



## SELECTING AND TAILORING DISPUTE RESOLUTION CLAUSES

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By Nick Gillies  
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### INTRODUCTION

1. Dispute resolution clauses<sup>1</sup> are often relegated to the end of contractual negotiations or standard “boilerplates” are included with little or no thought as to their appropriateness. Frequently such clauses are not considered important or there is a reluctance to contemplate the possibility of dispute. Like newlyweds, contracting parties can have a rose-tinted picture of the future and neither wants to consider the possibility of divorce.
2. However, disputes are a fact of life in commerce. Managing and resolving claims effectively is an important part of business. To that end, a dispute resolution clause (or at least the wrong clause) can have a profound impact on how claims are resolved and how contractual rights and obligations are enforced.
3. *Carr v Galloway Cook Allan*<sup>2</sup> and *Zurich v Cognition Education Ltd*<sup>3</sup> are two recent high profile examples of the potential risks or problems associated with dispute resolution clauses. In *Carr*, the Supreme Court found that the parties’ arbitration clause was defective and could not be severed, with the consequence that an arbitration award was set aside. In *Zurich*, the Supreme Court held that a summary judgment application by Cognition could not be heard because the parties had agreed to arbitrate disputes. In each case, the particular dispute resolution clause had an effect not contemplated or desired by at least one of the parties.
4. There are two key considerations when it comes to dispute resolution clauses: the concept and the drafting. While this paper touches upon certain drafting points, its focus is on the conceptual aspects – ie selecting the appropriate method and forum to achieve effective dispute resolution clauses.

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<sup>1</sup> That is, the contractual provisions by which parties specify how, or in what forum, their disputes are to be resolved.

<sup>2</sup> [2014] NZSC 75.

<sup>3</sup> [2014] NZSC 188, [2015] 1 NZLR 383.

## DISPUTE RESOLUTION OPTIONS

5. Lawyers and their clients are now blessed with a plethora of dispute resolution methods. Understanding the options and their pros and cons is paramount to including appropriate and effective dispute resolution clauses in agreements.
6. The options that may be available include:
  - a. Determinative processes:
    - i. Litigation;
    - ii. Arbitration (domestic and international);
    - iii. Adjudication (statutory and contractual);
    - iv. Expert determination; and
    - v. Early neutral evaluation;
  - b. Consensual processes:
    - i. Unassisted negotiation;
    - ii. Mediation; and
    - iii. Facilitation;
  - c. Hybrid processes:
    - i. Conciliation;
    - ii. Med-Arb; and
    - iii. Dispute Boards.

We consider each of these in more detail below.

### **Determinative processes**

#### Litigation – the Courts

7. Litigation through the courts remains the traditional and best-known forum for resolving disputes. Putting to one side the specialist courts and public tribunals,<sup>4</sup> there are three tiers to New Zealand's court system:

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<sup>4</sup> Such as the Family, Employment and Environmental Courts.

- a. Disputes Tribunal – for claims up to \$15,000 or, if the parties agree, up to \$20,000;<sup>5</sup>
  - b. District Court – for claims between \$15,000 and \$200,000;<sup>6</sup> and
  - c. High Court – for claims above \$200,000.<sup>7</sup>
8. For the purpose of this paper, we consider the High Court for comparative purposes.
  9. The advantages and disadvantages of litigation are generally well known and are summarised below:

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Guaranteed to provide a resolution that is legally binding and enforceable.</li> <li>• There is no cost for the judge and court facilities (except modest court fees).</li> <li>• A well-trying system with established rules and procedures.</li> <li>• A “Rolls Royce” process in which disputes are fully considered.</li> <li>• Precedent value of decisions.</li> <li>• Clear appeal rights on both fact and law.</li> <li>• Can join multiple defendants/third parties (provided this is not obviated by a dispute resolution clause with those parties).</li> <li>• Costs are recoverable by the successful party, <u>but</u> only at scale.</li> </ul>	<ul style="list-style-type: none"> <li>• A lengthy and time-consuming process. 18 months to judgment is common and some cases can take longer.</li> <li>• Comparatively expensive.</li> <li>• Heard in public.</li> <li>• No control over the selection of judge, who may not have expertise in the particular subject matter.</li> <li>• A relatively inflexible process. The parties are bound to follow the Court’s case management procedure and rules.</li> <li>• The scale costs regime means successful parties often recover much less than their actual costs.</li> </ul>

10. New Zealand’s courts are generally well-regarded. There is inherent risk in any determinative process, but parties who litigate their disputes can have confidence in the process. However, litigation is time-consuming, expensive and public, with no control over the selection of judge. These tend to be the main reasons parties look to other dispute resolution options.
11. Litigation (and arbitration) is typically the last resort for parties who are unable to resolve their differences. Unless an alternative forum has been agreed, litigation is the default method of determining disputes. Provided the court has jurisdiction, there is unfettered access to the New Zealand judicial system.

