

ADJUDICATION AND ARBITRATION AND THE ASSOCIATED BARRIERS TO LITIGATION

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ABSTRACT:

Some standard forms of construction contract require parties to first apply disputes through arbitration before applying to the courts as a last resort. Adjudication is a statutory right implied in New Zealand through the Construction Contracts Act 2002 enabling any party to pursue any matter through adjudication at any time. The extent that adjudication and arbitration restrict access to the courts was investigated through analysis of legislation, case law, and expert commentary. Contract provisions requiring arbitration effectually restrict the choice of dispute resolution method to adjudication and arbitration, creating a barrier to obtaining fine justice through the courts for the contracting parties and associated third parties. Courts will follow provisions requiring disputes to be arbitrated, staying applications until parties first do what they have contracted to. Arbitrator's awards are then only appealable to the courts on very narrow grounds. Parties must pre-elect to allow appeals on points of law in their arbitration agreement and even then, courts will only re-open the arbitrator's award where they deem the effect on the appellant party to be substantial. Courts are most likely to re-open an adjudicator's determination for breaches of natural justice or the adjudicator acting outside their jurisdiction, though an adjudicated dispute may be re-opened in litigation or arbitration where the contract provides.

Keywords: adjudication, arbitration, dispute resolution, litigation.

INTRODUCTION

Construction disputes were traditionally resolved through arbitration or the courts if a binding resolution was required. Over the years arbitration, which was supposed to be quicker and cheaper became protracted, typically taking months or years, and becoming increasingly more expensive. In part, to address this problem, adjudication was first mandated to be incorporated in all construction contracts in the UK in 1998 through the Housing Grants, Construction and Regeneration Act 1996 (UK 1996 Act). Unlike arbitration, the duration of the adjudication process is statutorily provided. The periods provided are relatively short, typically quoted in days. Both arbitration and adjudication are binding dispute resolution methods but unlike arbitration, an adjudicated dispute can subsequently be re-opened in court or, if the contract provides, in arbitration.

Since the UK 1996 Act came into effect in 1998 adjudication has since been statutorily introduced in another 13 Commonwealth jurisdictions. In New Zealand adjudication was introduced through the Construction Contracts Act 2002 (NZ Act). The UK 1996 Act was further refined and replaced in 2009 by the Local Democracy, Economic Development and Construction Act 2009 (UK 2009 Act). Many of the new changes in the UK 2009 Act were features already found in the NZ Act.

Both arbitrators and adjudicators may face a complex array of dispute considerations including matters of fact and law. Furthermore, the effects of arbitrated awards can extend to third parties. Hiroshi (1989) identified the problem of inconsistency in the USA whereby if an arbitrator decides differently to how a judge might render the claimant unable to sue third parties based on an arbitrated award. However, there is currently no statutory requirement for either to be legally trained. Given that arbitrators and adjudicators may derive from different legal or construction related backgrounds, there is potential for variance in knowledge, for example, about implied legal principles.

Arbitration in New Zealand is governed by the Arbitration Act 1996. Unlike arbitration, which requires agreement between the parties, adjudication is a statutory right to either party (Under New Zealand's Construction Contract Act 2002, any party can submit a dispute over any matter at any time to adjudication). The agreement to arbitrate is typically written into the contract. Standard forms of construction contracts typically include provisions dealing with disputes. These may require the parties to follow a hierarchical tier of resolution methods, beginning with negotiation, then mediation and arbitration, before the parties can finally submit their dispute to litigation. However, where a contract contains requires the parties to first arbitrate their disputes, the grounds to appeal the award are very limited, even where the award is erroneous in either matters of fact or points of law.

This paper analyses legislation, case law, and judicial and expert commentary in order to explore the legislative affect contractual provisions for arbitration have on the parties' access to fine justice through the courts, both before and after a dispute is arbitrated. It similarly explores the degree to which the courts might set aside an adjudicator's determination. Finally two standard forms of contract commonly used in New Zealand are evaluated. First the key features of adjudication and arbitration are outlined.

