strategies to our various clients. With limited information on the reasons for disputes or practices of ADR; specifically in construction, engineering and the commercial sector, we developed a personal repository by collating information from peers and connections.

The plan was to collect data from the people we knew on the nature of their disputes, understand the reasons behind these disputes, and whether these disputes went to court or followed ADR methodology for resolution. It was our general understanding that most disputes go straight to court unless parties negotiate their claims. The input gave us the idea to develop a survey to collect information across different sectors and professions in the country. PCDR is the first time that a comprehensive repository of data has been collected across Pakistan, which can be subdivided by sector, causation, and region.

PCDR will pave the way to identify the key causes of disputes in Pakistan's construction industry and help with appropriate strategies to mitigate and avoid them. The findings have been compared with global reports to determine how other jurisdictions apply appropriate commercial strategies to overcome these issues. The survey data is collected by region, dispute causes, industry sector, organization type, resolution method, and more.

This research has been designed and conducted by MK Consultus LLP Pakistan and supported by the Chartered Institute of Arbitrators Pakistan Branch, TCC ADR Centre Pakistan and Currie & Brown UK Limited. The report reveals that the dynamic of Pakistan's construction industry has great similarities when compared to data from global disputes.

¹ - <http://www.pcdr.pk>

² - Barrister Mian Sheraz Javaid is a Partner of MK Consultus LLP and works as a counsel, arbitrator, mediator, and adjudicator; a dual-qualified civil engineer - barrister with more than 20 years of experience in all aspects of construction contracts, litigation, and dispute resolution. Mr. Javaid is highly qualified in dealing with energy, power, and infrastructure-related matters. His core area of expertise is dispute avoidance with emphasis on arbitration and expert determination for commercial entities both in the private and government sectors. Mr. Javaid is a Fellow of various institutions and is on the Approved Faculty List of the Chartered Institute of Arbitrators in addition to being the founding Chair of the Chartered Institute of Arbitrators, Pakistan Branch.

³ - Nasir Khan MBE is Director of Contract Solutions at Currie & Brown UK Limited. He is a skilled and dynamic leader with 20 years' experience providing total solutions for procurement, commercial, dispute avoidance, management and resolution through effective pre- and post-contract management. Mr. Khan has led large and complex procurement programs, as well as claims on quantum, delay and engineering issues. He is an engineer, chartered quantity surveyor, chartered procurement specialist and is legally qualified. He has fellowships in various institutions and acts as an expert, mediator, adjudicator and arbitrator. Mr. Khan co-founded Muslims in Rail C.I.C and is Chair of Faith Legal Resolutions. He was awarded an MBE for his services to equality, diversity and inclusion.

Thank you

We are grateful for the help and support received by the Chartered Institute of Arbitrators (CIArb); University of Engineering & Technology (UET), Lahore; Nadirshaw Edulji Dinshaw University of Engineering & Technology (NEDUET), Karachi; Balochistan University of Information, Technology, Engineering, and Management Sciences (BUITMS), Quetta; National University of Science & Technology (NUST), Islamabad; University of Engineering & Technology (UET), Peshawar; and Karakoram International University (KIU), Gilgit-Baltistan. We are grateful to our amazing interns Abdur Rehman (LUMS), Bilquees Bano Vardag (LUMS), Maria Shoaib Khan (LUMS), Ali Waqas (BUITMS), Ulos Yar (BUITMS), Sajid Khan (NUST), Usman Aftab (NUST), Ejaz Ahmed (UET Peshawar), Inayat Ullah (UET Peshawar), who helped to collate and streamline this report. We received amazing help and support from CIArb Pakistan Branch; Syed Asad Ali Bukhari and Suneela Aslam. Lastly, we would like to thank Millie Patel (CIArb) for her input and constant support.

Disclaimer: Disputes and their causes are unique and presenting them in a consolidated group can only present a partial picture. We are confident that the results of this report represent the construction market in Pakistan. The report will be published free of charge and an industry-wide focus group will be formed to work on its recommendations. We have collaborated with public and private sector clients, contractors, consultants, prominent institutes and universities, associations and professional bodies for the completion of this report.

Privacy Notice: All survey responses are anonymous. Individuals' responses have not been used in any way that would allow their identification in the PCDR.

Methodology: The data was collected through a survey questionnaire developed on Microsoft Forms that was distributed to the respondents physically and digitally. The results form the basis of a comprehensive analysis which is presented in this report.

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| About us

I.I MK Consultus LLP

MK Consultus LLP⁴ (MKC) is an end-to-end solution provider law firm delivering dispute avoidance, management and resolution through its core service offering in legal consultancy, advisory, litigation, and alternative dispute resolution. We are the only dedicated legal practice in Pakistan for Construction and Engineering Law and are uniquely positioned to advise our clients throughout the project lifecycle, focusing predominantly on infrastructure, building and civil construction, oil & gas, energy and power sectors.

Our dual-qualified engineers and lawyers provide excellent advice on all aspects of Construction and Engineering Law and regularly act as arbitrators, providing expert determination on claims relating to engineering, quantum and delay issues. Having offices in the UK and Pakistan, we are uniquely placed to serve cross-border issues and have developed unique partnerships with legal and professional consultancies across the world to serve our clients' needs.

Our mission is to provide our clients with unprejudiced advice, so they know where they stand. We are passionate about raising the profile of construction law in Pakistan and provide a comprehensive service for contentious and non-contentious construction and engineering law matters.

“ Guest commentary by

Mian Sheraz Javaid

Partner MKC
Chair CI Arb Pakistan Branch

You cannot propose a solution unless you know the problem. Pakistan has seen enormous construction activity in the past few years mainly due to the development of the China-Pakistan Economic Corridor (CPEC), currently amounting to an investment of US\$ 70 billion. Public sector development is the compass to gauge the progress of any country. Public funds should be well spent, and the timely completion of projects saves money and cause for dispute. With the involvement of Chinese contractors, the need for skilled labour, the use of innovative technology, and efficient mechanisms for dispute resolution is greatly felt. The main objective of PCDR is to identify the prevalent problems within the construction industry, following which a solution can be devised and implemented.

The data shows that the top causes of disputes in Pakistan are payment delay, access to sites, and the behaviour and competency of people, reflecting Pakistan's similarity to other jurisdictions. The main areas requiring attention are efficient dispute avoidance and resolution mechanisms.

The management of disputes in other jurisdictions serves as a valuable source for devising effective dispute resolution mechanisms on a domestic level. In the United Kingdom, statutory adjudication plays a vital role in safeguarding the financial lifeline of contractors and other stakeholders. Matters are decided within 28 days, although the findings can be challenged in other forums. However, the intention is to deal with disputes actively and efficiently. Mediation is also becoming a well-recognised phenomenon and Courts have shown their inclination in resolving disputes through this avenue, especially when contractually mentioned in dispute resolution clauses. In Hong Kong, it is mandatory to appoint a Dispute Resolution Advisor for large construction projects and Dispute Boards are also being used for early neutralisation of problems in modern best-practice jurisdictions.

Unfortunately, Pakistan lacks the mechanism for efficient dispute resolution regarding the construction industry. The Arbitration Act was enacted in 1940, prior to the inception of Pakistan, and is still in force without amendment.

As the Pakistani jurisdiction does not lend great support to mediation or ADR, the resident entities consult the courts. Not surprisingly, the Civil courts in Pakistan have a backlog of 2.5 million cases, and parties face time-consuming litigation. It is due to these reasons that Parties in dispute naturally prefer the option to negotiate amongst themselves or follow ADR to avoid futile endeavour of going to the courts.

Arbitration is a mandatory course to be adopted for dispute resolution for all international contracts. The Arbitration and Reconciliation Committee of the Pakistan Engineering Council is currently the only forum for the resolution of construction disputes, although it is highly underused.

A unique data set is collected for this report. Much effort was expended, not only in reaching out to the target niche, but also to convince them to participate in the survey. This was especially so with regards to the public body officials.

At this point in time, Pakistan needs modern and tested mechanisms that support the construction industry. Beginning from contract clarity to the use of standard forms of contracts.

Barrister Mian Sheraz Javaid
Partner MK Consultus LLP
Chair CI Arb Pakistan Branch



1.2 Currie & Brown UK Limited

Currie & Brown⁵ is a leading physical assets management and construction consultancy, dedicated to advising clients in respect of the management and utilisation of their physical assets throughout the whole lifecycle. With over 100 years of experience, our company provides a wide range of professional services based around our core disciplines of project management, cost management, building surveying and advisory services.

With a network of over 60 offices across the globe and over 2,000 staff, we work across the public and private sectors, from health and education to retail, energy and transportation and logistics. Our blend of interdisciplinary expertise and marketplace specialisms adds value through every stage from concept to completion.

Each project has its own unique characteristics. At Currie & Brown, we recognise such differences and have established specialist teams to ensure that our client solutions ideally balance technical knowledge and capability with sector expertise.

We offer expertise across a wide range of complex contract solutions services with leading industry names benefiting from our contractual advice and construction claims consultancy.

“ Guest commentary by

Nick Gray

Chief Operating Officer - UK and Europe, Currie & Brown

It is a pleasure to see great progress and development across the globe on dispute avoidance and resolution. Our contribution to Pakistan's first construction dispute report provides an insight into dispute causation, risk mitigation, avoidance and resolution techniques.

The Pakistan Construction Disputes Report (PCDR) is the result of extensive collaboration across the public and private sectors to combine expertise and best practice. The team endeavoured to capture data from multiple sectors across the various provinces of Pakistan. I am convinced that this will pave the way for major projects to be delivered successfully and safely meeting time, quality and budgetary objectives.

The results identify that good communication, collaboration, transparency and flexibility based on secure contractual mechanisms are key to delivering successful outcomes.

The report highlights in particular:

- A very high proportion (95%) of projects suffered disputes. Further information will be needed to be establish why only 5% were 'dispute free'.
- The value and length of disputes is directly related to the dispute resolution mechanism.
- The cause of disputes and the means of their resolution varied across the different provinces.
- Provinces saw an increase in larger disputes related to substantial capital programmes and individual projects.

- Dispute boards featured as a common means of dispute management and reflected the need to demonstrate an effective risk management mechanism.
- Pakistan has an exceptionally strong work bank specifically for infrastructure projects.
- The principal causes of disputes are similar to other jurisdictions.
- The launch of CIArb Pakistan Branch will increase awareness, training, development and assurance of ADR procedures.

Through our 100 years of history, the continued success of Currie & Brown is because of our ability to maintain focus on, and a disciplined approach to, supporting clients in the key service areas of cost and project management, advisory services and building surveying.

Our services are underpinned by our values, a commitment to excellence and innovation, and the quality of our people. We leverage our global experience to achieve tangible benefits which inspire confidence and consistently deliver added value to our clients.

Our dispute resolution team, together with our experts in delay analysis and forensic planning, enjoys a strong track record of supporting clients through challenging projects.

Nick Gray

Chief Operating Officer - UK and Europe



I.3 The Chartered Institute of Arbitrators

The Chartered Institute of Arbitrators⁶ (CI Arb) is a global centre of excellence for the practice and profession of ADR, championing all aspects of dispute resolution across arbitration, mediation, and adjudication. It is committed to promoting ADR and the benefits it brings to society and economies across the world.

CI Arb has a growing membership of over 17,000 professionals and over 10,000 students based across 150 jurisdictions and is supported by an international network of 42 branches. It supports its members, from students to experienced Fellows, at every step of their ADR journey, offering:

- Opportunities to build skills and achieve career goals through learning, mentorship, and insightful publications.
- Global and local ways to connect through its branches, events, and networking opportunities.
- A voice for its members, representing the profession when it counts.
- Guidance to help its members adapt as the world changes and ensure ADR practice reflects the society it represents.

“ Guest commentary by

Catherine Dixon

Director General, The Chartered Institute of Arbitrators (CI Arb)

This report demonstrates how ADR (alternative dispute resolution) can be used to effectively resolve disputes. Disputes are inevitable, particularly in the construction sector. Therefore, it is important that businesses have access to and can rely on ways of resolving disputes effectively. This ensures business certainty, maintains business relationships and results in economic prosperity.

CI Arb is a global professional body and membership organisation for dispute resolvers. CI Arb offers world-class training and CI Arb postnominals are recognised as the gold standard globally.

CI Arb's aims are to:

- Globally promote effective dispute resolution.
- Be a global thought leader.
- Create a global community of diverse dispute resolvers.

CI Arb is proud to open a Branch in Pakistan, which is part of our global network of 42 Branches comprising members in over 150 jurisdictions.

As the Director General of CI Arb, I'm delighted to welcome the Pakistan Branch to our global community and wish all CI Arb members in Pakistan every success.

Catherine Dixon, MCI Arb
Director General





2 Introduction

MK Consultus LLP, in collaboration with Currie & Brown UK Limited, has surveyed to develop, understand and capture the leading causes of disputes in Pakistan's construction industry. The survey findings will pave the way to understanding the key causes of disputes and help develop appropriate strategies to avoid them.

This report has been devised to promote dispute avoidance and collaborative working by highlighting the key causes of disputes. The results of this report highlight that over 95% of construction projects are marred with significant additional time and cost related to disputes. Payment delay has been the biggest issue and cause of disputes followed by access to site, with behaviour and competency of the project teams of different parties being the third main reason.

As expected, results vary by province and industry. Surprisingly, the report indicates that ADR is the most common form of dispute resolution, while party- to-party negotiations account for almost 50% of the disputes. There could be several reasons for such negotiations and research suggests that these vary from maintaining relationships to not understanding parties' rights, obligations, and liabilities. Arbitration and mediation are also shown to be on the rise.

The results are comparable to global norms where negotiation, mediation and arbitration are the most common methods of dispute resolution and generally the steps to finality.

There has never been any comprehensive research on the causes of disputes in Pakistan's construction industry and we aim and hope that the results from this report and its recommendations will be useful for all parties, including the government, public and private sectors, independent contractors, consultants, engineers, and legal professionals.

The dynamics of Pakistan's construction industry have evolved in the last decade especially due to the development of the China-Pakistan Economic Corridor⁷, the establishment of Public-Private Partnership Authorities, the formulation of public procurement rules and the use of FIDIC⁸ (the International Federation of Consulting Engineers) in internationally funded development projects that have emphasised the importance of law governing the construction industry.

The construction industry in Pakistan is on an upward trajectory towards maturity. Still, it lacks the understanding of dispute avoidance and collaborative working due to its highly transactional nature, resulting in the misunderstanding of the key causes of disputes. Initially, we did not have data regarding the causes of disputes and how they are settled in the construction industry. Accurate data is required to achieve the goal of in-time mega project completion, thereby avoiding unnecessary delays and streamlining the process.

The Pakistan Construction Disputes Report is the first-ever effort to compile the data which has been collected across the provinces in Pakistan, which will help pave the way for the formulation of relevant construction laws in Pakistan.

The objectives of PCDR are as follows:

- To understand and identify the root causes and analysis of key factors disrupting Pakistan's construction industry.
- To enable awareness about dispute avoidance and collaborative working.
- To support and identify appropriate strategies to mitigate and avoid disputes.
- To pave the way for appropriate legislation governing the construction industry and ADR mechanisms.
- To enable year-on-year comparison of industry performance by establishing benchmarked data through regular publication of this report.

7 - China-Pakistan Economic Corridor is a framework of regional connectivity. CPEC will not only benefit China and Pakistan but will have a positive impact on Iran, Afghanistan, Central Asian Republic, and the region, available at <http://cpec.gov.pk/>

8 - FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide. Available at <https://fidic.org/>



3 Pakistan Construction Disputes Report

PCDR⁹ confirms that the construction industry is consumed in fault finding and defensiveness which results in disputes and litigation. We received comments from various professionals, contractors, and government clients that the industry is highly adversarial. In particular, the client and contractor relationship need to be thoroughly re-examined.

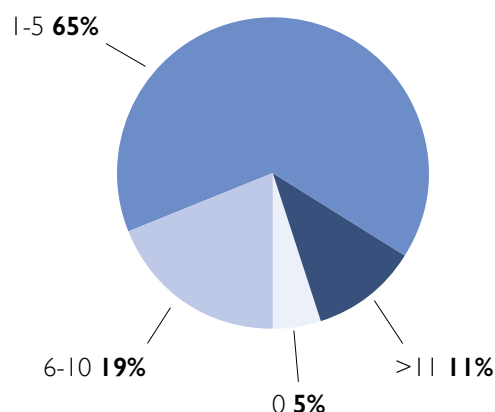
Pakistan's construction industry is not alone in having adversarial attitudes, however; the developed world (United States, United Kingdom, Middle East etc) has taken positive steps to try to reduce such attitudes with the growth of ADR. The debate over adjudication, conciliation/mediation and arbitration has been very strong throughout this report and there has been growing consensus over the action needed. The launch of the CI Arb's Pakistan Branch is just one of the steps taken to promote and introduce ADR and support avoidance and amicable resolution of disputes without recourse to the courts, through its Dispute Resolution Service¹⁰.

PCDR was designed in the form of 30 questions that were asked to understand and develop a comprehensive nature of Pakistan's construction industry. PCDR reveals the following results:

Number of disputes per project

- 95% of projects had 1 or more disputes, with 11% of projects having more than 11 disputes.
- The value of disputes ranges from less than PKR 1 million for 29% of the disputes to greater than PKR 500 million for 8% of the disputes.
- The disputes that were of low value were largely resolved through negotiation with 58% of the disputes being resolved in less than one year.

Number of disputes

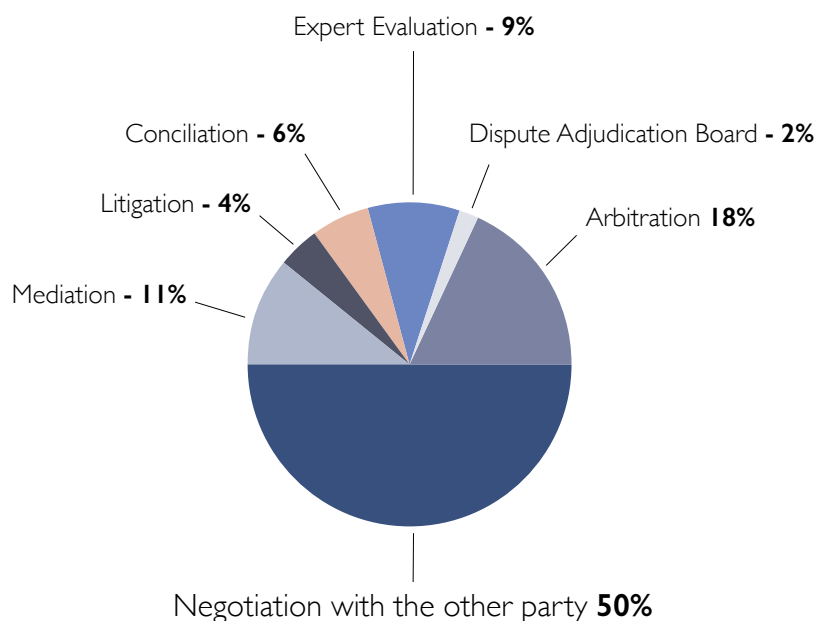


9 - Pakistan Construction Disputes Report interactive dashboard is available at <https://www.pcdr.pk/>

10 - The Dispute Appointment Service (DAS) offers a variety of Dispute Resolution Services to accommodate parties who are either seeking to appoint a dispute resolver or require suggestions from dispute resolvers to assist with their dispute. Please contact CI Arb Pakistan Branch at www.ciarb.pk

- The high-value disputes tended to have a longer duration, with 8% lasting five or more years. The main causes of disputes were extension of time (10%), payment delay (10%) and the behaviour and competency of people (9%). This is due to unrealistic project programmes and timelines agreed upon between the parties. When sequencing and project outcomes do not go as planned, it results in non-payment and the adversarial behaviour of project teams, causing minor variations to transform into major disputes.
- Unrealistic contract programme (7%) also received a high return as a cause of dispute. After further investigation, it appears that due to delay in design information (6%), construction programmes are squeezed resulting in poor workmanship and, in some areas, cutting corners. Health and safety practices were not listed as a cause of dispute, however, respondents flagged that in most cases, quality, health, safety and environment do suffer due to time constraints.
- Despite the impact of COVID-19 (5%) in the last 2 years, the construction industry continued across the globe yet experienced many delays and disruption due to lockdowns, social distancing and Standard Operating Procedures (SOPs) which were adopted to remain safe and vigilant.
- We were keen to understand how aware respondents were of ADR in Pakistan and their views on its effectiveness and efficiency. Just 56% were aware of ADR with 53% viewing it as effective. Only 22% agreed that the legal system in Pakistan is supportive of ADR.
- The main methods of ADR used are negotiation with the other party (50%), arbitration (18%) and mediation (11%); surprisingly, litigation was only 4%. Several respondents cited that they are involved in lengthy claims and disputes with litigation costs on the rise.
- The proportion using expert evaluation (9%) in construction was unexpected and is an area to be explored further.

