IBA International Construction Projects Committee

ADR in Construction

New Zealand

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1. Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

The courts of New Zealand have historically resisted specialisation, with the result that most complex construction and commercial disputes tend to go to arbitration. New Zealand is also an UNCITRAL Model Law jurisdiction, and it has acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which tends to make arbitration more attractive than the alternatives.

Most construction contracts (and all commonly used standard forms) include tiered dispute resolution clauses, with provision for interim determination by the engineer to the contract, followed by mediation and/or arbitration.

Statutory adjudication is a separate procedure, which stands outside the contractual provisions, and may run parallel to them.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

Yes.

Since the Construction Contracts Act in 2002 came into force on 1 April 2003, statutory adjudication has been available for the resolution of all disputes arising under *construction contracts*. Compared to similar legislation in other jurisdictions, adjudicators can determine a wide range of disputes, including in relation to payment and in relation to rights and obligations arising under a construction contract; the procedures for adjudication are also tightly prescribed.

Determinations under the Act are binding, but not final.

There is no requirement for the parties to agree to go to adjudication, to agree on the adjudicator or to agree on the adjudication procedure; and it is not possible to contract out of the Act. Once the procedure has been commenced, unless the claimant withdraws its notice of adjudication, the adjudication will runs its course.

The parties to adjudication are limited to the parties to the relevant construction contract; there is no ability to join third parties, and consolidation can only be by the agreement of the parties.

The parties may agree in their construction contract, to the appointment of a specific adjudicator or provide for a nominating body to make the appointment of an adjudicator. However, such agreement is not enforceable if entered into before the dispute arose.

Adjudicators can be appointed either by agreement, or by an *authorised nominating authority* on the application of any party to a construction contract. The main authorised nominating authorities are the Arbitrators' and Mediators' Institute of New Zealand Inc. (**AMINZ**) and the Building Disputes Tribunal (New Zealand) Ltd.

As the sole membership body for arbitrators, mediators and adjudicators in New Zealand, AMINZ provides the training and accreditation for adjudicators.

When making its appointments, AMINZ consults with its Appointments Panel, which is made up of practitioners with extensive and current experience in adjudication. The Panel makes a recommendation, which is then taken into account in making the appointment.

Once an adjudicator has been appointed (and terms of appointment set), she or he proceeds to determine the dispute in accordance with the procedure prescribed in the Act. Typically, the procedure involves the submission of:

- the adjudication claim within five working days of the adjudicator's appointment (this time period cannot be extended);
- the adjudication response within a further five working days (this time period can be extended by agreement, or by the adjudicator);
- a reply within five working days of receipt of the response; and
- a rejoinder two working days thereafter.

The adjudicator then issues a determination within 20 working days of receipt of the response (this time period may be extended). While binding on the parties, the courts and arbitrators must only have regard to the adjudicators' determinations; any court or arbitral hearing on the same issue is *de novo*.

Oversight of adjudication proceedings is by the courts, by way of judicial review. The courts have resolved, however that judicial review is to be the exception rather than the rule, reserved for the most egregious cases of misconduct and errors of law (see *Laywood & Rees v Holmes Construction Wellington Ltd* [2009] NZCA 35).

Authorised nominating authorities have no right of review of either the adjudication procedure or the determination; their function is discharged on the nomination of the adjudicator.

The costs of the adjudication, by default, are shared equally between the parties, with the parties also bearing their own costs. The adjudicator may depart from this default position in the exceptional situation where submissions or allegations are made without substantial merit or the behaviour of the parties in the adjudication warrants an award of costs.

After an initial bedding down period during which the industry adjusted to the new regime, adjudication has become the most commonly used means of interim dispute resolution with most disputes going no further that the adjudicator's determination. As a statutory regime, adjudication runs in parallel with any

contractual dispute resolution provisions and litigation in the courts; adjudication is only stayed if a court or arbitral tribunal resolves the dispute before the adjudicator's determination is issued.