<sup>5</sup> Disputes Tribunal Act 1988, s10.

<sup>6</sup> District Court Act 1947, s30. This is will increase to \$350,000 once the Judicature Modernisation Bill is passed.

<sup>7</sup> Strictly speaking, the High Court’ jurisdiction is not limited by claim value, but it will generally only hear civil claims that exceed the jurisdiction of the District Court and other specialist tribunals.

## Arbitration

12. Arbitration has been defined as “*the settlement of a dispute by [someone other than the courts] to whom the conflicting parties agree to refer their claims in order to obtain a final resolution*”.<sup>8</sup> More specifically, it is a contractual method of resolving disputes in accordance with the Arbitration Act 1996. Arbitration competes directly with litigation.
13. Arbitration has been around since antiquity<sup>9</sup> and is now enshrined in statute.<sup>10</sup> The Arbitration Act 1996 provides *inter alia* safeguards and default machinery to support effective and consistent arbitral processes. It also recognises arbitral awards as binding and enforceable and the subject matter of an award becomes *res judicata*.
14. Any dispute which the parties have agreed to submit to arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy or is excluded under any other law.<sup>11</sup> Generally, the dispute must be capable of being the subject of civil proceedings and settlement by direct agreement between the parties.<sup>12</sup> Unless there is agreement, a party cannot be compelled to arbitrate.
15. Arbitration shares similar procedural steps to litigation. However, in arbitration the parties can influence selection of the tribunal and there is more flexibility to modify procedures on an ad hoc basis. Arbitration often follows a similar process and time frame to litigation, although short-form arbitral procedures have been developed and are used from time-to-time for a speedier and more cost-effective process.<sup>13</sup> Under expedited procedures an award can, for example, be available in 90 days or less.
16. There are two types of arbitration: domestic and international. Domestic arbitration is where the parties reside in New Zealand while international arbitration applies where the parties reside in different jurisdictions or they otherwise agree.
17. Parties will often submit to international arbitration where they do not have confidence in the local courts or where they want a neutral forum outside their respective countries. An international arbitration clause may specify that any arbitration under the contract is to be administered by an institution, such as the ICC or Singapore International Arbitration Centre. Arbitrations would then be heard in accordance with the rules and under the aegis of that institution. This provides added comfort as well as cost. If an institution is not specified, arbitration is ad hoc or non-administered (ie is conducted without the assistance of an administering institution), although the parties can still choose to use a designated set of rules.<sup>14</sup>

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<sup>8</sup> Halsbury's Laws of England (5<sup>th</sup> Ed, 2008) paragraph 1201.

<sup>9</sup> Laws of New Zealand, Arbitration, paragraph 4.

<sup>10</sup> Arbitration Act 1996.

<sup>11</sup> Arbitration Act 1996, s10.

<sup>12</sup> *Laws of New Zealand*, Arbitration, paragraphs 5 and 19.

<sup>13</sup> For example: [www.buildingdisputestribunal.co.nz/ARBITRATION/EXPEDITED+COMMERCIAL+ARBITRATION+PROCEDURES.html](http://www.buildingdisputestribunal.co.nz/ARBITRATION/EXPEDITED+COMMERCIAL+ARBITRATION+PROCEDURES.html)

<sup>14</sup> For domestic arbitration, there are local organisations who offer arbitration rules and services (eg Arbitrators and Mediators Institute of New Zealand (AMINZ), LEADR and the Building Disputes Tribunal (BDT)).

18. In many respects the advantages and disadvantages of arbitration are the mirror of those for litigation:

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• The parties can decide important details about the arbitration set-up (eg tribunal selection method, venue, domestic / international, administered / ad hoc, rules, applicable etc).</li> <li>• The tribunal can be selected for their particular skills and experience.</li> <li>• More procedural flexibility than litigation.</li> <li>• Private and confidential.</li> <li>• Sometimes quicker than litigation, but not always.</li> <li>• Costs recovery for the successful party is not subject to the scale costs regime and therefore can be higher than litigation.</li> </ul>	<ul style="list-style-type: none"> <li>• No precedent value because an award is private.</li> <li>• More limited appeal rights (eg questions of fact cannot be appealed).</li> <li>• The parties must meet the cost of the arbitrator and the hearing facilities.</li> <li>• Comparatively expensive. The costs can be similar to litigation.</li> <li>• Potential drafting risk in arbitration agreements (eg <i>Carr</i> and <i>Zurich</i>).</li> <li>• Third parties cannot be joined unless they expressly agree.</li> <li>• Arbitration awards themselves are not directly enforceable. If necessary, a successful party must have the award “confirmed” by the court.</li> </ul>

19. Arbitration tends to be used by commercial parties who want their disputes resolved privately and/or where the subject matter militates in favour of a third party decision maker with particular knowledge or expertise. It is often no less expensive or faster than litigation and, for smaller-value claims, arbitration may be disproportionate because the parties must pay the tribunal and meet the cost of the hearing facilities.