ADR method



3.1 PCDR 2023

Planning on next year's report is already underway and we would very much appreciate input from members of the construction industry, private contractors, consultants, and those working in government departments associations and professional institutions. We would also be grateful if you could cascade the survey link to relevant colleagues and contacts.

The link to the 2nd PCDR survey can be found here:
<https://pcdr.pk/pcdr-2023/>

Alternatively, please use the QR code
(to be scanned with a smartphone camera).



3.2 PCDR global comparison

The PCDR and the global reports by Arcadis¹¹ and HKA's CRUX¹² contain many similarities in the way they identify disputes across industry sectors and geographical regions; namely, listing the main causes of dispute before similarly making recommendations. However, the way these factors are discussed differs greatly.

The PCDR lays out three main causes for construction disputes, namely payment delay, access to site and behaviour and competency of people. These three causes alone account for 25% of the reasons behind all construction disputes in Pakistan. The Arcadis report goes on to discuss dispute causes by region, while the CRUX report discusses them by sector. Nevertheless, we can compare the main and most prominent causes identified.

Arcadis does not identify payment delay as being one of the most common causes of dispute, despite accounting for 10% of all construction disputes in Pakistan. However, CRUX identifies 'cash flow and payment issues' as the ninth most reported cause of dispute, linking such issues with delays in approvals and design information, halting contractors' tasks (as discussed later).

Similarly, access to sites is not identified as one of the main causes in the Arcadis report but is considered in the CRUX report. In the latter report, 'access to site/workplace was restricted and/or late' was the eighth most common cause for construction disputes, mainly in the defense sector. The CRUX report, which identifies causes and solutions based on sectors, comprehensively explains how different factors affect each sector. For example, in the case of access to site it goes on to illustrate how this is hindered when requirements such as security clearances and strict vetting limits are put into place.

Lastly, when considering 'behaviour and competency of people' which comprises 9% of the causes behind construction disputes in Pakistan, both the Arcadis and CRUX reports contain similar findings. Arcadis identified 'failure to make interim awards on extensions of time and compensation' and 'owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations' as two of the main causes reported for construction disputes in North

11 - Arcadis Global Disputes Report 2021, available at <https://www.arcadis.com/en/investors/arcadis-annual-integrated-report-2021>

12 - HKA's integrated research programme, CRUX, available at <https://www.hka.com/2021-crux-insight-operating-in-uncertain-times/>

America, the UK and the Middle East. Both of these factors relate to the behaviour and competency of the stakeholders involved in the project(s). Upon analysis, the report recognises the causes relating to human factors such as biases, relational breakdowns and a lack of collaboration and communication between parties.

Moreover, the CRUX report identified 'change in scope', 'design information was issued late', 'level of skill and/or experience' and 'poor management of sub-contractor/supplier and/or their interfaces' as some of the most common causes of dispute.

In contrast, however, there are two factors identified in the Arcadis and CRUX reports that are not in the PCDR. Firstly, regarding 'poor drafting of/and contractual issue', the Arcadis report highlights those errors and omissions in the contract documents cause issues in administering them, directly leading to disputes and a plethora of other issues that eventually result in a dispute. The report recognises this as the number one cause behind construction disputes, particularly in North America and the Middle East, reporting that 60% of their respondents believe that 'proper contract administration' would have the single largest impact in avoiding disputes. It also identifies 'errors and/or omissions in the contract documents followed by an unrealistic contract duration or completion date and a failure to properly administer the contract' as one of the main causes reported in Continental Europe.

Similarly, the CRUX report recognises poor drafting of contracts and administration of contract management as the second and third most reported causes of disputes, respectively.

The other factor stated in these two reports, but not highlighted in the PCDR, relates to design challenges and the communication gap between stakeholders when changing design plans. In the CRUX report, this was identified as the number one leading cause for all construction disputes prevalent across sectors. The biggest challenge with this factor is how it affects stakeholders at all stages and causes delays, leading to many other issues such as payment delay, delivery delay, change of circumstances and hindrance to access to sites.



Virginie Colaiuta

Partner, LMS Legal LLP and Visiting Fellow, King's College London

The starting point for contractors and employers who want to avoid disputes is to focus on their agreed contractual provisions establishing a balanced set of obligations between the contractor and the employer. A poorly drafted contract or imbalanced contractual obligations will inevitably lead to disputes. Having a good understanding of what is to be achieved and what is required before works are commenced may greatly affect the success of any project.

Most disputes derive from differing interpretations of contractual clauses by the parties. The report does not purport to analyse this particular aspect. However, the report shows that only 3% of the projects did not lead to some formal dispute and a major reason for disputes was “Behaviour & Competency of People”.

Keeping the dialogue open between the parties and increasing knowledge/understanding of relevant issues at stake may help to clarify problems and find solutions which were not envisaged at the time of the drafting of the contract. Making the effort to better understand one's own obligations and those of a counterparty requires adopting a collaborative approach to disputes. In many cases, disputes are the result of a poor or distorted understanding of one's own obligations.

The key aspect of any ADR method is to facilitate communication between litigants so that any misunderstandings may be overcome.

The report shows that mediation was used only in a limited number of cases and that recourse to dispute boards was extremely infrequent (a maximum of 3%). As these ADR methods have been considered successful in addressing disputes in other countries, their use in Pakistan could be improved.

The success of ADR methods greatly depends on how and when they are used and there is, therefore, an obvious need to increase awareness of the ADR methods available. A statistical analysis for the coming years could identify how knowledgeable the parties were about the ADR methods they used before the dispute arose.

Better knowledge and use of ADR methods may also help to reduce the costs of project delivery as some of these methods may resolve tensions in a project before they advance into disputes.

Establishing a culture that encourages amicable solutions of disputes may foster investments in the construction industry.

There is a need for Pakistan to improve its infrastructure. This is an area in which the government is currently investing only a minor portion of Pakistan's GDP suggesting there is great potential for major development and investment. The China-Pakistan Economic Corridor has encouraged new investments in the construction industry and such private investments presuppose reliance on cost and time-efficient methods to resolve possible disputes.

An analysis could be undertaken to identify any differences between the use of ADR methods in exclusively domestic projects compared to those involving any foreign contractors, employers or funders. Such an analysis could help determine which ADR methods are preferred by foreign companies and investors when conducting

business in Pakistan, and, therefore, which ADR methods are considered most efficient from a foreign perspective. Private foreign investments, on the basis of PPPs or other funding agreements, may lead to an increased development of infrastructure projects in Pakistan and, in view of an enhanced flux of foreign investments, it will be paramount for Pakistan to anticipate the multiplication of disputes with foreign parties and the growing risk of claims based on investment treaties.

Virginie Colaiuta

Partner, LMS Legal LLP, UK

Visiting Fellow of the Centre of Construction Law
and Dispute Resolution, King's College London



Mohammed Zaman QC

No5 Barristers Chambers

Pakistan's requirements for greater and better housing and infrastructure are self-evident and this report recognises that the growth in those sectors requires an aligned improvement in dispute avoidance and resolution techniques. Pakistan's court systems should evolve to match parties' needs and there should be an examination of best practices elsewhere on integrating ADR at the core of dispute resolution.

I set out how ADR has become central in English dispute avoidance and resolution.

The procedures in English courts were overhauled by the Civil Procedure Rules 1998 ('the CPR'). The CPR completely replaced the prior procedural rules and introduced what was then seen as the novel concept of the court taking an active role in case management and requiring parties to enter into pre-action conduct before issuing claims. The CPR contains a 'Practice Direction – Pre-Action Conduct and Protocols' that parties have to comply with. The stated objectives of that Practice Direction require parties to exchange sufficient information to understand each other's position; to try and settle the issues without proceedings; to consider a form of ADR to assist with settlement; to support the efficient management of those proceedings, and to reduce the costs of resolving disputes.

The CPR encourages dispute avoidance (with the exchange of information) and ADR (in whatever form the parties consider appropriate). The courts can, however, impose sanctions for non-compliance including imposing a stay on proceedings unreasonably issued without complying with the Practice Direction making adverse costs orders. Whilst the CPR is of general application there is a specific Pre-action Protocol for Construction and Engineering Disputes, which sets out the steps that parties must take prior to the dispute being referred to the courts. The consensus is that the changes made by the CPR have gone a long way towards encouraging parties to resolve disputes by pre-action engagement with the exchange of information and ADR (typically mediation).

This report reveals that construction disputes in Pakistan have the same root causes as in other jurisdictions: payment delay, access to site and competency issues. Pakistan needs to consider how it can best encourage parties and the legal profession to make better use of ADR and the English experience is one that is worth considering. The starting point has to be clarity and commitment to ADR in drafting, which is a matter for the parties, as well as a significant review of legislation, firstly to bring arbitration in Pakistan in line with most other jurisdictions that have adopted the UNCITRAL model and secondly, procedural changes to give priority to ADR. If the English experience is to be followed, the debate continues as to whether sufficient use is made of ADR. In a speech in October 2021, the Master of the Rolls (Head of Civil Justice in England and Wales) considered whether we needed to go further and drop the 'A' from ADR, so that it is no longer an 'Alternative' but rather 'Dispute Resolution' and that mediation should become compulsory. That is now a current issue of consultation and debate.

Mohammed Zaman QC

No5 Barristers' Chambers

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4 Regional PCDR findings

Surprisingly, the dispute results obtained from various regions of Pakistan are similar to the disputes found globally.

Although the resolution of disputes through ADR is taking place in Pakistan, the lack of appropriate laws supporting ADR, and other means of dispute resolution, are still lacking.

The stakeholders in the construction industry have little or no knowledge about dispute avoidance mechanisms and collaborative working methods, and party-to-party negotiations are the most reliable method of dispute resolution, especially within the public sector.

- The most common disputes found in Pakistan's construction industry are 'payment delay', 'extension of time' and 'behaviour and competency of people'.
- The majority of disputes take under one year to resolve; however few disputes take up to four years for resolution.

We have found that the International Chamber of Commerce (ICC) also sees cases arising from a wide range of industry sectors, with the construction/engineering and energy sectors usually generating the largest numbers of disputes. Together, these two sectors accounted for approximately 38% of all the ICC's cases in 2020. Other sectors which include health/pharmaceutical, general trade and distribution, industrial equipment and services, and financing and insurance represent 5-7% of the cases.¹³

¹³ - Details available at <https://www.dlapiper.com/en/us/insights/publications/2021/09/the-iccs-2020-dispute-resolution-statistics/#:~:text=Proceedings%2C%20arbitral%20awards%20and%20delays,and%2039%20awards%20by%20consent>.

“ Guest commentary by

Dr. Javed Uppal

President, Institution of Engineers Pakistan (IEP)

The Institution of Engineers Pakistan is a premier body of engineers with members spread across the country with local centres in all major cities and headquarters in Lahore. It is a non-profit, non-commercial independent organisation serving the purpose of procuring the latest know-how, disbursing this to its engineers, and preparing them to meet the challenges that the country faces today. The Institution has agreements with several world-renowned parallel bodies for this purpose.

Construction dispute resolution, ways of conciliation and arbitration are established professional practice these days, especially, when international collaboration is available.

After Pakistan's First Construction Dispute Report, we recently conducted three dispute resolution workshops which were participated by many engineers from around the country: senior and middle management levels, young professionals and students, with international experts from MKC, Currie & Brown, and the Chartered Institute of Arbitrators.

The brainstorming that arose from these workshops has given weight to this Guest Commentary and its findings, namely: our experiences on dispute resolution methods in Pakistan are glaringly mishandled causing a huge loss of public funds. Although in theory, the relevant clauses of many contracts are mainly derived from the Pakistan Engineering Council's Rules of Conciliation and Arbitration, in practice, detailed SOPs are not present in many departments or are not given due attention to draw a clear line of action.

The work that is presently being done in dispute avoidance and risk management is inadequate and active pursuance through joint efforts among institutions such as the Institution of Engineers Pakistan and CI Arb is needed to accelerate the matter. In addition to this, we consider that the construction industry is inadequately equipped with ADR tools and the awareness of ADR requires greater attention. This is also confirmed by the report. The report also shows ADR success in Pakistan is only 49%, whereas the global norms are over 90%. A leapfrog jump is possible through training, certification, and monitoring by a centralised authority.

The report shows that only 3% of survey respondents said that their projects did not lead to a dispute, while 97% of projects had one or more disputes. This situation can be reversed by working on wartime footings, assembling, and utilising adequate resources, large proportions of which are already being lost at public departments and contractors.

The legislature's support towards ADR mechanisms is divided and we believe, that currently, enough work is not being done to bridge such division which can create the legal basis for reliance on ADR processes.

Dr Engr Javed Yunas Uppal

President

Institution of Engineers Pakistan



The Institution of Engineers Pakistan

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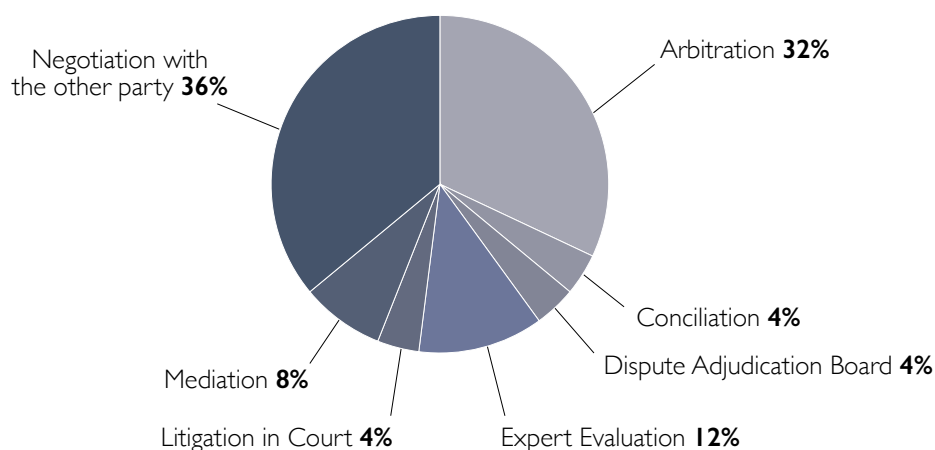
4.1 Federally Administered Territory (ICT) Islamabad

Islamabad sees a variety of ADR methods being adopted in its dispute resolution. While negotiations with the other party and arbitration are the most widely used methods, mediation, litigation, expert evaluation, dispute adjudication and conciliation are all observed in the capital territory. This is perhaps why it has an 84% success rate of ADR processes outcomes, the highest recorded in the country.

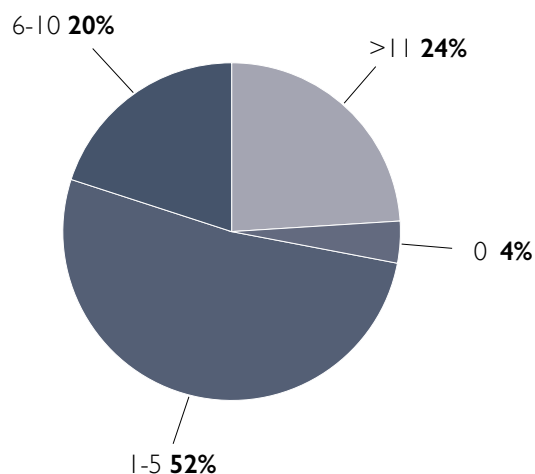
In Islamabad, the most common issue of dispute is access to site:

No.	Top 3 Causes of Dispute
1	Access to Site
2	Behaviour & Competency of People
3	Payment Delay

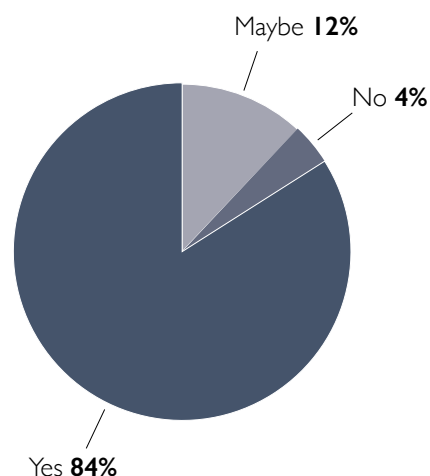
ADR method



Number of disputes



ADR outcome success



“ Guest commentary by

Mr. Kamal Nasir Khan

Chairman, Constructors Association of Pakistan (CAP)

It is to be appreciated that the execution of mega projects in our country is rare as the majority of public sector projects range between 50 million to 5000 million and are executed through one-sided contract agreements heavily in favor of the employer. For such projects, especially those under provincial governments, major powers of 'the engineer' rest with the Executive Engineer of the department without any justified mechanism exercised for impartial dispute resolution. This is largely due to a lack of funds required to establish a body for dispute resolution, hence, no mechanism is established.

Moreover, for small to medium-sized projects, an independent departmental body with participation from the employer, the private sector and CAP with on-hand experience of COC and dispute resolution should be established which can address 15 to 20 projects at one time, reducing the funding requirements.

The referred measures will be helpful in the reduction of disputes and enhancing the confidence of the parties ensuring justice. This will, in turn, add to the timely completion of projects, saving the precious resources of the country.

Engr. Kamal Nasir Khan

Chairman

Constructors Association of Pakistan



”

Dr. Khurram Iqbal Ahmad Khan

Assistant Professor/Head of Department, NUST

Pakistan is the fifth most populous country with a population of 220 million. It is considered the ninth largest labour force in the world and there is currently an increase in the pace of work on the China-Pakistan Economic Corridor (CPEC). The above-mentioned factors have increased construction-related activities across the country.

The construction industry of Pakistan is fragmented, adversarial and complex and is faced with issues such as corruption, bureaucracy and health and safety concerns. Nonetheless, it offers significant potential in terms of employment for the local people of the country and accommodates a huge labour force, which is mostly unskilled.

Construction disputes are detrimental to the health of any construction project and affect the project in terms of cost, quality, and time. There is a need, therefore, to adopt various conflict resolution techniques such as ADR techniques.

The survey indicates that ADR methods have been used, however, the construction industry needs to build capacity in terms of the settlement of disputes through ADR techniques.

The situation is less favourable in terms of the adoption and practice of ADR techniques as there is generally a lack of awareness and understanding of ADR mechanisms within the construction industry. Moreover, they are not being practiced in a proper manner. There is, therefore, a need for formal training in ADR techniques provided to the construction industry professionals.

The construction industry in Pakistan is huge and holds great promise. However, to compete on a national and international level, particularly in the wake of international investments such as the China-Pakistan Economic Corridor (CPEC), it needs to adopt and properly implement systems and procedures being practiced in the developed world.

Dr. Khurram Iqbal Ahmad Khan

Assistant Professor/Head of Department
Construction Engineering and Management
School of Civil and Environmental Engineering
National University of Sciences and Technology Islamabad Pakistan



4.2 Punjab

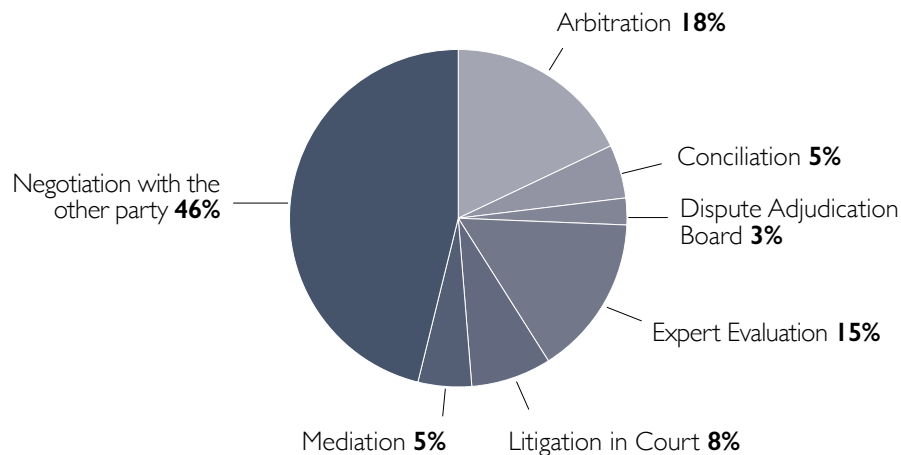
Much like Islamabad, Punjab also relies heavily on negotiations as a form of alternative dispute resolution. Arbitration is only used in 10% of all disputes, with the remainder being referred to mediation, litigation, expert evaluation, dispute adjudication and conciliation.

While all other methods are not heavily relied on, they are still practiced in Punjab unlike many other areas in the country, showing how ADR methods are relatively more developed in Punjab compared to the rest of the country.