After an extensive review, the Construction Contracts Act 2002 was amended in 2015 to:

- widen the definition of *construction contract* to include design, engineering and quantity surveying appointment agreements;
- remove any practical distinction between *residential* and *commercial* construction contracts;
- modify the adjudication procedure, including allowing for rights of *reply* and *rejoinder*;
- provide for determinations on *payment* and *rights and obligati*ons to have the same legal effect; and
- provide for a statutory trust over retentions held under commercial construction contracts.

Those amendments came into force on 1 December 2015, with design, engineering and quantity surveying appointments being covered by the Act from 1 September 2016 and the retentions trusts applying to commercial construction contracts of a contract value over a specified amount, entered into from 31 March 2017.

The threshold for the application of the retention trust has yet to be set.

Additional rules apply to residential building under the Building Act 2004, specifically in regard to compliance with the national building code, implied warranties and minimum contract terms.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

New Zealand is a common law jurisdiction.

Final and binding, but non-statutory adjudication of disputes, is available by arbitration under the Arbitration Act 1996; by expert determination, which is a matter of contract; and by taking the dispute to court, subject to compliance with any preconditions to litigation in the contract, for example mediation.

Arbitration

The Arbitration Act 1996 covers both domestic and international arbitration in a combined Act, and is based on the Model Law (including the 2006 amendments).

For domestic arbitration, the provisions of the Second Schedule to the Act are "opt-out", and for international arbitration (i.e. where parties to the arbitration are from different States) those provisions are "opt-in".

Issues covered by the Second Schedule include:

- Procedure for the appointment of arbitrators
- Consolidation of arbitral proceedings
- Powers relating to the conduct or arbitral proceedings
- Determination of preliminary points of law by court
- Appeals on questions of law
- Costs and expenses of the arbitration
- Extensions of time for commencing arbitral proceedings

Subject to any reservation of rights of appeal on questions of law, arbitral awards are final and binding.

The 2006 amendments to the Model Law, providing for interim measures and preliminary orders, and for all arbitral proceedings to be confidential by default, were brought into the Act by the Arbitration Amendment Act 2007.

Expert determination

Expert determination can be provided for as a matter of contract.

There is no statutory provision for expert determination, and therefore the procedure to be followed is a matter contractual interpretation. In general terms, care needs to be taken to ensure that the procedure followed is not "arbitral" in nature if issues of natural justice are not to be imposed.

Where such a determination is properly an expert determination, as opposed to an arbitration, then the requirements for natural justice are dispensed with (see *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95, Fisher J at [45]).

Ideally, expert determination is best suited to single issue disputes, like settling payment disputes, valuations and complex pricing mechanisms.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

Arbitration under the Arbitration Act 1996 results in awards which are final and binding, subject to any agreement to appeal on questions of law.

The procedure to be followed in arbitration may be settled by the parties in the agreement to arbitrate, in any applicable Rules, or otherwise by the arbitral tribunal. This may or may not involve a hearing.

Typically, the procedure will involve:

- Issue of a notice of arbitration and answer
- Appointment of the arbitral tribunal
- Preliminary conference
- Exchange of pleadings
- Disclosure of evidence and witness statements
- Evidential hearing
- Exchange of formal submissions
- Interim award on liability
- Submissions on costs
- Final Award

Adjudication under the Construction Contracts Act 2002 results in determinations which are binding, but not final. This has been described as the "pay now argue later" rationale of the Act.

The procedure laid out in the Construction Contracts Act 2002 is as follows:

- Notice of adjudication
- Appointment of adjudicator; if by an authorized nominating authority, no sooner than 2 working days and no later than 5 working days after the notice
- Adjudication claim, served no later than 5 working days after the adjudicator's appointment
- Adjudication response, served no later than 5 working days after the claim (this may be extended by the adjudicator)
- Reply may be served within 5 working days after the response
- Rejoinder may be allowed, within 2 working days after the reply
- Determination to be provided within 20 working days of the response (this may be extended by 10 working days by the adjudicator, and longer by agreement between the parties)

Any court or arbitral hearing on the matters in dispute following adjudication are *de novo*, but regard will be given to the adjudicator's determination. Pending any decision of the court or arbitral award to the contrary, the adjudicator's determination is binding and enforceable.