Adjudication

20. Adjudication is a rapid determinative process developed specifically for construction disputes. In New Zealand, the Construction Contracts Act 2002 (**CCA**) creates a statutory right to adjudicate disputes under a “construction contract”. That right exists regardless of whether adjudication is provided for in a construction contract and parties cannot contract out of this.
21. Adjudication is often described as a “quick and dirty” dispute resolution process. It is intended to provide quick answers to discrete contractual issues in order to help keep projects on track and maintain cash flow.
22. Adjudications are usually heard on the papers without an oral hearing, there is no discovery and there are strict timeframes to follow. A determination is usually available within five to seven weeks of a referral notice, which compares with many months or years for litigation and arbitration. Unlike other forum, parties bear their own costs regardless of the outcome, although the losing party usually has to meet the adjudicator’s fees and expenses.

23. There is currently no mandatory criteria for eligibility as an adjudicator, although today most are senior construction professionals who have had adjudication training. If the parties cannot agree an adjudicator, or a charging order is sought, the adjudicator must be nominated by an “*authorised nominating body*”.<sup>15</sup> These are bodies which are approved by the relevant minister and which vet any adjudicators they nominate.
24. At present, adjudication determinations about payment are enforceable, but those about rights and obligations are not. That distinction is due to be removed.<sup>16</sup> A losing party in adjudication can have the dispute re-heard *de novo* in the District or High Court (or other forum specified in the contract).
25. Adjudication brought a sea change in the resolution of construction disputes by providing parties with access to a rapid dispute resolution process.<sup>17</sup> Adjudication is believed to be the most commonly used dispute resolution method in New Zealand for construction claims.<sup>18</sup> Various amendments to the CCA are currently before parliament. This includes extending the jurisdiction of adjudication to consultants (ie engineers, architects and project managers),<sup>19</sup> which is expected to come into force in 2016.
26. Anyone who is not a party to a “construction contract” does not have a statutory right of adjudication. It is, however, possible to incorporate adjudication contractually, although in reality this will end up being either an expedited arbitration (see above) or an expert determination (see below).
27. Some lawyers remain uncomfortable with the “quick and dirty” nature of adjudication, whereas construction parties themselves tend to support the process, even where the outcome goes against them, as it provides certainty in a short time period. When it comes to drafting dispute resolution clauses, there is no need to expressly include adjudication in “construction contracts” as it exists of right, which should be borne in mind when specifying any other forum.

### Expert Determination

28. Expert determination involves the engagement of “*a third party expert, with expertise in the particular subject-matter in issue, to give a determination upon that subject issue*”.<sup>20</sup> It is normally used for disputes of a specialised or technical nature, which do not involve complicated issues of fact or law.<sup>21</sup> Expert determination bears some similarities to adjudication outside of a construction context.

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<sup>15</sup> Such as AMINZ, Royal Institute of Chartered Surveyors (RICS) and BDT.

<sup>16</sup> Construction Contracts Amendment Bill 2013.

<sup>17</sup> An adjudication decision can be available within 20 – 37 days.

<sup>18</sup> [www.buildingdisputestribunal.co.nz/ADJUDICATION.html](http://www.buildingdisputestribunal.co.nz/ADJUDICATION.html).

<sup>19</sup> *Ibid.*

<sup>20</sup> Robert Gaitskell QC, *Adjudication – Its effect on other forms of dispute resolution (the UK experience)* ACLN #105 November/December 2005 at 9.

<sup>21</sup> Scientific, valuation and quantum matters are traditional examples. However, expert determination has been used for disputes involving *inter alia* construction & engineering (where the CCA does not apply), professional services, sale of goods, shipbuilding, valuations, rolling stock, leases and licences, etc. See also T Kennedy-Grant, *Expert Determination and the Enforceability of ADR Generally*, 2010 AMINZ Conference at paragraphs 16-17.

29. Expert termination requires the agreement of both parties. However, unlike arbitration, it is not supported or governed by any statutory safeguards. Instead, the expert decides according to his or her own expertise and the terms of the parties' contract. As a result, expert determination tends to be speedier, cheaper and more flexible than arbitration. The expert can (and often does) adopt an inquisitorial-type role and determines their own processes subject to the terms of the contract.
30. Being entirely a creature of contract, there are few checks and balances on an expert's process and very limited grounds on which an expert's decision can be appealed.<sup>22</sup> Expert determinations are normally final and binding. As the Court of Appeal recently observed in *Waterfront Properties (2009) Ltd v Lighter Quay Resident's Society Inc*:<sup>23</sup>

*“... in agreeing to expert determination, parties have agreed to a dispute resolution process which has the advantages of cost, speed and finality. Courts must be careful to keep parties to their bargain and not undermine the benefits of expert determination.”*

31. Further, there is no automatic right to enforce an expert's decision. Instead the successful party would need to commence proceedings for breach of contract if a determination is not honoured.