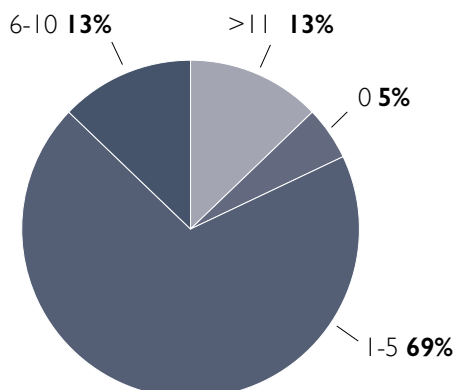
Nevertheless, only 36% of all cases being referred to ADR processes result in successful dispute resolution. With a province that has the resources and abilities to carry out successful ADR processes, it is unclear why they have such a low success rate.

No.	Top 3 Causes of Dispute
1	Access to Site
2	Behaviour & Competency of People
3	Payment Delay

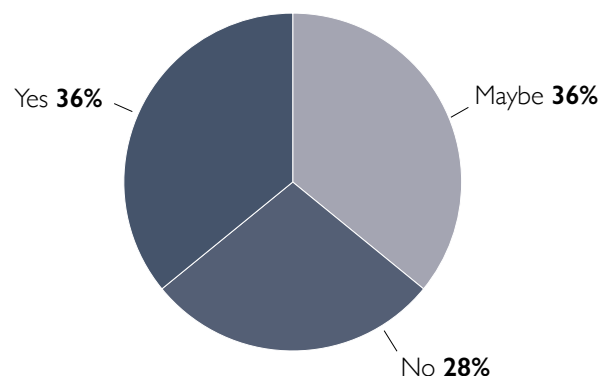
ADR method



Number of disputes



ADR outcome success



“ Guest commentary by

Professor Dr. Habib Ur Rehman

Dean Faculty of Civil Engineering, University of Engineering & Technology Lahore

Construction is a mutual interaction between three major parties: client, contractor, and consultant. The construction industry is extremely fragmented with complex processes that require the coordinated efforts of diverse groups, each having different goals and requirements, and each expected to enlarge its profits. One of the problems arising from these contradictory intentions is construction disputes. During the execution of a project, there are several stages at which a dispute can occur leading to challenges that include: overrun in project time and cost, loss of quality and productivity, dissatisfaction among project stakeholders, loss of profit and reputation, and damage in business relationships.

Disputes in business are unavoidable and the construction industry is no exception. Delay in payment, contractual claims, public interruption, poor communication, differing site conditions, lack of funds, and unclear risk allocation are the main causes leading to disputes. Special attention should, therefore, be given to these factors during the life cycle of the construction project. It is difficult, if not impracticable, to completely prevent construction disputes from arising, however, minimising their effect carries numerous returns, such as reducing contractual complications, educating and guiding construction workers to increase their competence to avoid and/or resolve them and form alternative dispute resolution systems.

Professor Dr. Habib Ur Rehman

Dean Faculty of Civil Engineering
University of Engineering & Technology Lahore



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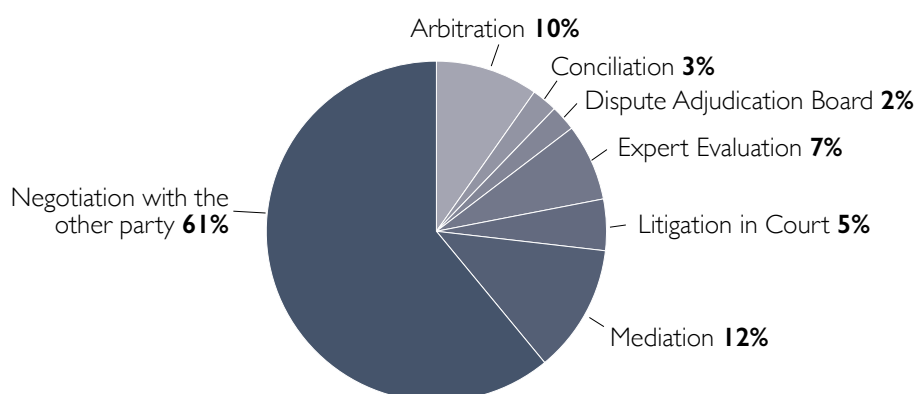
4.3 Sindh

Sindh and Punjab's results are quite similar in terms of the variety of ADR methods being adopted in each province. However, Sindh has the second-highest reliance on negotiations with the other party after Balochistan. While it relies on negotiations for 61% of its disputes, it relies on mediation for 12% and arbitration for 10% of its disputes.

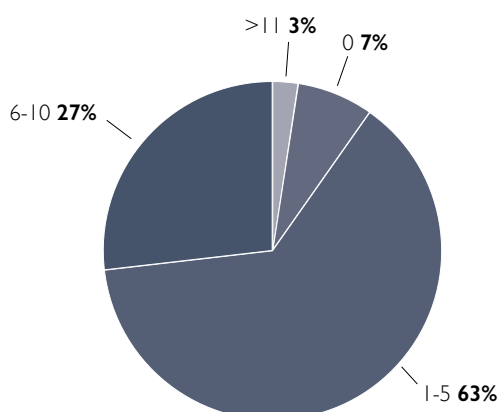
Unlike Punjab, in Sindh, 58% of disputes being referred to ADR processes result in successful outcomes.

No.	Top 3 Causes of Dispute
1	Access to Site
2	Behaviour & Competency of People
3	Payment Delay

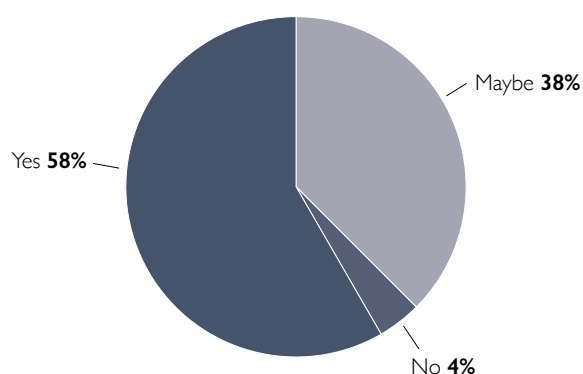
ADR method



Number of disputes



ADR outcome success



Dr. Rizwan Farooqui

Professor and Chair, Department of Civil Engineering NED University of Engineering & Technology, Karachi

With all the benefits the construction industry brings to the country's economy, there have always been key challenges throughout the various life cycle phases of construction projects which frequently lead to unavoidable situations, particularly in the form of conflicts and disputes. Unfortunately, our industry faces serious issues in coping with such situations and needs, not only clear and correct intent from the stakeholders but also appropriate knowledge, skills, and strategies on both technical and techno-legal matters,

This PCDR no doubt reflects the true situation of our industry performance in terms of key disputes and their current state of avoidance/management. The findings are not surprising since smooth cash flow is always a major concern in developing countries and I further believe that the major cause of payment delay is not only a matter of financial cash flow but is also related to irresponsible behaviour and incompetency at various levels.

Regarding ADR methods, “party-to-party negotiation” is the industry norm, whereas more structured ADR methods such as arbitration and mediation, common in the global arena, have begun to find their place in Pakistan's construction industry. ADR success of only 49% reflects a clear shortcoming in terms of the preparedness of our industry towards presenting and defending a case. It is time, therefore, to create awareness and skills among concerned stakeholders in our industry regarding better approaches to using ADR methods.

Over 95% of projects are facing disputes regardless of their sector or size. This is not a striking finding since a key contributor towards a larger number of disputes is the lack of structured contract management. From a sectoral perspective, disputes largely arise from the building and infrastructure sectors, together representing 72% of the coverage. Irrespective of project value, almost every sector holds a significant proportion of disputes, both from public and private sectors, which again reflects issues related to level of commitment and attitude of stakeholders.

One of the most surprising and serious findings is the duration of dispute; almost 42% of disputes lasted for more than a year, which is indicative of the slow-paced resolution methods adopted in our industry. From the point of view of dispute avoidance, the approach is focused on either risk management or relationship management, almost 87% of the time, instead of finding technical solutions to the identified problems, which is also a reflection of industry norms.

Dr. Rizwan Farooqui

Director General, NED Academy / CCEE

Professor and Chair, Department of Civil

Engineering NED University of Engineering & Technology Karachi, Pakistan





Dr. Sadaqat Ullah Khan

Professor and Chairperson, Department of Civil Engineering, Thar Institute of Engineering Sciences and Technology (TIEST) NED University of Engineering & Technology, Karachi

The PCDR is the first of its kind to collate data from across Pakistan, broken down by region. There is a need for such research as no data on disputes and how they are resolved in Pakistan's construction industry has been produced, to date. The findings in this report would aid in the timely completion of large projects by avoiding unnecessary delays, which will pave the way for the drafting of relevant construction laws in Pakistan.

Payment delays, contractual claims, public disruption, poor communication, and site conditions are the main sources of conflict in Sindh, which can harm projects and influence project stakeholders' performance. The data shows that in Sindh, dialogue with the other side has been proven to be a more reliable strategy for resolving disputes than in other parts of the country, with access to the site being the most common source of contention.

The ADR approach in Sindh has a success rate of 58%, which is greater than Punjab and KPK, but lower than Islamabad. This is owing to a lack of trust in the legal system and delays in decision-making in most construction disputes, which drives up project costs and timelines. As a result, the most common method of resolving disagreements is to negotiate with the opposing side rather than going to court. The data analysis also reveals that Pakistan's construction industry is unfamiliar with typical ADR approaches for resolving conflicts. Arbitration clauses that may easily send a dispute to ADR are not given enough weight in contracts and most construction projects are still unfamiliar with the concept and practices of dispute avoidance.

Dr. Sadaqat Ullah Khan

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Thar Institute of Engineering Sciences and Technology (TIEST)
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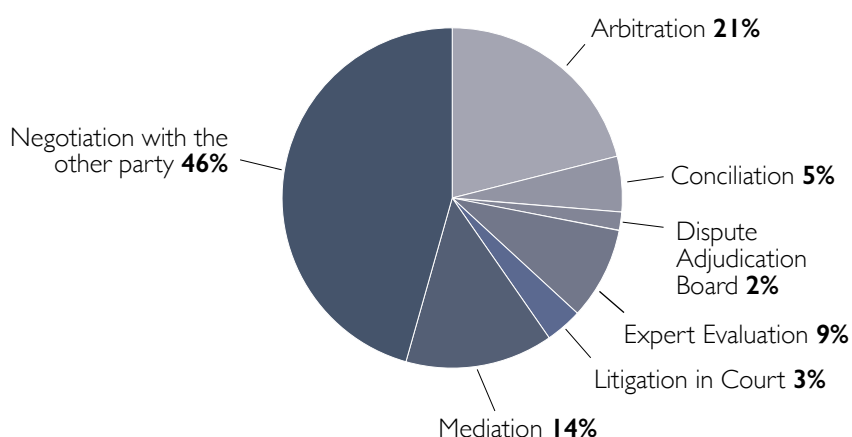
4.4 Khyber Pakhtunkhwa (KPK)

KPK relies the most on negotiations as an alternate dispute resolution process. However, relative to other provinces' reliance, it also has the highest rate of arbitration as a dispute resolution method, reaching 21% of all disputes.

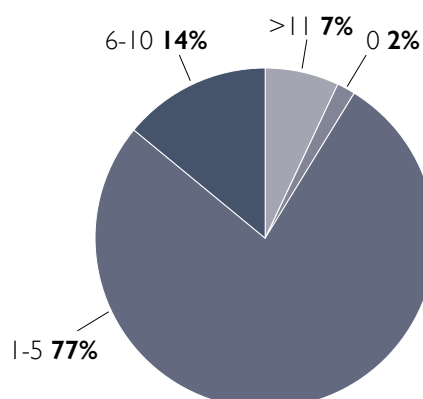
KPK and Sindh both have the same success rate in ADR outcomes, namely: 58% successful and 4% not successful.

No.	Top 3 Causes of Dispute
1	Payment Delay
2	Behaviour & Competency of People
3	Design Error

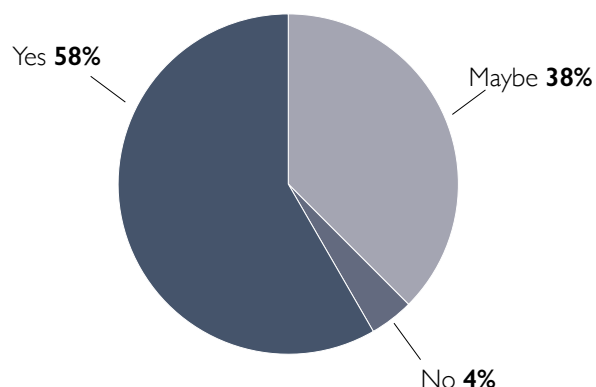
ADR method



Number of disputes



ADR outcome success



“ Guest commentary by

Professor Dr. Qaiser Ali

Meritorious Professor and Pro Vice Chancellor

Dean Faculty of Civil, Agricultural & Mining Engineering, University of Engineering & Technology, Peshawar

Construction projects, considered to be the backbone of the development of any country, can face different challenges during execution. Unfortunately, there exists no proper mechanism within the legal system to address the issues that might arise during the execution of these projects, therefore, Pakistan's construction sector is ineffective in resolving disputes, as evidenced by the survey's findings.

Although, the causes of disputes vary according to area and sector, the main causes of dispute during projects mainly include haphazard behavior; badly designed contract conditions, and lack of professionalism on the part of those involved.

Although there are numerous strategies for resolving and settling disputes, their efficacy is a concern. Most professionals prefer direct negotiation with the other party as it seems to be the fastest method of resolution without involving a third party. If this fails, the second option for most is arbitration/mediation followed by the least preferred method of litigation, as it takes much longer and causes further delays in the project. Survey findings indicate that people have little trust in the current legal system regarding dispute resolution, suggesting great potential for ADR.

Although the Pakistan construction sector does have ADR mechanisms, the complicated procedural formalities involved in addition to the level of acquaintance of the personnel with the procedures mostly make these mechanisms ineffective. More awareness and training are required to make the system and tools fast and effective.

Developing ADR tools is not enough; proper training of professionals is also required to increase the success rate of ADR as the efficiency of such tools directly depends on the competency of the people. Without adequate training or awareness, there will be no efficiency. Professionals should be given awareness and training on the importance of contractual clauses and how ambiguity can become a reason for dispute, affecting the pace and budget of the project. The importance of having everything well documented for dispute avoidance and later for dispute settlement should also be raised.

Both, development of efficient ADR tools and training of professionals is important to have a smooth system of dispute resolution.

Professor Dr. Qaiser Ali

Dean Faculty of Civil, Agricultural & Mining Engineering
University of Engineering & Technology,
Peshawar, Pakistan



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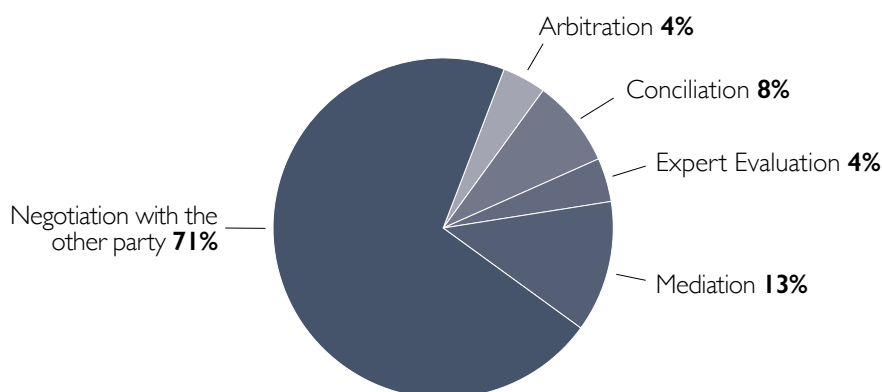
4.5 Balochistan

Balochistan relies mostly on negotiations, referring 71% of its disputes for resolution in this way. It relies on arbitration the least compared to all other provinces, handling only 4% of all its disputes via this method.

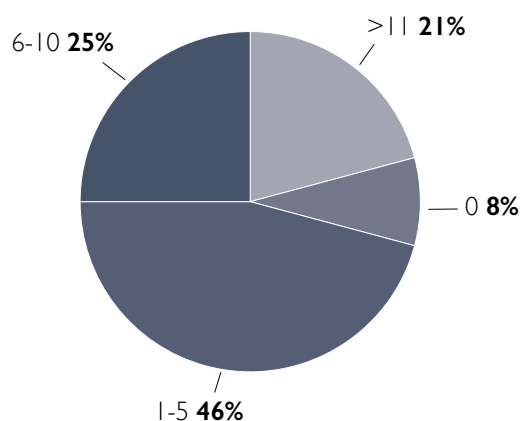
Its two main methods of dispute resolution, namely negotiations and mediation prove the reliance on parties' involvement for solving disputes. This could indicate the lack of development of other more formal alternative dispute resolution processes.

No.	Top 3 Causes of Dispute
1	Payment Delay
2	Extension of Time
3	Design Error

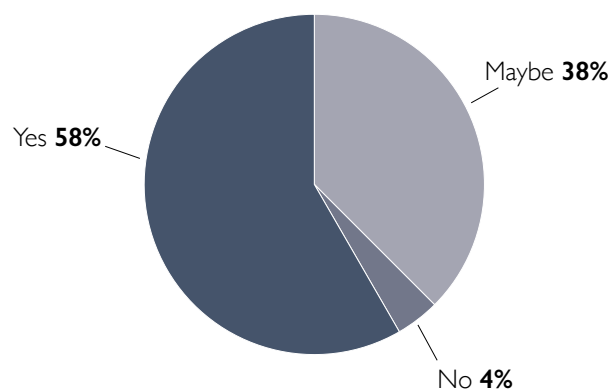
ADR method



Number of disputes



ADR outcome success



“ Guest commentary by

Dr. Saeedullah Jan Mandokhail

Chairman, Civil Engineering Department, Balochistan University of Information Technology, Engineering and Management Sciences (BUITEMS), Quetta, Pakistan

ADR is the most effective method of resolving disputes, however, this has been practiced less when compared internationally due to a lack of understanding or awareness about ADR.

As most disputes arise in small to middle range projects, contractors, particularly in this range, need to be given proper training on computing the adequate cost and time required to complete the project. Contractors should be able to do a risk analysis, with such risks being priced into the total estimate of the project. In many cases, the contractor includes the risk of project delay but does not include the additional cost for overtime work during this delay, which leads to a dispute.

Due to the effectiveness of ADR, it should be incorporated into the contract as a method of dealing with disputes. The contractors and other responsible people involved in the construction industry should also be given enough awareness about ADR through frequent workshops and seminars. Moreover, the schedule rates must be frequently revised to avoid disputes.

Dr. Saeedullah Jan Mandokhail

Chairman, Civil Engineering Department
Balochistan University of Information Technology,
Engineering and Management Sciences
(BUITEMS), Quetta, Pakistan



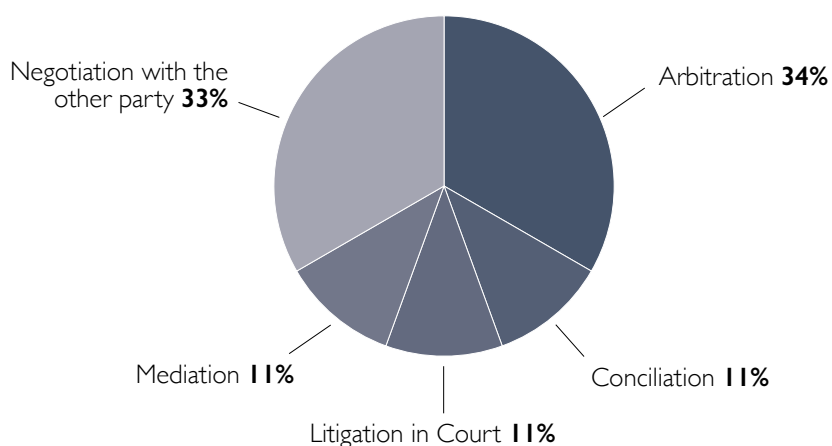
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4.6 Gilgit Baltistan

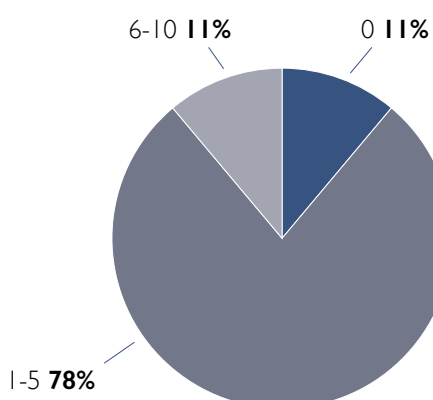
Gilgit Baltistan is the only region in Pakistan that relies equally on negotiations and arbitration as dispute resolution mechanisms since every other region relies mainly on the former. While Gilgit Baltistan remains largely undeveloped in terms of its urban landscape, its development of ADR methods is commendable as every process of dispute resolution was observed in the region, albeit with a different rate of reliance on each.