The procedures for expert determination are set as a matter of contract.

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

There is one member organisation for dispute resolution professionals, the Arbitrators' and Mediators' Institute of New Zealand (**AMINZ**). AMINZ is the default appointing body for arbitrators under the Arbitration Amendment Act 2016 and is

an authorised nominating authority for the appointment of adjudicators under the Construction Contracts Act 2002.

AMINZ provides for accreditation of disputes resolution professionals, provides member services and advocates for all types of disputes resolution with government, the community and internationally.

In 2016, AMINZ promulgated its Arbitration Rules (for use in domestic and international arbitration) and also adopted procedures for emergency arbitration, to deal with applications for interim measures, and expedited arbitration.

AMINZ primary involvement in arbitration is in the appointment of arbitrators; there is no provision for administration of arbitral proceedings or approval of awards, though these may be agreed by the parties and there is provision for such administration in the AMINZ Rules.

AMINZ also offers the AMINZ Arbitration Appeals Tribunal to deal with appeals on questions of law, as an alternative to appeal to the High Court. The appeals procedure is confidential by default, and is typically dealt with expeditiously by senior arbitration practitioners (retired judges, in the main).

Appointments may also be made by other institutions by agreement, for example the New Zealand Law Society, or private institutions, for example Building Disputes Tribunal (New Zealand) Limited.

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

The most frequently used standard form of construction contract is the Conditions of Contract for Building and Civil Engineering published by Standards New Zealand (NZS3910:2013). That contract provides for review by the Engineer, following which a dissatisfied party may either require the matter to be referred to mediation or to arbitration.

Mediation as provided in the contract is rarely used, with most parties preferring determinative processes like adjudication and arbitration.

Ad hoc non-binding early neutral evaluation and evaluative mediation are becoming increasingly popular. Historically, the industry has preferred an initial review by the engineer or other independent party, followed by a determinative process. Consensual and advisory procedures have usually been agreed as the need arises.

The Engineer's interim determination becomes binding on the parties, unless a notice requiring the dispute to be referred to mediation or to arbitration is issued within one month of the determination.

For larger infrastructure projects, disputes boards have become increasingly popular as part of a disputes avoidance initiative. AMINZ has a panel of disputes board practitioners for this purpose.

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

Admissibility of evidence in arbitral or court proceedings in New Zealand is determined by considerations of relevance and materiality.

As DAB proceedings would not typically be subject to privilege, the decision of the DAB could adduced in evidence. The weight given to the DAB decision would depend on normal evidentiary considerations; DAB decisions have no particular recognition, and the arbitral tribunal or court would consider all evidence and submissions afresh without particular regard to any finding of the DAB.

1.8 What form of ADR is considered to be cost effective for construction disputes in your jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

There has been a move away from complex multi-tiered dispute resolution provisions, like those developed for the Channel Tunnel and Hong Kong Airport Core Programme projects. The focus in New Zealand is more on procedures for dispute avoidance and non-binding interim procedures, like disputes boards, early neutral evaluation or evaluative mediation, followed by determinative procedures like adjudication and arbitration.

Arbitration is still considered to be more expedient and more cost effective than traditional litigation in court.

In arbitration, unless the parties agree otherwise, the arbitral tribunal "fixes and allocates" the costs and expenses of the arbitration (see clause 6 of the Second Schedule to the Arbitration Act 1996).

This raises a number of issues:

- The parties share equally in the arbitral tribunal's costs and expenses pending the final award.
- Costs "follow the event", i.e. the successful party is compensated for the cost of enforcing its legal rights.
- The costs and expenses comprise the arbitral tribunal's costs and expenses, and the parties' own costs and expenses incurred since the

arbitral proceedings were commenced (this includes legal expenses and the costs of experts and witnesses).