KEY FEATURES OF ADJUDICATION AND ARBITRATION

Berg Hill Greenleaf & Ruscitti LLP (2010) capture the main advantages of arbitration (which could equally apply to adjudication) as being the confidentiality of process, limited rules of discovery, reduced attorney fees, a faster final resolution, and the parties' ability to mutually choose an arbitrator with specific expertise in the subject matter.

Parties can select the adjudicator or arbitrator

It is the technical expertise of the adjudicator or arbitrator which is their key advantage over litigation, which more often relies on a judge calling expert witnesses. (Ministry of Justice, 2004; Berardo & Clemens, 2012). It therefore makes sense, that unlike litigation, the parties may appoint an adjudicator or arbitrator best able to decide the dispute at hand.

Lawyers see the experience of the arbitrator as key to their effectiveness (Ministry of Justice, 2004). When commenting on the quality of arbitrators in the UK, Ashworth (2012, p50) concluded that while arbitrators need not have any particular skills or qualifications, in the majority of cases, arbitrators are appointed on the basis of experience or expertise in the subject matter of the dispute. He called it 'preferable' for arbitrators to have both technical expertise and legal training. Ministry of Justice (2004) also found a preference for arbitrators who have qualifications in construction and law. While there are no minimum training or experience requirements mandated for arbitrators, parties can set out minimum qualifications in their arbitration agreement (Berardo & Clemens, 2012).

Conversely, the arbitrator's potential lack of legal knowledge is a disadvantage of arbitration. While the courts can generally offer sound opinion on points of law, the arbitrator may seek the court's opinion, 'but this' Ashworth (2012, p51) asserted "could easily be overlooked and then a mistake could occur." When a question of law does arise during the proceedings, Ashworth (2012, p55) identified three possible ways for the arbitrator to deal with this; decide the matter personally; consult counsel or a solicitor, or; state a case to the courts. Where the arbitrator selects the third approach, they prepare a case clearly outlining the facts for the courts to decide on a point of law. The arbitrator may do this voluntarily or a party may require them to do so. Once the court makes their decision, the arbitrator can continue the proceedings and must take into account the court's decision. Failure to do so would result in misconduct on the part of the arbitrator.

Concerns have also been raised about the suitability of adjudicators to determine complex disputes. The New Zealand Construction Contracts Act 2002 was amended in 2015 via the Construction Contracts Amendment Act 2015. Among other things, this widened the scope of the Act to include professional services. The New Zealand Institute of Architects (NZIA) (2013) was one of few submissions to object. They argued that disputes over design related issues are too complex for adjudication, given its strict timeframe and unspecified minimum competency standards. These concerns were echoed by one other submitter, Transpower (2013), who felt that because their projects were very large and complex, the limited timeframe would make adjudication inappropriate and, that where determinations are later overturned for matters other than payment, compensation may not prove satisfactory. The NZIA (2013, p.11) recommended that if the Act's coverage of adjudication is to be expanded to include design disputes, then eligibility criteria should set specifically for

adjudicators of design-related disputes. Of note, Bayley (2013, p.35) observed that “many adjudicators currently are relatively inexperienced and are not required to demonstrate on-going competency.”

Parties may choose legally or non-legally trained representatives

Under New Zealand legislation governing adjudication and arbitration, parties may select representatives who are either legally or non-legally qualified (s38B(1) of the CCA and Article 1 24(4) of the Arbitration Act). Spillar (2007, p129) called the freedom it advantageous.

Privacy of outcomes

Both adjudicator’s determinations and arbitrator’s awards are private outcomes. Judge’s judgements on the other hand are public. The private nature of adjudication and arbitration may be an attraction to businesses who do not want their laundry aired publically.