No.	Top 3 Causes of Dispute
1	Behaviour & Competency of People
2	Extension of Time
3	Payment Delay

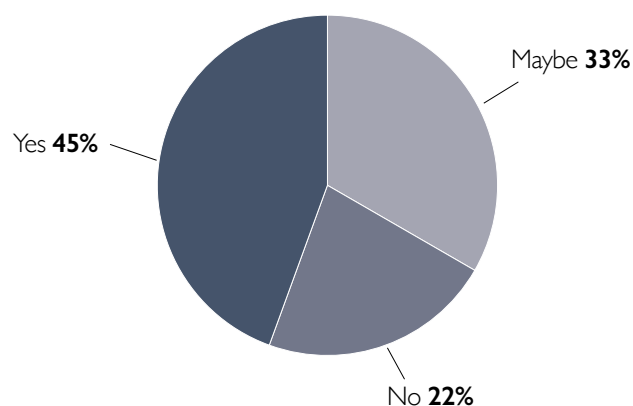
ADR method



Number of disputes



ADR outcome success



Dr. Attaullah Shah

Professor and Vice Chancellor at Karakoram International University, Gilgit Pakistan

The Construction Industry of Pakistan is in many ways still in its embryonic stage, as its contribution to the National GDP is one of the lowest in the world. It is dominated by major public sector construction projects in education, health, infrastructure development, hydropower, etc. The construction industry in the private sector of Pakistan is now evolving and it is expected that the construction industry of Pakistan will improve with time.

Contracts are executed under FIDIC, yet its implementation in true spirits is lacking. The main causes of disputes in the construction industry include non-adherence to contract clauses, misinterpretation of the clauses by the contractor and employer, delay in possession of the construction sites, political interference, delays in releasing of funds, irrational cost estimation, poor programming of the projects, lack of human resources, design errors, delay in processing the contractors' payments and frequent changes in the scope and design parameters. One of the major reasons for construction disputes is the vague role of the Engineer in the public sector department. In most cases, the Engineer is representing the employer which is not consistent with the spirit of FIDIC.

Some of the main approaches adopted in dispute resolution include referring the matter to the employer and 'The Engineer', however in the majority of cases, such disputes are referred to arbitration and later to litigation. In most cases, reconciliation and arbitration do not lead to mutually acceptable solutions.

ADR methods are rarely practiced as the current version of FIDIC in vogue in Pakistan does not provide for such methods. The Pakistan Engineering Council needs to, therefore, revisit these documents by including ADR approaches as practiced in the subsequent versions of FIDIC. The results of the survey have also reflected this fact as the national success rate of ADR in Pakistan is 49% as compared to the global success rate of 90%.

In the present contract regime, the frequency of disputes reported or initiated is very small due to limited capacity of the contractor and operators in the implementation of the contracts. The dispute resolution process is time-consuming as in some cases the mediation, reconciliation, arbitration, and litigation process takes years making contractual dispute resolution a challenging task. These disputes are more prevalent in the hydropower and infrastructure development mega projects of Pakistan contributing significantly to cost increases and project delays.

To deal with construction disputes, ADR approaches need to be incorporated into the contract document. To this effect, it is recommended that the latest version of the FIDIC Red Book incorporating ADR may be adopted as the existing version of FIDIC does not contain such provisions.

Engr. Dr. Attaullah Shah

Professor and Vice Chancellor at
Karakoram International University, Gilgit Pakistan



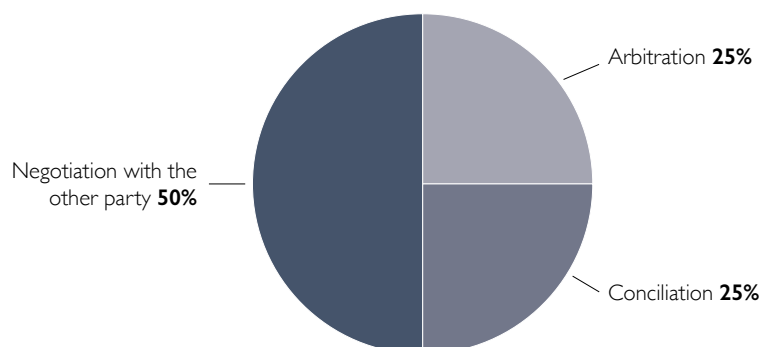
4.7 Azad Jammu Kashmir

Azad Jammu and Kashmir is likely the only region in the country that only practices three ADR methods: negotiations, arbitration, and conciliation. However, like all other regions, reliance on negotiations is most prominent. The fact that no other ADR method is used in Jammu and Kashmir shows their under development in the region.

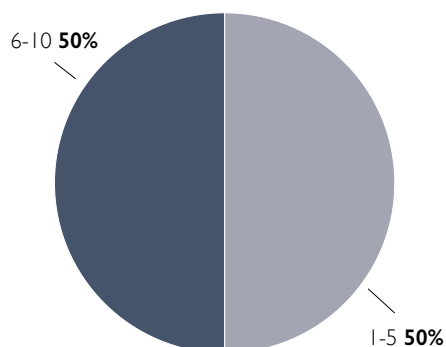
Encouragingly, half of all disputes referred to existing ADR methods result in a successful outcome.

No.	Top 3 Causes of Dispute
1	Payment Delay
2	Behaviour & Competency of People
3	Extension of Time

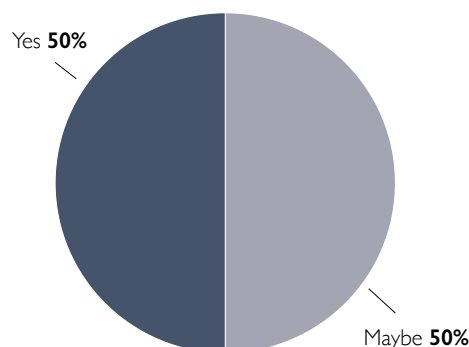
ADR method



Number of disputes



ADR outcome success



Dr. Tariq Mahmood FCI Arb

Barrister, 33 Bedford Row

The lack of understanding of contractual obligations and familiarity with the latest FIDIC contracts raise concerns about the legal orientation of businesses involved in the construction industry. This requires proactive action from the stakeholders, namely business associations and regional chambers of commerce, to build up the capacity of the concerned stakeholders in Pakistan.

The preferred choice of forum paints a bleak picture of Pakistan's dispute resolution frameworks that requires immediate legislative and administrative attention. The report states that in cases of a dispute, most parties' preferred course of action is negotiation, followed by arbitration and mediation, respectively. The data further reports litigation as one of the less preferred choices of forum.

The use of arbitration in construction disputes is universally accepted as a time-effective and cost-efficient dispute resolution mechanism. However, the findings of its acceptability within the Pakistani dispute resolution landscape suggest otherwise. One of the reasons for this may be due to issues regarding the enforcement of arbitral awards.

The official data about the construction activities in Azad Jammu Kashmir (AJK) is very limited. The available information suggests minimal construction activity, unlike real estate development and construction activity through private investments in Punjab and Sindh. Due to substantial overseas remittances from the United Kingdom, the construction industry is thriving in the regions of Mirpur and Kotli, where there are no big housing developers the likes of 'Defence Housing Authority' and 'Bahria Housing Authority'. Individuals would be willing to bring further investment in real estate development provided that a robust dispute resolution framework exists to safeguard those investments.

The PCDR report suggests that construction disputes in (AJK) are usually triggered by delays in payment, the extension of time and the competency of people. Like the national trend, negotiations also appear to be the favoured course of action in case of construction disputes. However, these trends suggest a similar underlying set of problems. The legal and administrative framework for arbitration principles and their enforcement mechanisms are covered under the arbitration law in Pakistan yet these frameworks are not free of procedural complexities and jurisprudential uncertainty regarding arbitration enforcement procedure.

PCDR provides an in-depth analysis of data on the nature of construction disputes in Pakistan and such findings would assist the policymakers and stakeholders in devising an apt strategy. This strategy may also emphasise a legal regime for construction law and clearly defined arbitration award enforcement mechanisms to deal with these sectoral issues. Any serious efforts to resolve construction disputes must include proactive engagement with all the stakeholders for capacity-building regarding construction contracts and expeditious and efficacious arbitration rules for construction disputes. The report serves to identify the significant construction dispute causes, and it would be a valuable tool for taking the necessary measures.

Dr. Tariq Mahmood FCI Arb

Barrister, Arbitrator, Mediator and Lecturer
33 Bedford Row
United Kingdom





5 Conclusions

The construction industry is known to be one of the most disputatious of all due to the regular occurrence of disputes during or after the completion of projects. As a result, the PCDR advises the need to develop and adopt a strategy that can not only manage disputes but also the common issues that can escalate into a dispute. Rather than simply responding to disputes when they arise, actions are required much earlier; avoidance is better than cure.

Commercial risk management strategies help in avoiding conflicts in the first instance and will include a thorough assessment of the risks of disputes occurring with agreed procedures for dealing with differences of opinion amicably. It is also understood that claims and disputes cannot be completely avoided in construction and the PCDR highlights this with 95% of projects having one or more disputes.

Insurances and limitation of liability are some ways of mitigating the risks associated with such issues, however, there are several other means of avoiding and managing these risks before they escalate and before legal costs are incurred and commercial relationships suffer.

The PCDR outlines techniques to help avoid disputes arising and when differences do arise, techniques to deal with issues early, quickly and cost-effectively. The aim is to educate people working across the industry about the lifecycle of conflict avoidance and early intervention to prevent disputes. The PCDR promotes the value of conflict avoidance and early intervention techniques and the use of these in construction and engineering contracts. CI Arb is part of the Conflict Avoidance Pledge¹⁴.



Standard forms and well-drafted contracts that are easy to understand and include practical systems for avoiding and resolving disputes at an early-stage help to develop a culture of collaboration between the parties. The contract should be written in plain, simple English, avoiding legal terms and jargon.

The objective is that the contract should be understood by all the people using it.

It is not straightforward to complete construction projects without variations. Most of these variations are straightforward until the parties dispute the facts and/or interpretation of the statements.

This inability to understand leads to failed negotiations and without adequate measures for dealing with disputes early on, it poses a risk that minor issues will escalate into disputes and claims. Meaningful dialogues between the parties' end and positions become entrenched with legal costs mounting out of control. These minor issues can develop into far-reaching conflict, which put the effective delivery of the project at risk.

Construction and engineering disputes can involve straightforward issues. They can also be incredibly intricate and involve complex questions of law. Deciding the right method for avoiding and resolving differences requires careful thought and should be a key part of the contractual negotiation process. Most situations, which can give rise to disagreements and full-blown disputes, can be avoided through well drafted contracts and a commitment by parties to embrace dispute avoidance and early intervention techniques which can be incorporated into the contract terms.

A well-designed dispute avoidance procedure in a contract helps parties to engage in open and honest communication. Such a procedure should provide an agreed system for identifying problems early and dealing with them in a non-adversarial environment that encourages compromise and avoidance of escalation over formal dispute resolution.

¹⁴ - The Conflict Avoidance pledge is prepared by six leading institutions and two of the UK's biggest employers in construction and engineering. They have led a coalition which has the objective of helping the industry tackle the rising financial costs of disputes as well as the growing dissatisfaction surrounding established forms of dispute resolution. The coalition includes Royal Institution of Chartered Surveyors (RICS), Institution of Civil Engineers (ICE), International Chamber of Commerce (ICC) United Kingdom, Royal Institute of British Architects (RIBA), Chartered Institute of Arbitrators (CI Arb), Dispute Resolution Board Foundation (DRBF), Chartered Institution of Civil Engineering Surveyors (ICES), Transport for London (TfL) and Network Rail (NR).

5.1 Dispute Avoidance

Avoidance is better than cure. A risk management approach helps with identifying and avoiding conflicts. This is seen as the most successful way of ensuring projects are delivered on time and on budget. When used in accordance with agreed principles and rules for co-operation, a viable dispute avoidance system will reduce the number of potentially costly disputes and settle emerging problems at an early stage. It also helps to maintain positive working relationships between employers and the supply chain.

Dispute avoidance involves setting up a system that explores the potential risks connected to a project. It often includes the use of contractual procedures designed to mitigate problems which arise and settle differences before they crystallise into formal disputes.

Dispute avoidance systems are utilised in FIDIC Contracts 2017 and beyond as standard. In Pakistan, it has been highlighted that FIDIC 1986 is still being used which does not reflect on Dispute Avoidance Boards. Hence, an addendum to any contractual agreement can be used to develop a neutral Dispute Avoidance Panel (DAP), which is also a key recommendation for World Bank-funded projects¹⁵.

The primary objective of the DAP is to identify and report observations on possible sources and warning signs of potential disputes through the review of live project reports, programmes, and commercial data as well as the assessment of current behaviours and practices via interviews with key practitioners and stakeholders. The DAP Review Report will allow early management intervention to avoid or minimise the potential exposure of all parties to contractual disputes and to safeguard reputations.

In addition, it will:

- Promote open and honest communication between all stakeholders.
- Encourage dialogue and timely action where necessary to avoid or minimise matters escalating into formal dispute resolution procedures such as adjudication, arbitration, or litigation.

- Demonstrate genuine willingness by the stakeholders and project team to prevent the need, wherever possible, to embark on drawn-out and potentially divisive and expensive dispute resolution processes.
- Support and foster Mutual Trust and Cooperation/Collaborative relationships which underpin supply chain performance.

A DAP will normally consist of no less than two and, no more than four members, consisting of experts from the legal, quantum, planning/construction, and behavioural professions. Additional technical expertise can be provided if necessary. Each DAP member must be able to demonstrate a very good understanding of the process.

DAP members must be impartial, as between all the parties, and must also be seen to be independent of them. Those appointed must have due regard to their professional bodies' guidance on Conflicts of Interest. The role of a DAP member is to communicate with all the relevant parties and to gather and review information to provide observations via the DAP Review Report as to the propensity for disagreement and dispute.

However, the DAP is not constituted to give advice, mediate, or decide upon a dispute; rather it is expected to offer its observations to all parties on potential areas of dispute upon which they will consider and act accordingly. However, the parties can and should choose to employ a standing Dispute Adjudication / Avoidance Board in line with FIDIC Clause 20 for the life of the contract, maintaining the ability of the parties to take a dispute to adjudication at any time. It is recommended that a DAP be used in conjunction with projects where the value or complexity/risk of disagreement is sufficient to justify the cost.

Dispute avoidance systems involve regular information gathering by professionals. This normally begins early on, even before a contract is signed. It can also continue through the lifetime of a project where the parties desire a neutral insight into how identified risks are performing over time. The main objective is to identify emergent issues and ensure that there is a clear understanding of the risks across the project team.

¹⁵ - Further details available at <https://fidic.org/world-bank-signs-five-year-agreement-use-fidic-standard-contracts>

The key to successful dispute avoidance is open and honest communications between parties on how to deal with potential risks. Parties which regularly connect freely and openly are more informed and able to tackle problems collaboratively, without fear of negative consequences.

This is evident from the PCDR as behaviour and competency of people and failing to understand and/or comply with contractual obligations rank high on the causes of dispute.

5.2 Risk Management

It must be accepted that not all disputes can be avoided. When differences emerge, it is sensible to use procedures that facilitate an early review and disposal of the disputed issues. Early intervention techniques are effective at preventing disagreements from becoming fully-fledged disputes.

Early intervention mechanisms safeguard commercial managers and directors against losing the ability to choose how differences will be resolved as they are moved into the hands of lawyers.

Generally, the procedure would involve an impartial review of the issues on which parties do not agree. The review would be undertaken by an independent person who is a highly credible and experienced subject-matter expert. He or she will usually engage with all relevant parties and undertake an investigative role. In some cases, typically where issues are complex and/or involve significant amounts of money, parties can choose to use a panel of independent persons.

Parties can opt for early intervention procedures that yield binding or non-binding recommendations. Where they are non-binding, recommendations can be used to inform discussions between the parties and promote settlement. In addition, parties can choose a procedure where, if either party declines to accept a non-binding recommendation, they will be required to provide written reasons. This can dissuade a party from unilaterally declining a recommendation simply because they do not like it.

5.3 Negotiation and Settlement

The PCDR confirms that over 50% of disputes were settled using amicable resolution methods such as negotiation and conciliation.

Parties can opt for a mediative method to resolve their dispute that is private and non-adversarial resolving established disputes collaboratively. In cases where parties can neither avoid a dispute nor resolve it early and quickly, mediative procedures exist that enable them to achieve a settlement without going “eye to eye” in a confrontational procedure such as arbitration or court action. These procedures are usually private and confidential and involve the appointment of neutral subject-matter experts who help both sides to negotiate their way to an agreed settlement.

Parties would be wise to use a mediative procedure that uses a neutral third party (mediator, conciliator, etc) who has a track record in the subject matter of the dispute, giving the parties confidence in the process. It ensures that the mediator, conciliator, or similar, is suitably equipped to understand matters that go to the heart of the dispute and can, if required, provide the parties with knowledgeable and effective guidance on settlement options.

Mediative procedures can be employed quickly and effectively. They are remarkably cost-effective and will usually be significantly cheaper than adversarial procedures such as the courts or arbitration.

5.4 Dispute Resolution

Parties can opt for a final and binding determination of their disputes that is quicker, cheaper, and more private than the courts. In cases where parties can neither avoid a dispute nor resolve it early and amicably, determinative procedures exist that enable them to achieve a settlement quickly and cost-effectively.

Decisions are usually binding, either in the interim or with immediate and permanent effect. Parties will often have a contractual and/or statutory right to refer their disputes to the binding decision of an adjudicator or arbitrator.

These procedures are optional (parties can jointly choose to use other early intervention or dispute resolution methods). When using adjudication or arbitration, parties would be wise to appoint an adjudicator or arbitrator who is trained in the relevant procedure and is a recognised expert in the subject matter in dispute. Where parties opt for an appointment by a third party, they should choose an appointing body that ensures the appointed person is suitably qualified and impartial.

Adjudication, when utilised effectively, can be swift thus saving parties time and money. It provides a decision that is binding in the interim. The United Kingdom adopted adjudication through enacting the Housing Grant Construction and Regeneration Act 1996 as amended by the Construction Act 2009. This has, by far, been the most successful dispute resolution procedure in the UK as it is quick and supports projects to continue whilst the dispute is being adjudicated by a neutral third party.

Sir Michael Latham recommended that “adjudication should be the normal method of dispute resolution” in his “Constructing the Team” report in 1993¹⁶.



¹⁶ - Available at <https://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>



6 Recommendations

1

Preparation of pre-contract information of project documentation, and appropriate risk allocation, is the first step in conflict avoidance.

2

The contract should be written in plain, simple English, avoiding legal terms and jargon. The objective is clarity so that the contract should be understood by all the people using it.

3

The contract should be up to date with the current market and industry norms. It should be suitable for the type of work and location it is intended to cover. It should avoid unnecessary clauses copied from forms that do not apply to the project.

4

The contract should include obligations for parties to identify and communicate problems early and commit to achieving a quick and amicable resolution. The parties should be required by their contract to work together to find solutions and establish necessary actions to the mutual benefit of all those involved.

5

The contract should provide specific tools for managing the project risks in the way which best meets the objectives of the project. Control of risks can be achieved using a continuously updated programme and early warning procedures.

6

The contract should include a viable variation and change control procedure which aims to establish the cost and time effects of changes at the time each change occurs. The procedure should enable parties to either agree on the level of time and cost variations for the change or identify the reasons for any disagreement at an early stage

7

All parties should agree and engage in the dispute avoidance process early, and all parties should be properly informed and allowed to be heard. Contracting parties should agree on the procedure and timetable for including dispute avoidance methods into their contract in advance and can agree on any changes to it during the project.

8

Parties should utilise the services of qualified neutral Dispute Avoidance Panel (DAP) professionals as part of the project delivery team to avoid, mitigate and resolve disputes on their largest programs. With this expertise in place, parties should be able to take advantage of a well-thought-out strategy for avoiding, mitigating and resolving disputes throughout the lifecycle of the project.

9

Parties can choose the type of dispute resolution outcome they prefer, e.g., a binding (arbitration) or non-binding (neutral evaluation) recommendation. Parties can decide that non-binding recommendations will become binding, e.g., if not challenged after a specified time.

10

The parties can appoint an expert(s) to facilitate an agreed outcome on the subject that is at the heart of the dispute. Expertise lends credibility to the mediator, conciliator, etc. and gives the parties confidence in the process.

11

The parties should aim for procedures and outcomes of amicable alternative dispute resolution that are inherently private and confidential. Mediative procedures allow parties to decide what information they will share with their opponents.