- The arbitral tribunal first considers whether or not the cost and expenses were reasonably and properly incurred.
- The tribunal then considers the extent to which a party was successful.
- The costs and expenses are then adjusted to take account of wider considerations like any interim costs award, the conduct of the parties, settlement offers and any other issue which may impact on the allocation of costs.

Where costs awards in court litigation take into account the wider considerations of access to justice, such considerations do not generally apply to costs in arbitration. The traditional approach of "reasonable contribution" is still frequently applied, though it has little justification in terms of the Act.

Costs are awarded in court litigation according to provisions in the High Court Rules. It is generally accepted that these costs were inadequate, even when first promulgated.

AMINZ has issued Rules and a Guide to Awarding Costs in Arbitration, which deals with the specific requirements of costs in arbitration in terms of clause 6 of the Second Schedule to the Arbitration Act 1996. It is always open to the parties to agree on how costs are to be dealt with.

Indemnity costs, where the losing party pays all the successful party's costs, reasonably and properly incurred, are becoming more common.

2. Dispute Resolution Agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

The jurisdiction of the arbitration is founded on the agreement to arbitrate.

The validity of the agreement to arbitrate, the definition of the dispute and compliance with procedural requirements are critical to the validity of the final award (see the decision of the Supreme Court in *Carr v Gallaway Cook Allen* [2014] NZSC 75 in which an arbitral award was set aside as the agreement to arbitrate included a right to appeal on questions of fact).

That said, the agreement to arbitrate may be oral or written, and need say little more than that all future disputes arising out of the applicable legal relationship are to be referred to arbitration in terms of the Act. The Act will then provide the necessary guidance on how the arbitration is to proceed.

Where the agreement to arbitrate is with a *consumer* (i.e., where a party to the agreement is an individual, not "in trade" and the other is "in trade") the Act imposes a further requirement that the arbitration agreement is only enforceable if the consumer enters into a further agreement, after the dispute has arisen, certifying that the consumer agrees to be bound by it.

The agreement to arbitrate in clause 20.6 of the FIDIC Red Book would, on its face, be a valid agreement to arbitrate in terms of the Arbitration Act 1996. Depending on the issues in dispute, that clause itself would not provide any impediment to a party seeking interim measures from either a court or arbitral tribunal. Whether or not those measures would be granted will depend on the matters in dispute and the criteria outlined in Chapter 4A of the First Schedule to the Act.

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

There is no basis for challenging the agreements to arbitrate in any standard form as a matter of right.

Article 16 of the First Schedule to the Arbitration Act 1996 provides that the agreement to refer disputes to arbitration is independent of the validity of the contract of which it forms part; and the arbitral tribunal has the authority to rule on its own jurisdiction, including the validity of the agreement to arbitrate.

Arbitral awards may be set aside in terms of Article 34 of the First Schedule, or enforcement refused in terms of Article 36, where there is an issue of invalidity of the agreement to arbitrate (see *Carr v Gallaway Cook Allen* above), the capacity of the parties to enter into the agreement, a failure to follow the procedural requirements for appointment or the award deals with matters not properly covered by the dispute.

Procedurally, as mentioned above, where a party to the arbitration agreement is in trade and the other a "consumer", i.e. not in trade, the agreement is not enforceable unless the consumer agrees to submit to arbitration after the point in time when the dispute arises.

Article 8 of the First Schedule provides that a court must stay any proceedings which are the subject of an agreement to arbitrate.

Other forms of ADR are not subject to such constraints, and are subject to the more general rules of contractual interpretation.

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

All standard forms of construction contract used in New Zealand provide for arbitration. No institution or rules are referred to.

In most cases, there is provision for interim binding decisions by the engineer to the contract, followed by mediation and arbitration. Technically, the Engineer's determination is akin to determination by an expert.