#### Early Neutral Evaluation (ENE)

32. ENE is a confidential non-binding opinion by an independent person of the issues (or certain agreed issues) in dispute.<sup>24</sup> The opinion is based on a brief review of the core documents and arguments of each party. It is not a fully-detailed assessment.
33. ENE is often used to assist with negotiations. Having a preliminary neutral view on the merits can help bridge the remaining gap to settlement. It is particularly well suited to disputes where the parties have widely different views on the law or quantum, and where the issues are relatively discrete. To carry weight the evaluator must be someone of standing whose opinion will be respected (eg Queen's Counsel).
34. If done properly, and in the right circumstances, ENE can be a fast, economical and effective way to encourage a settlement. Nevertheless, as the evaluation is essentially based on a “look and feel”, rather than a properly detailed assessment, there is always a possibility the opinion is incorrect (or perceived to be incorrect). If one party feels strongly that is the case, ENE can sometimes result in a further entrenchment of position. In addition, ENE carries the risk of front loading costs, especially if counsel try to cover off every detail. This can be mitigated to some degree by careful management from the evaluator (eg limiting page numbers).

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<sup>22</sup> See for example *Barclays Bank PLC v Nylon Capital LLP* [2012] 1 All ER (Comm) 912 at [37] and also Kennedy-Grant ibid at paragraphs 44.

<sup>23</sup> [2015] NZCA 62 at [38].

<sup>24</sup> Robert Gaitskell QC, *Adjudication – Its effect on other forms of dispute resolution (the UK experience)* ACLN #105 November/December 2005 at 9.

## Consensual processes

35. Each of the dispute resolution options outlined above involve a third party determining the outcome of a dispute. In contrast to this, there are a number of alternative consensual methods in which the parties themselves retain control over the outcome. They include direct negotiation, mediation and facilitation.

### Unassisted Negotiation

36. Unassisted negotiation is largely self-explanatory. It involves the parties attempting to resolve a dispute between them. Dispute resolution clauses sometimes mandate this before the parties can refer a dispute to a formal process involving a third party. The main advantage of unassisted negotiation is that it costs the parties nothing other than their own time.
37. More often than not commercial parties can resolve problems themselves. Sometimes, however, the issues are too significant, the positions too entrenched, or the sense of grievance or emotional stress is too great for parties to be able to negotiate effectively without assistance.<sup>25</sup> When this arises it is necessary to turn to other ADR options.

### Mediation

38. Mediation is a formal negotiation facilitated by a neutral third party (the mediator). The mediator has no decision-making authority and will not normally express a view on the legal merits. Instead, their role is to manage negotiations in order to help the parties try to reach a settlement. Whether a settlement is ultimately achieved remains in the hands of the parties.
39. Mediation is consensual (ie all parties must agree to mediate), private and confidential, and the usual procedural and evidential rules do not apply. If the mediation fails, anything said, prepared or produced during mediation cannot be relied on or introduced as evidence in subsequent proceedings without the other party's agreement. These features are designed to provide flexibility and encourage open and frank dialogue.
40. There is no limit on the way in which mediations can be run, although often there is an initial plenary session in which the parties make opening statements / discuss key issues, before breaking into separate rooms with the mediator caucusing between them. Most mediations take place on a single day, but larger or more complex claims, or claims involving many parties, can extend to two or three days. The idea is to assemble the key decision-makers and their advisors in one place at one time to explore settlement with the assistance of an independent person.
41. Parties can agree in advance to refer any disputes to mediation. This may be one of a number of steps specified in a multi-tiered dispute resolution clause (see further below). Alternatively, they can agree to mediate on an ad hoc basis after a dispute has arisen and regardless of what is specified in the contract. Once there is agreement to mediate, a mediator will be appointed – either in accordance with the method specified in their contract (if any) or otherwise

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<sup>25</sup> [www.buildingdisputestribunal.co.nz/DISPUTE+RESOLUTION.html](http://www.buildingdisputestribunal.co.nz/DISPUTE+RESOLUTION.html).



consensually. Most mediators will require the parties to sign a mediation agreement, which *inter alia* governs the mediation process, confirms confidentiality and records the fees and expenses payable to the mediator.<sup>26</sup> Mediators usually have their own mediation agreements although standard terms and protocols are commonly available.