12

Amicable resolution is often considerably quicker than litigation. When managed correctly, e.g. pursuant to procedural rules and timetable, it is usually cheaper too.

13

Agreed outcomes facilitated by a neutral subject-matter expert will be satisfactory to all parties and end the dispute.

14

Parties should take all possible steps to avoid conflict and agree to speedy dispute resolution if any conflict arises by a pre-determined impartial arbitrator/adjudicator/referee/expert. Determinative procedures result in binding outcomes and will usually end disputes.

15

The person appointed to determine the dispute would normally be an expert in the subject which is at the heart of the dispute. Expertise lends credibility to the arbitrator, adjudicator, expert, etc, and gives the parties confidence in the process.

16

The procedure and outcomes of dispute resolution are inherently private and confidential.

17

Determinative procedures such as adjudication are considerably quicker than litigation. Arbitration and expert determination, when managed correctly, e.g., pursuant to procedural rules and timetable, can be comparatively quicker and cheaper.

18

Parties can agree to the identity of their adjudicator, expert, or arbitrator, or choose an appropriate organisation to appoint someone who is suitably qualified and impartial and is available to act as and when the parties require.

19

Pakistan Arbitration Act to be updated to UNCITRAL Model Law.

20

Contract Act 1872 needs to be updated regarding archaic practices like 'pay when paid' clauses which are detrimental to the construction and engineering industry.

21

Civil Procedure Rules need to be updated to adopt pre-action protocol that promotes ADR supported by the ADR Acts recently enacted but not yet enforced across Pakistan.

22

Legislation and procedures to be adopted which are specific to construction and engineering law disputes.

For the complete results of the PCDR, please see Appendix A or for an interactive analysis of the results please see <http://www.pcdr.pk>



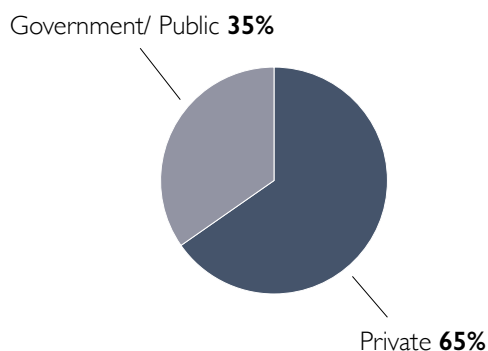
7 Appendix A

Detailed survey results

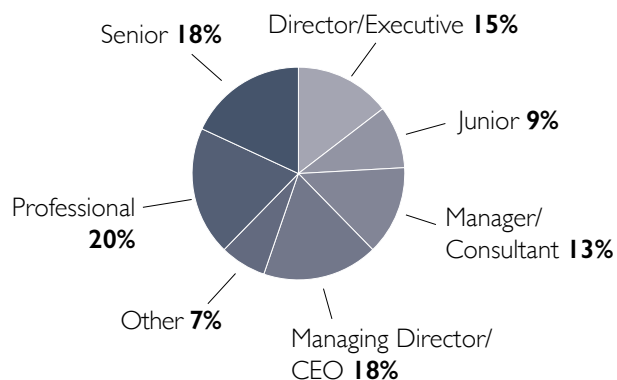
Respondent organisation

The following graphs represents the industry sector of the survey respondents. The background of the respondent is important in understanding the mindset and problems being faced by them.

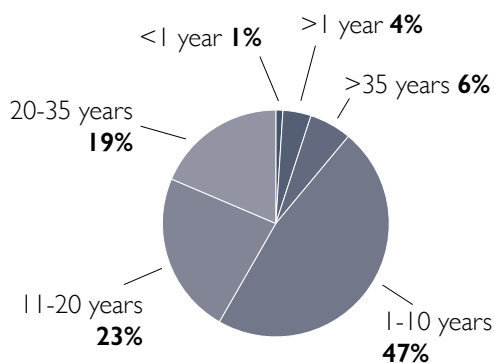
Type



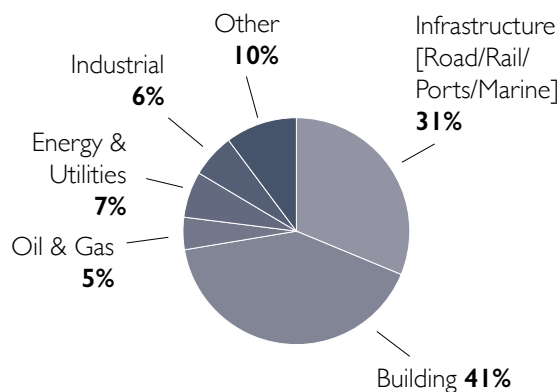
Occupation



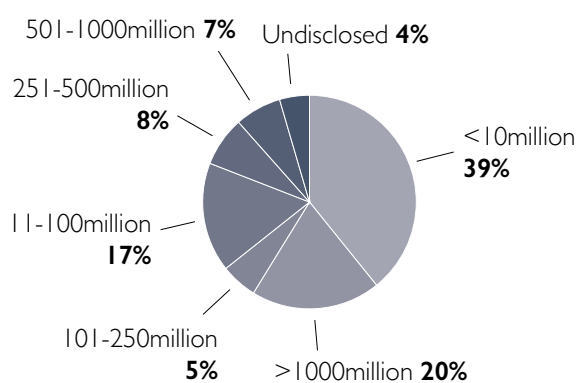
Experience (Years)



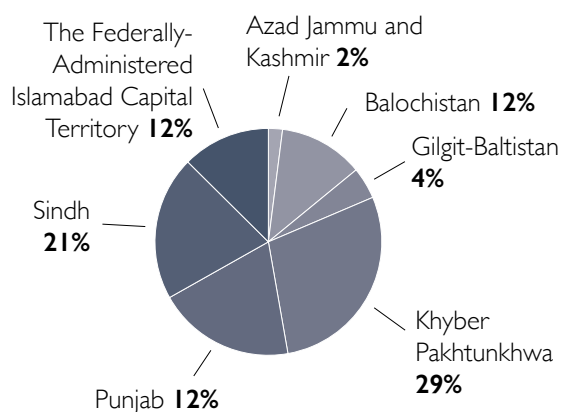
Industry Sector



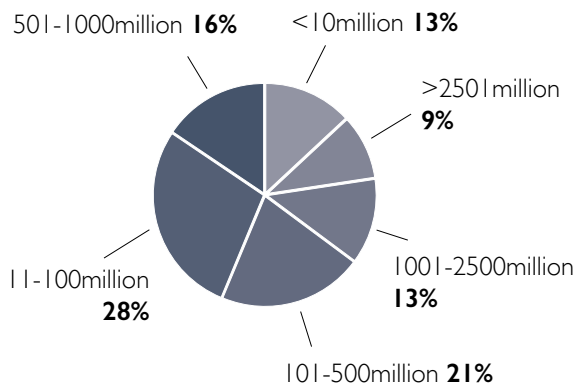
Organisation Size



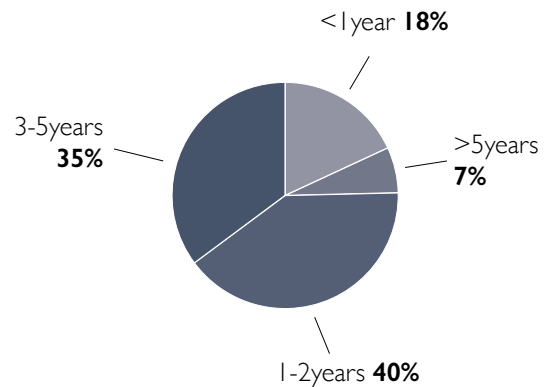
Project Location



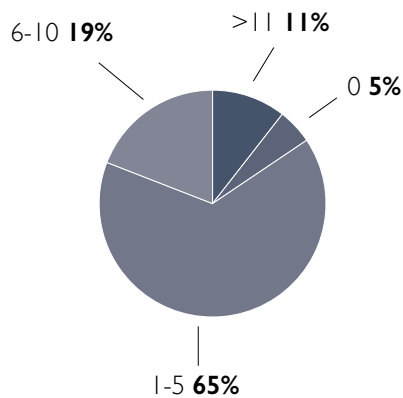
Project Value



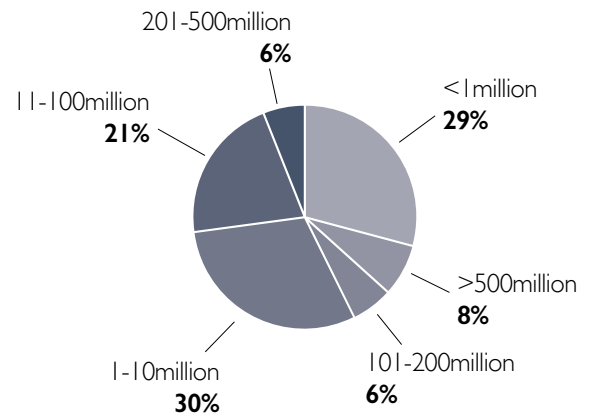
Project Duration



No. of Disputes per Project

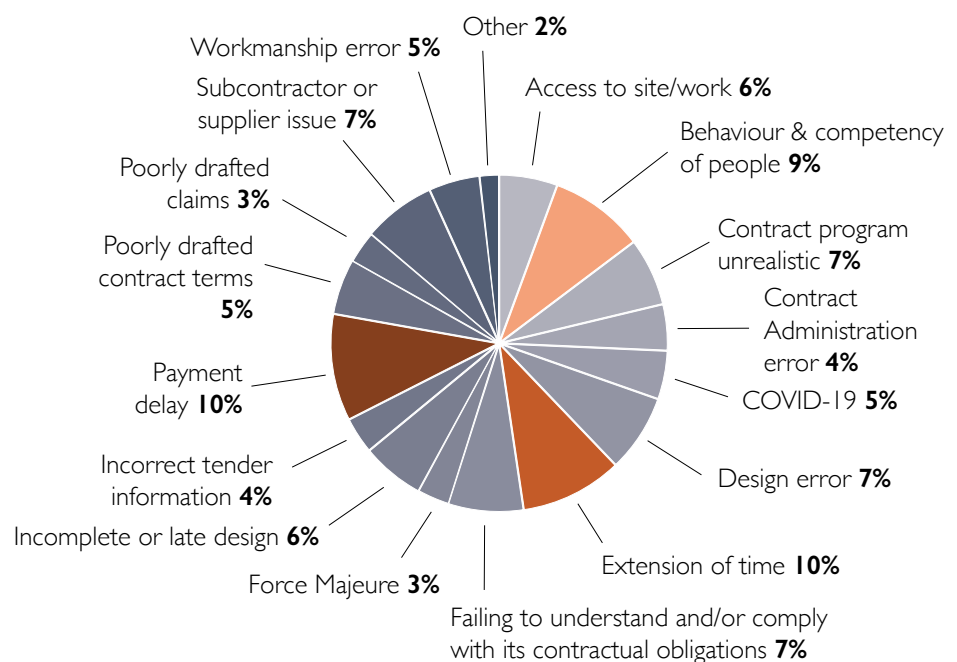


Value of Disputes

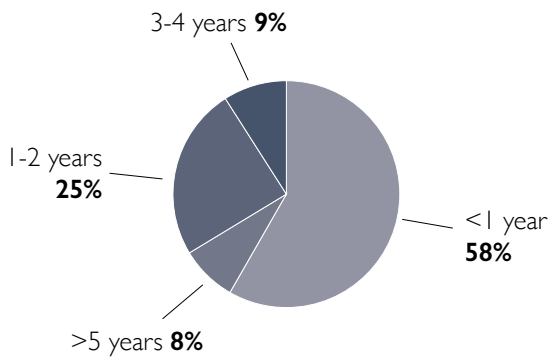


Dispute Causes

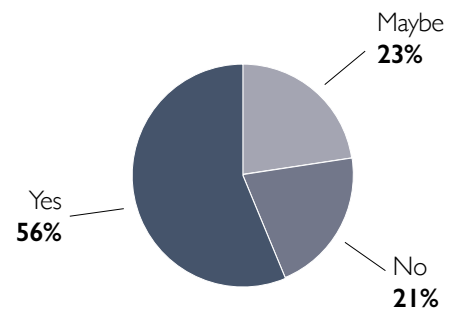
Rank	Most common disputes
1	Payment Delay
2	Extension of Time
3	Behaviour and competency of people



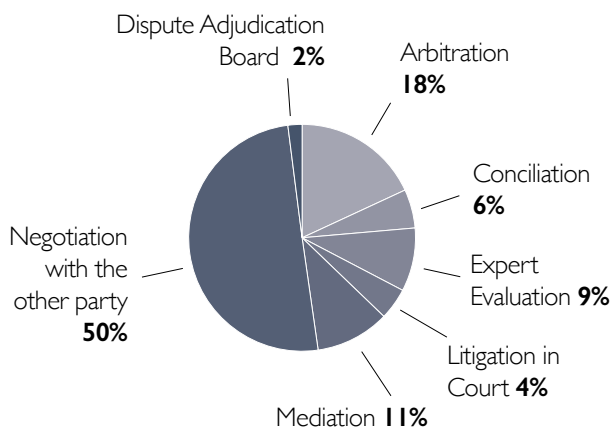
Duration of Disputes



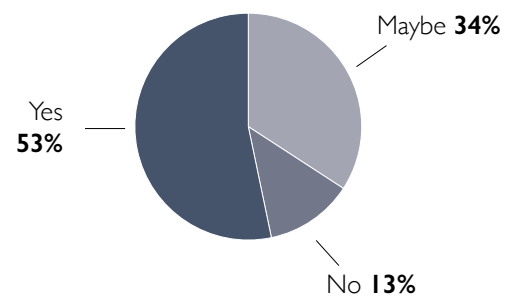
ADR Awareness



ADR Method

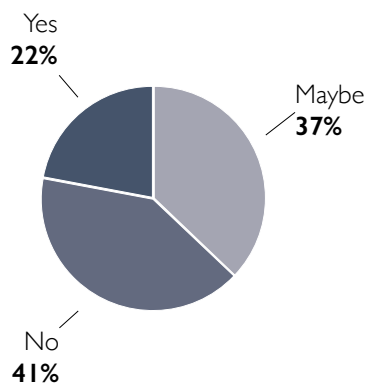


ADR Success



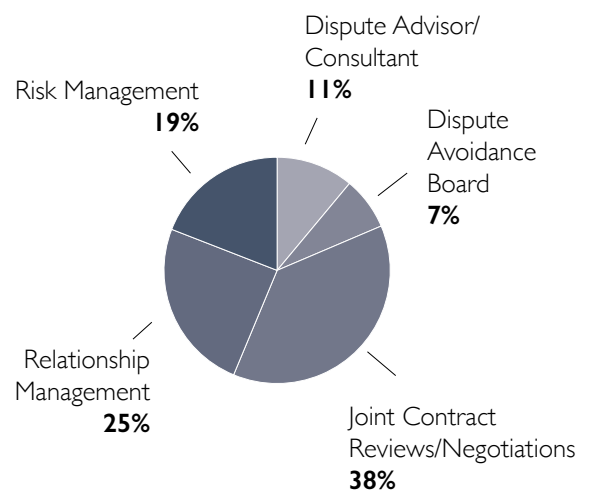
Legal System Support for ADR

The respondents were asked to share their views on whether they consider that the current legal system in Pakistan supports Alternative Dispute Resolution.



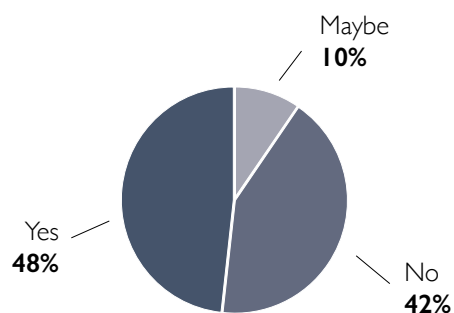
Dispute Avoidance

The respondents were asked if they know about the Dispute Avoidance and any methods deployed by the respondents.



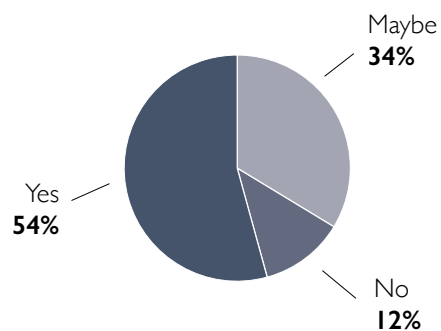
In-House Legal

The provision and resources of having an in-house legal team was asked of the respondents.



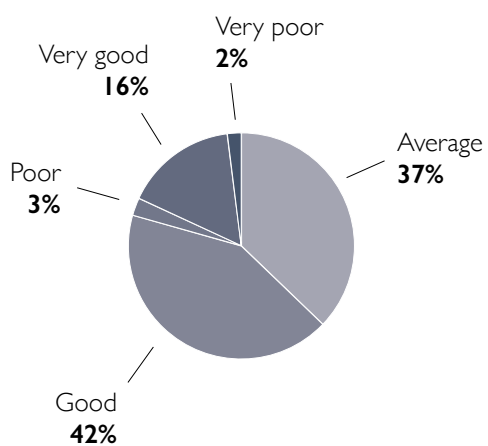
Construction Disputes Outsourcing

The respondents were also asked if they have legal teams onboard for the resolution of construction disputes.



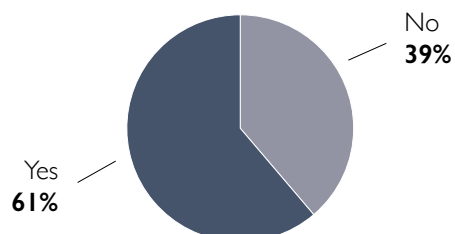
Competency Levels

The respondents were asked if they are satisfied with the competency of the contracts team.



PCDR Further Discussion

The respondents were asked if they are interested in discussing their ongoing disputes in past or current projects.



Standard forms of contract

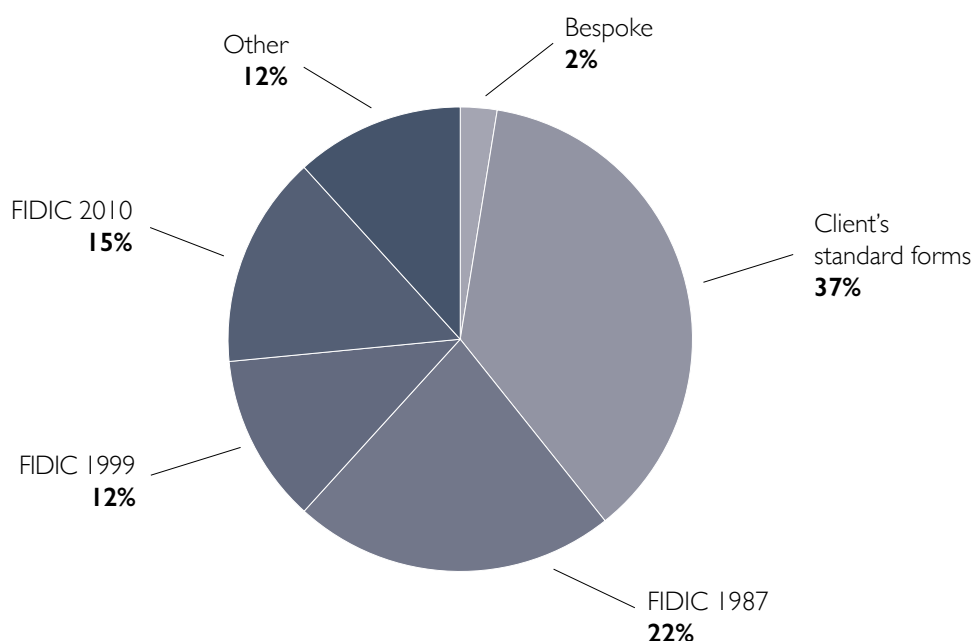
Across the globe, standard forms of building contracts have been used for centuries and their use is extremely widespread. In Pakistan, the Pakistan Engineering Council⁶⁷ promotes its bidding documents. There are numerous forms available for the parties to choose but the PEC forms are mainly adapted within the public sector. These forms are generally found to be based on the old FIDIC contracts.

The range of contracts developed over the years reflect the different procurement methods, risk profiles, nature of the project, client teams requirements, value & size of project and the varying demands/expectations of those who own and use/occupy buildings.

Construction projects are complex, both in terms of the rights and obligations of the employer and the contractor who will carry out the work, and also in terms of what will physically occur on site. The contracts that govern these projects and the relationships associated with them therefore need to be clear and certain as to who is doing what, for how much, how it will be done and who is responsible for the varied and numerous risks involved.