Statutory adjudication is a separate procedure which the parties cannot contract out of; theoretically, it will run in parallel to the contractual procedures, however in practice most parties will engage in adjudication, followed by arbitration, in exceptional circumstances, rather than run the statutory and contractual procedures in parallel.

2.4 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances? Is this different for other forms of ADR?

No.

In general terms, unless there is specific agreement to comply with any related arbitral award, arbitration agreements bind only the parties to the agreement. Similarly, adjudication only binds parties to the construction contract and mediation will only bind those who enter into a mediated agreement.

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

Expert determination is not, of itself mandatory, unless the contract provides for it.

Technically, the determinations by the Engineer under NZS3910 and the Expert's under NZS3915 are "expert" determinations, as they become binding if not challenged.

In order to be binding, as a precondition to litigation in court or to arbitration, the procedure must be clear and the timings and preconditions must be explicit. If the intent is vaguely expressed, with limited procedural clarity, then the agreement to refer disputes to expert determination or mediation as a precondition to final determination will not be enforceable.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

If preconditions are clearly defined, and the procedural steps explicit, then any attempt to skip a step and go straight to litigation in court or arbitration can be challenged. However, if the parties do not reserve their positions, and they engage in the disputes process, the ability to challenge may be lost.

Most construction contracts provide for tiered dispute resolution, however while mediation is provided for, it is not a mandatory precondition to arbitration. A failure to mediate is rarely fatal to arbitration as, in most cases, both parties have actively participated in the arbitral procedure without reservation.

3. ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

All disputes arising out of a construction contract may be referred to adjudication under the Construction Contracts Act 2002 as of right, and any dispute arising out of a legal relationship may be arbitrated by agreement in terms of the Arbitration Act 1996.

Mediated agreements enjoy the protection of the law as it applies to any valid contract.

Final and binding determinations of experts, engineers, review boards and the like are all creatures of contract, and are enforceable, provided they do not fall within the requirements of arbitrations; the rules of natural justice will only apply if the procedure is held to be arbitral in nature, and the Arbitration Act 1996 will then apply (see *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95, Fisher J at [45]).

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

There is no restriction on matters that may be dealt with by binding expert determination provided the matter falls within the scope of the relevant agreement.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

No.

3.4 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

No.

3.5 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

No.

Section 4 of the Arbitration Act 1996 and section 8 of the Construction Contracts Act 2002 expressly provide that those Acts bind the crown.

There is no basis to argue that a contractual dispute resolution provision in a contract involving a crown entity is not applicable on the grounds of sovereign immunity.

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Yes.

There are no special requirements for such disputes.

Any legal relationship can provide for disputes to be resolved by arbitration; any dispute arising under a construction contract can be referred to adjudication; and parties in dispute can agree to resolve their disputes with the assistance of a mediator.

3.7 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "*The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it*". In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

This will depend entirely on the interpretation of the relevant clause.

As drafted, the FIDIC Red Book provisions will limit the jurisdiction of the DAB to the dispute arising under the over-arching contract. In the scenario described, if the issues fell within the ambit of the contract containing the DAB clause, then there would, as a general proposition, be jurisdiction to determine those matters.

If the DAB makes a decision which is outside the dispute referred to it or outside the jurisdiction conferred by the contract containing the DAB clause, it would not be enforceable.

4. Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

No.

The parties are free to agree on their arbitrators, DAB members, adjudicators and mediators.

Where the parties have not or are unable to agree on their arbitral tribunal, then they may provide for a default appointing body, e.g. the President of AMINZ or NZLS. If they have not done so, then the Arbitration Act 1996 provides for a default appointment by AMINZ.

The Construction Contracts Act 2002 does provide for adjudicator qualifications to be set by the Government; to date, no such qualification requirements have been promulgated.

Any agreement as to an adjudicator, or a default nominating body for the appointment of an adjudicator, made before a dispute has arisen will not be enforceable. Furthermore, if the claimant in adjudicative proceedings

seeks approval for the issue of a charging order over the construction site, the appointment must be made by an authorised nominating authority, and the appointed adjudicator must be suitably qualified.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

There are no special institutions for construction disputes.