42. Mediation has become popular over the last 10-15 years and is now a well-accepted technique for resolving disputes.<sup>27</sup> Anyone can act as a mediator; there are no eligibility requirements. However, most mediators today having completed formal training and a few are practising as full-time mediators. Selection will depend on the mediator's independence, training, experience, style and knowledge of the subject matter (although the latter is not always necessary).
43. Mediations are often effective because they force parties to confront one-another in person in a private but controlled environment. This can help eliminate misunderstandings or miscommunications, and provide the necessary catharsis in order to make a compromise. The mediator is fundamental to the process and an effective one will be particularly adept at applying the right pressure and encouragement to reach a settlement. If a dispute does not settle on the mediation day, it often does within a short period afterwards.
44. Mediation is used for a wide variety of disputes, including commercial, construction, insurance, environmental, employment, family and other areas.<sup>28</sup> If successful, mediation will avoid the future costs and uncertainties of litigation, arbitration or such other process where a third party determines the outcome. It also provides a private and confidential resolution without any admission or finding of liability.
45. Nevertheless, mediations cost money<sup>29</sup> without any guarantee of a resolution. They are not normally suitable for discrete or stand-alone issues, and, if mediation fails, one party may gain a tactical advantage from seeing the other's witnesses. Parties should be careful about not mediating prematurely before a dispute is sufficiently mature, which is an important consideration if mediation is specified in a dispute resolution clause (see below).

### Facilitation

46. Facilitation bears many similarities to mediation. Both are consensual, private discussions between parties, assisted by an independent person with no decision-making power. Facilitators are often trained mediators.<sup>30</sup>
47. However, facilitation tends to be used where there is tension or differences between parties but they are not yet in dispute and where the parties recognise they may not have the necessary

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<sup>26</sup> Usually this will include an express provision preventing the parties from calling the mediator to give evidence about the contents of the mediation, and indemnifying the mediator of any liability in relation to the dispute.

<sup>27</sup> Mediation is even recognised in certain statutes as an appropriate form of dispute resolution (eg Crown Minerals Act 1991, ss63-75 and Building (Residential Consumer Rights and Remedies) Regulations 2014, Schedule 3, s6). Further, the Courts offer a similar process known as a judicial settlement conference (or "JSC") in which a Judge or Associate Judge assumes a mediator-like role. That Judge or Associate Judge will not hear the case if it does not settle.

<sup>28</sup> See [www.aminz.org.nz/Attachment?Action=Download&Attachment\\_id=382](http://www.aminz.org.nz/Attachment?Action=Download&Attachment_id=382).

<sup>29</sup> This includes the mediator's fees/expenses, potentially the cost of hiring a venue, and the parties' own costs.

<sup>30</sup> See [www.nigeldunlop.co.nz/services/mediation/the-difference-between-mediation-and-facilitation/](http://www.nigeldunlop.co.nz/services/mediation/the-difference-between-mediation-and-facilitation/) for a further comparison of mediation and facilitation.

skills or capacity to manage “a difficult discussion, consultation process and/or to solve a substantive problem.”<sup>31</sup> Community/public interest and family issues are examples where facilitation can have a role.

48. Whereas a mediator takes an active role in trying to get the parties to an agreed resolution, a facilitator’s role is to help the parties or group engage in more effective dialogue and improve the process for solving problems and making decisions themselves.
49. As with mediation and conciliation, the facilitator would normally expect to receive fees and expenses, so there is a cost without any guarantee as to the outcome. For most civil or commercial disputes, mediation or conciliation is likely to be more appropriate than facilitation and it is unusual to see facilitation specified in a dispute resolution clause. Instead, it tends to happen on an ad hoc basis.

### **Hybrid processes**

50. In addition to the processes noted above, there are some hybrid processes, which involve both consensual and determinative elements.

### Conciliation

51. There is no settled definition of conciliation. Here we use it to mean mediation in which, if a settlement is not achieved at the end of the mediation, the mediator (or conciliator) expresses a confidential and non-binding view on the merits. In many respects conciliation is a hybrid of mediation and ENE.
52. Conciliation is best suited to disputes involving technical subjects and where the opinion of an experienced independent person is likely to carry weight. The idea behind conciliation is that, having gone through a structured negotiation, the parties may be more inclined to compromise further in order to settle once they receive the conciliator’s opinion. Anecdotally, settlements often closely follow the conciliator’s findings.
53. In general, the advantages and disadvantages of mediation apply equally to conciliation, with the additional consideration that the parties will receive a non-binding opinion in the absence of settlement. As a result, cost escalation can be an issue with counsel taking care to ensure all relevant evidence and arguments are put before the conciliator. Once a view is expressed, it can sometimes further entrench positions, particularly if one party considers the opinion to be incorrect. Practically speaking, finding someone with both the technical expertise and mediation skills might also be difficult in some areas.
54. As for mediation, conciliation can be agreed in advance or on an ad hoc basis after a dispute has arisen. One example of the former is the IPENZ short form agreement that specifies conciliation to be followed by arbitration. Another (statutory) example is the Sharemilking

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<sup>31</sup> See [www.buildingdisputestribunal.co.nz/DISPUTE+RESOLUTION.html](http://www.buildingdisputestribunal.co.nz/DISPUTE+RESOLUTION.html).