The first line of defence in terms of dispute avoidance is to have contracts that are concise and appropriate for the type of project. It is not possible for one type of standard form of contract to address the needs of various shapes and sizes of construction projects that now exist. However, the standard forms are extremely useful and can provide a model which is familiar to, and understood by, lawyers, their industry clients (eg contractors and developers) and professional consultants, which can be adapted (as and where necessary) to suit a varying need.

Standard Forms of Contract



67 - PEC Bidding Documents available at https://www.pec.org.pk/pec_bid_docs.aspx



8 Appendix B

Contextual information

8 Pakistan

Pakistan is the fifth most populous country in the world with a population exceeding 220 million. It has a labour force of 60 million and a burgeoning middle class. As per the Pakistan Economic Survey¹⁷, the construction industry accounts for 2.53% of the total GDP of Pakistan. It employs 7-8% of the total Employed labour force. A continuous trend of people shifting to urban centres and the China-Pakistan Economic Corridor (CPEC)¹⁸ have provided the necessary boost to this sector with a high demand for housing and infrastructure projects such as dams, highways, power plants. Unfortunately, Pakistan has failed to follow the trends in the world, be it the shift towards the circular economy from the traditional 'take, make, waste' strategy or shifting from adjudication (courts) to more developed dispute settlement mechanisms.

8.1 Construction Industry

The construction sector is a significant contributor to the global economy. In Pakistan alone, it provides up to PKR 380 billion in GDP. Amongst the many procedural complexities, it is often unavoidable to complete a major construction project without any disputes. According to the Association of Builders and Developers, pending cases relating to construction and housing add up to PKR 1.1 trillion. The construction industry in Pakistan has long been known to be ineffective, adversarial, fragmented and incapable of delivering to its customers. It needs greater partnering, collaboration, and teamwork. An appropriate delivery strategy for construction projects is essential to drive sustainability, innovation, efficiency, value for money, and most importantly, avoidance of disputes.¹⁹

8.2 Key Indicators

According to the Board of Investment (BOI)²⁰, the latest Construction Profile of.

- Pakistan has an installed cement capacity of 54,557,100 tonnes per annum.
- Similarly, ongoing infrastructure projects, especially CPEC projects, have significantly increased the demand for steel. To meet this growing demand, steel production capacity has increased with Pakistan currently ranking 28th in the world for steel production as stated in a Pakistan Business Council²¹
- Pakistan is ranked 22nd worldwide when it comes to road networks, with a total road network length of 263,775km. This network is expected to improve further with the connectivity projects under the China-Pakistan Economic Corridor and the Central Asia Regional Economic Cooperation²²(CAREC) program as well as ongoing government projects.
- Construction activity for the year 2020 increased by 8.06% due to increased government spending, according to the Pakistan Economic Survey (2019-2020).
- Foreign Direct Investment²³ (FDI) in the construction industry continues to grow. FDI in the sector was US\$ 40.4 million during July-April FY18 and increased to US\$ 70.2 million during July-April FY19. This is largely attributed to projects initiated under the banner of CPEC.

8.3 Projected Growth

Despite a decrease in GDP, public sector spending on infrastructure, and FDI, the future trend in the sector remains positive²⁴. This is mainly due to policy realignment, restructuring, improvements in the regulatory system, incentives, and relief packages. According to projections by Fitch Solutions²⁵ the value of the Construction industry in Pakistan will be Rs 2,705.5 billion by 2028. This shows the potential of the housing and Construction industry.

8.4 List of Mega Projects [CPEC, ARAMCO Oil, Ports, Rail Lines, Energy]

The Construction sector in Pakistan is witnessing an unprecedented scale of work which can be attributed to the ongoing China-Pakistan Economic Corridor. A plethora of mega projects have been initiated with many more in the pipeline. These projects include transportation projects, energy projects and infrastructure projects such as dams and ports.

A list of current and future mega projects in Pakistan as per the Public Sector Development Programme 2021-22²⁶ was published by the Planning Commission-Ministry of Planning, Development & Special Initiatives in June 2021²⁷.

17 - Pakistan Economic Survey 2020-21, Economic Adviser's Wing, Finance Division, Government of Pakistan, available at https://www.pc.gov.pk/uploads/cpec/PES_2020_21.pdf

18 - China Pakistan Economic Corridor; See details at <http://cpec.gov.pk/>

19 - Prime Minister's Office, Islamic Republic of Pakistan, available at <https://pmo.gov.pk/>

20 - The Board of Investment (BOI) was established with broad based responsibilities of promotion of investment in all sectors of economy, facilitation of local and foreign investors for speedy materialisation of their projects, enhancement of Pakistan's international competitiveness and contribution to economic and social development. Available at <https://invest.gov.pk/about-us>

21 - Further details available at <https://invest.gov.pk/housing-and-construction>

22 - Further details available at <https://www.carecprogram.org/>

23 - See <https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=PK>

24 - See Pakistan outlook: <https://www.focus-economics.com/countries/pakistan>

25 - See <https://www.tchslutions.com/country-risk/headwinds-temper-pakistans-growth-outlook-fy202122-07-01-2022> 26 - See https://www.pc.gov.pk/uploads/archives/PSDP_2021-22.pdf

27 - See <https://www.pc.gov.pk/web/psdp>

8.5 Government Outlook on the Construction Industry

The government of Pakistan has focused on transparency in the public sector and on making roads and highways via a PPP-BOT model which, despite the hike in the prices of raw materials, are being built at a much lower cost than those built by previous governments. In pursuit of national and regional economic integration, several incentives have been created to encourage the private sector to join the public sector in the construction of national highways, motorways, tunnels, and bridges. The establishment of the Public Private Partnership Authority was a positive step in this regard. Over the last few years, the National Highway Authority (NHA) has completed four successful projects worth Rs 135 billion on a BOT basis and is currently undertaking nine more projects.

In 2020, following the massive hit to the economy caused by COVID-19, the federal government announced an incentive package that included: a Rs 30 billion subsidy for the Naya Pakistan Housing Project²⁸; investors not being asked about their source of income; banks being asked to set aside 5% of their portfolios for house financing, amounting to Rs 330 billion; reducing the number of No Objection Certificates (NOCs); a fixed tax regime for eligible developers and builders; a reduction and exemption in taxes such as withholding tax on the purchase of raw materials and capital duty tax; declaring construction as an industrial undertaking.

9 Construction Dynamics in Pakistan

9.1 Construction as a Key Enabler of Economic Growth

The Construction sector can be said to be the backbone of Pakistan's economy, contributing between 2.3% and 2.85% in the last five fiscal years to Pakistan's GDP (this was valued at PKR 316 billion in the Pakistan Economic Survey 2019-20)²⁹.

The construction sector is also the second-largest employer, after agriculture, globally. Given its importance to the economy of the country, an effective dispute resolution mechanism needs to be created for the construction sector.

9.2 Construction Contracts

The construction industry in Pakistan does not use a specific standard form of contract. However, some standard forms of contracts that are used include FIDIC, PEC, NEC as well as bespoke forms. Government construction authorities at provincial levels have, however, employed building codes which regularise construction contracts.

The National Highway Authority³⁰ operates at the federal level and regularises highway construction contracts. The Private Power and Infrastructure Board³¹ (PPIB) of the Ministry of Energy (Power Division)³² offers some standard forms of contract, especially for Public-Private Power Projects as well as on Private Power Agreements (PPA)³³ for Hydropower, Oil and Gas, and Coal. Collaborative contracting is not prevalent in the construction sector in Pakistan.

9.3 Legally Binding Contract

The primary law that sets out the requirements to create a legally binding contract is the Contract Act, 1872.³⁴ The Act is based on English common law doctrines. The elements of a valid contract are offer, acceptance, consideration, and an intention to create legal relations. For a binding contract to come into existence, there needs to be an agreement between two parties who are competent to contract, the agreement should be based on free and mutual consent for a lawful consideration and lawful object. Construction contracts must satisfy these requirements to become legally enforceable.

The general conditions in a construction contract include clauses such as the scope of work, contract price, commencement and completion of work, terms of payment, insurance, contractor to obtain licenses, termination, arbitration, and force majeure. The special conditions include, for example, labour relations, extra working time, supervision, and coordination.

9.4 Letter of Intent

The legal position regarding a letter of intent (LOI) is based on common law principles. This position states that an LOI merely indicates a party's intention to enter a legally enforceable contract in the future. Therefore, it is not enforceable in law as it does not confer any rights and obligations on the parties.

9.5 Insurance

In Pakistan, the statutory law obligates employers to insure their employees when carrying out construction work. The Industrial and Commercial Employment (Standing Orders) Ordinance³⁵, 1968 places a compulsory group insurance requirement on an employer to have its employees insured in an 'industrial and commercial establishment'. This ordinance applies to an establishment where 20 or more 'workmen' are employed. Section 10A of the ordinance requires an employer to have its 'permanent workmen' insured against natural

28 - For further details see <https://naphda.gov.pk/>

29 - https://www.nance.gov.pk/survey_1920.html

30 - <https://nha.gov.pk/>

31 - <https://www.ppib.gov.pk/>

32 - <http://www.mowp.gov.pk/>

33 - <https://ppp.worldbank.org/public-private-partnership/sector/energy/energy-power-agreements/power-purchase-agreements>

34 - <https://www.pakistancode.gov.pk/english/UY2FqajwI-apaUY2Fqa-a50%3D-sg-jjjjjjjjjjjjjj>

35 - See <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86160/97030/F-114188043/PAK86160%202010.pdf>

death and disability and contingencies of death and injury not covered in the Workmen's Compensation Act, 1923 or the Provincial Employees Social Security Ordinance, 1965 (PESS)³⁶.

The Workmen's Compensation Act, 1923³⁷ places a compulsory requirement on employers to pay for compensation in case of an injury or death of an employee while performing his/her employment duties.

PESS applies to establishments that are specifically notified by the provincial governments. Once an establishment is notified, then all the benefits under PESS would be given to employees of that establishment. The Ordinance has formed a social security fund under section 3 which is managed by the social security institution established under the same section. Under section 21, the employers of notified establishments are required to pay 6% of the wages of their employees to the social security fund. Under section 21(8), where there is construction work the owner of the building is required to guarantee the payment of contributions by the contractors.

9.6 Statutory Requirements

All construction contractors must comply with the Contract Act, 1872. Apart from this Act (which is the general law applicable to all contracts), there are no statutory requirements specifically dealing with construction contracts.

"Pay when Paid" clauses are valid under the Contract Act, 1872.

9.7 Labour

All employers and contractors must comply with the relevant labour laws in force in Pakistan. After the 18th Constitutional Amendment³⁸, labour is now a provincial subject. Labourers get their legal status from the definition of 'workman' in the Industrial Relations Act enacted in each province of Pakistan. Every labourer who comes under the definition of 'workman' is entitled to statutory benefits and standards of fair and equitable treatment at the hands of their employer/contractor.

9.8 Tax

Generally, taxes in a construction contract include Work Contract Tax, Excise, Sales Tax, and Income Tax.

9.9 Health and Safety

The Workmen's Compensation Act, 1923³⁹ places a compulsory requirement on employers to pay for compensation in case of an injury or death of an employee while performing his/her employment duties. Furthermore, the Pakistan Occupational and Safety Act, 2018⁴⁰ also ensures safe and healthy working conditions for people at work.

9.10 Retention of Title

Right of lien makes it possible for contractors to have retention of title rights. A lien comes into effect from the contractor's right to be paid for the goods and services supplied to the employer. A lien over goods whose ownership passes over to the employer on delivery may exist if provided in the contract. However, most construction contracts do not provide for the contractor's title rights to the goods and supplies made for the works. In Pakistan, a retention of title clause is enforceable if the contract is for specific goods or the goods have been subsequently appropriated to the contract and the contractor has, in the contract or at the time of appropriation of the goods, reserved the right of disposal until certain conditions are fulfilled.

9.11 Retention of Purchase Price

Retention of part of the purchase price is quite common in construction contracts. Parties can agree to deposit the purchase price in an escrow account to ensure a level playing field for the employer and the contractor. The contract may state that the employer, prior to completion of works, releases the retention money provided the contractor provides an unconditional bank guarantee.

9.12 Performance Bonds and Guarantees

Performance bonds or guarantees are commonly used in construction contracts to provide security against the failure of a contractor to perform its contractual obligations. Likewise, an employer may require company guarantees from parent companies against the duties and obligations of a subsidiary company involved in construction contracts in Pakistan.

The nature of restrictions upon a performance bond/guarantee depends upon the specific terms and wording of the guarantee. By its nature, a performance guarantee is a contract between the employer and the guarantor and is independent of the contract between the employer and the contractor. This means a guarantor is obliged to unconditionally honour the guarantee when called upon by the employer.

36 - See https://kp.gov.pk/page/the_provincial_employees_social_security_ordinance_1965/page_type/rules

37 - See https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96232&p_country=PAK&p_count=396

38 - See https://na.gov.pk/uploads/documents/1302138356_934.pdf

39 - See <http://punjablaws.gov.pk/laws/29a.html>

40 - See <https://www.pec.org.pk/Downloadables/buildingCode/Draft%20Modle%20OHS%20Act%202018.pdf>

Ordinarily, construction contracts require the contractor to furnish an unconditional performance bank guarantee, to ensure timely and satisfactory performance by the contractor. Normally, the employer requires the contractor to keep the performance bank guarantee valid until the defect liability period is over or the completion certificate is issued. The beneficiary of the bank guarantee (employer) should make a payment demand under the bank guarantee before the expiry of the validity of the bank guarantee. Any payment demand made by the employer after the expiry of the validity of bank guarantee will not be honoured by the bank.

9.13 Supervising Construction Contracts

Construction contracts are commonly supervised by third parties, who may be employed by an employer in the role of an engineer or an architect. The scope of their duties and obligations depends upon the terms of each contract. Generally, an engineer or an architect has a contractual duty to act impartially between the contractor and the employer. In general practice, in government contracts, the engineer often toes the line of the employer.

9.14 Liquidated Damages

Parties are free to agree in advance compensation for breach of contract (liquidated damages) if it is stipulated in the contract. Under section 74 of the Contract Act, 1872 liquidated damages are permissible. Section 74 provides that if a sum is mentioned in the contract as the amount to be paid in case of breach or if the contract contains any other stipulation, then the party who is in breach of the contract is liable under these terms.

The party complaining of the breach is entitled to receive the said amount 'whether or not actual loss is proved to have been caused'. Courts have placed some restrictions on this phrase. It has been interpreted that if it is possible to prove actual damage or loss, then such proof should be placed before the court, however; when it is impossible to prove actual damage or loss then liquidated damages stipulated in the contract should be provided. Other restrictions placed by courts when claiming liquidated damages are:

- Reasonable compensation should be awarded as liquidated damages.
- Liquidated damages should be a genuine pre-estimate of the actual damage or loss caused.
- The number of liquidated damages mentioned in the contract serves as a ceiling on the sum which can be awarded.

Generally, the courts do not revise an agreed rate of liquidated damages when they are a reasonable and genuine pre-estimate of the loss or damage caused.

10 Common Issues in Pakistan on Construction Contracts

10.1 Variations

Variations in the works to be performed under the construction contract may be made by the employer or an engineer employed for such works. If variations are made, a contractor is entitled to seek additional payments for such variations which are duly authorised by the employer/engineer in charge. However, such variations must not substantially alter the nature of the contract in question and must be within the ability of the contractor to execute.

10.2 Omission

Works may be omitted from a construction contract by an employer or an engineer if there is an express term in the contract permitting such omission. However, such omissions must not be made to deliberately deprive a contractor of its entitled share of works. The employer cannot omit the work on non-bona fide grounds (and have it carried out by someone else without the contractor's consent).

10.3 Implied Terms

The law in Pakistan recognises the use of both express and implied terms in a construction contract. Express terms are easily identifiable, implied terms must be read into a contract while examining the intention of the contracting parties. However, such terms must not offend the intended commercial purpose of the contract as understood between the parties. While there is no agreed set of terms which can be implied into a construction contract, certain obligations are understood as impliedly binding on both the employer and the contractor. For example, a contractor is entitled to perform its tasks while exercising a standard of care and must provide such materials as are fit to be used for the stipulated works.

10.4 Concurrent Delay

In situations where there are concurrent delays on the part of the employer and a contractor, both parties commonly assert concurrent delay to avoid responsibility for extension of time claims and the imposition of liquidated damages.

Therefore, in case of concurrent delays, a contractor would be entitled to an extension of time and not to compensation for any loss it may have suffered due to the delays.

This extension of time would be for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.

10.5 Time Limits

The Limitation Act, 1908 provides the statutory time limit beyond which the parties to a contract cannot bring their claims. The Act governs the time limit for filing a court action and claims before an arbitral tribunal in case of domestic arbitration. Under entry no 114 in the First Schedule of the Act, the limitation period for the rescission of a contract is three years. The period of limitation starts when the cause of action arises.

10.6 Unforeseen Ground Conditions

Parties are free to determine upon whom the risk of unforeseen ground conditions would lie under the construction contracts.

10.7 Change in Law

Most construction contracts include stipulations for bearing the risk of a change in law which affects the completion of work.

In general, an employer bears the risks emanating from a change in law, and any delays resulting from it can be condoned by granting an extension of time to the contractor.

Section 64A of the Sales of Goods Act, 1930⁴¹ provides that in the event of an increase or decrease in tax or the imposition of a new tax in respect of goods after the making of any contract for the sale or purchase of goods, in the absence of any stipulation as to the payment of such tax, any increase would entitle the seller to add an equivalent amount to the contract price and the buyer would be liable to pay the increased sum to the seller.

However, in case of a decrease in tax, the buyer would be entitled to deduct the equivalent amount from the contract price and the seller would be liable to pay that sum to the buyer.

The provision applies to any duty of customs or excise on goods and to any tax on the sale or purchase of goods.

10.8 Ownership of Intellectual Property

A contract for service generally contains clauses that empower an employer to claim ownership over all intellectual property that may be created by an employee in the course of his/her employment.

Pakistani law provides for employment as an exception to an author's ownership over his intellectual property. Therefore, in the case of construction contracts, ownership of intellectual property in the form of design of concerned works vests with the employer.

10.9 Suspension of Performance

A contractor may suspend performance of its obligations under a construction contract on the grounds provided for in the contract. The statutory right to do so is provided under the Contract Act, 1872. Some examples of circumstances when a contractor may suspend works are:

- Non-performance of the obligations or considerable delay by an employer.
- Non-payment of dues for works performed.
- Non-fulfilment of the conditions upon which the performance is contingent.
- Force majeure.

10.10 Termination of the Contract

The Contract Act, 1872 allows a party to rescind/terminate a contract when a material breach is made by the other party. Section 39 of the act provides that the promisee may put an end to the contract when the promisor refuses to perform or disables himself from performing the terms of the contract.

Beyond the statutory grounds of breach recognised in the Act, parties may choose to provide contractual stipulations recognising events which would amount to a breach of contract entitling the injured party to terminate the contract.

10.11 Termination for Convenience

A statutory or common law ground of breach need not be expressly provided in the contract, whereas non-statutory instances of breach should be specified in the contract.

41 - See <https://www.ma-law.org.pk/pdflaw/Sale%20of%20Goods%20Act,%201930.pdf>

No construction contracts usually specify events based on which an employer can terminate the contract. In most cases, the contract provides for a cure period notice to be given by the employer prior to termination. If termination is for the employer's convenience, the contractor is usually entitled to termination payment and compensation.

If the contract has been wrongly terminated, the contractor is entitled to claim compensation.

10.12 Force Majeure or Frustration

The concept of a force majeure event is well recognised in Pakistan's legal system. The doctrine of frustration of contract is provided in Section 56 of the Contract Act, 1872.

A contract stands frustrated if the performance of an agreed set of obligations becomes impossible or unlawful, either before or after the conclusion of a contract. Section 56 of the Act recognises force majeure (act of God) events as a ground for frustration of contracts. Because of frustration, a contract becomes void in law, and thus unable to be enforced. Therefore, a frustrated contract stands discharged and relieves the parties from performance of all underlying obligations.

However, an exception to section 56 states that if frustration was within the reasonable contemplation of the promisor; or if the contract is frustrated due to acts attributable to the promisor; the promisee shall be entitled to compensation for any loss it suffers due to non-performance of the promisor's obligations under the contract.

However, section 56 does not apply to instances of mere inconvenience, economic infeasibility, or if the performance of the contract has become more burdensome, but without impossibility.

10.13 Third Party Rights

Third parties cannot bring claims or enforce terms of a contract against a party to a contract. This principle is rooted in the doctrine of 'privity of contract', which confers rights and obligations arising out of a contract only upon parties to a contract.

This principle applies in construction law; therefore, a contractor cannot be subjected to claims from third parties to a construction contract.

In Pakistan, the basic emphasis is on consideration; the rights of the contracting party and third party to the contract solely depend on this.

