"Dispute Resolution Systems – A Comparative Analyses of the Respective Strengths and Weaknesses of the Primary Theatres of Dispute Resolution"

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The author has endeavoured to provide a synopsis of the various dispute resolution institutions in a fashion that is stripped down to the basics. The analysis is based on the better part of 25 years of dispute resolution experience in a variety of cross-jurisdictional dispute resolution forums. It not only accords with the author's experience but also that of his colleagues at Lovegrove Solicitors.

The author in particular, on account of the length of time that he has practised, has witnessed the halcyon days of arbitration in the 80's, followed by the gradual demise of arbitration in the 90's. He then witnessed the emergence of mediation as being "the next big thing" and then some developing cynicism with respect to the same, the lessening reliance upon the courts and the emergence and proliferation of tribunals. The last 25 years have been characterised by "seismic shifts in dispute resolution paradigms", the redundancy of certain models and the metamorphosis of others.

This paper will canvass the respective merits of established and emerging dispute resolution institutions.

The dispute resolution systems that will be subject to this presentation are:

1. Arbitration
2. Mediation
3. Expert Determination
4. Adjudication
5. The Courts
6. Tribunals

The analysis will adhere to a template rigour that will comprise

1. brief description of the system
2. the virtues
3. the shortcomings
4. cost impacts

5. time impacts
6. commercial impacts

1. ARBITRATION

An arbitrator has been defined as "A person to whom a dispute or difference is referred to be resolved by arbitration. The arbitrator's decision is termed an 'award'. An arbitrator is not bound by the formal rules of evidence, or precedents in other arbitral awards, in conducting the arbitration hearing and making the decision, but is bound to follow the rules of natural justice (procedural fairness)".[1]

Another definition for arbitration is "The hearing or determination of a dispute between parties by a person or persons chosen, agreed between them, or appointed by virtue of a statutory obligation".[2]

In New Zealand the relevant Act of Parliament is the Arbitration Act 1996.[9] Domestic Building Disputes in New Zealand may still be admitted to arbitration unlike some Australian jurisdictions.

Arbitrators need not be qualified lawyers. In the building sector they are often retired builders or architects or quantity surveyors who have a working grasp of the elementries of construction law or in other arenas the rudiments of the apposite legal paradigm.

The only parties that can involve themselves in an arbitration are those entities/persons that are party to the contract. Furthermore, the contract must have an arbitration clause that states that arbitration is the exclusive dispute resolution forum.

Ordinarily the interlocutory process is akin to the courts and the tribunals in that statements of claim, statement of defence, counterclaims, discovery processes and ultimately the setting down of hearings are "par for the course".

People tend to say that the process is less formal than the courts. This is possibly misleading, it is probably more accurate to say that the arbitration settings are less austere than the courts as there are no wigs or gowns and the arbitrators are not referred to as Your Honour or Your Worship. Having said that, it would ill-behove one to neglect to comply with an arbitrator's determination.

The Arbitration Process

Arbitration is triggered by an arbitration clause in a contract. The arbitration clause will typically provide that if a dispute arises in respect of the contract or matters that come within the ambit of the contract, the matter must be referred to arbitration.

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[1] "*Butterworths Australian Legal Dictionary*", p. 70.
[2] "*The Macquarie Concise Dictionary",* p. 49.

Either party to the contract is at liberty to issue a notice of dispute and the notice of dispute need only make mention of the fact that there is a dispute or difference.

If a litigant were to issue proceedings in an alternative jurisdiction to arbitration, the opponent would be well within its rights to apply to a court of law for the proceedings to be referred to arbitration. It would be most unusual for a court of law to fail to show sympathy to such application. The consequence of this would be that the matter would be referred to arbitration and the party that naively issued in the wrong jurisdiction, would in all likelihood have a costs award visited upon it.

A disputant will also after having had regard to the arbitration clause under the contract refer the matter to the body that is contractually identified as the body that nominated the arbitrator. Some arbitration clauses stipulate that the parties can agree upon an arbitrator but in the absence of agreement the parties are required to refer the matter to the nominating body.

The nominating body may be the Law Society of New Zealand for example. The body that is nominated in the contract is the body that chooses the arbitrator.

The arbitrator must be a qualified arbitrator. Alas some contracts provide that there must be two arbitrators. The problem with this is that the cost of retention of the arbitrator doubles.

Upon accepting an engagement an arbitrator will require moneys to be placed in trust prior to the crystallisation of their appointment. The monies are normally placed in an account held by the nominating body. Once the monies are placed in the account the arbitrator will write to the parties and order them to come to a directions hearing.

The norm is that lawyers are engaged as advocates for the disputants and at the initial directions hearing a synopsis and description of the issues that define the conflict will be presented.[3]

Virtues

Within the sovereign setting it is a system that has experienced diminishing patronage. Nevertheless arbitration is still used in some commercial and many international disputes. There are still many standard form commercial contracts that contain arbitration clauses. Where such clauses exist the parties are compelled to go to arbitration.

It is however, save for the international area, difficult to identify any particular virtue of arbitration that is sufficiently commendable to promote its virtues as being superior to the Courts. Judy Clarke, Associate Editor of Oil and Gas Journal states in her article International Arbitration -

[3] Please see Appendix 2 for Arbitration Process.

"Dispute resolution and arbitration can be good strategies for mitigating risk because they enable companies …to avoid hostile local courts, where the location and language may put them at a disadvantage, where resolution could take 5-10 years, and national pride or political intervention could influence the outcome"[4]

Shortcomings

The fact that one cannot consolidate proceedings where there are multi party responsibilities is a very serious shortcoming. The only parties that have standing at arbitration are those that are party to the given contract. This means that in a given dispute if an engineer, an architect, a building surveyor and a builder are implicated in defective building work with a developer, the developer and the builder would not be able to join other responsible actors as either co defendants or third parties.

This is highly problematic because it can lead to very cumbersome, duplicatory and convoluted multi party proceedings. Take the case of the above in circumstances where the clause prevents the joining of third parties. This would be the case in the significant majority of arbitration clauses, the disputants would have to issue separate legal proceedings in separate decision making arenas such as the courts. So instead of having a consolidated set of legal proceedings in the one dispute resolution theatre to preside over a multi defendant, multi responsibility matter, there may well be a plethora of proceedings running in parallel.

When one considers that in so many litigations, in particular in the construction sector, there will be a number of responsible actors, it is paramount that there are consolidated legal proceedings for matters in common to be held in common.

Some would say that they are troubled that arbitrators need not be legally qualified. The point is moot, for to reiterate arbitrators are required to be qualified arbitrators and the qualifications are rigorous and comprehensive.

Cost Impacts

The parties have to pay for arbitrators. An arbitrator can cost anywhere between $1500 & $10,000.00 a day and anywhere between $200 & $800 an hour. The parties also have to pay for room hire. These are costs that neither the courts nor the tribunals visit upon the parties at dispute and they add another very significant layer to the cost dispute resolution.

Ms Wong Mew Sum a lawyer who practises commercial law in Malaysia and who is an associate of the Chartered Institute of Arbitrators in Malaysia identifies in her article 'The Advantages and Disadvantages of Arbitration in Malaysia' that:-

"The costs of court proceedings are borne by the public purse, parties have to pay the arbitrator's fees and other incidental costs such as hire charges for the venue. However,

[4] *Judy Clark,* 'International arbitration' *Oil & Gas Journal;* May 10, 2004; 102, 18 p. 15.

when one considers that arbitrations proceed at a much quicker pace, the savings may be negligible"[5]

Whether or not the costs savings are negligible is very much a moot point and in the absence of evidence or statistics to verify this contention the view is no more than an opinion. For fear of labouring the point the author has had conduct of cases in both the courts of higher jurisdiction and arbitration that have involved Queens' counsel, junior barristers and instructing solicitors. These cases were plagued with litanies of adjournments in both jurisdictions and the court disputes and arbitrators alike assumed tenures of many years. However, arbitrations were more expensive because the arbitrators were charging $3000.00 a day, plus preparation and perusal time.

Little wonder that Professor of Law Thomas Stipanowich stated in his article Arbitration: The New Litigation -

"Once promoted as a means of avoiding the contention, cost, and expense of court trial, binding arbitration is now described in similar terms – "judicialized", formal, costly, time-consuming, and subject to hardball advocacy."[6]

Consistent with Stipanowich's observation sceptics would opine that where an arbitrator can be so handsomely renumerated the desire to expedite a conclusion of a matter may not be as powerful as circumstances where a servant of the Crown, a salaried servant of the Crown that is, does not require remuneration, that is derived from similar criteria.

Mazirow, quoted earlier, picks up on this theme in that he notes that members of the Bench are not remunerated by the parties and this in itself could be one of the factors that augers well for impartiality.

"The judge, by law, must be impartial and the judge's paycheck is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case."[7]

It is correct to observe that judges are not personally affected by the outcome of a case. However this may not strictly be the case in the emotional sense in that judges are not emotionally bankrupt and they may on occasion be affected by a case and a decision of moment. A relation of mine, a retired central North Island, District Court Judge, who presided over a case in circumstances where a gentleman was released having engaged in a first time act of violence and then subsequently within a few days found a spade and chopped an innocents head off was personally affected by the case. But this was an emotional consequence. In no way was the judge compromised nor did he have any relationship of any persuasion with the subject criminal.

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[5] Wong Mew Sum, '*The Advantages and Disadvantages of Arbitration in Malaysia'* Goh Wong Pereira Advocates and Solicitors www.gohwngpereira.com/artilces/arbitration.htm.21st June 2011.
[6] Thomas J Stipanowich, *Arbitration: The New Litigation*, (2010) U. Ill. L. Rev. 1 at page 1.
[7] Mazirow A, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' Speech delivered at the Counsellors of Real Estate, Chicago, 13 April 2008..

Judges are detached and removed from the parties and most importantly they are not retained by the parties as they have a permanent retainer with the crown to make decisions and determinations with respect to the conduct of those with whom they have no relationship with. Mazirow seems to suggest by implication that arbitrators lack the ideal level of detachment from the parties and they may be affected by the outcome of a case. In some instances they may, but equally in many instances the outcome would be immaterial to the arbitrator, arbitrators and adjudicators nevertheless have a pecuniary association with the parties as the parties pay them to arbitrate.

The author recalls that it was often difficult to agree upon the choice of arbitrator as there was a perception that the other party may have had some connection or proximate association with a nominee.

The Honourable Justice Patrick A Keane discusses the benefits of arbitration stating,

"Arbitration as a method of dispute resolution is seen to offer the major benefits of enforceability, neutrality, speed and expertise over court based determinations; and, because arbitration is quicker and more expert, it is likely to be cheaper than the lengthier and more elaborate proceedings in court".

His Honour identifies that there are many benefits to arbitration including that it is quicker and therefore cheaper. His Honour does not support this finding with statistics or corroborative evidence to substantiate his opinion.

Further in the absence of being presented with evidence to suggest that arbitrations are cheaper the sceptic will still argue that in circumstances where an arbitrator is paid to arbitrate and paid handsomely, what possible incentive is there to expedite the conclusion of a hearing? It runs against the grain of all capitalistic instincts.

What troubles the writer is that the view that arbitration is cheaper than the courts has assumed a certain cache, yet it is at odds with the author`s and his litigation colleagues` experience and in the absence of statistical substantiation seems to rely upon anecdotal supposition.

Time Impacts

In the author`s personal experience arbitrations were no faster than the courts but were a little bit slower than tribunal experiences. Our law firm had one matter that spanned over 4 years which was far too long. One of the consequences was that one of the parties ran out of money and had to abort the case.

Would the matter have been better dealt with in the Courts or in a tribunal? The answer would have to be yes, if for no other reason than the parties had to spend a great deal of money on the retention of the arbitrator. In either a court or a tribunal neither the judges nor the members are remunerated by the parties.

Commercial Impacts

Again as arbitration is essentially an adversarial medium it does not lend itself to the betterment of relationships between the parties to the dispute i.e. the applicant and the respondent.

To this extent it is akin to the courts and the tribunals.

2. EXPERT DETERMINATION

This is where parties to a contract agree to engage an expert as a person responsible for resolving any dispute that may emanate from their business transaction. Normally the contract will provide that any dispute of whatsoever nature to do with the contract or the subject matter of the contract will be referred to the expert.

The contract might provide that the parties agree upon an expert prior to the execution of the contract. The parties also agree that pursuant to the contractual condition, the expert's determination once forthcoming is binding upon both parties.

Ordinarily the contractual condition will provide that both parties are responsible for payment of the expert on a 50/50 basis. As long as the provision is well drafted it should be very difficult to challenge the determination in a court of law.

Some years ago, I was engaged to prepare such a condition for a very large Melbourne development and the parties to the contract were enamoured of this approach because:

1. it was fast track
2. kept matters in-house
3. allowed a dispute to be resolved without impacting upon the critical path of the very sizeable project

There are variations to the expert determination theme, namely the condition may provide that the determination cannot be challenged until the end of the project whereupon it can be revisited and challenged. Alternatively, the determination can be binding, period.

Another variation may be that whilst the expert determination is on foot, if a contract is live, that the balance of the project be allowed to continue and the dispute coming within the jurisdiction of the expert is corralled. Another possibility is an American form of expert determination where two experts are retained at the commencement of a project, with one expert chosen by each key party to the contract. The experts are given a watching brief over the project from its inception, so when and if trouble develops later on, the parties already have "a dispute resolution panel", so to speak, that is already briefed on the facts. There is usually the possibility for a third expert to be chosen by joint decision between the parties' two appointed experts, to add another buffer of independence or neutrality.

The Virtues

It is a confidential process, the parties can agree upon someone who has "purpose built" expertise and a sufficient level of standing to be taken seriously by the contracting parties. The mechanism creates the opportunity for dispute containment and the maintenance of a working relationship.

It can be incredibly fast. The provision may provide that the expert meet with the parties within 48 hours of 7 calendar days passing, and then the expert is provided with *carte blanche* to get full co-operation and accommodation to facilitate a fast track determination.

This approach is very sophisticated but contemplates the involvement again of highly sophisticated contracting parties. It is well suited to the "higher end of town".

The Shortcomings
There are none to speak of. Provided the expert is well chosen and well credentialed the merits of expert determination are compelling.

Cost Impacts
Good experts come at a high price and rightly so. The cost of their retention is however, infinitesimal when one factors into the equation the merits of a fast track, confidential binding resolution that serves to keep commercial relationships intact.

Time Impacts
Depending upon the way the contractual conditions governing the expert determination processes are worded, one can create a set of mechanisms that make this form of dispute resolution the swiftest system on offer. A great advantage is that it brings certainty to the scenario quickly and in this respect is rather unique.

Commercial Impacts
For the reasons cited in the above mentioned virtues, expert determination along with the model of early negotiated outcome is the approach that is most conducive to the protection of commercial relationships. The Japanese would love it.

3. MEDIATION

Mediation is where, be it through the courts or a tribunal or a term of contract, the parties are compelled to refer their dispute to mediation. A mediator is appointed to convene a meeting that is designed to facilitate negotiation and ultimately compromise. The mediator is a facilitator, a cajoler if you will, and has no power to compel the parties to agree upon the outcome.

If the mediator is unable to facilitate the resolution of a dispute then the mediation fails and resort will be had to the more adversarial models of dispute resolution.

The Virtues

If matters can be mediated at the gestation of a dispute, a mediated outcome has considerable merit. It is, however, paramount that a party to a mediation, through the medium of the mediator is not cajoled into a compromise or a decision that is against his/her/its best interest.

Unrepresented parties at mediations can often fall foul of being pressured into settlements they will later regret, particularly if the mediator is 'overly activistic' for a settlement, and we usually counsel against parties representing themselves at mediations.

If one has a strong case and the respondent is financially secure and correspondingly has a weak case then the party with the strength should be ill-disposed to compromising their position. It is a bit like "gun boat" diplomacy, the party with the gun boat should not capitulate to the party with the canoe.

Anecdotally, I know of instances where mediated outcomes have occurred in circumstances where a given party gave up too much. In hindsight, more than they had to, and this leads to a fair measure of disenchantment. Nevertheless, it has to be said that mediation has become very popular, with good reason, because settlements are better than trials and moreover as long as matters are being negotiated or mediated, parties still have control over their destiny.

One of the ostensible benefits of mediation is confidentiality. If a matter is resolved by mediation the disputants can keep their issues of discontent "in house". If there is any "dirty linen" it is "washed" in-house, never in public. For people in high office this is most important, reputations particularly in this day of age where communications via the internet are immediate and widespread mean that anything odorous can be seized upon and published very quickly. Furthermore once the odium is out there it can never be archived or placed in a vault that is dedicated to the scurrilous. Information that is published on the web remains there in perpetuity for all and sundry. The need for confidential resolution of disputes is therefore greater than ever and mediation is a useful although not necessarily perfect way of achieving this.

Not everyone however is convinced that a benefit of mediation is confidentiality.

"It could be said that the reality of confidentiality in mediation is in large part reliant on the goodwill of the parties. If good will breaks down, then somewhat ironically, whether confidentiality will be upheld or not depends on relatively insecure legal protections"[8]

"From an ethical marketing perspective it is less than desirous to use the concept of confidentiality to promote mediation; certainly not without providing full information about the qualified nature of the concept in practice. Indeed, the accuracy and legitimacy of some of the assertions made about confidentiality in mediation can be brought into serious question"[9]

Shortcomings

The key shortcoming is that with mediation there is no guarantee of outcome. Although a mediator may very quickly figure out who is in the right and who is in the wrong, he or she cannot compel the parties to settle.

An additional problem is that unlike judges, tribunal members or even arbitrators, mediators do not necessarily have to be in possession of any formal training. Although by and large mediators have had some training, (ordinarily a three day course) when one considers the extraordinary persuasive power that they may have, albeit by cajolement or charisma, it is troubling that there are not more robust and rigorous mediator training courses. It is my contention that anyone who has a prominent office in the dispute resolution chain should be very well trained in their craft and in possession of a very serious rigour. This rigour should go beyond being a "settlement scalp hunter".

[8] Field, Rachael and Wood, Neal (2006) "Confidentiality: An ethical dilemma for marketing mediation?" Australasian Dispute Resolution Journal 17(2):pp. 79-87 at 7.

[9] *Id.*

There is currently no uniform federal legislation prescribing conduct obligations for disputants and their representatives in ADR processes, and little legislation prescribing the conduct of ADR practitioners.[3] This may adversely affect the value and perceived integrity of ADR"[10]

This is a serious problem, if a judge makes an error the decision can be appealed, this is also the case with arbitrators, adjudicators and tribunal decisions. Admittedly this community of judicial professionals is required to make decisions whereas a mediator is not required to make a decision. The problem however is that if a mediator does break free of his or her mandate i.e. the mandate to facilitate rather than influence settlement and in so doing if the mediator influences or forces an outcome that culminates in a material prejudice to a party then there is no redress. There is no redress because there is no decision, determination or award that is capable of being appealed.

An additional problem is that unlike judges, tribunal members or even arbitrators, mediators do not necessarily have to be in possession of any formal training. Although by and large mediators have had some training, (ordinarily a three day course) when one considers the extraordinary persuasive power that they may have, albeit by cajolement or charisma, it is troubling that there are not more robust and rigorous mediator training courses. Anyone who has a prominent office in the dispute resolution chain should be very well trained in their craft and in possession of a very serious rigour. This rigour should go beyond being a "settlement scalp hunter".

"There are no comprehensive or uniform standards applied to mediators in Australia. While it may be undesirable to impose a unitary standard of training and accreditation on the diverse forms of mediation practice, there are strong arguments to support a unified approach to legal regulation of mediation practice in its diverse forms across Australia."[11]

Mediators "[s]eek to influence the course and outcome of negotiations for a variety of reasons related to their own interests and values. They become parties to the negotiations into which they enter and to some extent encourage outcomes consistent with their own ideas and interests"[12]

Cost impacts

Mediation is relatively cheap and in some jurisdictions it is indeed free. The courts however, compel the parties to mediate whereupon the parties have to engage and pay for recognized and reputable mediators. This can cost anywhere between $1,500 and $10,000 a day but is money well spent if the matter is resolved quickly by mediation.

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[10] NADRAC, "Maintaining and Enhancing the Integrity of ADR Processes, from Principles to Practice Through People", February 2011, at page 3.

[11] Robyn Carroll (2001), "Mediator Immunity in Australia", 23 Sydney Law Review 185 at page 186.

[12] (Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1996) 15 Aust Bar Rev 213 at page 5).

Time Impacts
An actual mediation rarely takes more than a day or so. The critical thing is to ensure that the mediation occurs close to the beginning of the dispute rather than on the eve of trial.

It is critical, for fear of labouring the point, that mediation occurs at the outset. Ideally, a mediator should be engaged before a matter goes to court, arbitration or a tribunal but this requires a contractual condition that binds the parties to this course of action

Commercial Impacts
A mediated outcome at the earliest possible time can indeed arrest the deterioration of a commercial marriage.

4. ADJUDICATION

Adjudication has been defined as: "A form of Alternative Dispute Resolution. It is used widely in the construction industry and allows disputes to be determined by an adjudicator comparatively swiftly while work progresses. The adjudicator's decision is binding, unless and until the dispute is finally determined by legal proceedings, arbitration or the agreement of the parties. The parties may, however, accept the adjudicator's decision as finally determining the dispute".[13]

It has further been defined in the Butterworths Australian Legal Dictionary as "The determination of the rights and liabilities in dispute between two or more parties by the final imposition of a decision or judgment of a court of law, tribunal, or as a result of a decision of a person otherwise sitting in judgment: Commissioner of Police v Brady".[14]

Adjudication is a system that seemed to have originated in the United Kingdom but has also been introduced in a number of southern hemisphere jurisdictions; New Zealand, Victoria and New South Wales being some of those jurisdictions. The process of adjudication is specifically provided for under Part 3 of the *Construction Contracts Act 2002* (NZ), in relation to payment claims under a construction contract.

The Virtues

The system is swift and when the recipient or respondent of a claim receives a claim the respondent must give the claim immediate and time intensive attention. It is a system that is possibly weighted more in favour of the claimant from a logistical and preparation point of view; reason being a claimant may take many weeks to prepare the claim but the recipient may only have ten days (depending upon the Act of parliament) to generate the schedule and reply, be it a rebuttal, in part, in full or acceptance. So whereas the claimant has the luxury of time to prepare the claim the respondent is corralled by statutory time bars.

There is little doubt however that the system (where there is strong patronage) has expedited the processing of claimants' payments.

Any party who is the beneficiary of swift decision making will be most enamoured of a system that provides that outcome. Cases that take years to resolve are highly prejudicial and place tremendous and sometimes terminal strain on financial resources.

The speed by which claims are processed and adjudications determined is both the system's virtue and its vice. In this regard I use the analogy of a construction critical path, there is a balance between building too quickly and building too slowly. If one builds too quickly, quality can be compromised. If one builds too slowly, time related

[13] *Osborn's Concise Law Dictionary,* p.16
[14] *Butterworths Australian Legal Dictionary,* p. 27

costs escalate. Likewise with adjudication: expedited adjudication can generate casualties in that the adjudicator may get it wrong. This is akin to the compromising of quality.

Whereas with the courts and the tribunals, one can by and large have a high level of confidence in the quality of the decision makers on account of their experience and the reverence by which they are held to get their judicial appointments in the first place, the quality of adjudicators may be more variable. It is not terribly difficult to become an adjudicator; a 1 day training course in adjudication will often suffice.

The quality of the adjudication will be very much dependant on the adjudicator, and the process that culminates in the appointment of an adjudicator may not be anywhere near as exacting as that which is conducive to a judicial appointment.

Having acted in a battery of major adjudications on the Commonwealth Games site for one of the developers/head contractors, we can vouch for the fact that when the respondent receives a claim or series of claims then he/she/it is required to respond within frequently prohibitive time constraints. There has to be a tremendous concentration of client, technical and legal expertise on the task of responding to the claim within the statutory time. The New Zealand report 'Construction Contracts Act 2002 Review: Summary of Submissions Report', released in January 2011, identified the concern "That adjudication may be used to achieve technical wins by mounting surprise attacks or ambushes in order to take advantage of strict time limits for a respondent".[15]

On larger matters, the system dictates that if one does not have the critical mass of human resources that can be deployed in a moment's notice, the respondent may be occasioned by misfortune. In the matter referred to we had to deploy three lawyers, full-time for three weeks to assess and prepare the responses.

Adjudication is a relatively mature institution in the United Kingdom and has attracted a great deal of comment, some good, some very controversial.

Sir Michael Latham was by all accounts one of the prime movers of this United Kingdom institution, and intended that the system be swift and effective with regards to the facilitation of payment of claims. A very good article titled 'The Future of Adjudication 'Is it all it is cracked up to be?'[16], written by barrister and accredited adjudicator, Ms Kim Franklin, suggests that these noble objectives may have been compromised.

Ms Franklin's paper suggests that what was fashioned as being an inexpensive form of dispute resolution is becoming increasingly expensive. Ms Franklin's observation that adjudication *"has turned into a form of hybrid, a cross between adjudication and*

[15] Department of Building and Housing, Construction Contracts Act 2002 Review: Summary of Submission Report, January 2001 at page 15.
[16] *(Franklin, Kim (2005) "The Future of Adjudication is it all it is cracked up to be" page 6 at 19)*

arbitration or 'adjudibration'"[17] may however hold sway. Both systems require the 'arbitors' to be remunerated by the disputants, so the issues relating to remuneration of dispute resolution circuit breakers that have been discussed elsewhere in the book are on point.

Ms Franklin goes on to add that: "The disadvantages of this procedure include a protracted procedure with increasing number of written submissions. Some adjudicators let the parties go on as long as they like" and - "The process is not cheap. There is no mechanism for controlling costs"[18]

Ms Franklin's following quote however is both bold and eloquent –

"21st Century Adjudication has been described by some as 'an expensive way to flip a coin'. Even if the coin comes up heads, it is not the last word. Challenges to enforcement need only raise a triable issue. That issue then has to be tried. Even an enforceable decision can be challenged in litigation or arbitration".[19]

The author would not characterise adjudication as an expensive way to flip a coin because this connotes a high risk punting dynamic, which does a disservice to some of the more venerable adjudicators. Nevertheless, the speed by which adjudication can evolve could indeed compromise the necessary level of rigour that is needed to generate a sound outcome.

A New Zealand report identified that court may not be an alternative for parties to an adjudication because: "After payments of the dispute are made, it is too expensive to seek other appeal options for consumers and small contracting firms on limited budgets".[20]

In said paper, 'The Future of Adjudication' Ms Franklin does a synopsis of the case of *London Amsterdam Properties v Waterman* [2004][21] and Judge Wilcox held that -

"Mere ambush, however unattractive does not amount to procedural unfairness. There was clearly a deliberate evidential ambush. The adjudicator ought either to have excluded the late evidence in reply or to have given Waterman a reasonable opportunity of dealing with it. Instead he avoided a decision as to whether or not the evidence should be admitted and then based his decision on the late evidence without giving Waterman an opportunity to deal with it. That was a substantial and relevant breach of natural justice".[22]

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[17] *(Franklin, Kim (2005) "The Future of Adjudication is it all it is cracked up to be" page 6 at 19)*
[18] *Id.*
[19] *Id.*
[20] Department of Building and Housing, Construction Contracts Act 2002 Review: Summary of Submission Report, January 2001 at page 9
[21] *London Amsterdam Properties v Waterman* [2004] BLR 179
[22] *(Franklin, Kim (2005) "The Future of Adjudication is it all it is cracked up to be" page 8/9 at 27).*

An even more damming expose of the SOP schemes was evident in a very good paper written by Matthew Bell and Donna Vella - 'From Motley Patchwork to Security Blanket'.[13] The authors stated that "it is this broad application which has brought to bear criticisms that the legislation represents an unjustified incursion into freedom of contract. For example, writing of the HGCR Act … Ian Duncan Wallace QC who has been described as [p]erhaps the most trenchant polemist of the legislation characterised the HGCR Act as "a monument of what legislation should not be – an inadequately considered surrender of customer/consumer interests to thinly disguised producer lobbies in an industry which has done little or nothing to deserve it".[14] Ian Duncan Wallace QC makes further observations, the import of which being that the process negatively impacts upon procedural fairness on account of the "extraordinarily short time periods.[15]

Another poignant quote that the authors derive from Wallace QC on the shortcomings of adjudication is "it quite simply abrogates at a stroke the long established machinery of professional administrative regulation, which has evolved and been implemented by most commonly used forms of main contract in England and the Commonwealth for over a century".[16]

The same paper then quotes Judge Humphrey Lloyd who also makes certain observations about said Act.

"It is hard to think of another comparable case of parliament singling out parts of a sector of the commercial life of the country and requiring them to alter their contracts…….on the basis that it knew better than its members how the commercial relationships should be regulated. It is a remarkable interference in the freedom of contracts enjoyed by people who are normally well able to look after themselves."[17]

The Shortcomings

The speed by which claims are processed and adjudications determined is both the system's virtue and its vice. In this regard I use the analogy of a construction critical path, there's a balance between building too quickly and building too slowly. If one builds too quickly, quality can be compromised. If one builds too slowly, time related costs escalate. Likewise with adjudication: expedited adjudication can generate casualties in that the adjudicator may get it wrong. This is akin to the compromising of quality.

Whereas with the courts and the tribunals, one can by and large have a high level of confidence in the quality of the decision makers on account of their experience and the reverence by which they are held to get their judicial appointments in the first place, the quality of adjudicators may be more variable. It is not terribly difficult to become an adjudicator, a 3 day training course in adjudication will often suffice. The quality of the adjudication will be very much dependant on the adjudicator, and the process that culminates in the appointment of an adjudicator may not be anywhere near as exacting as that which is conducive to a judicial appointment.

Having acted in a battery of major adjudications on the Melbourne Commonwealth Games accommodation site for one of the developers/head contractors, we can vouch for the fact that when the respondent receives a claim or series of claims then they are absolutely "under the pump" within frequently prohibited time constraints, and there has to be a tremendous concentration of client, technical and legal expertise on the task of responding to the claim within the statutory time. On larger matters, the system dictates that if one does not have the critical mass of human resources that can be deployed in a moment's notice, the respondent may indeed be occasioned by misfortune. In the matter referred to we had to deploy three lawyers, full-time for three weeks to assess and prepare the responses.

Time Impacts

The time impacts equate with the cost impacts. Part of the raison d'etre of the adjudication process was to establish a system that fast tracked dispute resolution in order to substantially reduce costs. Adjudication is much faster than the typical court or tribunal process but if one has regards to Ms Kim Franklin's observations and if indeed they telegraph cross jurisdictional trends the time to resolve adjudications may be increasing.

Adjudication is probably the fastest of all the dispute determination systems explored in this book. When one considers that some of the critics of the system have described the system as being anything from extraordinarily short to tantamount to ambush, from a respondent's point of view the system is frighteningly swift.

From a timing point of view adjudication is heavily weighted in favour of the claimant. Duncan Wallace is quoted as saying that *"*claimants were free to prepare massive and detailed claims over whatever periods of time they may choose and launch them without warning".[23] Once the claim is visited upon the respondent, the respondent has to operate in surreal and compressed time constraints.

The respondent, to borrow terminology from Mathew Bell`s paper, has to engage in a "patch quilt" exercise in the generation of a "response on the run". Often a phenomenal amount of human resource has to be concentrated within a very short period of time to frantically analyse, rebut where necessary and validate where necessary. This surreal time compression chamber is the perfect environment for the generation of ill-considered responses and mistakes, mistakes that may prove to be dire in an industry where the actors often teeter on the edge of insolvency.

If a mistake is made in preparation of a respondent`s submission or a mistake is made in the assessment of a claim by an adjudicator then money that would not ordinarily considered to be owing at law can be ripped out of the respondent's pocket. The plight of an aggrieved respondent may be of little consequence to a claimant but in

[23] Bell, Matthew; Vella, Donna --- "From Motley Patchwork to Security Blanket: The Challenge of National Uniformity in Australian "Security of Payment" Legislation", *Australian Law Journal*, Volume 84, Issue 8, 2010 pp 3-4.

circumstances where money exchanges hands in compromised circumstances the head contractor will not be able to visit the loss upon the principal and this could prove fatal.

Cost Impacts
When compared to the courts and the tribunals the real cost is measured in terms of time as adjudications can be wrapped up and claims processed in a matter of weeks. The swift application of justice, so to speak, translates into much lower dispute resolution service costs. To this extent, adjudication is more akin to expert determination.

Obviously, if the adjudicator gets it wrong then significant costs will be visited upon the victim of that wrong. Whereas the courts and the tribunals are very close to being free for the participant save for filing costs, adjudication is similar to both arbitration and expert determination in that the parties remunerate the decision maker. The cost of such a retainer would vary greatly but can be anywhere between $1,500 and $10,000 a day.

Commercial Impacts
In my experience, the processing of the payment claims where lodged in accordance with the legislation, proceeds with alacrity. I have not observed that commercial relations have been cruelled by the processing of the claims rather the destruction of the commercial relationship often occurs where one of the parties considers that an adjudicator's determination has gone awry.

Security for payment claims in New Zealand

Shortcomings of the New Zealand SOP Regime

The NZ Act distinguishes and differentiates between residential and commercial contracts. Residential building contracts are excluded from the clauses that relate to progress payments and the enforcement powers pertaining to adjudication orders are also limited with respect to the provisions that govern residential building contracts. The New Zealand report proposed that residential construction contracts should be better captured by the legislation's application. Submissions received noted that the distinction between residential and commercial is "Making dispute resolution and enforcement of resulting adjudication orders difficult, time consuming and costly for all parties involved".[24]

Those that furnished submissions were of the opinion that having such distinction means that consumers find "The adjudication process difficult and daunting".[25]

The report discusses the enforcement of adjudication orders; a view expressed was that "The enforcement of adjudication orders can be ineffective".[26] Submissions made the

[24] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report'*, January 2001 at page 5.
[25] *Id.*

following points: "Without strong enforcement of orders, the credibility of the process is undermined" and "The concept of 'pay now, argue later' must be upheld to ensure it remains in keeping with the spirit of the Act. Delays caused by Court proceedings, such as waiting for objections to be satisfied are counter- productive to this."[27]

The recommendation was that adjudication orders should be afforded the same level of potency as an order made by a court of superior jurisdiction.

A further weakness in the adjudication system in NZ was identified as being that "After payments of the dispute are made, it is too expensive to seek other appeal options for consumers and small contracting firms on limited budgets".[28]

The report discussed confidentiality of adjudication in NZ. Submissions identified a view that "The confidentiality of adjudication orders protects bad builders and the public has the right to know if there is a problem with a building firm".[29] However, this view does not consider the benefit of confidentiality when protecting one's commercial interests.

One of the sceptics opined that: "adjudication may be used to achieve technical wins by mounting surprise attacks or ambushes in order to take advantage of strict time limits for a respondent." [30]This inkling is consistent with the views of other sceptics who are ill-disposed to the fast track pathology of adjudications. As has been expressed elsewhere in this chapter the claimant has ample time to lodge a claim and may have the luxury of weeks to prepare a claim. The respondent on the other hand is deprived of such luxury and has to commit immediate and significant resources within a time challenged environment.

Virtues of the New Zealand SOP Regime

The Building and Construction Minister Maurice Williamson released a discussion document on the New Zealand Construction Contracts Act 2002[31] in late 2010. Submissions were received from various sources such as construction firms, home owners, law firms, professional bodies and institutions, the Building Disputes Tribunal and the Arbitrators' and Mediators' Institute of New Zealand. The findings from the various submissions were published in the report: "Construction Contracts Act 2002 Review: Summary of Submissions Report"[32] ("the report"), released in January 2011. The report identified many strengths and weaknesses in the current adjudication system in New Zealand.

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[26] *Id.*
[27] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report'*, January 2001 at page 5
[28] *Ibid* at p 9.
[29] *Ibid* at p 11.
[30] *Ibid* at p.15.
[31] *New Zealand Construction Contracts Act 2002* (NZ).
[32] Ministry of Innovation and Employment New Zealand, *'Construction Contracts Act 2002 Review: Summary of Submissions Report',* 2011.

The protagonists "believed adjudication under the Act has been more successful than other forums used for alternative disputes, ie Tenancy Tribunal. This is due to the fact that orders are provided promptly by private adjudicators."[33]

Adjudicators are also afforded a fair bit of latitude in terms of the way they conduct proceedings as adjudicators in New Zealand. As observed by the below quoted Australian lawyer they "can conduct an adjudication in any manner that they think fit which could include conducting more extensive conferences, engaging experts and requesting the parties to comply with an adjudicator's directions."[34]

Please see Appendix 1. For an outline of the adjudication procedure under the SOP Act.

[33] Department of Building and Housing, '*Construction Contracts Act 2002 Review: Summary of Submission Report*', January 2001 at page 12.

[34] Uher, Thomas E; Davenport, Philip "Adjudication in NSW and NZ" [2005] AUConstrLawNlr 51; 103 Australian Construction Law Newsletter 34 at 36.

5. THE COURTS

Description

In most Western jurisdictions there are courts of lower and higher jurisdictions. Courts are formal, very much reliant on interlocutory processes and are presided over by judges or Magistrates. One must be a qualified lawyer and ordinarly an experienced if not outstanding barrister as a condition of appointment.

Proceedings are characterized by statements of claim, states of defence, counterclaims, third party motions, the costly discover process, sometimes interrogatories and ultimately if matters do not settle the matter proceeds to trial. A trial can take anything from days to weeks and in the worst case scenarios many months and sometimes years.

The Virtues

The courts have been around for centuries; they are tried and true and tend to attract high calibre decision makers. Needless to say the most venerated are those in the courts of higher jurisdiction which are the epicentres of the finest legal minds.

Courts also play host to a well established interlocutory rigour that for better or worse has been honed over many generations of decision making.

Courts of higher jurisdiction also provide determination precedents that bind tribunals, courts of lower jurisdiction and adjudicators. The courts of higher jurisdiction could be regarded as the "judicial cathedrals" in this respect. "Alternative dispute resolution is spreading and is sometimes now a prerequisite to litigation. While this is often beneficial, it does occasionally deprive parties of a judge with the will to ensure a just and lawful outcome to a conflict. It may sometimes effectively substitute market forces for the rule of law"[35]

Importantly the courts allow for multi party proceedings and the consolidation of multi defendant matters. This is rarely possible with either arbitration or adjudication and is a serious shortcoming in respect of the later.

There is an additional consideration that is often overlooked, magistrates and judges have permanent tenure and are employed by the Crown, not by the litigants. This means that they are not remunerated by the parties to the dispute.

[35] The Honorable Justice Kirby '*The Rule of Law beyond the Law of Rules'* (2010) 33 Aust Bar Rev 195) at p 7.

"The judge, by law, must be impartial and the judge's paycheck is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case"[36]

As judges and magistrates enjoy tenure and are remunerated by the Crown the potential for there to occur a conflict of interest would be most remote. Probity considerations require disclosures of any possibility of a conflict of interest or a consideration that may compromise impartiality or the perception of impartiality.

Courts are essential to the fabric of justice, but their paramouncy is not to be confused with that which is most cost effective way of delivering an outcome. The most critical role of the courts is that through the generation of precedents that give voice and provide interpretation of statute. Without precedents, decisions would be adhoc, inconsistent and chaos could ensue.

The Shortcomings

Matters can take a long time to resolve. Time is money and litigation can be a protracted and disquieting process and it tends to repudiate commercial relationships.

Litigation is a hostile form of dispute resolution, hence the term adversarial. Just think of the parlance applicable to this arena: statements of claim, statements of defence, counterclaims, and interrogatories. It is to be about winners and losers but rarely does the winner take all. It is probably more accurate to say the loser suffers more.

Cost Impacts

Although there are court filing fees one of the advantages of the courts is that one neither pays for judges nor magistrates. This makes this form of dispute resolution somewhat cheaper than either arbitration or adjudication.

The real cost however is in the retention of the lawyers, the experts and in larger matters these costs can be exorbitant. If a case degenerates into a litigation juggernaut the cost of legal advocacy can be "eye wateringly" expensive.

Courts of higher jurisdiction are expensive dispute resolution forums Justice Bruce Lander an Australian federal court Judge was quoted in the Australian financial review newspaper on the 15th of July 2011 as saying that " litigation is a very expensive process….to lose is very, very expensive, but even to win is very expensive. You can win litigation and not recover as much as it cost running the process.''

Time Impacts

[36] Mazirow, A '*The Advantages and Disadvantages of Arbitration as Compared to Litigation'* Speech delivered at the Counsellors of Real Estate, Chicago, 13 April 2008.

When compared with mediation or negotiated outcomes it is a lengthy and protracted process. Long cases are exhausting, both financially and emotionally and distract clients from core business.

A trial can take anything from days to weeks and in the worst case scenarios in the courts of higher jurisdiction many months and sometimes years. There is some research that suggests that the time that it takes to get a matter to trial is increasing, this would certainly appear to be the case in the USA as the below quote from the economist suggests.

"Less than 2% of federal cases result in a trial. The worse problem comes in the pre-trial phase known as discovery"[37].

"So ever fewer cases are going to trial: the ratio of federal trials to initial filings in 2009 was a twelfth of what was in 1962". [38]

Commercial Impacts

When two businesses become embroiled in litigation they effectively go to war. In countries like Japan litigation is anathema as it destroys business relationships, it culminates in loss of face and leaves long term business scars. A negotiated outcome is more conducive to the protection of commercial relationships.

[37] The Economist Volume 399, Number 8739, June 25 2011, "The Paper Chase".

[38] *Id.*

6. TRIBUNALS

Tribunals have been burgeoning in many jurisdictions. Governments around the world have seen them as being ostensibly cheaper and faster than the courts and attended by less formality.

The decision makers are called members rather than judges but they have to be experienced and qualified lawyers. The interlocutory process is reminiscent of the courts, save for a couple of key differences:

1. mediation at an early stage is compulsory
2. compulsory conferences are common
3. it is rare for interrogatories to be ordered

Virtues

There are more established systems of alternative dispute resolution (ADR). The mediums of mediation and compulsory conferences lend themselves to settlement at an earlier juncture than the courts. This has to be good.

Shortcomings

Miro Djuric, (a pervious Special Counsel of the firm), stated “the tribunal process is increasingly akin to the courts, just as costly and takes the same amount of time to resolve.”

Justin Cotton, fellow partner and dispute resolution expert, in like vein, recalls one multi-million dollar dispute to do with a multi unit development that “took four years to conclude and the time and the process proved to be both frightening and prohibitively expensive for his plaintiff clients”. Justin added that: “Admittedly this case was a worst case scenario, and generally matters do get resolved faster in a tribunal forum than the courts. However this is not always so.”

Cost Impacts

Like the courts, parties do not have to pay for the presiding tribunal member nor do they have to pay for mediators on conveners of a compulsory conference. In this regard the judicial machinery costs are considerably cheaper than either arbitration or adjudication. Again like the courts, the process is heavily dependant on expert advocacy and expert technical advice and in the main such deployment is not cheaper than the courts.

Time Impacts

From the initiation of a dispute resolution process to its conclusion our experience is that “runoff the mill” tribunal matters will probably be 20% faster than the courts. This is because as mediation and tend to be “hard wired” into the tribunal dispute resolution fabric there is a greater chance of earlier outcome, albeit a compromised outcome.

Commercial Impacts

The impacts are similar to the courts be it court or tribunal litigation.

THE ROLE OF CONTRACTS IN DISPUTE RESOLUTION

Contracts form a critical role in the fashioning of in the commercial and civil arena, contracting parties have far more latitude with respect to the way by which a contract, it's terms and dispute resolution mediums are chosen. If a contract dictates that a dispute must go to arbitration then that is the end of it. If a contract dictates that a dispute must be referred to expert determination then providing the contract is well crafted that will be the binding dispute resolution mechanism.

Some civil and commercial contracts, contain a potpourri of mediation/arbitration/quasi expert determination provisions and the dispute resolution routes can be a tad cryptic and unnecessarily protracted. In doing so they are not conducive to "the nipping of a dispute in the bud" and in fact can on occasion exacerbate rather than contain the disquiet.

It is for this reason that our lawyers have a tendency to amend some of the standard contractual dispute resolution mechanisms. Our preference is to have a clear and succinct, swift process. The contract can have a mechanism for either rapid mediation with the fall back position of a rapid expert determination or rapid expert determination.

Great care must characterise the fashioning of dispute resolution provisions. A naïve or illconsidered dispute resolution mechanism can escalate a dispute and can be conducive to the obliteration of commercial rapport. As the building industry is very much built upon return work, it is implicit that commercial relationships should develop, evolve and mature. The dispute resolution model is therefore supreme importance and gravitas.

SUMMARY AND CONCLUSION

Courts are dispute resolution venues of last resort. When a matter goes to court, disputants have relinquished their ability to resolve their differences by negotiation. The initiation of legal proceedings in a court of law is a final and drastic step and generally signifies the repudiation of a commercial relationship and commercial history.

Litigation is very expensive and takes a very long time to conclude. It is misleading to call the process of court commandeered dispute resolution "dispute resolution" in the true sense of those words, the fact of the matter is courts conclude disputes but they do not facilitate reconciliation.

What I have referred to as "the top end of town" comprises those organizations that are consumed with resolving disputes quickly, cost effectively and with the least amount of commercial collateral damage. Expert determination as described in the paper is a very sophisticated form of dispute resolution and is well suited to this echelon. Where informed institutions are able to choose the umpire to "circuit break" a problem, as is the case in sport, they are generally happy to defer to the umpire's ruling.

In recognizing the virtues of expedited dispute resolution through the mediums of mediation and expert determination; the author is nevertheless at pains to point out such observation is not in derogation of the role courts. The higher courts will always be the seminal judicial cathedrals because after all it is these institutions that established the binding precedents that provide guidance to all other judicial and quasi decision making institutions. The paramouncy of the courts is to provide certainty and guidance rather than to provide the swiftest routes to decisions of moment.

The concept of dispute resolution is often misunderstood. The community often confuses the idea that particular established forums are designed to resolve disputes. Judicial determinations are construed as dispute resolution mechanisms but they are more in the nature of a sanction and in a sense can be heavily punitive. The "loser" would not ordinarily opine that their dispute was resolved. The contrary might be the case, he/she/it may say that a dramatic and unceremonious form of True and pure dispute resolution is where resolution process has a reconciliation mechanism. Disputes can be resolved in a manner that is characterized by a happy ending. Such encounters will have witnessed the ingredients of a conflict or potential conflict, a willingness to solve the problem by both parties, a lack of arrogance, a preparedness to take cognisance of the other party's point of view and a willingness to pay homage to wise and impartial counsel. Mediation, negotiation and expert determination are all dispute resolution mediums that sit comfortably with this dispute resolution pathology and the net effect will be resolution, reconciliation and possibly even the "adding of mortar" to a long term and constructive union.

Appendix 1.

Procedure for adjudication under the *Construction Contracts Act 2002* (NZ).

Section 28 of the NZ Act[39] provides that adjudication is commenced by a claimant referring a dispute to adjudication by way of the dispatch of a notice of adjudication. A copy of the same has to be given to any other party to the construction contract and or the owner.

The notice has to be dated, has to provide a synopsis of the dispute description, the location of where the dispute arose and what sort of relief is sought.

The notice depending on the circumstances may also seek a direction as regards the owner's liability. The notice will give details as regards the parties to the contract and the particulars of the contract. The claimant then has to select an adjudicator pursuant to section 33 and this has to be done within a specified period of time as determined by the NZ Act.

At first instance agreement between the parties should be sought regarding the choice and identity of the adjudicator. If agreement is not forthcoming an authorised nominating body can be approached to nominate an adjudicator. The authorised nominated body has to select a person as soon as possible.

An adjudicator is afforded a great deal of latitude in terms of the way he or she wishes to run an adjudication and this power is set out under section 42.[40] The adjudicator will require written submissions and has to give all concerned parties an opportunity to provide comment on such submissions.

The parties to the dispute have to provide documents that are germane to the adjudication. The adjudicator also has the power to appoint an expert advisor provided that the parties are apprised of this election before the appointment crystalizes.

The adjudicator can and often will convene a conference and will ordinarily conduct an inspection of the construction work that is subject to the adjudication. The NZ Act[41]provides that the adjudicator can request that any relevant material be provided that is germane to the adjudication and the adjudicator can issue directions from time to time whereupon the parties have to take heed of and comply with such direction.

Anyone who is party to a building contract has the ability to refer a dispute to adjudication and is allowed to invoke that right, regardless of whether there are concurrent proceedings in a court of law or another tribunal. Although a dispute cannot be referred to adjudication without the consent of the other parties, if the parties have

[39] *New Zealand Construction Contracts Act 2002* (NZ) s 28.
[40] *New Zealand Construction Contracts Act 2002* (NZ) s 42.
[41] *New Zealand Construction Contracts Act 2002* (NZ).

chosen to refer a dispute that embraces the same dispute terrain to either a local arbitration or an international arbitration.

If a party is unhappy with the adjudicator's determination the matter can be appealed to the local District Court i.e. the District Court that is closest to the location of the adjudication.

Once a respondent receives an adjudication claim the respondent has to generate a written response within five (5) working days or within a period of time that is agreed by the parties or any extended period of time that has the imprimatur of the adjudicator. The respondent has to serve any relevant documentation germane to the response with the response.

The adjudicator has to issue a determination within twenty (20) working days of the expiration of the period of time that was afforded to the respondent to submit his, her or its response. Time can however be extended for the provision of the determination if the parties agree to an extension.

Section 57 of the NZ Act[42] provides that the adjudicator's fees will be agreed upon between the adjudicator and the parties to the adjudication. If no such agreement is forthcoming then the adjudicator is entitled to charge reasonable fees. The parties to the adjudication are jointly and severally liable for payment of the adjudicator's fees and expenses.

[42] *New Zealand Construction Contracts Act 2002* (NZ) s. 25.

Appendix 2

Arbitration Process

The process is then very much reminiscent of the courts. The arbitrator in cohorts with the advocates will typically make the following types of orders.

A statement of claim will be filed that articulates the particulars of the dispute.

A statement of defence will be filed and in circumstances where there is a counterclaim the counterclaim will be filed with the statement of defence.

The plaintiff will be ordered to file a response to the defence and counterclaim.

An order for discovery will be forthcoming and both parties will be ordered to draft and file an affidavit of documents comprising all documentation relating to the contract of the dispute.

There will be an order for discovery whereby both parties will be afforded the opportunity to inspect the other party`s documents.

Normally the parties will be desirous of retaining expert witness to provide specialist opinion on matters that make up the ingredients of the dispute. Expert witness statements then have to be prepared, served and filed.

There may be an order that the matter is sequested out to mediation although this is optional.

There will be further orders providing that the parties will be required to attend further compliance directions hearings to ensure that the time frames for submitting and filing interlocutory pleadings are indeed filed by the due date.

Once matters have been progressed to the extent that relevant pleadings have been filed and served, discovery has been completed and expert witness statements filed the matter will be set down for hearing.

Throughout the process the arbitrator will require the parties to place in trust monies in advance.