



## AVOIDING AND RESOLVING CONSTRUCTION DISPUTES

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### INTRODUCTION

1. In New Zealand, construction is one of the larger sectors of the economy, contributing more than 6% of GDP and employing over 170,000.<sup>2</sup> At present, the sector is enjoying exceptional growth – at levels not been seen in 40 years.<sup>3</sup>
2. Regrettably, building and engineering is prone to disputation. As New Zealand moves through a period of significant construction activity, the risk of claims is likely to rise. High demand combined with concerns about industry capacity, fragmentation and limited competition, together with the widening of tort law, is a recipe for conflict.<sup>4</sup>
3. Disputes are a negative distraction that drain productive resource, affect cash flow and potentially wipe out margin on a project. Effective dispute resolution is an important part of any business's risk management, and especially so in the construction sector.
4. This paper outlines the common causes and features of construction disputes before considering:
  - a. Options and strategies for avoiding and resolving construction disputes;
  - b. Dispute resolution clauses, with reference to multi-tiered clauses and pre-action protocols; and
  - c. Current and predicted trends regarding construction disputes in New Zealand.

### COMMON CAUSES AND FEATURES OF CONSTRUCTION DISPUTES

5. The inherent complexities and uncertainties of construction projects, even small ones, lend themselves more easily to conflict and dispute. Client expectations, design, equipment, materials, labour and land all need to come together in relative unison in order to achieve a successful outcome. Unfortunately, all too often, this does not happen.

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<sup>1</sup> With assistance from Richard Belcher, Solicitor, Hesketh Henry.

<sup>2</sup> MBIE, *Construction Sector Report* (2013).

<sup>3</sup> For a more detailed analysis of the state of New Zealand's construction sector, see N Gillies, *Overview of the Construction Landscape in New Zealand*, Legalwise Conference, 24 August 2015.

<sup>4</sup> MBIE, above note 2, at 10-11.

6. There is a large body of literature on the high rate of construction claims. While there may be local differences and peculiarities, in general, the main causes are common to all countries, including New Zealand. These include:
  - a. Inadequate scoping;
  - b. Incomplete or defective design;
  - c. Inappropriate delivery methods;
  - d. Poor contractual documentation and/or contract administration;
  - e. Inequitable risk allocation; and
  - f. Unrealistic time and cost objectives.
7. These features cause uncertainty, put parties under additional commercial pressure, increase the likelihood of variations and claim events, and drive adversarial / contractual behavior – all of which fuel conflict. It is trite to say that each of these features is avoidable. Time and effort spent getting things right up front goes a long way towards keeping projects on track and preventing subsequent disputes. This starts with selecting the right procurement method, having appropriate written contracts in place from the outset and then carefully managing the project in accordance with those contracts. However, no matter how sophisticated the industry becomes, the common pitfalls above are unlikely to ever disappear altogether.
8. Issues frequently arise during the course of a project and sometimes after completion. The vast majority of these are resolved at project personnel or commercial manager level. Very few turn into an actual dispute and fewer still result in litigation or arbitration. During design and construction, early identification and engagement is best practice for dispute avoidance.<sup>5</sup> The longer an issue is left unaddressed, the more likely it is to generate conflict and potentially turn into a dispute.

### **Common features of construction disputes**

9. In many respects, construction disputes are no different to any other commercial disputes. However, they do bear some common features. In particular:
  - a. They tend to turn on questions of fact, rather than law;
  - b. They often involve the interaction of many issues;
  - c. They frequently concern technical matters which require input from an expert, such as an engineer or quantity surveyor;
  - d. They can comprise a large number of individual claim items, which are frequently presented in a “Scott” schedule;<sup>6</sup>
  - e. The volume of documentation is usually high; and
  - f. It is not uncommon for multiple parties to be involved.

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<sup>5</sup> An Early Warning Register is one way of encouraging the prompt identification of issues, which can then be discussed (and hopefully addressed) at regular project meetings.

<sup>6</sup> A Scott schedule is a table or spreadsheet in which each individual issue or claim item is recorded in a single row. The columns provide details of each claim item (eg identifying details, nature of the claim and the amount claimed). Further columns are sometimes added for experts or other parties to add their comments or response.