10.14 Use of Direct Agreements or Collateral Warranties

Collateral warranties or direct agreements are not usual in construction and engineering projects in Pakistan.

10.15 Set Off

Parties in construction contracts can set off their claims and dues against each other. This can be done either by way of mutual negotiations and agreement, or through proceeding before a court of law or in arbitration proceedings.

An example of legal proceedings includes when parties disagree upon the amount due to either party. In such cases, a crossclaim is filed by the party who wishes to set off its claims against the amount it owes to the other party.

Such crossclaims must be for a recognised sum and must be based on a legitimate claim against the other party.

10.16 Ambiguity

Any ambiguity must be attempted to be resolved by resorting to well-recognised rules of contractual interpretation, such as the rule of literal interpretation or harmonious construction, giving effect to the intention of the parties and resorting to an interpretation which upholds the business efficacy of the contract.

If the ambiguity sustains in the application of the said rules, the rule of contra proferentem may be resorted to.

10.17 Un-enforceability of Clauses

Following are the terms which, if included in a construction contract, would be unenforceable:

- Clauses empowering an employer to unilaterally terminate a contract without any remedy to a contractor.
- Unilateral or substantial alteration of the character of a contract by adding/omitting obligations of a contractor.
- Clauses for payment of an unreasonable sum in the form of liquidated damages.

10.18 Decennial Liability

The concept of decennial liability is not recognised in Pakistan. Defect liability clauses in construction contracts broadly cover such liability of the contractor. Liability under the defect liability clause is generally for a period of 6 or 12 months after completion of the project.

II Dispute Resolution

Pakistani society is litigious, and the substantial delays increase further due to the overburdened courts and considerable backlog. Litigation is challenging and at times expensive, parties to disputes nevertheless resort to litigation as the courts readily grant interim relief where appropriate.⁴²

The statement makes clear that litigation is the most utilised form of dispute resolution in Pakistan. However, dispute resolution is not a novel concept for Pakistan, in fact, it has existed long before its independence in the form of jirgas and panchayats for family and property issues.

Over the last decades, ADR has developed quite strongly in Pakistan with mediation and arbitration being the most adopted methods. Due to the concerns that inefficiencies in the judicial system adversely affect investment and businesses, ADR is gaining traction to improve the confidence of domestic and foreign investors. Other reasons for the positive trend also include benefits such as speed, convenience, efficiency and most importantly confidentiality, which cannot be provided via public courts.⁴³

II.1 Court Proceedings

II.1.1 Civil Procedure Code

The Code of Civil Procedure, 1908⁴⁴ governs and outlines the process of court proceedings in civil suits. The proceedings are initiated by the filing of a plaint. Once filed, the court issues a summons to the defendant/s and gives a time to file a written statement. After this, the court frames issues for determining the merits of the suit. Thereafter, the trial starts where both parties present their arguments and evidence before the court. After the conclusion of arguments, the court reserves a date for the pronouncement of judgment and decree.

In case of matters relating to payment of debts under mortgage and negotiable instruments the court can adopt a summary proceeding and may adjudicate the matter without hearing the defending party.

After the issuance of decree by the trial court, if a party is aggrieved by the decision, it may file an appeal before the first appellate court and if no appeal is provided for in the law, then the aggrieved party can file a review before the same court. There is also a remedy of revision by the High Court whereby the High Court can call for a record of the case decided by a subordinate court and issue appropriate orders. Remedy of revision can be availed if the following conditions are met:

- Where subordinate court exercised jurisdiction not vested in it by law or when it failed to exercise the jurisdiction which was duly vested in it.
- Where subordinate court exercised jurisdiction illegally or with material irregularity.

On the other hand, if the cases passed from appellate courts to the High Court, then it can also decide on the suit in appeal before it. The court of final adjudication in this chain is the Supreme Court of Pakistan. If the suit is filed in appeal before the Supreme Court from a decision of the High Court, the aggrieved party must file a leave to appeal. If the Supreme Court thinks that leave to appeal has some merit, then it will hear the matter in appeal.

II.1.2 Court Pending Cases

The backlog of cases increases each year. According to recent statistics provided by the Law and Justice Commission of Pakistan, there are 2,147,788 pending cases before Pakistani courts as of 30 November 2021. The pending cases pertaining to construction and housing add up to Rs. 1.1 trillion in monetary value⁴⁵

II.1.3 Court Proceedings in a Foreign Country

Under section 13 of the Code of Civil Procedure, 1908 a foreign judgment is conclusive as regards the matter directly adjudicated upon between the parties. However, this is subject to the following conditions:

- Where the foreign court was not a court of competent jurisdiction.
- Where the judgment was not given on the merits of the case.
- Where the foreign court has adopted an incorrect view of international law.
- Where the foreign court refused to recognise the law of Pakistan when it was applicable.
- Where the court proceeding based on which the judgment was passed is opposed to natural justice.

42 - See <https://www.riaabarkergillette.com/pk/wp-content/uploads/2020/04/2019-GTDT-pakistan-legal-landscape.pdf>

43 - Asian Development Bank – Pakistan Fact Sheet, available at <https://www.adb.org/publications/pakistan-fact-sheet>

44 - The Code of Civil Procedure 1908, See <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/81783/88953/F-1236102385/PAK81783%202016.pdf>

45 - See <https://www.dawn.com/news/1632089> and <https://www.pakistantoday.com.pk/2022/01/15/supreme-court-backlog-reaches-crisis-levels/>

- Where the judgment was obtained through fraud.
- Where the judgment sustains a claim founded on a breach of any law in force in Pakistan.

11.1.4 The ADR Acts of Pakistan

Arbitration is the most common alternative dispute resolution (ADR) process in Pakistan as the laws related thereto are well developed. Arbitration is the process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision and promote the settlement of disputes amicably through persons in whom both the parties have confidence.

The main laws concerning arbitration in Pakistan are the Arbitration Act, 1940⁴⁶ dealing with domestic arbitration and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011⁴⁷ (REA 2011) for the enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴⁸ (New York Convention). The Punjab Alternate Dispute Resolution Act, 2019⁴⁹ (PADRA) was promulgated to ensure the delivery of 'inexpensive and expeditious' justice for local arbitrations. The Arbitration (International Investment Disputes) Act, 2011⁵⁰ is also of relevance to give effect to the ICSID Convention.

As for mediation, the Alternative Dispute Resolution Act, 2017⁵¹ is passed requiring the referral of certain civil disputes to mediation if the parties agree (applicable in the Islamabad capital territory). This law was enacted in Punjab in 2019 with the addition of Order IX-B to the Code of Civil Procedure, which requires the referral of certain types of disputes to a preliminary round of mediation. According to data published by the Lahore High Court, 30,688 cases have been sent to mediation since 2017, with 14,239 successfully mediated cases as of January 2019⁵².

Currently, 36 official ADR centres are functional all over Punjab. According to a source, as of February 2020, these centres received 30,688 references out of which only 14,239 references were successfully mediated⁵³.

11.2 ADR Centres

There are only two ADR Centres established in the country. One is the National Centre for Dispute Resolution (NCDR) Karachi, and the other is the Alternative Dispute Resolution (ADR) Centre, Lahore High Court. Besides the ADR Centres, the local Chambers of Commerce and Industry, Association of Builders and Developers (ABAD) Pakistan and a few other organisations have developed some form of ADR mechanism for the resolution of disputes between the members.

11.2.1 Lahore High Court Mediation Centre

The Lahore High Court, in collaboration with the World Bank, has established mediation centres in all districts of Punjab where designated officers are working as mediators. These centres are usually located at judicial complexes inside the buildings of the court. The purpose of these mediation centres is to provide for amicable dispute settlement of disputes pending in courts. Dispute types include family, attempt to murder, scuffle, land and murder cases. As per reports, these centres have solved up to more than 11,000 cases since their establishment. Other than reducing the burden on the courts, they also reduce the risk of future litigation in the form of appeals, reviews, and revisions. They also save time and cost of the parties. The weekly statements are published on the website on the Lahore High Court⁵⁴.

11.2.2 National Centre for Dispute Resolution (NCDR)

The National Centre for Dispute Resolution is a dispute resolution organisation that was established in 2007 with the collective efforts of the Karachi High Court and the International Finance Commission. The main purpose for establishing the organisation was to reduce the backlog of cases and undue burden on the judiciary to provide a time-efficient, cost-effective and strictly confidential way to resolve their disputes amicably. The organisation functions in accordance with international standards rules and code of ethics to govern mediation proceedings. It has vast experience in resolving several family, landlord and tenant, contractual and labour disputes, etc. The organisation has been working quite successfully since its inception with a success rate of about 70 percent⁵⁵.

46 - See <http://www.ilo.int/dyn/natlex/docs/ELECTRONIC/I04990/I28244/F-1624568702/PAK104990.pdf>

47 - See https://www.pakistancode.gov.pk/english/UY2Fqa|w|_apaUY2Fqa-apaUY2Fsa|g%3D-sg|

48 - New York Convention, see <https://www.newyorkconvention.org/>

49 - PADRA, See <http://punjablaws.gov.pk/laws/2739.html#:~:text=An%20Act%20to%20provide%20for,I>

50 - See <https://www.pakistancode.gov.pk/english/UY2Fqa/wl-apaUY2Fqa-apaUY2Fsa/s%3D-sg->

51 - See <https://www.pakistancode.gov.pk/english/UY2FqaWl-apaUY2Fqa-apaUY2Noajc%3D-sg->

52 - See <https://www.lhc.gov.pk/node/365>

53 - USSD, Country Report on Human Rights Practices for 2019. See <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/pakistan/>

54 - See https://www.lhc.gov.pk/Adr_Centres

55 - See <https://courtingthelaw.com/2017/03/01/commentary/national-centre-for-dispute-resolution-celebrates-decade-of-achievement/>

11.2.3 Technology Commercial and Construction ADR Centre

The Technology Commercial and Construction (TCC) ADR Centre is a not-for-profit organisation that aims to support the business community in having improved access to justice and the rule of law for ordinary citizens of Pakistan. TCC promotes the use of ADR with accredited, trained and specialised mediators, expert determiners, neutral evaluators and arbitrators with a specific focus on technology, commercial, and construction disputes. The inspiration for this Centre is taken from the Technology and Construction Courts (TCC) in the UK, which were set up with specialised focus on such disputes. The TCC ADR Centre will encourage parties to effectively use ADR before resorting to lengthy court proceedings. TCC ADR is co-founded by Mian Sheraz Javaid and Nasir Khan⁵⁷.

11.2.4 CI Arb's Dispute Appointment Service (DAS)

The Dispute Appointment Service (DAS) is a pivotal part of CI Arb, providing quick, confidential and cost-effective methods of dispute avoidance and dispute resolution to users in the UK and around the world. It offers a variety of Dispute Resolution Services to accommodate parties who are either seeking to appoint a dispute resolver or require suggestions from dispute resolvers to assist with their dispute. Parties do not need to be members of CI Arb to access DAS and although it is recommended that dispute resolution clauses are included in contracts, if a clause is not included then parties may still make a joint application to DAS.

Parties frequently use DAS to assist in identifying a suitable dispute resolver, either by CI Arb acting as an appointing body (e.g., the appointment of a dispute resolver by the President of CI Arb "Presidential Appointments"), or by DAS suggesting a selection of candidates for party agreement. It also provides Arbitration and Mediation Rules, and a range of dispute resolution and dispute avoidance schemes catered to disputes of differing areas, sizes, and/or levels of complexity.

Due to its vast global network, DAS has access to an large pool of qualified and experienced professionals from a wide range of disciplines including lawyers, engineers, surveyors, architects and accountants. Dispute resolvers can be appointed to deal with civil or commercial disputes, in almost all areas, including but not limited to:

- Partnerships, financial companies and shareholders, banking.
- Contracts including the sale of goods, supply of services, distribution and agency agreements.
- Professional negligence, including architects, surveyors, engineers and solicitors.
- Construction and engineering contracts.
- Intellectual property, patents and information technology.
- Property/land use disputes, property transfers, boundaries and neighbourhood issues.
- Landlord and tenant issues, rent, lease renewals, repairs and dilapidations, service charges, security deposits and eviction.
- International trade finance, infrastructure projects and cross-border contracts.
- Employment disputes, employment contracts, terminations, disputes at work and employment tribunals.
- Relational disputes or other civil and personal conflicts.

CI Arb's DAS also promotes a fixed fee basis service. Appointment fees start from £360.00. Further details are provided on the CI Arb website.⁵⁸

11.2.5 Construction Dispute Resolution

Parties to a construction contract can resort to multiple ways to resolve their disputes. Disputes can be resolved by way of court litigation, arbitration, mediation, conciliation, dispute resolution boards and judicial settlements. However, arbitration is commonly resorted to in construction contract disputes.

11.2.6 Adjudication of Disputes

There is no statutory law that provides for adjudication. However, parties can opt for adjudication in their contracts. In the construction industry, FIDIC Red Book forms of contracts are used by parties. These contracts provide for adjudication as an interim dispute resolution method through dispute review boards. This form of adjudication is called contractual adjudication. The adjudicator must give its decision within a specified time limit.

In case the parties are aggrieved by the decision of the adjudicator they may refer the matter for arbitration within a time limit specified in the contract.

11.2.7 Enforceability of International Arbitral Awards

Pakistan has ratified the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 commonly known as the **New York Convention**. In 2005 the convention was adopted as a law of the land through a presidential ordinance. The presidential

57 - See <http://www.tccadr.pk>

58 - See <https://www.ciarb.pk/disputes/>

ordinance lapses after 120 days and until 2011 the Convention was adopted through various presidential ordinances. In 2011, parliament passed the New York Convention as an act of parliament. Now, the Act is known as the Recognition and Enforcement (Arbitral Agreements and Foreign Arbitral Awards) Act, 2011. Pakistan has a reciprocity reservation to the Convention. This means that under the law, an arbitration award rendered in a foreign country that is a signatory to the New York Convention is recognised as a decision of a court of law and can be enforced by the high courts. However, if an arbitration award is rendered in a non-signatory country, then it will not be recognised and enforced in Pakistan.

The obstacles to the enforcement of international arbitration agreements and awards are laid down in article 5 of the New York Convention. Section 7 of the 2011 Act says that recognition and enforcement of foreign arbitral awards will not be refused except in accordance with article 5 of the New York Convention.

Pakistan has also ratified the Convention on the Settlement of Investment Disputes commonly known as the 'ICSID Convention' or 'the Washington Convention'.⁵⁹

12 ADR and Construction Sector in Pakistan

There are two types of Alternative Dispute Resolution (ADR) methods which are frequently used in the construction sector in Pakistan.

The first is contractual adjudication which is provided as a default adjudication method in different FIDIC contracts. These contracts provide for Dispute Adjudication Boards (DABs) or Dispute Review Boards (DRBs) where engineers mostly sit as adjudicators. Statutory Adjudication is not recognised in Pakistan as there is no specific statute providing for the resolution of construction disputes.

The second is arbitration (the most common ADR method in Pakistan) which can be either domestic or international.

Other ADR methods like mediation and conciliation are also used, however, they are ineffective due to their non-binding nature.

12.1 Law on Non-Statutory/Contractual Adjudication

The law does not recognise non-statutory/contractual adjudication as binding and as a contract it can be challenged before any court of law. This policy of law is declared in section 28 of the Contract Act, 1872 which states that any agreement that prevents a party from enforcing his/her legal rights in ordinary tribunals is void. The exceptions to section 28 include where parties must go for arbitration. Effectively, therefore, non-statutory/contractual adjudication is not on the same ground as arbitration and is liable to be challenged like an ordinary contractual provision.

Moreover, there is nothing in Pakistan's law that prevents DRBs decisions, or the evidence presented before them from being used as evidence in subsequent arbitration or court proceedings. The conclusions, however, would not be conclusive or binding, and they would be subject to judicial scrutiny and dispute. The weighting of any piece of evidence is left to the court or tribunal's judicial discretion.

12.2 Cost-Effective Method of ADR

Pakistani courts do not award real costs in favour of the winning party. However, arbitrators allow substantial costs in favour of the winning party. Under section 36(3) of the Arbitration Act, 1940, the court can give orders respecting the costs of an award.

12.3 Dispute Resolution Agreements

12.3.1 Requirements for a Valid Arbitration Agreement

An arbitration agreement must be in writing, but it can also be in the form of a letter exchange or any other form of communication that provides a record of the agreement. The agreement does not have to be signed, and an unwritten agreement backed up by the parties' actions can be used as an arbitration agreement. An arbitration agreement is also regarded to be in writing if the existence of the agreement is stated by one party and not rejected by the other in the exchange of a statement of claim and defense.

12.3.2 Restrictions on Enforceability or Validity of ADR Agreements

There are no restrictions on the enforceability of arbitration agreements provided the requirements of arbitrability under the law are met. A mere stipulation for other ADR agreements like mediation and conciliation cannot be specifically enforced. This is based on the notion that a legal requirement to simply negotiate would be unenforceable. Much would depend on how the clause is construed in order to decide if it is mandatory.

The main distinction between arbitrations and other ADR procedures is that the former has a stronger obligation to operate judicially. Furthermore, arbitrations are governed by the Act's statutory rules and regulations. Other ADR mechanisms, on the other hand, are either not subject to any (or extremely limited) statutory requirements. Expert and/or DRB decisions can be contested and are not binding ipso facto.

59 - See <https://icsid.worldbank.org/>

12.3.3 Standard Arbitration Clauses in Construction Agreements

Arbitration clauses are highly common in construction contracts and they are very necessary as regular civil courts are clogged with delays and are insufficient to handle huge commercial disputes. In Pakistan, most domestic arbitrations are ad hoc and international arbitrations are mostly institutional. The ICC Rules are generally included in the contracts of public sector undertakings in international arbitrations. Public sector undertakings typically demand that the arbitration be held in Pakistan and that Pakistani law rule the proceedings. As previously indicated, building contracts also refer to the Engineer and DRB mechanisms.

12.3.4 Expert Determination in an Arbitration Agreement

There is no statutory basis on which expert determinations are carried out. The requirement of submitting issues to an expert relies on the contract's text and how it is interpreted by a competent court.

12.3.5 Multi-Tier Dispute Resolution Clauses

Multi-tier dispute resolution clauses are common in Pakistan. In construction contracts the requirement to first refer the dispute to the engineer or DRB is mandatory. Some arbitration agreements are pre-conditioned upon mutual negotiation or conciliation. If the precondition is specific and not vague, meaning that it lays out a time scale in the agreement, then it would be difficult for a party to eschew it.

12.4 Alternative Dispute Resolution and its Jurisdiction

12.4.1 Construction Disputes not Subject to ADR

It is a requirement in arbitration proceedings that the issue referred to the arbitration tribunal should be arbitrable. If in the opinion of the court the issues in the arbitration agreement are not fit for arbitration, the court can stay the arbitration proceeding in favour of legal proceedings.

Conflicts involving criminal offenses, divorce disputes, child custody, guardianship, insolvency, winding up, testamentary affairs, or allegations of significant fraud are examples of non-arbitrable disputes. Construction issues can be resolved through arbitration or other forms of ADR if the conditions outlined above are met.

12.4.2 ADR and Public Entities

Public bodies occasionally include ADR methods in their dispute resolution clauses, and they rarely use mediation or conciliation to resolve major disagreements. This is based on a practical standpoint as these institutions are scrutinised both within and outside their organisations and their decisions are subject to inspection by a variety of monitoring organisations. As a result, it is uncommon for public institutions to reach an agreement or compromise.

12.4.3 Immunity of State Bodies

Commercial activities of the state are not immune under the doctrine of sovereign immunity.

12.5 Arbitrators, Mediators and other ADR Practitioners

12.5.1 Rules on Eligibility and Appointment of Arbitrators and DABs/DRBs

Parties are free to choose any person as the arbitrator and unless the arbitration agreement stipulates the eligibility of an arbitrator there are no statutory requirements present in the Arbitration Act, 1940.

Moreover, there are no statutory rules for the appointment of ADR entities like DABs/DRBs as there is no concept of statutory adjudication in Pakistan. In the Arbitration Act, 1940, the default appointment is for a sole arbitrator. After providing the opposite party with notice of 15 days, a party may initiate arbitration by applying to the court for an appointment of arbitrators. Alternatively, either party may request that the arbitration agreement be enforced in court, which will allow the court to refer the case to the arbitrators after hearing the parties.

12.5.2 Arbitral Institutions on Construction Arbitration

There is no arbitral institution specialising in construction arbitrations. Some arbitral institutions exist but they are not widely recognised and used by parties. SAARC Arbitration Council and the Center for International Investment and Commercial Arbitration (CIICA) are seated in Pakistan.

12.5.3 Arbitrators in Construction Industry Arbitrations

In Pakistan, members of arbitral tribunals are usually former judges. Occasionally, in construction-related arbitrations professionals like engineers are appointed as members of arbitral tribunals. Integrated panels of lawyers and building experts are uncommon. Construction experts are generally represented on DRBs.

12.5.4 Use of Technical Expertise by Arbitrators and DRBs

Before delivering a binding award, a tribunal (or any other entity operating in a judicial capacity) must first notify the parties of its tentative conclusions from the use of technical knowledge and the rationale for those conclusions, as well as provide them with an opportunity to respond to the findings. If it does not, the ruling could be overturned as it violates natural justice standards. However, this basic rule may not apply to DRBs who are expected and allowed to use their own knowledge.

12.6 ADR Procedure

12.6.1 Due Process in ADR Procedures

Any quasi-judicial body must follow the bare minimum of due process, which includes fair treatment for all parties and an adequate opportunity for them to present their case.

Furthermore, unless waived or specified otherwise in the parties' agreement, the right to a personal hearing is included at minimum in due process. A party would generally have the right to legal representation, and if that right is refused, the award could be challenged based on a lack of due process.

12.6.2 Law on Rules of Evidence and Procedure

In practice, rules of evidence laid out in the Code of Civil Procedure, 1908 and Qanoon e Shahadat, 1984⁶⁰ are used and arbitrators rely on them for guidance. However, parties are free to choose any other rules of evidence and procedure.

12.6.3 Experts in Construction Arbitrations

Experts are rarely used in domestic arbitrations. Employees/consultants act as witnesses of fact when dealing with issues such as delay, disturbance, and so on.

12.7 Interim Measures and Interim Awards

12.7.1 Interim Measures by an Arbitral Tribunal

The Arbitration Act, 1940 does not expressly confer power on the arbitral tribunal to issue interim orders. However, the tribunal may exercise any powers granted by the parties in the agreement. In practice, parties approach the court for interim relief.

12.7.2 Interim Measures on Dispute Review Board (DRB) decisions

Only contractual backup exists for DRB provisions. The court may accept the DRB's findings as a valid basis for issuing interim relief, however, there is no requirement that it do so.

12.8 Awards and Decisions

12.8.1 Non-Binding Nature of DRB Decisions

A DRB decision can be overturned in arbitration or in court. Arbitration awards are binding on parties and can be set aside by the courts on specific grounds such as under section 28 of the Arbitration Act, 1940 for misconduct by an arbitrator or invalidity of an arbitration agreement. An enforcing party cannot move straight to court without first going through the arbitration process and getting an award from the arbitral tribunal.

12.8.2 Arbitral Awards to be Reasonable

Under section 26A of the Arbitration Act, 1940 the arbitral tribunal has to state the reasons for deciding the award. If reasons are not stated then the court has the power to remit the award back to the arbitral tribunal.

Other ADR rulings do not have a statutory requirement to state reasons, however, the requirement of natural justice and due process apply.

12.8.3 Dissenting Opinions

In Pakistan, dissenting opinions are permitted, and they may be expressed in a separate opinion. Usually, they form part of the same award.

13 Arbitration Laws in Pakistan

13.1 Multilateral Conventions on Arbitrations

Pakistan was one of the early signatories to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), and ratified it through a presidential ordinance in 2005. The New York Convention is currently in force as an act of parliament called Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011.

60 - The Qanune Shahadat Order, 1984 (Law Of Evidence), see <http://pakistancode.gov.pk/pdf/files/administrator32b2d132138b421a65ab547a15ecd6ae.pdf>

Pakistan is also a contracting party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1966 (Washington Convention). It came into force in domestic law through the Arbitration (International Investment Disputes) Act, 2011. Its application is limited to foreign investments made by nationals of other contracting states.

Moreover, Pakistan is also a signatory to the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (also known as the Geneva Conventions). The Geneva Conventions entered into force in domestic legislation through The Arbitration (Protocol and Convention) Act, 1937. The Act is still applicable to foreign arbitral awards made before 14th July 2005. Whereas the 2011 Act applies to awards made after this date.

13.2 Bilateral Investment Treaties

Pakistan has signed 59 Bilateral Investment Treaties (BITs) in total. Out of these, 32 BITs are in force and 16 are signed, but not in force. 5 BITs have been terminated.

13.3 Domestic Arbitration Law

The primary law governing domestic arbitration is the Arbitration Act, 1940.

The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 governs the arbitration awards covered under the New York Convention. This Act applies to foreign arbitration awards made after 14th July 2005 whereas foreign arbitration awards made before 14th July 2005 are governed by the Arbitration (Protocol and Convention) Act, 1937.

The Arbitration (International Investment Disputes) Act, 2011 governs arbitration awards under the ICSID Convention/Washington Convention.

13.4 Domestic Arbitration and UNCITRAL

The Arbitration Act, 1940 is an antiquated law which is not based on the UNCITRAL Model Law (UML) on Arbitration. Some major differences between the two are:

- If the parties cannot agree, the Arbitration Act, 1940 mandates the appointment of a single arbitrator; whereas the UML calls for three arbitrators.
- When an agreement calls for three arbitrators, one is appointed by each party and the third is appointed with the consent of the two arbitrators; the third is an umpire, according to the 1940 Act. This is the default appointment procedure in the UML, and the third is not an umpire.
- The court has broad powers under the Arbitration Act, 1940 to return the case to the tribunal for reconsideration, whereas the court has limited powers under the UML to stop proceedings to let the tribunal restart hearings or take other procedures that may eliminate the grounds for setting aside.
- When court proceedings have begun on an issue that is subject to an arbitration agreement, the party requesting arbitration faces a higher burden of proof than under the Arbitration Act, 1940.
- If an arbitrator or umpire misconducts himself or the proceedings, or if the award was improperly gained or otherwise invalid, the award might be set aside under the Arbitration Act, 1940. Domestic courts have broadly interpreted grounds for setting aside the award. The UML, on the other hand, has short and exhaustive grounds for setting aside the award.
- The Arbitration Act, 1940 allows arbitrators to make a special case for a court's opinion on a legal issue, whereas the UML does not.
- The UML provides more specific laws about arbitration proceedings, whereas the Arbitration Act, 1940 has no specific provisions in this regard.

13.5 Mandatory Domestic Arbitration Law Provisions

Subject to the provisions of the Arbitration Act, 1940, parties are free to agree on any arbitration rules. However, there are some mandatory provisions of law. Examples include:

- Under section 2 (a) an arbitration agreement must be in writing.
- Under section 6 an arbitration agreement is enforceable against the legal representatives of a deceased award debtor.
- Under section 14 parties must be served with notices of arbitration, the award has to be signed by the arbitrators and must be filed before a competent court for enforcement.
- Under section 20 the application must be filed before the civil court for enforcement of award.
- Under section 26A arbitrators must give sufficient reasons in the award.
- Right to fair proceedings under Article 10A of the Constitution

13.6 Substantive Law

The Arbitration Act, 1940 does not give any guidance on the substantive rights of parties to the arbitration agreement. However, various court judgments have required arbitral tribunals to give due consideration to parties' intentions in the arbitration agreement, apply the rules of equity and natural justice, and apply the laws which have the closest and real connection with the dispute.

13.7 Arbitration Agreement

13.7.1 Arbitrability

Arbitration can be used to resolve any civil problem that could be the subject of a civil suit. However, court rulings in a variety of settings show that matters governed by specific legislation that give a certain court or tribunal exclusive jurisdiction, are not arbitrable. These include disputes under the jurisdiction of the rent tribunals, guardianship and custody disputes and some banking matters.

13.7.2 Requirements

Under Pakistani law, a valid arbitration agreement must be in writing. Most importantly, parties must have an intention to refer the dispute to arbitration. In *Imperial Electric Company (Pvt.) Limited v Zhongxing* (2019 CLD 609)⁶¹ the court held that the parties' intention to refer the dispute to arbitration could be inferred from the language used in documents and correspondence. An express or precise reference to the word 'arbitration' is not necessary.

Moreover, contract law principles of capacity, coercion and soundness of mind also apply when ascertaining the validity of an arbitration agreement.

13.7.3 Enforceability

An arbitration agreement becomes unenforceable, similar to a contract, if it is entered into by parties without capacity to enter into the agreement or has an unlawful object or consideration. Moreover, under Article 2 of the New York Convention (adopted through the Recognition and Enforcement (Foreign Arbitral Awards and Arbitration Agreements) Act, 2011 the arbitration agreement becomes inoperative or incapable of being performed if the parties had no capacity to enter into the agreement.

13.7.4 Separability

The separability doctrine has been recognised in both domestic and international commercial arbitration through various judicial decisions. See *Lakhra Power Generation Company Ltd v Karadeniz Powership*⁶² Kaya Bey 2014 CLD 337 and *Hub Power Company Ltd. v. Pakistan WAPDA*, PLD 2000 SC 841⁶³.

13.7.5 Third-Party

In principle, an arbitration agreement does not bind a non-signatory or a third party. However, it may be bound by an arbitration agreement under the doctrine of agency. A general power of agency does not, however, confer the power to enter into an arbitration agreement; the power has to be construed strictly. It also becomes enforceable against the receiver or official assignee of an insolvent person.

13.7.6 Group of Companies Doctrine

The 'group of companies' doctrine is not recognised under Pakistani arbitration law and courts/ tribunals are not empowered to extend an arbitration agreement to non-signatory parent or subsidiary companies.

13.7.7 Multi-Party Arbitration Agreements

There are no clear provisions for multiparty arbitration agreements in the Arbitration Act, 1940.

Section 21 of the 1940 Act, on the other hand, states that if all parties in an ongoing lawsuit agree that a disagreement should be resolved by arbitration, they can petition the court for an order to that effect.

Section 24 also permits some parties to a lawsuit to consent to arbitration, with the award binding exclusively on those parties. As a result, multi-party arbitrations are permissible under the legislation.

13.7.8 Consolidation

The Arbitration Act, 1940 does not give tribunals the authority to combine separate arbitral cases, but nothing prevents parties from doing so voluntarily.

61 - See https://pakistanlaw.pk/case_judgements/2415/the-imperial-electric-company-pvt-limited-versus-zhongxing-telecom-pakistan-pvt-limited

62 - See https://pakistanlaw.pk/case_judgements/18150/lakhra-power-generation-company-limited-lpgcl-versus-karadeniz-powership-kaya-bey?search=Mutual%20concern&searchMode=

63 - See https://pakistanlaw.pk/case_judgements/73383/hub-power-company-limited-hubco-versus-pakistan-wapda

13.8 Constitution of Arbitral Tribunal

13.8.1 Eligibility of Arbitrators

Parties are free to choose any person as the arbitrator unless the arbitration agreement stipulates the eligibility of an arbitrator. There are no statutory requirements present in the Arbitration Act, 1940.

13.8.2 Background of Arbitrators

Generally, lawyers and retired judges are appointed as arbitrators. Where disputes require technical specialties, subject-matter experts (such as engineers in construction-related issues) are frequently appointed.

13.8.3 Default Appointment of Arbitrators

In the Arbitration Act, 1940 the default appointment is for a sole arbitrator. After providing the other party with notice of 15 days, a party may initiate arbitration proceedings by applying to the court for appointment of arbitrators. Alternatively, either party may request that the arbitration agreement be enforced in court, which will allow the court to refer the case to the arbitrators after hearing the parties.

13.8.4 Challenge and Replacement of Arbitrators

If an arbitrator misconducts himself/herself or the proceedings, this constitutes a ground for removal. Courts do not exercise this power routinely but only in exceptional situations where reasonable grounds of misconduct exist.

Failure to preserve fair treatment, act impartially and perform a just and proper review of all concerns are all examples of misconduct. Courts have found arbitrators guilty of misconduct when they failed to behave judiciously, were negligent and reckless, and failed to conduct the procedures properly.

Under section 9, a party-appointed arbitrator can be replaced, upon request before the court, if he/she becomes incapable of acting, refuses to act, or dies.

13.8.5 Relationship between Parties and Arbitrators

An arbitrator is a third-party judge in a dispute between two parties who decides on the facts and the law. He or she must do so in accordance with the law and not in the capacity of a mediator or conciliator.

Failure to behave impartially may result in setting aside the award.

Parties pay the fee of the arbitrator, either jointly or separately. In most cases, the nominating party pays the fee of its nominee arbitrator, and in the case of a sole arbitrator the fee is divided equally.

13.8.6 Duties of Arbitrators

The Arbitration Act, 1940 is silent on arbitrators' obligations regarding the disclosure of any confidential information. Since arbitrators have a duty to remain impartial throughout and disclose any information which compromises impartiality, failure to disclose confidential information that raises concerns of partiality can be considered grounds for misconduct.

13.8.7 Immunity of Arbitrators from Liability

The Arbitration Act, 1940 is silent on the immunity of the arbitrators. In general, arbitrators' immunity from liability in conducting the proceedings and provisions for challenge and removal are available in cases of misconduct. There is no court precedent which holds an arbitrator liable for damages for misconduct. However, an arbitrator is not entitled to remuneration for his or her services if he or she is removed under section 11 of the Arbitration Act, 1940.

13.9 Jurisdiction and Competence of Arbitral Tribunal

13.9.1 Court Proceedings Contrary to Arbitration Agreement

In domestic arbitrations, section 34 of the Arbitration Act, 1940 stipulates that if civil proceedings are brought against a party to an arbitration agreement, then such party may apply to the court to stay the proceedings in view of the arbitration agreement. However, the party seeking stay has to persuade the court that it is prepared to take the necessary steps to initiate the arbitration proceedings.

For foreign arbitration agreements, section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 states that where legal action has been commenced against a party who is a signatory to an arbitration agreement, the party may request the High Court to stop the proceedings. Unless the court is satisfied that the arbitration agreement is invalid and void, inoperative, or incapable of being performed, the court must refer the parties to arbitration.

13.9.2 Jurisdiction of Arbitral Tribunal

Under the doctrine of competence-competence, the arbitral tribunal has the authority to decide on its jurisdiction. However, under the Arbitration Act, 1940 the jurisdiction may be subject to court review. In *Karachi Dock v Quality Builders Ltd* (PLD 2016 Supreme Court 121), the Supreme Court said that jurisdiction can not be assumed by the tribunal or conferred by the parties against the Act through consent, waiver, estoppel etc.

However, for foreign arbitration agreements, Pakistani courts recognise the principle of competence-competence under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 which implements the New York Convention, 1958.

If a party has objections to the tribunal's jurisdiction these should be raised in earnest. Parties who submit to the jurisdiction and participate in the proceedings may be barred from subsequently opposing jurisdiction under the principles of waiver and estoppel.

13.10 Arbitral Proceedings

13.10.1 Place, Language and Choice of Law

The Arbitration Act, 1940 makes no provision for choosing the location or language of arbitration. In practice, such questions are decided by tribunals. In deciding the dispute's substantive law, tribunals use contractual interpretation standards to ascertain the parties' intent or, if that fails, the option of law that has the closest real connection to the underlying agreement.

13.10.2 Commencement of Arbitration

The proceedings start with the service of a notice on the opposite party to commence arbitration. Under section 20 of the Arbitration Act, 1940 a party may request that the arbitration agreement be filed in court and the dispute be referred to arbitration by filing a written request. Under section 21, during the pendency of a lawsuit, the parties may jointly petition the court for a referral to arbitration.

13.10.3 Hearing

To meet the criteria of natural justice, a hearing is typically required. Given that parties are free to devise their own method of hearing, it is unclear if such a provision would be enforced in cases when parties agree not to hold a hearing.

13.11 Evidence

To establish the facts of the case, the tribunal is not bound by any specific guidelines. Unless the parties agree otherwise, the tribunal may adopt any reasonable method as long as it gives each party a fair chance to present evidence, examines all of their claims, and renders a written reasoned award. In Pakistani courts, there is no practice of using IBA Rules on the Taking of Evidence.

13.11.1 Court Involvement

A tribunal may seek court involvement for the issuance of summons or production of relevant documents. Tribunals can also make a special case for the opinion of the court on an issue of law.

13.11.2 Confidentiality

There is no confidentiality clause under the Arbitration Act, 1940. The award, as well as in some situations, all depositions and documents pertaining to the dispute, must be filed in court by the panel. As documents filed before a court become public record, in effect, domestic arbitration proceedings do not retain their confidentiality.

13.12 Interim Measures and Sanctioning Powers

13.12.1 Interim Measures by the Court

Interim measures can be ordered by the courts regarding the following matters:

- The preservation, interim custody, or sale of goods that are the subject of the dispute.
- The preservation, detention, or inspection of any property or thing that may arise as an issue during the proceedings.
- Interim injunctions.
- Appointment of a receiver or guardian.

The interim powers of the court are without prejudice to the powers of an arbitral tribunal.

More importantly, after the award has been filed, the court may issue any interim orders required to avoid defeat, delay or obstruction of the decree's execution, or if circumstances warrant, expediting the award's implementation.

13.12.2 Interim Measures by an Arbitral Tribunal

The Arbitration Act, 1940 does not expressly confer power on the arbitral tribunal to issue interim orders. However, the tribunal may exercise any powers granted by the parties by agreement. In practice, parties approach the court for interim relief.

13.13 Awards

13.13.1 Decisions by the Arbitral Tribunal

In case of a three-member tribunal, the third appointee is regarded as an umpire when the parties designate one arbitrator of their choice. In this scenario, the panel (excluding the umpire) must make a majority decision.

13.13.2 Dissenting Opinions

The enforceability of awards is not impacted by a dissenting note.

13.13.3 Form and Content of Award

The tribunal's award must be written and signed. It must also include sufficient detail for the court to evaluate any legal issues that may arise as a result of the judgment.

13.13.4 Time Limit for Award

Parties are free to determine the time scale within which the tribunal has to render the award. A four-month time limit is indicated in the absence of agreement in this regard. The tribunal, on the other hand, cannot extend the time without the approval of the parties.

13.13.5 Date of Award

An application to set aside or remit an award under the Arbitration Act, 1940 must be lodged before the court within 30 days following the date of service of the tribunal's notification of award. An application for enforcement of the award must be filed within 90 days of the date of notification of the award by the tribunal. An application for modification of the award must be submitted within three years, although it is unclear whether the time starts from the date of the award or the date of delivery.

13.13.6 Types of Awards

Arbitration awards under the Arbitration Act, 1940 can take the form of a final award, interim award, partial award, consent award, default award or a conditional award.

13.13.7 Interest

A court, but not a tribunal, can grant appropriate post-award interest. See *Gerry's International v Aeroflot* (2017 CLC 291).⁶⁴

13.14 Proceedings Subsequent to Issuance of Award

13.14.1 Interpretation and Correction of Awards

Any clerical errors, inadvertent errors, or omissions in the award can be corrected by the tribunal. In addition, the court has the authority to alter or correct the award. Parties have three years to seek modification, albeit it is unclear whether the time starts from the date of the award or the date of delivery.

13.14.2 Challenge of Awards

A domestic award can be challenged on the following grounds:

- The arbitrator misconducted himself/herself or the proceedings.
- The award was made after the court superseded the tribunal's jurisdiction.
- The award was made after the arbitration proceedings became invalid under section 35 of the Arbitration Act, 1940.
- The award was obtained in an improper manner.
- The award was otherwise void.

A party seeking to challenge an award must file an application with the court within 30 days of receiving notice that the award has been filed.

13.14.3 Appeal

Depending on the value of the claim, there may be two or three tiers of appeal. While timescales vary, appeal hearings often last two to three years.

64 - See https://pakistanlaw.pk/case_judgements/7270/gerry-s-international-pvt-ltd-versus-aero-ot-russian-international-airlines

13.14.4 Recognition and Enforcement

A domestic award must be signed before it can be filed in court. The court must be convinced that there are no grounds for remitting or setting aside the award. If satisfied, the award is made a court rule and is enforced as a court decree. Misconduct, evident illegality on the face of the award, the determination of questions that were not subject to arbitration, or the failure to determine an issue that was subject to arbitration, and an award being incapable of execution are all grounds for refusal to recognise and enforce an award.

In the case of a foreign award, the award creditor must apply to a high court under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 which has enforced the New York Convention, 1958. The award is enforced in the same way that a court ruling is. The party must submit the documentation specified in article IV of the New York Convention, 1958 with the application. The grounds for withholding recognition and enforcement are specified in Article V of the Convention. Pakistani courts have recognised the Convention's pro-enforcement policy.

13.14.5 Time Limit for Enforcement

The award has to be filed within 90 days after the serving of notice of the award by the tribunal to the parties.

As there is no specific time restriction for filing a request to enforce a foreign award, the default period of three years from the day the right accrues will most likely apply.

13.14.6 Cost of Enforcement

Under the Stamp Act, 1899⁶⁵ and the Court Fee Act, 1870⁶⁶ costs include stamp duties and relevant court fees.

65 - See <http://punjablaws.gov.pk/laws/15.html>

66 - See <http://punjablaws.gov.pk/laws/3.html>

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