Agreements Order 2011.<sup>32</sup>

### Med-Arb

55. As the name suggests, Med-Arb combines mediation and arbitration into a single process that ends with an arbitral award if there is no settlement. It arises where a person or tribunal is appointed.<sup>33</sup>
- a. as a mediator and, if the mediation fails, then as an arbitrator for the same dispute; or
  - b. as an arbitrator and they have the power within the arbitral appointment to mediate the same dispute, but will continue as the arbitrator if the mediation fails.<sup>34</sup>
56. There is an inherent conflict between arbitration and mediation. A mediator is privy to discussions and negotiations that would ordinarily remain confidential and never be heard by the person(s) making an award. For this reason, there has been caution around Med-Arb in New Zealand, with some practitioners concerned about the same person performing both roles.
57. Addressing those concerns, Fisher J in *Acorn Farms Ltd v Schnuriger* offered five ‘precautions’ for Med-Arb, which include that the mediator-arbitrator may not receive information without the knowledge of both parties.<sup>35</sup> This effectively rules out caucusing, although some mediators and parties may take a pragmatic view if progress is being made.
58. Med-Arb offers all the advantages of mediation, with the added efficiency of using the same person to provide an award if agreement is not reached. It also offers the possibility of converting settlement agreements into arbitral awards for enforceability.<sup>36</sup> However, with the dual roles, there is an increased risk of the award being set aside if the unsuccessful party decides to make a jurisdictional or procedural challenge. In practice, this should be infrequent as most parties who agree this hybrid process recognise the practical benefits of it and will usually accept the final outcome.
59. Med-Arb is not thought to be widely used in New Zealand, although it does feature in some statutory processes and we know of at least one private dispute resolution provider which is about to release a protocol.<sup>37</sup> Interestingly, Med-Arb it is believed to be more popular in Asian and European countries with an inquisitorial system than in common-law countries.<sup>38</sup>
60. Med-Arb should be considered where the parties are not especially concerned about the

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<sup>32</sup> AMINZ administers the National Panel of Sharemilking Conciliators and has a protocol for this: [www.aminz.org.nz/Folder?Action=View%20File&Folder\\_id=1&File=Conciliation%20Protocol.pdf](http://www.aminz.org.nz/Folder?Action=View%20File&Folder_id=1&File=Conciliation%20Protocol.pdf).

<sup>33</sup> R Hindle, *Is Med/Arb an oxymoron?* 2013 AMINZ Conference Paper at [9].

<sup>34</sup> This is sometimes referred to as “Arb-Med”.

<sup>35</sup> [2003] NZLR 121- one of the few cases in New Zealand about Med-Arb.

<sup>36</sup> M Dean QC, *Converting Mediated Agreements into Arbitral Awards* [2005] NZLJ 159.

<sup>37</sup> For example, the Disputes Tribunal Act 1988 (s18) obliges Referees to assess whether it is appropriate to assist the parties to negotiate an agreed settlement.

<sup>38</sup> Goodrich, *Arb-Med: Ideal Solution or Dangerous Heresy?* 2012 Vol 15 IBLR referencing M Schneider, *Combining Arbitration with Conciliation*, ICC Congress Series, No 8 (1996) at p57.

contents of a mediation being known by the decision-maker and where a relatively fast and inexpensive process, that provides a binding determination in the absence of settlement, is desirable. This may suit lower value or less complex claims where a guaranteed outcome at the end of the process is important. It also requires willingness by the parties (and the mediator-arbitrator) to take a pragmatic approach and accept the inherent compromises associated with having the same person perform both roles.

### Dispute Boards

61. Dispute boards are mostly used in complex, high-value construction projects. A dispute board is a board of independent persons (usually there are three), which is formed at the outset to resolve disputes during the course of the project.<sup>39</sup> They are created by contract and their decisions can be binding or non-binding. The “dispute review board” model is generally considered to be the most effective (and expensive) as the board visits site and meets with the parties on a regular basis in order to proactively identify and resolve issues before they escalate into disputes (the consensual element) and, where necessary, make a formal determination.<sup>40</sup> The alternative is essentially a standing adjudication board, which simply determines disputes referred to it.

### **SELECTING AND TAILORING DISPUTE RESOLUTION CLAUSES**

62. Dispute resolution clauses are commonplace. They provide certainty as to how a dispute under the contract is to be resolved and are necessary if the parties want to depart from using the courts.
63. An effective dispute resolution clause will, generally speaking, enable the parties to achieve a resolution as quickly and inexpensively as possible. Other factors may also come into play, such as preserving the relationship, keeping a project on track or maintaining confidentiality. What constitutes a “good” dispute resolution clause is ultimately a function of what the parties “*hope to achieve from the inclusion of such a clause in their agreement*”.<sup>41</sup>
64. When including a dispute resolution clause, the first decision to be made is which forum(s) to use. The starting point for that is choosing between litigation and arbitration.

### **Litigation vs Arbitration**

65. There are no hard and fast rules about whether litigation or arbitration is preferable. It will depend on the nature of the contract, the parties involved and their particular preferences. Having an understanding of the advantages and disadvantages of each option is essential to making this assessment.

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<sup>39</sup> *MI-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) per Akenhead J at 16.