10. Construction disputes generally divide into payment and defect claims:
  - a. Payment claims encompass issues about late/non payment, including claims for additional money (eg re-measurement under a measured works contract, variations, delay and disruption costs, and contra charges). At the end of a project there may be a rump of smaller issues, the aggregation of which can give rise to a substantial dispute.
  - b. Defect claims concern problems with the design or construction of the works themselves, which do not always materialise until long after completion. Where a defect is significant, it is more likely to end in a dispute situation. Defects can raise difficult questions about which parties are at fault, the appropriate remedial solution and the proper quantification.
11. Counter-claims and cross-claims are another common feature of construction disputes, which reflect the fact that multiple parties are involved in a project. For example, it is not unusual for a claim for additional money to be met by a defect claim, which can, in turn, drag other parties (eg designers and sub-contractors) into the fray.
12. One consequence of these common features is that the cost of fighting construction disputes can be expensive and disproportionately high. It is helpful therefore to understand the different resolution methods that are available, which is discussed below.
13. If a dispute does arise in relation to a project, there are a number of practical steps that parties can and should do to assist with the efficient management and resolution of claims. These include:
  - a. Reading and following the contract. Parties who fail to comply with the contract, even in minor ways, can exacerbate a situation and, tactically speaking, cause them to lose leverage.
  - b. Issuing timely and compliant payment claims/schedules in accordance with the Construction Contracts Act 2002. A failure to do so may deny a payee their timely entitlement or force a payer to make a progress payment that it does not consider is due.
  - c. Preserving, collating and organising relevant contemporaneous documents. Disputes frequently turn on the project records, which tend to be more reliable than factual witnesses. A common source of conflict is inadequate or sloppy documentation, so having this in order will go a long way towards avoiding and managing disputes. Control of documents is essential.
  - d. Where appropriate, identifying factual witnesses and requiring them to write up a statement as early as possible while the events are still fresh.
  - e. Seeking professional advice early. Parties sometimes make the mistake of trying to save costs by attempting to manage problems themselves. Time and again this results in further damage being done. Once it becomes clear that a dispute is likely, early advice often saves time and costs in the long run.

## DISPUTE RESOLUTION OPTIONS AND STRATEGIES

14. Should a dispute arise in relation to a construction project, there is now a wide range of resolution methods that may be available, many of which were developed overseas. These include:
- a. Determinative processes:
    - i. Litigation;
    - ii. Arbitration (domestic and international);
    - iii. Adjudication (statutory);
    - iv. Expert determination;
    - v. Early neutral evaluation;
  - b. Consensual processes:
    - i. Unassisted negotiation;
    - ii. Mediation;
    - iii. Facilitation;
  - c. Hybrid processes:
    - i. Conciliation;
    - ii. Med-Arb; and
    - iii. Dispute Boards / Advisors.
15. These methods are discussed in detail in a separate [Hesketh Henry paper](#).<sup>7</sup> The particular methods typically suited to construction disputes are discussed below.

### Final Forum: Can we learn from the Singaporeans?

16. Traditionally, arbitration was the method by which construction disputes were resolved. It remains the preferred final forum over litigation. That is primarily because the parties can appoint specialist arbitrators and the process is private and confidential. Arbitration was also originally thought to be quicker and cheaper than the courts, however, that is often no longer the case. In some situations (eg lower value claims) arbitration can even be disproportionate because the parties must pay for the arbitrator(s) and venue.
17. The advent of specialist courts in some jurisdictions, such as the Technology and Construction Court in England, has eroded the competitive advantage of arbitration and encouraged some parties to agree to submit to litigation in those tribunals even where they had agreed on domestic arbitration in their contract. However, that is not the case in New Zealand where there is no specialisation within the High Court. Therefore, while the courts do see construction disputes from time-to-time, the majority are resolved by arbitration or alternative methods.