Procedural flexibility

Adjudication and arbitration both provide greater procedural flexibility than the more formal court proceedings. Spillar (2007, p129) noted that while the formalities of a court hearing are possible “there is no need to imitate the process to which arbitration is an alternative.” Then providing a rather extreme example, he described how one arbitrator reported received a telephone call at 9am, attended a building site, heard the dispute, wrote the award (on a cement bag) and was home in time ‘for morning coffee.’ While it difficult to imagine a judge ever taking such a casual stance to their proceedings, parties may sometimes prefer lower costs over obtaining pure justice.

Timing and costs

The key advantage of adjudication is its statutorily provided timeframe. Under s.46(2) of the Construction Contracts Act 2002 an adjudicator must determine the dispute within 20 working days or 30 working days if they feel additional time is reasonably required or within any further time that the parties to the adjudication agree.

Arbitration was originally intended to be faster and cheaper than litigation. However arbitration has since become protracted to the point that many commentators now see any time and cost benefits over litigation as being negligible and even sometimes more expensive (Freeman, 2012; Lau & Lewis, 2014; Ministry of Justice, 2004a). Factors influencing the speed of arbitration include the; parties agreeing a rapid process (Spillar, 2007, p129; Lau & Lewis, 2014) and; the rules around limits of discovery can help reduce the cost of arbitration (Berardo & Clements, 2012).

Finality of outcomes

Unsurprisingly given the opposing objectives of reducing time and cost versus obtaining a pure justice, debate has long existed about whether arbitrator’s awards should be appealable through litigation on points of law (McLoughlin, 1997). The lack of right of appeal has been found a potential disadvantage of ADR over litigation (Ministry of Justice, 2004). Berg Hill Greenleaf & Ruscitti LLP (2010) call the “limited rights to appeal” the main disadvantage of arbitration and raise concern about the “perception that arbitrators often “split the baby” by arriving at an outcome somewhere in the

middle.” The Ministry of Justice (2004a) describe the arbitration process as often being seen as “embracing the adversarial nature of court adjudication without the safeguards of the court in relation to appeal and precedent.” As Spillar (2007, p131) asserted that arbitrators can provide practical solutions to disputes, whereas the courts will strictly apply the law, but that courts provide an element of protection by way of appeal which is not so available through arbitration, with the grounds for appealing an arbitrator’s award being very limited.

In summary, adjudication, arbitration and litigation are all adversarial in nature. An appointed adjudicator or arbitrator is likely to be more technically knowledgeable about a given dispute than a judge whose core expertise is in law not construction. Costs may be reduced through the procedural flexibility of arbitration. However, the flexibility and potential lack of legal training of adjudicators and arbitrators risk incurring outcomes which do not align with the principles of law. Unlike litigation, the outcomes in adjudication and arbitration are private. Any other perceived benefits around arbitration being cheaper or faster than litigation may be negligible. However, unlike litigation and arbitration, the statutorily set timeframe of adjudication does ensure a quick and affordable outcome.

LIMITED GROUND FOR INTERFERENCE BY THE COURTS

Once parties have agreed to arbitrate their disputes (for example through an arbitration clause in their contract) they cannot instead submit their dispute to the courts. Ashworth (2012, p49) explained how if they do, the courts will stay any such legal proceedings. Williams & Thorp (2011, p9) identified a “presumption in favour of upholding arbitration agreements, especially where the dispute involves international commercial disputes between sophisticated business concerns.” In *Marnell Corrao Assoc v Sensation Yachts* (2000) the contract provided a hierarchy for dealing with disputes, first negotiation between the parties, second negotiation between the parties’ chief executives, third reference to the architect as formal decision-maker, and then arbitration. The plaintiff argued that the dispute could not be referred to arbitration, because the requirement to negotiate between the parties’ chief executives had not first been satisfied. However, the Court held that the failure to meet this precondition was due to the plaintiff not responding to the defendant’s attempts to negotiate. The matter was therefore referred to arbitration by the Court who concluded that the plaintiff could not take advantage of their own wrong doing. The statement by Wild J on p26 reinforces the general “presumption of upholding arbitration agreements”:

That the result gives effect to the general principle that the Courts should uphold arbitration, by striving to give effect to the intention of the parties to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording of or operation of the arbitration clause to thwart that intention.

Similarly the contract in *On Line International Limited v On Line Limited* (2000) required parties to first negotiate and then only to apply for arbitration if a negotiated settlement was not reached within 30 days. It was noted at paragraph 24 of that case that “a party would not be able to avoid going to arbitration by refusing to seek to have the matter amicably settled.”

The parties finding the prescribed arbitration process too slow or inefficient is not an acceptable reason for the courts to hear their dispute. In *Channel Tunnel Group v Balfour Beatty Construction Ltd* (1993) the parties were required to first defer any disputes to a panel of experts before referring the matter to ICC arbitration. The plaintiff sought an injunction from the English courts to prevent the defendants from suspending work. However, the House of Lords stayed the action because it breached the parties' agreement to decide disputes through an alternative method. Lord Mustill called the decision:

in accordance, not only with the presumption exemplified in the English cases above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point.

The courts will stay proceedings where the parties have agreed to arbitrate despite claims existing against other defendants. Young J in *Montgomery Watson NZ Limited v Milburn NZ Limited and Others* (2000) demonstrates this point and emphasize the importance the Courts place on arbitration:

It follows that the claims by Montgomery Watson against Aquatec-McDowell must be stayed. But should I also stay the claims against the other defendants.

The statement of claim, particularly in relation to the first three defendants, reads oddly. If Montgomery Watson were permitted to pursue its claims against the first three defendants, they could perhaps be expected to join Aquatec-McDowell as a third party. The proceedings might then run on in parallel with the arbitration between Aquatec-McDowell and Montgomery Watson.

I would see this as permitting the process of this court to be used so as to subvert the arbitration agreement between Aquatec-McDowell and Montgomery Watson. As to this I refer to the Court of Appeal decision *Contact Energy v Natural Gas Corporation Limited* (CA 65/100, judgment delivered 18 July 2000).

I stay the proceedings on the basis that the plaintiff may apply to have the stay lifted in relation to its claims against the first three defendants upon determination of the arbitration process between it and Aquatec-McDowell for a settlement of its dispute with Aquatec-McDowell.

If there is an application to lift the stay, the court will, I have no doubt, be astute to ensure there is not to be an inappropriate and abusive re-litigation of issues which have, in substance, been determined at arbitration.

In *Zurich Australian Insurance Limited T/A Zurich New Zealand v Cognition Education Limited* (2014) the Supreme Court effectively narrowed the scope under which the court can hear summary

applications where a contract for arbitration exists. Cognition sought to recover a shortfall in their insurance cover with Zurich. The contract contained a clause providing that any dispute would be settled by arbitration. However, instead of applying the matter to arbitration, Cognition sought summary judgment in the High Court. Article 8(1) of Schedule 1 of New Zealand's Arbitration Act 1996 limits the grounds for court involvement to only where the arbitration agreement is "null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred." Zurich appealed the court's jurisdiction to the Supreme Court. Although the parties settled amongst themselves before the judgment, the Supreme Court decided the matter was sufficiently important to deliver a judgment on and, as reported by East (2012), the Supreme Court "noted that there may be a controversy between the parties which can properly be described as a 'dispute' even though it is ultimately capable of being determined by a summary process." Therefore, where parties have contractually agreed to settle any matter through arbitration, the courts must stay the matter to arbitration. The only exceptions would be where such a course is rejected because, for example, the basis of the arbitration clause is null and void or it is immediately apparent that the defendant is not acting bona fide in asserting that there is a dispute. The removal of the court's discretion around whether or not to stay proceedings was heralded by Williams & Thorp (2001) as "a welcome end to arguments in court that, despite the parties' agreement to arbitrate, the dispute is too complex to be decided by a mere arbitrator (see for example *Roose Industries Ltd v Ready mixed Concrete Ltd* (1974) 2 NZLR 246)."

Williams & Thorp (2001) noted that the Supreme Court's judgement in *Zurich v Cognition* (2014) also clarified the Courts' position that they will observe arbitration agreements despite there being other defendants involved which may result in "possible consequence or multiplicity of proceedings, increased costs and inconsistent findings of fact. They further noted that a similar approach was adopted towards the remaining claims in the On Line decision.

In conclusion, parties should seriously consider the inclusion of clauses within their contracts which require any dispute to be arbitrated before they can be litigated. The costs and timeframe of arbitration can be similar to litigation and with the inclusion of such a clause, the courts will stay any proceedings in favor of allowing the arbitration to proceed. The only exceptions are set out in Article 8(1) of Schedule 1 of the Arbitration Act 1996, whereby the arbitration agreement is "null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred." This places a great deal of reliance on the quality of the arbitrator and their technical and legal knowledge, someone who may or may not be legally trained. This reliance also extends to third parties. Unlike arbitration, adjudication does not require agreement between the parties and does not bar access to the courts. Section 26 of the Construction Contracts Act 2002 provides that instigating adjudication does not prevent the parties from "submitting a dispute to another dispute resolution procedure (for example, to a court or tribunal, or to mediation), whether or not the proceedings for the other dispute resolution procedure take place concurrently with an adjudication." If the dispute is determined through another dispute resolution method before the adjudicator determines the adjudication, s.26(4) requires them to terminate the adjudication proceedings. The grounds for an aggrieved party who is unhappy with a determination or an award will now be considered.

GROUNDINGS FOR APPEAL THROUGH THE COURTS

Section 6 of the Arbitration Act 1996 sets out the *Rules applying to arbitrations in New Zealand*. The Act contains two Schedules which provide the rules relating to the arbitration. These are Schedule 1 *Rules applying to arbitration generally* and Schedule 2 *additional optional rules applying to arbitration*. For parties to a domestic arbitration, s.6 provides that the general rules provided under Schedule 1 will apply to all arbitrations. Whereas, the additional optional rules under Schedule 2 will only apply unless the parties agree otherwise. This means the parties can contract out of the additional rules provided under Schedule 2.

Rules applying to arbitration generally

The grounds for the courts to hear an appeal over an arbitration award under the general rules are set out under Article 34 of Schedule 1. The only grounds to appeal an arbitrator's award under Article 34 include where the arbitrator has acted outside their jurisdiction, there have been procedural problems or the arbitrator has breached the rules of natural justice either during the arbitral proceedings or in connection with the award. Spillar (2007, p164) expanded on the types of procedural problems and jurisdictional breaches which might justify an appeal to the courts:

- The arbitration agreement is unsound because of lack of validity or lack of capacity of a party.
- There was insufficient notice of the appointment of an arbitrator, the place and time of hearing, or the party's case was not able to be properly presented.
- The award is in error in that it deals with a dispute outside the terms of the submission. If it is possible to sever those parts of the decision which are outside the arbitrator's jurisdiction, the rest of the decision stands.
- The arbitral tribunal was not in accordance with the agreement between the parties or in accordance with the First Schedule. If there is a conflict between the agreement and part of the schedule from which the parties cannot derogate, this ground will not apply.
- The High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand or it is in conflict with public policy. A common example of a dispute not capable of settlement by arbitration is an employment dispute, as the appeal to the High Court provided by the Arbitration Act 1996 is in conflict with the Employment Relations Act 2000. Conflict with public policy arises when the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

However, even where procedural problems do occur the courts are not quick to set aside an award. Williams & Thorp (2001) provided that:

Although the courts do require that arbitrators comply with basic standards of due process, they will not sit in de novo review of procedural decisions of arbitral tribunals, and will also require a high threshold to be satisfied before setting aside an arbitral award on the grounds of procedural misconduct or breach of natural justice.

Additional optional rules applying to arbitration

The additional optional rules contained in Article 5 of Schedule 2 provide grounds for appealing the Arbitrator's award on any question of law. Even if the parties opt to include the right to appeal on points of law, the courts can only consider such an appeal where (under Article 5(2)) it is deemed likely to "substantially affect the rights of 1 or more of the parties." Spillar (2007, p163) provided the courts may grant leave where there is a prima facie error of law if "there will be savings in costs, and the rights might be substantially affected." In *Trustees of Rotoaira Forest Trusts v Attorney General* (1998), Elias J found that the failure to take into account a clause of a lease agreement would amount to an error of law by the arbitrator. Spillar (2007, p162) recommended that if parties want a final award which cannot be appealed through the courts "they should delete cl 5 from the terms of engagement."

The New Zealand Law Commission (n.d.) investigated whether the Act should provide grounds for appealing the award to the courts, and if so what the grounds should be. This followed the case of *Gold and Resource Development (NZ) Ltd v Doug Hood Ltd* (2003) in which the Court of Appeal set out an approach for New Zealand courts to take when exercising their discretion whether or not to hear arbitral appeals. After surveying cases and legislation from Australia and the UK, the Court concluded that Parliament had intended that the arbitrator's award should usually be accepted by the parties and that the court's discretion should be construed narrowly. Although it emphasized that other factors might be considered, the guidelines established by the Court of Appeal were:

- the strength of the challenge and/or the nature of the point of law;
- how the question arose before the arbitrators;
- the qualifications of the arbitrators;
- the importance of the dispute to the parties;
- the amount of money involved;
- the amount of delay involved in going through the courts;
- whether the contract provides for the arbitral award to be final and binding; and
- whether the dispute before the arbitrators is international or domestic.

In the case of *Carr & Anor v Gallaway Cook Allan* (2014) the Supreme Court made explicitly clear that arbitrator's awards cannot be appealed on matters of fact, only on matters of law. As reported by Herbert (2014) the parties made their agreement to arbitrate subject to both "questions of law and fact." The Supreme Court held that by making their agreement subject to something which compromised the purpose of the Act, they had made their agreement invalid, and they therefore set aside the award. This is reinforced by Article 9(3) of Schedule 1 of the Arbitration Act 1996 which, when dealing with arbitration agreements and interim measures by court, provides that:

Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

Berg Hill Greenleaf & Ruscitti LLP (2010) recommend that “prior to negotiating and drafting any contract, a party to a contract is well-advised to discuss the types of disputes that are likely to occur and what will be important to your company during that process. It is prudent to discuss with legal counsel your options regarding the drafting of a dispute resolution clause most advantageous to your company’s business needs early in the contract process, rather than after the dispute has occurred.” This may be good advice, however, it is the author’s experience that parties seldom adjust the general arbitration provisions in standard forms of contract.

Interestingly for third parties, an application to the Courts from another party who is affected, but not part of the arbitration agreement, will be stayed by the Courts until the arbitration is conducted and then the award is likely not to be appealable for errors of law or fact. There is again great reliance placed in the quality of arbitrator’s awards. Both adjudicator’s determinations and arbitration awards effectually sit higher than a judge’s judgement, even though neither is statutorily required to be legally trained or have any minimum qualifications or experience.

Adjudication

In adjudication, judicial commentary suggests that the court’s will consider re-opening determinations for breaches of natural justice or the adjudicator acting outside their jurisdiction. This is demonstrated by Green (2012) in his explanation of *Herbosch-Kiere Marine Contractors Limited v. Dover Harbour Board [2012]* and the quoted judge’s comments:

In *Herbosch-Kiere Marine Contractors Limited v. Dover Harbour Board [2012]*, a recent decision of the Technology and Construction Court (TCC), Akenhead J found that an adjudicator had breached the rules of natural justice when he used a method to assess the sum due to the contractor pursuant to his final account that neither party had put to him and upon which they had been given no opportunity to comment. The adjudicator’s approach was consistent with his use of his own experience and knowledge. However, in response to a submission that the adjudicator could not be criticised for reaching a decision that was wrong either in fact or law, the TCC commented that:

“What [the adjudicator] can be criticised for is deciding something not only on a basis which was not argued in the adjudication proceedings but also without giving either party the opportunity to address the point.”

The TCC found that the adjudicator’s methodology had a clear and material financial effect on the decision and, as such, the decision should not be enforced.

The following comments by Bell (2014, p7) also raise concerns over both the quality of the adjudicator’s determinations and their level of enforcement: “Nonetheless, the current practice – at least in Australia and the UK – is that courts are upholding determinations which are made within the adjudicator’s jurisdiction, even where they are erroneous.” He then cited Mullins J in *McNab Developments v MAK Construction Services (2013)* who held that “... even though the adjudicator appears to have made errors in the construction of the subcontract, they are not jurisdictional errors that enable [the plaintiff] to obtain the declaratory relief it seeks.”

The judges' responses appear to acknowledge that determinations cannot be set aside for being wrong either in fact or law, only for breaches of natural justice or jurisdiction. In this regard both adjudication and arbitration sit above litigation in that the adjudicator or arbitrator's determination or award is less able to be appealed than a judge's judgment.

OPTIONS ONCE APPEALED

If the courts do re-open an award, they may either refer the award back to the arbitrator to re-arbitrate it or set the award aside. Ashworth (2012, p56) listed the following as grounds for the courts to refer back the award:

- Where the arbitrator makes a mistake so that it does not express the true intentions.
- Where it can be shown that the arbitrator has misconducted the proceedings, for example, in hearing the evidence of one of the parties in the absence of the other.
- Where new evidence, which was not known at the time of the hearing, comes to light and as such will affect the arbitrator's award.

The grounds for setting aside an award are similar to those for referring back an award, except they are much more serious. Once the courts set aside an award it becomes null and void. Ashworth (2012, p56) lists the grounds for setting aside as:

- Where the award is void, for example, if the arbitrator directs an illegal action.
- The discovery of evidence that was not available at the time the arbitration proceedings were held.
- Where the arbitrator has made an error on some point of law.
- Misconduct on the part of the arbitrator by permitting irregularities in the proceedings.
- Where the award has been obtained improperly, for example, through fraud or bribery.
- Where the essentials of a valid award are lacking, for example, the award is inconsistent or impossible of performance.

It is interesting to note here that, given the very limited grounds for courts to interfere with arbitration contract provisions or to appeal an arbitration award around points of law, Ashworth (2012) listed the arbitrator making an error on a point of law as grounds for setting aside the award.

CONCLUSIONS

Once a construction contract contains a provision requiring the parties to arbitrate any dispute it is almost impossible to instead choose to litigate. The courts will not interfere with what the parties have contracted to so will stay any proceedings until the dispute has been arbitrated. Then appeals over an arbitrator's award will only be heard on the narrowest of grounds.

Under New Zealand legislation any party to a construction contract may choose to adjudicate or litigate over any matter at any time. Neither adjudication nor arbitration require agreement from the other party. Arbitration on the other hand does require agreement between the parties. The agreement is typically written into the contract. The effect of a contract clause which sets arbitration as the default dispute resolution method is to restrict the party's options to that of adjudication or arbitration

only. The right to litigation is eliminated except for the narrowest grounds to appeal (breaches of natural justice, procedural breaches, and over points of law only when the parties have opted to allow such appeals and where the courts deem the consequences to substantially impact on the affected party). If the contract does not set arbitration as the default dispute resolution method then the parties are still able to apply any dispute to arbitration. However they must both agree that it is the best resolution method for the given dispute.

Adjudication, arbitration and litigation are all adversarial rights based dispute resolution methods. Both enable the parties to appoint the best person for the given dispute. An adjudicator must reach their determination within the timeframe, set by legislation, making adjudication faster and cheaper than arbitration and litigation. Determinations are binding and can only be re-opened for breaches of natural justice or the adjudicator acting outside their jurisdiction. Fine justice is attainable through the courts at a cost. Litigation may be appropriate for large disputes centering on points of law.

Since the introduction of statutory adjudication the use of arbitration has declined throughout both New Zealand and the UK. This is hardly surprising given that commentary suggests arbitration often costs the same and takes as long as litigation, while erroneous awards cannot be appealed, even though arbitrators may or may not be legally qualified. Third parties may also find themselves bound by an arbitrator's award or adjudicator's determination even though it is legally incorrect. With its statutorily set timeframe adjudication does provide a relatively cheap and fast resolution process.

It is difficult to see why anyone would want arbitration to be preset as the default dispute resolution method in their contract. Reynolds (2014) concluded that evidence suggests arbitration has become unpopular within the construction industry particularly due to the "time, cost and litigation-like tendencies of the process." The Ministry of Justice (2004a) found that lawyers sometimes view arbitration as "a costly exercise with the appointment of an appropriate arbitrator often leading to considerable delay." Indeed, since the implementation of statutory adjudication, some standard forms of contract have removed arbitration as the default dispute resolution method. Murdoch and Hughes (2008, p368) describe how provisions for arbitration as a default dispute resolution method have been removed from the 2005 suite of JCT contracts. This they said was because "most disputes are now resolved by adjudication, and that issues which are not so resolved are frequently concerned with points of law" and that "litigation is now the default dispute resolution procedure" in these contracts. This provides parties with the greatest freedom. Previously, they could not opt out of arbitration in favor of litigation. Now parties can unitarily choose litigation or adjudication or agree to arbitration.

Approach taken in New Zealand standard forms of construction contracts

There are two commonly used standard forms of construction contract in New Zealand. These are

- Standards New Zealand (2013) NZS3910:2013 Conditions of Contract for Building and Civil Engineering Construction
- The New Zealand Institute of Architect Incorporated (2014) (NZIA) Standard Conditions of Contract 2014

Both contracts contain arbitration clauses. The wording varies between the two clauses in that NZIA SCC 17.5 requires that disputes ‘must’ be arbitrated before they may applied to the courts, while NZS3910 13.4 provides that if either party is dissatisfied with the Engineer’s decision or the Engineer has not made a decision then they ‘may’ submit their dispute to arbitration. However, the effect of each clause is the same in that once an arbitration agreement exists, the courts will stay any proceedings in the “presumption of upholding arbitration agreements.” Recall Wild J in *Marnell Corrao Assoc v Sensation Yachts* (2000) who stated that “...That the result gives effect to the general principle that the Courts should uphold arbitration, by striving to give effect to the intention of the parties to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording of or operation of the arbitration clause to thwart that intention.” Furthermore, s.8(1) of the Arbitration Act 1996 provides that:

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party’s first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

The above requirement that proceedings must be stayed before a party has submitted their first statement on the substance of the dispute demonstrates the principle that where parties have one step in the litigation process, then the litigation will continue.

Effectively, the parties’ choice of dispute resolution methods under both contracts is limited to adjudication or arbitration, but not litigation. An adjudicated dispute may be re-opened in arbitration. However, an aggrieved party may only challenge an arbitrator’s award or adjudicator’s determination through the courts for jurisdictional or procedural breaches or for breaches of natural justice.

Opportunities for further research

Further research could include; measuring the number of times arbitration clauses are amended in standard form construction contract; ascertaining the level of knowledge construction contract users have about adjudication and arbitration and the effects on access to litigation and; how such knowledge might influence their choice of dispute resolution method for any given contract or even dispute type.

REFERENCE LIST

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