The parties are free to appoint their arbitral tribunal by agreement, or by reference to an appointing body; if appointment is not covered in the agreement, and the parties are unable to agree on the composition of their tribunal, under the Arbitration Amendment Act 2016, the appointment will be made by AMINZ.

AMINZ and Building Disputes Tribunal (NZ) Ltd have panels and lists of arbitrators, adjudicators, mediators and disputes board members published online. When appointing, they will both have regard to their respective lists and panels.

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

No.

The use of lawyers is, however, reasonably common.

In adjudication, if a charging order is sought, then the authorised nominating authority will typically appoint an adjudicator with legal qualifications.

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

Not that often. As arbitration is a legal process, the tribunal is most often comprised of legally qualified practitioners with experience in construction.

For particularly technical disputes, a technical expert might be appointed to assist, or a person with technical expertise appointed to the tribunal.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Not typically.

Where an issue is germane to the determination of the dispute, the parties are entitled to be given the opportunity to make submissions on the issue – this is a question of natural justice and procedural fairness which is always within the supervisory jurisdiction of the courts.

Arbitrators are entitled to bring their expertise with them to their professional role. That is not the issue. They cannot, however, make their own inquiries without involving the parties and they cannot make their determinations based on issues and arguments which have not been put to the parties.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

The AMINZ Arbitration Rules provide that the applicable law, as agreed between the parties, is to be applied to the substance of the dispute.

Where the parties have not agreed, then the general conflict of law rules apply.

Article 28(3) of the First Schedule provides that the tribunal may only decide "ex aequo et bono or as amiable compositeur", i.e. according to considerations of general justice and fairness, if the parties have expressly provided for it to do so.

5. ADR Procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

The procedures for arbitration are largely contained in the Second Schedule, which may be altered by agreement.

Article 34 of the First Schedule does provide for arbitral awards to be set aside on a number of grounds, including:

- Invalidity of the agreement to arbitrate.
- A failure to give proper notice of the appointment of the tribunal or of the arbitral proceedings, or if the party was unable to present its case.

- The award dealing with matters outside the scope of the arbitration.
- The composition of the arbitral tribunal or the procedure adopted by the tribunal being outside what was agreed by the parties.

The parties are to be given full and equal opportunity to present their cases and they may appear in person and may be represented by any person of their choice. There is no requirement that such representatives must be legally qualified.

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

It is unusual for arbitral proceedings not to include provision for an oral hearing.

Adjudications, conversely, do not include provision for hearings, though a "conference" may be held. As there is no provision for taking evidence under oath, most adjudicators avoid conferences or any opportunity for oral submissions.

5.3 Are there rules on evidence in the laws or your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

The Evidence Act 2006 governs the rules of evidence in court proceedings.

The parties are free to agree on the applicable rules of evidence, failing which the applicable rules are to be determined by the tribunal. The overriding considerations are procedural fairness and natural justice.

In most cases, the parties and tribunals avoid traditional discovery in favour of disclosure of all information relevant to the case with a residual right for the tribunal to order disclosure of any relevant and material information which has not been disclosed. In practice, the parties agree a bundle of documents, provide witness statements and allow for cross-examination.

5.4 Is a hearing mandatory for all forms of ADR?

No.

It is the expectation that arbitration will include an oral hearing, and it is not required for adjudication. Other, contractual procedures, depend on what the parties have agreed.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) *conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules*,". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

This will largely depend on whether or not the DAB procedures are construed by any court as being an arbitral procedure, and subject to the provisions of the Arbitration Act 1996 and, more generally, the requirements of natural justice and procedural fairness, or if it is to be construed as an expert determination, and outside those requirements.

Where the issue to be determined is a narrow technical issue, based on the DAB's expertise, rather than any findings of fact, then it is more likely to be held to be an expert determination, in which case the rules of natural justice might not apply.

However, if the parties make submissions, there is a hearing involving findings of fact, and argument, then the rules of natural justice and the requirements for procedural fairness would almost certainly apply.

While the wording of expert determination clauses may be persuasive, if the determination is more akin to an arbitration, then the rules of natural justice may be inferred (see *Lighter Quay Residents' Society Inc v Waterfront Properties (2009) Ltd* [2013] NZHC 2678 and *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc* [2015] NZCA 62).

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

Construction arbitrations almost always involve technical experts, cost consultants/quantity surveyors and programming/delay experts.

The process of "hot-tubbing" where experts are required to consult and agree on those issues over which there is no professional disagreement, and to agree those issues where there is disagreement and why, is reasonably common. Following such consultation, the experts are examined by the arbitral tribunal, and then cross-examined by the parties, in the hope of establishing and defining the areas of disagreement.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Experts are most commonly appointed by the parties, though the arbitral tribunal may also appoint experts directly.

Where the expert is appointed directly by the tribunal, the tribunal provides the parties with the terms of engagement of the expert, provides the parties with the expert's report and gives the parties the opportunity to cross-examine the expert at the hearing.

Generally tribunal appointed experts have greater evidential value than party appointed experts.

The cost of experts form part of the costs and expenses of the arbitration, fixed and allocated by the tribunal as part of the final award.

5.8 Is the expert supposed to be independent to the parties/counsel?

Yes.

Most experts will confirm that they have read and understood, and agreed to be bound by, the code of conduct for expert witnesses included in the High Court Rules, notwithstanding that such rules do not apply to arbitration. The IBA Rules of Evidence are incorporated into the AMINZ Arbitration Rules by reference.

5.9 Does the expert normally give written evidence or oral evidence?

Yes, typically the expert gives a written report, which is distributed prior to the hearing, either as part of the parties' evidence or, if the expert is tribunal appointed, by the tribunal. The expert is then available to be cross-examined at the hearing.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be "delegated" to the expert?

The tribunal gives weight to the expert evidence in the same way it does to any other evidence, unless specific issues have been delegated to the expert for determination by the parties.

The tribunal has to give reasons for all aspects of its determination, unless the parties agree otherwise.

Part of the tribunal's decision can only be delegated to an expert by agreement of the parties.

5.11 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Yes, though not particularly common.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

Site visits are not regulated and they are not mandatory; they may be undertaken either by agreement between the parties or at the behest of the tribunal.

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

A party may elect not to attend a site visit, in which case the tribunal needs to take considerable care that it does not engage in taking or discussing the submissions of the parties.

All parties must be given the opportunity to present its case, to respond to any submission by the other parties and to make submissions on issues which are relevant to the determination of the dispute, which would include attending any site visit.

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness testimonies are common to almost all arbitrations, and are limited to written statements in adjudications.

Provided the testimony is material and relevant (and within the direct knowledge of the witness), the tribunal will give it the weight which it considers to be appropriate. The fact that a witness may be an employee or consultant engaged by a party will go to the weight which the tribunal gives to that testimony.

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

Arbitral tribunals determine materiality, relevance and weight for themselves.

Where appropriate, they may be guided by the IBA Rules on the Taking of Evidence in International Arbitration, particularly in relation to admissibility (see Article 9).

6. Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

Yes, provision for interim measures and preliminary orders were included in the Arbitration Amendment Act 2007.

The measures may be decided by either an arbitral tribunal or a judge. The Arbitration Amendment Act 2016 made specific provision for the appointment of emergency arbitrators for this purpose.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated *(g) decide upon any provisional relief such as interim or conservatory measures (...)* The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

Interim measures granted and preliminary orders issued by an arbitral tribunal or a court are binding.

It is unlikely that such "interim or conservatory measures" decided by a DAB would be held to be an award of interim measures in terms of Articles 17A to 17M of the First Schedule to the Arbitration Act 1996.

At most, such a decision would be a contractual provision, subject to enforcement as a matter of contract.

7. Awards, decision, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

Enforcement of a DAB decision will be a matter of contractual enforcement, to which the normal rules of contractual interpretation and the laws of contract will apply.

As drafted, clause 20.6 of the FIDIC Red Book provides for arbitration of DAB decisions which have "not become final and binding". Clause 20.7 provides that where any DAB decision that has become "final and binding", a failure to comply with the decision may be referred to arbitration. This would almost certainly result in a stay of any court proceedings on the basis that there is an agreement to arbitrate. This issue has not been considered by the courts of New Zealand.

7.2 Does the award or binding decision have to be reasoned?

Article 31(2) of the First Schedule to the Arbitration Act 1996 provides that the award is to include the reasons upon which the award is based, unless the parties agree otherwise or the award is a consent award recording the basis upon which the parties have settled their dispute.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

Article 29 of the First Schedule to the Arbitration Act 1996 provides for majority decision, unless the parties have agreed otherwise. Majority decision would normally include the reasons for a member of the tribunal not agreeing with the majority.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

An award may be corrected for computational, clerical of typographical error within 30 days of receipt of the award, on the application of a party or of the tribunal's own initiative. Similarly, an additional award may be issued to cover claims presented but not dealt with in the award.

The tribunal has no power to otherwise "reconsider" the substance of an award.

8. Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

Article 35 of the First Schedule to the Arbitration Act 1996 provides that an arbitral award (regardless of the country in which it was made) must be recognized as binding and may be enforced on application in writing to a court by entry as a judgment.

The applicant must provide the authenticated original of the award or certified copy, the original agreement to arbitrate or certified copy and a translation of both (if appropriate).

Enforcement may be refused (Article 36) only on equivalent grounds to setting aside awards (Article 34) referred to above.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

No, it is unlikely that a FIDIC Red Book DAB decision would be accepted as an arbitral award.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Yes. Provided the foreign award met the requirements of a foreign award, and there were no grounds for refusing enforcement in terms of Article 36 referred to above.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

Challenge to a FIDIC Red Book type DAB decision will depend purely on contractual rights. A DAB type decision is not, as of right, enforceable in the same manner as an arbitral award.

Any contractual provision is unlikely to be enforced in the case of fraud, and a failure to follow contractual requirements is also likely to impact on the enforceability of the DAB decision as a matter of contract.

Any DAB decision will inevitably require consideration and determination in arbitration or in court before it can be enforced.

8.5 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

No. Provided the legal requirements for expert determination are met, and the contractual procedures for the expert determination are followed, the expert's determination is final and binding.

If questions of jurisdiction of the expert arise, the court is the final arbiter.

9. Trends and developments

Most participants in the construction industry in New Zealand are reluctant to engage in lengthy, expensive and uncertain dispute resolution procedures. The industry is relatively small, and the reputational impact of construction disputes is considerable.

Construction disputes tend, therefore, to be negotiated by the parties themselves.

Construction adjudication remains popular as a prompt and cost effective means of determining disputes on an interim basis. For large projects, this can be a useful and discrete means to settling disputes which might otherwise derail the project. Large projects have also increasingly recognised the need for dispute avoidance procedures, and interim resolution by disputes boards is becoming more common.

Arbitration, however, remains the preferred means of final determination of disputes.

10. Other important issues

In recent years, the construction industry in New Zealand has moved away from the traditional prescriptive contract, with the central role of the engineer to the contract, to a more collaborative approach. Dispute avoidance has become recognised as a means of procuring positive project outcomes, with early warning mechanisms becoming more prevalent.

Dispute resolution practitioners have risen to the occasion, with increasing use of non-binding determinations, advisory opinions and evaluative mediation to identify potential disputes, and to provide opportunities to avoid or minimise potential disagreement.

The availability of interim measures through emergency arbitration, expedited arbitration procedures, and streamlining the arbitration process is also a positive development for the industry.

The new AMINZ Arbitration Rules and the AMINZ Arbitration Appeals Tribunal also make arbitration more attractive.