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<sup>7</sup> [www.heskethhenry.co.nz/Articles/x\\_post/selecting-and-tailoring-dispute-resolution-clauses-00221.html](http://www.heskethhenry.co.nz/Articles/x_post/selecting-and-tailoring-dispute-resolution-clauses-00221.html)

18. For cross-border contracts and projects in developing countries, international arbitration remains the only sensible final forum for resolving construction disputes. That is because of the perceived independence of international arbitration and the enforceability of foreign arbitral awards under the New York Convention 1958.
19. In New Zealand international arbitration is relatively uncommon for building and engineering disputes – mostly because very few projects are large enough to involve cross-border contracts and there is a reasonable measure of confidence in the local judicial system and rule of law.
20. International arbitration centers have been developed in certain parts of the world, including London, Paris, Dubai and Singapore. These provide established rules, procedures, administrative support and facilities for hearing international arbitrations, which add convenience and cost. Given its relative proximity, Singapore is the most common seat for any international arbitral proceedings arising out of New Zealand.
21. In addition to its reputation as an arbitration hub, Singapore recently added another alternative option for international commercial dispute resolution: the Singapore International Commercial Court (**SICC**).
22. The SICC is designed to take advantage of a court-based mechanism to try to address the growing time and cost of arbitration, concerns about legitimacy and ethical issues in arbitration, a lack of consistency in arbitral awards, and the inability to join third parties to arbitral proceedings. Parties can agree to submit their claim to the SICC despite undertaking business in different states.
23. The SICC also adopts some of arbitration's "Best Practices". For example:
  - a. *The SICC Panel of Jurists*: Each claim may be tried by a single judge or a panel of three, which is to be decided by the Court. This is distinct from arbitration where the parties decide, but different from traditional litigation where one judge would only ever hear a case.
  - b. *International Judges*: The court will not only include judges of the High Court of Singapore, but also foreign jurists, who in the opinion of the Chief Justice have the necessary qualifications, experience and standing to be appointed as a International Judge. This will enable specialist judges to be appointed, where appropriate, for particular cases.
  - c. *Limited freedom to choose Counsel*: Foreign counsel who fulfill certain conditions may appear in front of the SICC without having to be admitted to the Singaporean bar.
  - d. *Domestic rules of evidence may not apply*: Parties are permitted to submit evidence on foreign law, rather than prove such law through expert evidence. In addition, the SICC may apply all other rules of evidence, whether they are founded in foreign law or otherwise, if the parties decide to make an application. This includes rules relating to legal professional privilege and the taking of evidence.
  - e. *Confidentiality*: The amended rules of the Court allow the SICC, on the application of a party, to order that a case before it be heard in private, or that the parties not disclose any information relating to the case, or that the file in the case is to be sealed.

24. One issue that the SICC does not yet seem to address is the enforceability of its judgments in other jurisdictions. A SICC judgment, being in essence a judgment of a Singaporean Court, cannot be enforced under the New York Convention. Instead, it relies on the enforcement of foreign judgments. That said, the SICC offers some attractive features that draw together advantages of litigation and arbitration.
25. For the time being, the SICC is likely to have minimal impact on the resolution of construction disputes arising out of New Zealand. However, it does show a new hybrid approach in an effort to better meet the needs of commercial parties. It is possible that some of the features of the SICC may make their way into New Zealand's domestic arbitral processes (and possibly even the Courts) in due course.

### **Consensual and hybrid methods for the construction sector**

26. In the last 15-20 years, the time and cost of litigation/arbitration has driven demand for alternative dispute resolution methods, which are cheaper and quicker. This has seen the emergence of mediation/conciliation and, since 2003, the introduction of statutory adjudication. To a lesser extent, expert determination and dispute boards also feature.

#### Mediation/conciliation

27. Mediation provides a structured settlement negotiation process. It has become popular and is seen as a means of achieving a commercial resolution and avoiding the ongoing cost and distraction of a protracted dispute.
28. Conciliation is a variant of mediation in which the mediator (or conciliator) gives a non-binding view on the merits if there is no settlement at the end of the mediation (or conciliation) process. The technical nature and proportionately high cost of construction disputes lend themselves to mediation/conciliation.

#### Adjudication / Expert Determination

29. Adjudication was introduced by the Construction Contracts Act 2002 (**CCA**). There is a statutory right to adjudicate any dispute under a "construction contract". Impending changes to the CCA will extend the right of adjudication to disputes under agreements with engineers, architects and quantity surveyors.<sup>8</sup>
30. Adjudication is a rapid determinative process developed specifically for construction disputes. It normally provides a decision within 5-7 weeks, and the parties bear their own costs regardless of the outcome. This is designed to keep costs down and provide a quick decision in order to keep cash flowing and the project on track. Adjudication has effectively plugged a gap between the Disputes Tribunal, which will hear claims valued up to \$15,000 (or \$20,000 if the parties agree), and the District Court. Adjudication is believed to be the most commonly used dispute resolution method in New Zealand for construction claims.<sup>9</sup>
31. Expert determination is sometimes used where adjudication is not available<sup>10</sup> or where the parties prefer the flexibility and finality of an expert determination process.

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<sup>8</sup> For further discussion: [www.heskethhenry.co.nz/Articles/x\\_post/changes-to-the-construction-contracts-act-2002-00178.html](http://www.heskethhenry.co.nz/Articles/x_post/changes-to-the-construction-contracts-act-2002-00178.html)  
<sup>9</sup> [www.buildingdisputestribunal.co.nz/ADJUDICATION.html](http://www.buildingdisputestribunal.co.nz/ADJUDICATION.html).

<sup>10</sup> For example, where the building project is not connected to land or does not involve "construction contract" services, such as project management.



## Quasi avoidance/resolution methods – Can we learn from the Americans?

32. The involvement of independent persons during the works has been identified as a cost-effective way of both avoiding and resolving issues/disputes.
33. Traditionally, the Engineer has performed this type of role. However, the Engineer's effectiveness in this respect has diminished over time, and it should be remembered that they are ultimately the principal's appointee regardless of any contractual obligations to act fairly and independently. Against that background, there has been demand for alternative methods that perform this type of real time function.
34. The UK and subsequently New Zealand and others responded to this demand by introducing statutory adjudication as a "quick and dirty" method in which a determination could be obtained within a few weeks. However, adjudication is still a reactive and determinative process that does not help avoid disputes in the first place.
35. In the US dispute boards and independent advisor models have been developed as alternative dispute management methods. These have been used infrequently in New Zealand but the current construction boom provides ideal conditions to give them further consideration. They are discussed below.

### Dispute Boards

36. Dispute Boards are mostly used in complex, high-value construction projects. They involve a board of independent persons (usually three), which is formed at the outset to resolve disputes during the course of the project.<sup>11</sup> The board is created by contract and their decisions can be binding or non-binding.
37. The US "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. Any determinations can be re-heard by arbitration or litigation, although DRBF data suggests that less than 3% of board determinations are reconsidered. The alternative to the dispute review board model is essentially a standing dispute adjudication board (**DAB**) (as used in FIDIC contracts), which simply determines disputes that are referred to it. The DAB model does not help avoid disputes and has been criticised.
38. The main advantage of Dispute Boards is that the board is already familiar with the project and regularly checks in on the parties. As a result, they are able to "nip issues in the bud" and, where required, give advisory opinions or make formal determinations quickly and efficiently.
39. What tends to put parties off Dispute Boards is the cost. The board members, who will be senior practitioners, need to be paid for their services. The dilemma is that, at the outset of a project, the parties do not know whether or to what extent the board will be required, and contracting parties often have a rose-tinted view about the likelihood of future claims.
40. For a detailed discussion and analysis of Dispute Boards, please click [here](#).<sup>12</sup>

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<sup>11</sup> *MI-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) per Akenhead J at 16.

<sup>12</sup> N Gillies, *Rebuilding New Zealand: A Case for Dispute Boards*, *Arbitrators & Mediators Journal* (December 2014), Vol 33, No 2. [www.heskethenry.co.nz/Articles/x\\_post/rebuilding-new-zealand-00143.html](http://www.heskethenry.co.nz/Articles/x_post/rebuilding-new-zealand-00143.html).

## Dispute Resolution Advisors

41. For lower value and less complex projects, dispute resolution advisors (**DRAs**) may be more appropriate and cost effective than a Dispute Board.
42. A DRA is a neutral third person who gives non-binding advice to the parties in relation to any disagreements or disputes in a project. The advisor does not make interim binding decisions but merely advises on the means by which a settlement could be achieved. The parties retain control over the outcome, although anecdotal evidence suggests that non-binding recommendations are often accepted.
43. The DRA model bears many of the same features and advantages/disadvantages of Dispute Boards and could be considered a “mini” Dispute Board. For example, the DRA would conduct site visits and meet with the parties on a regular basis, and the parties’ confidence in them is fundamental. As with a Dispute Board, the contracting parties need to get on board with the concept in order to make it work.

## **DISPUTE RESOLUTION CLAUSES**

44. Dispute resolution clauses are commonplace in commercial contracts, including construction agreements. They provide certainty as to how a dispute would be resolved and are necessary if the parties want to depart from using the courts.
45. 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. 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>13</sup> Below are some specific issues to consider, which are of particular relevance to building contracts and consultant agreements.<sup>14</sup>

### **Multi-Tiered Clauses and Pre-Action Protocols – Can we learn from the English?**

46. Multi-tiered clauses have become fashionable and feature in many standard form construction contracts, such as NZS3910:2013. They prescribe a number of escalating steps, which typically start with negotiation, then mediation (or similar) and finally litigation or arbitration.<sup>15</sup> The preceding step is often a condition precedent of moving to the next.<sup>16</sup>
47. 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.
48. From 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>17</sup>

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<sup>13</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).

<sup>14</sup> For a more comprehensive discussion of dispute resolution clauses, see N Gillies and P Cogswell, *Dispute Resolution Clauses: Uses and Analysis*, ADLS, 30 July 2015.

<sup>15</sup> This includes some well-known standard form contracts.

<sup>16</sup> As an example, see *Emirates Trading Agency Plc v Prime Mineral Exports Private Ltd* [2014] EWHC 2014 (Comm).

<sup>17</sup> For example a debt that is not disputed.



49. 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>18</sup>
50. 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.
51. If parties want to prescribe certain preliminary steps in their dispute resolution clause, one alternative is to adopt a process similar to the Pre-Action Protocol for Construction and Engineering Disputes in England & Wales (**the Protocol**). The Protocol is part of the equivalent High Court Rules in that jurisdiction. In summary, it requires the parties to a construction or engineering dispute to exchange letters of demand/response and meet on a without prejudice basis before commencing proceedings (except for urgent relief, summary judgment or undisputed money claims).
52. The letters of claim/demand must include certain prescribed information (such as the names and addresses of the parties, the facts on which the claims/responses are based, basis of each claim, the relief sought, etc). The letter of response must also be provided within 28 calendar days, with the without prejudice meeting taking place a further 28 days after that. The requirements of the Protocol are not to be followed slavishly, but non-compliance will expose the non-complying party to an adverse costs order in any future proceedings regardless of the outcome of those proceedings.<sup>19</sup> The costs of complying with the Protocol are not recoverable if the claiming party does not commence proceedings.
53. The purpose of the Protocol is to:
  - a. Encourage the exchange of early and full information about the prospective claim;
  - b. Enable the parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
  - c. Support the efficient management of proceedings where litigation cannot be avoided.
54. The Protocol has been criticised for front loading costs and encouraging scatter gun claims. This can be true, but experience shows there are reasonably regular instances where claims are not pursued after the issues were clarified in the Protocol process. It is also less cumbersome, inflexible and expensive than the multi-tiered dispute resolution clauses found in many contracts. Jackson LJ considered the Protocol in his 2009 Costs Review and ultimately recommended that it be retained.
55. There is currently no equivalent to the Protocol in New Zealand. Unless there is specialisation within the High Court bench, we are unlikely to see anything formally adopted under the rules. However, there is no reason in principle why parties to a construction contract could not incorporate this concept in their dispute resolution clause as an alternative to formal negotiation/mediation if they are insistent on a stepped approach to litigation or arbitration.

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<sup>18</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>19</sup> See the principles laid down in *Halsey v Milton Keynes General Trust* [2004] EWCA Civ 576.

## Back-to-back clauses

56. 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.
57. 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>20</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.
58. Different forums 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.

## CURRENT AND PREDICTED TRENDS

59. This final section is a commentary on current and potential future dispute trends in New Zealand's construction sector. Some overlap with matters discussed above.

## Earthquake, payment and defect claims

60. The Canterbury earthquakes caused a large volume of "first generation" claims about the scope of cover for earthquake damage and remedial works, which encompass building and engineering issues. The Earthquake List in the Christchurch High Court Registry has been flooded with these proceedings and there is currently approximately 250 cases on the list, although the number of new claims has peaked.
61. A more recent trend emerging from Canterbury, is "second generation" claims over the appropriateness and adequacy of remedial works. The number of "second generation" claims is likely to continue increasing for some time yet.
62. Further, as projects come to an end and the demand begins to fall, it is likely that traditional payment and defect disputes will increase – across New Zealand and not just in Canterbury.

## Procurement challenges

63. We may see an increase in procurement or tender challenges, particularly for public sector projects where, for example, proper process have not been followed or perceptions of bias arise. There is some construction-centric case law on this already.<sup>21</sup> Even though it did not concern building or engineering, the Problem Gambling Foundation's recent success in challenging a tender process conducted by the Ministry of Health for the provision of services for problem gamblers may now encourage others, especially in the construction sector.<sup>22</sup>

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<sup>20</sup> As an example see *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm).

<sup>21</sup> Andrew Skelton, *The Tender Process – Rights and Wrongs, Getting it Wrong*, NZSCL Annual Conference, 2015.

<sup>22</sup> *Problem Gambling Foundation of New Zealand v Attorney-General* [2015] NZHC 1701.

## Potential further widening of tort law in New Zealand

64. The widening of tort law in New Zealand in recent years has encouraged scatter-gun claims, most notably in leaky building disputes. This could be extended further following the recent *Carter Holt Harvey v Ministry of Education* decision, which has opened the door to building manufacturers owing a duty of care to property owners.<sup>23</sup>

## Increased adjudication

65. Various amendments to the Construction Contracts Act 2002 (**CCA**) are currently before Parliament and are awaiting their third and final reading. The expected changes will include:
- a. Largely removing the existing distinction between residential and commercial construction contracts;
  - b. Extending the right of adjudication to design, engineering and quantity surveying work; and
  - c. Updating and clarifying the adjudication procedure (eg by including an express entitlement to a right of reply by claimants).
66. Those changes are likely to see an increase in the number of construction disputes that are referred to adjudication.

## Dispute Boards and Advisors

67. There is growing support for the wider use of dispute boards (and dispute advisors) during projects. With the volume of work and number of large projects in the pipeline, there has never been a better time to embrace these methods and we should expect to see and hear more about them.

## CONCLUSION

68. Disputes are usually best avoided. However, the nature of construction means the industry will always remain disposed to conflict as projects evolve and issues emerge. When that happens, effective and efficient dispute management is important.
69. Having an appropriate and realistic procurement method and carefully completed contract documents will go a long way towards minimising the risk of problems. During the project itself, early identification and engagement is best practice for preventing issues escalating into a dispute.
70. If a dispute does arise, it is important to understand the resolution methods that may be available. One of the key trends that is likely to emerge from New Zealand's current construction boom is an increase in the use of adjudication, conciliation and dispute boards or advisors.
71. It is recommended that parties to construction contracts be pro-active and flexible in their approach to dispute resolution.

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<sup>23</sup> [2015] NZCA 321. For a discussion of that decision, see: [www.heskethhenry.co.nz/Articles/x\\_post/building-product-manufacturers-and-duties-of-care-00212.html](http://www.heskethhenry.co.nz/Articles/x_post/building-product-manufacturers-and-duties-of-care-00212.html).