<sup>40</sup> For a more detailed explanation and analysis of dispute boards, see N Gillies, *Rebuilding New Zealand: A Case for Dispute Boards*, Arbitrators & Mediators Journal, December 2014, Vol 33, No 2.

<sup>41</sup> A Bihancov, *What is an example of a good dispute resolution clause and why?* (2014) Evaluation of ADR, Paper 3 at p1, see [www.civiljustice.info/adreval/3](http://www.civiljustice.info/adreval/3).

66. As a general rule, arbitration may be preferable where one or more of the following factors apply:
- a. Privacy and confidentiality are important;
  - b. There is an ongoing commercial relationship;
  - c. The value of any dispute will be reasonably high;<sup>42</sup>
  - d. The outcome is unlikely to have any precedent value;
  - e. The parties want to be able to control who determines any dispute, especially if particular knowledge or expertise is important;
  - f. Procedural flexibility is desired;
  - g. Speed is a consideration (although arbitration may be no quicker than litigation).
67. Arbitration remains popular in New Zealand and performs an important function in providing a private alternative to the courts. There are numerous standard-form arbitration clauses and many dispute resolution institutions provide recommended wording for submitting to their rules and administration. A detailed analysis of the drafting considerations for arbitration clauses is outside the scope of this paper. We do, however, mention that it is often sensible to reserve the right to use the courts for urgent relief and enforcing monetary obligations and, where the value of any dispute is unlikely to be significant, to limit the tribunal to one arbitrator for cost reasons.<sup>43</sup>
68. As a general approach, we suggest starting with litigation as the default forum and only departing from this if there are good reasons to do so. For small-to-medium “vanilla” contracts, for example, litigation is likely to be the most appropriate and cost-effective option. We regularly see unnecessarily convoluted or complex dispute resolution clauses, when a simple reference to the courts would better serve the parties.
69. If no dispute resolution forum is specified, the host country courts will likely have jurisdiction by default. Even if litigation is the chosen forum, it is normally prudent to include a jurisdiction clause agreeing the court has jurisdiction in order to put this beyond doubt. That becomes especially important if there is any possibility of a jurisdictional challenge (eg one party resides out of New Zealand or part of the contract is performed overseas). The parties can agree that the jurisdiction is either exclusive (meaning only the courts can hear a dispute under the contract) or non-exclusive (which guarantees jurisdiction for the local courts but provides flexibility to sue in another country if appropriate).

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<sup>42</sup> The cost of the tribunal and hearing facilities can make arbitration disproportionate for lower value claims.

<sup>43</sup> For further drafting guidance on arbitration clauses, see for example: S East, *Dos and Don'ts for drafting alternative dispute resolution clauses*, 2013 AMINZ Conference, IBA Guidelines for Drafting International Arbitration Clauses, 2010 International Bar Association, and Guide to Drafting International Dispute Resolution Clauses, ICDR, [www.icdr.org](http://www.icdr.org).

## Other dispute resolution options

70. Having made a choice between litigation and arbitration, the next decision is whether to specify any other dispute resolution options – either in place of or in addition to litigation/arbitration. Again, having an understanding of the options available and their pros and cons is essential.

### Determinative options

71. If it is a “construction contract” under the CCA, adjudication will exist as of right alongside the courts or any other forum specified in the contract (ie adjudication does not need to be expressly included). If statutory adjudication applies, there would be little value in specifying expert determination or expedited arbitration. As noted above, adjudication under the CCA should soon extend to agreements with engineers, architects and project managers – most likely in 2016.
72. Where the contract is not a “construction contract” but discrete technical issues are likely to arise, it would make sense to consider expert determination. Sometimes, certain types of issues can be carved off for expert determination, although this usually only works for larger more complex contracts and it requires careful drafting to ensure there is certainty about what can and cannot be referred for expert determination.
73. There is empirical evidence that parties respond better to non-binding decisions.<sup>44</sup> For this reason ENE can be more effective than it might seem by providing an early steer on the merits by a respected independent person; although it will increase costs if the evaluation is not accepted by one party. As ENE is typically claim-specific, it is usually agreed on an ad hoc basis after a dispute has arisen, rather than in the original contract.

### Consensual and hybrid options

74. Including consensual ADR processes in a dispute resolution clause can be counter-productive, especially where the parties are required to complete them at an early stage (see our discussion of multi-tiered clauses below). This is particularly true of unassisted negotiation, mediation and facilitation, where a resolution is wholly dependent on the parties’ themselves. In our experience, these options should only be included consciously where there are clear and specific reasons for doing so and with strict time limits in order to minimise the risk of stonewalling. If parties want to discuss settlement, they can and will do so regardless of what is included in the dispute resolution clause.
75. Conciliation and Med-Arb are slightly more amendable to being included in a dispute resolution clause as each concludes with a determination (non-binding and binding) if there is no settlement. These options should be considered where the parties are comfortable with a mediator moving on to express a view and where the speed and efficiencies outweigh the perceived risks.

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<sup>44</sup> George Golvan QC, *Practical issues in the establishment and operation of a Dispute Board: Some reflections on Sydney’s Desalination Plant Project Dispute Resolution Board* BuildLaw 7 September 2010.

## Multi-tiered dispute resolution clauses

76. Multi-tiered clauses have become fashionable in recent years. These prescribe a number of escalating steps, which typically start with negotiation, then mediation (or similar) and finally litigation or arbitration.<sup>45</sup> The preceding step are often a condition precedent of moving to the next.<sup>46</sup>
77. The rationale is that the parties should exhaust every reasonable avenue for resolving a dispute themselves before commencing a formal determinative action. This is admirable but misguided. Such clauses also seem to be founded on a misconception that settlement is an almost guaranteed outcome of meditation.
78. In our experience, multi-tiered clauses do not increase the likelihood of an early, cost-effective or satisfactory resolution. Instead, they tend to cause delay, add cost and are used tactically by one party. Mediation, for example, may be disproportionate to the sum in dispute or frankly pointless if the legal rights are clear.<sup>47</sup>
79. Further, compulsion is anathema to the consensual nature of negotiation and mediation, and pushing people to mediate early frequently results in failure. As one of New Zealand's leading mediators has observed, "*these clauses risk pushing people through the doors of the mediation room too soon ... before the dispute is mature, before the rough edges have been rubbed off*".<sup>48</sup>
80. Conventional wisdom is that mediation should not take place before discovery when each party has the opportunity to see each other's documents. Pre-action mediations, by contrast, tend to have less chance of success because the issues are not fully developed and the parties are not yet ready and willing to make the necessary compromises. For these reasons, mandatory early mediation is frequently counterproductive and a wasteful exercise.
81. If parties want to include mediation in their dispute resolution clause, we suggest they provide that it takes place within a specified time following a particular step in proceedings (eg after pleadings, discovery or briefs of evidence). Alternatively, a process similar to English pre-action protocols could be adopted<sup>49</sup> whereby the parties agree to exchange a letter of claim/letter of response and meet on a without prejudice basis before commencing proceedings (except for urgent relief, summary judgment or undisputed money claims).<sup>50</sup> Most parties do this anyway, so making it compulsory is arguably unnecessary, risks front loading costs and may create arguments about compliance. If pre-action steps are to be included in a dispute resolution clause, we suggest this as an alternative to negotiation/mediation.

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<sup>45</sup> This includes some well-known standard form contracts.

<sup>46</sup> As an example, see *Emirates Trading Agency Plc v Prime Mineral Exports Private Ltd* [2014] EWHC 2014 (Comm).

<sup>47</sup> For example a debt that is not disputed.

<sup>48</sup> G Sharp, *Dispute Resolution Clauses in Commercial Contracts: The Case for Later Settlement*, [www.cliftonchambers.co.nz/2013/12/dispute-resolution-clauses-in-commercial-contracts-the-case-for-later-settlement/](http://www.cliftonchambers.co.nz/2013/12/dispute-resolution-clauses-in-commercial-contracts-the-case-for-later-settlement/).

<sup>49</sup> [www.justice.gov.uk/courts/procedure-rules/civil/protocol](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol).

<sup>50</sup> If this is a condition precedent, there should be an exception for urgent relief, summary judgment and any other appropriate exclusion(s).

### **Back-to-back clauses**

82. Where there are different but related agreements, such as in a contractual chain, the dispute resolution clauses should be back-to-back. An example of this is in construction where there is a head contractor, sub-contractors and consultants, each of whom may have some culpability for a defect with the building project.
83. If there are different dispute resolution clauses, it can result in multiple legal proceedings in different forums addressing the same or closely related issues.<sup>51</sup> If, for example, arbitration has been specified in one contract but not another, the party who has not already agreed to arbitration cannot be compelled to submit to that forum and will not normally do so for tactical advantage.
84. Different forum will result in unnecessary additional complexity, expense and delay. It also has the potential to prevent one party from passing on liability to another if there are time-bar issues. These problems can affect defendants wanting to make cross claims and third party claims as much as they can affect plaintiffs themselves.

### **Ongoing performance obligations**

85. It may be sensible to state that the parties must continue to perform their obligations while a dispute resolution process is underway. This prevents one party from “downing tools” in order to apply commercial pressure and is especially important for contracts that are likely to be ongoing for some time.

### **CONCLUSION**

86. A standard dispute resolution clause will often suffice but not always. Having the “wrong” clause can materially affect the resolution of claims and the enforcement of rights and obligations under a contract. In practical terms, it may result in wasted time and costs and may even constrain the ability to pursue legitimate claims.
87. When preparing an agreement, contracting parties and/or their lawyers should consciously consider the types of disputes that might arise and how best to have these resolved having regard to all of the options available.

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<sup>51</sup> As an example see *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm).