Construction dispute resolution in uncertain times

By Christine Gordon and Emily Woods

Dispute resolution forums around the world have had to adapt to operating through the emergence of COVID-19, and the resulting lockdowns. This article considers three of the most common dispute resolution forums used by parties to a construction dispute and how they have adapted to the uncertainties as a result of COVID-19.

Court

In New Zealand, a Four-Stage Alert Level System was established by the Government on 21 March 2020 (**Alert Levels**). The legal framework for the Alert Levels was originally found in a series of orders made under the COVID-19 Public Health Response Act 2020.[1] The New Zealand courts are designated as an "essential service" which are defined as those that are essential to the provision of the necessities of life and those businesses that support them.[2]

On 9 April 2020,[3] the High Court (COVID-19 Preparedness) Amendment Rules 2020 came into force (**HC Covid Act**) which introduced several temporary amendments to the High Court Rules 2016, including granting the judges the power to direct that participation in a hearing (including trial, interlocutory hearings or case management conferences) be held by telephone or by audio-visual link (Rule 3.4A(1)).

In practice, there are a finite number of telephone lines and audio-visual links which limits the number of hearings that can be conducted remotely at any one time. The successful use of technology to conduct a hearing is also dependent on the user being "technologically literate" insofar as a practitioner, judge and any witnesses can access the audio-visual link and use video cameras on laptops. In an attempt to minimise disruption during the national levels 3 and 4 lockdowns in March to May 2020, court staff held "test runs" whereby all legal representatives involved in the case were asked to access the audio-visual link at an agreed time prior to the hearing. The aim of this exercise was, to identify any technology / access issues in order that these could be ironed out prior to a significant hearing with the judge / judges.

While the COVID-19 pandemic resulted in an increase in using technology to facilitate hearings during the lockdowns, it remains to be seen how technology will impact the conduct of litigation in the longer-term. Travel to New Zealand remains heavily restricted (at the date of this article, a bubble with Australia and the Cook Islands has

1 While the original orders have been revoked, the current Alert Level Requirements are set out in the COVID-19 Public Health Response (Alert Level Requirements) Order (No 6) 2021. The legality of aspects of the New Zealand Government's Alert Level measures was challenged in *Borrowdale v Director-General of Health* [2020] NZHC 2090. It was held that the measures imposed on New Zealanders by way of the statements for the nine days between 26 March 2020 and 3 April 2020 were unlawful. We note that this decision has been appealed to the Court of Appeal and the decision has been reserved.
2 As set out in the Appendix to the order dated 24 March 2020 made pursuant to section 70(1)(m) of the Health Act 1956.
3 Three weeks after the Level 4 lockdown was imposed.

been established, albeit that the bubble has been closed more than it has been operational due to outbreaks of Delta in New Zealand and Australia) accordingly offshore expert witnesses will often need to join hearings by way of audio visual link, resulting in a saving on travel and accommodation costs for a commercial party. In terms of access to court for members of the public, rather than attend in-person and sit in the public gallery in a court room, a person can be granted access to an audio-visual link, with leave of the court and/or agreement by the parties, to observe a hearing.

Arbitration

In many of the leading forms of construction contracts, arbitration is often the default process for the resolution of disputes.[4] The arbitration process has some similarities with litigation but the key difference is that the arbitration process is confidential, which is attractive to parties wishing to resolve disputes privately and avoid opening the floodgates to a large number of claims against them in the event of an unfavourable award (as opposed to a court judgment which is public).

In New Zealand, the default position is that arbitration is governed by the Arbitration Act 1996. Parties to an arbitration can agree certain rules such as whether formal claim documents are required and the timing of interlocutory steps.[5] Depending on the nature and complexity of the dispute, the costs of arbitration can be similar to those associated with litigation. However, parties in an arbitration are required to pay the cost of facilities and other costs such as stenographers (as opposed to a hearing fee for litigation).

In arbitration, the parties have the ability to agree on the appointment of the arbitration panel. Therefore, the parties have the ability to appoint arbitrators with specialised knowledge relating to the subject matter of the dispute (as opposed to a judge who has been assigned to the dispute). In the event that the parties cannot agree between them on the appointment of an arbitrator / the composition of the arbitral tribunal, the major standard forms make provision for the parties to refer the decision to an independent body,[6] such as the New Zealand Dispute Resolution Centre or the Building Disputes Tribunal.

The flexibility of the arbitration process means that parties can take steps to minimise the unpredictability of lockdowns due to COVID-19. As lockdowns remain a possibility in the current climate, it would be prudent for parties to include a clause in an arbitration agreement to provide for virtual or semi-virtual hearings to be held in the event of a change in Alert Levels.[7] When considering the appointment of an arbitrator, parties should confirm whether the proposed arbitrator can facilitate an online arbitration.

The increased use of technology to conduct arbitrations remotely could result in reduced costs of arbitration such as the cost of hiring a facility for the arbitration, travel costs for parties and/or the arbitral panel, expert witnesses, and legal representatives. This could be attractive to corporates with a focus on sustainability as the increased use of technology could have the attractive by-product of reducing carbon emissions.

Mediation

Most standard form construction contracts contain an option for parties to agree to attend mediation in the event of a dispute between them.[8] Unlike litigation and arbitration, mediation is a voluntary process facilitated by an independent third-party, appointed by the parties and it is without prejudice (i.e. the process is "off the record"). In New Zealand, the courts expect most commercial litigants to attend some form of alternative dispute resolution in the course of the case management process.[9]

4 For example, arbitration is the default dispute resolution forum in the NZS suite and the FIDIC 2017 suite of standard form contracts.
5 Parties can agree to modify the rules for an arbitration outside the minimum mandatory requirements set out in Schedule 1 (and in some instances, Schedule 2) of the Arbitration Act 1996.
6 For example, in NZS3910:2013, clause 13.4.3 provides that if the parties cannot agree upon the arbitrator, the arbitrator shall be nominated by the "Person" identified in the Special Conditions and the provisions of the Arbitration Act shall apply.
7 The rules of the New Zealand Dispute Resolution Centre and the Building Disputes Tribunal provide for the use of remote technology for both directions conferences and hearings.
8 For example, NZS3910:2013 provides (at clause 13.3).
9 K. Saville-Smith and R. Fraser Alternative Dispute Resolution: General Civil Cases (Ministry of Justice, June 2004) at

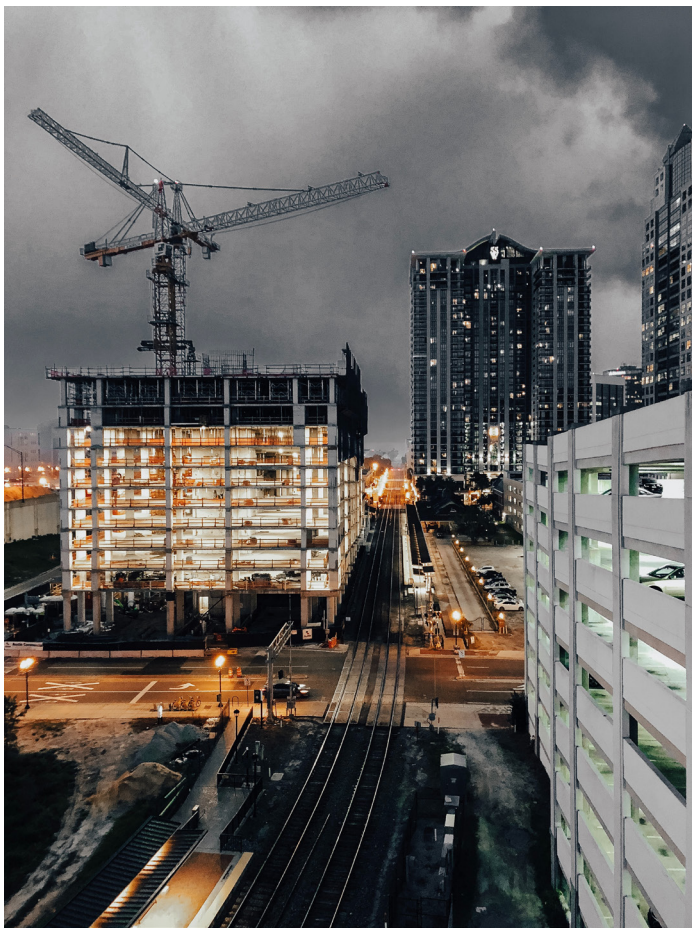
In the event the parties fail to appoint a mediator, construction contracts will often include a clause stating either party can refer the dispute to arbitration.[10] In terms of cost, parties are required to pay the mediator's fees, the cost of the venue (assuming it is not hosted at one of the parties' solicitors' offices), together with their own legal and expert costs.

Mediation is one of the fastest, cheapest and most flexible methods of resolving disputes in the construction industry. A 2015 survey of commercial mediations in New Zealand reported a settlement rate of at least 70%.[11] However, not all disputes will be suitable for mediation and not all parties will agree to mediate.

Key points

There are several key points that commercial parties should be aware of when in respect of dispute resolution and achieving a greater level of certainty in 2021 and beyond:

- The emergence of COVID-19 has accelerated the use of technology by the courts to facilitate hearings remotely, which may ease the financial and logistical challenges of traditional in-person proceedings. While the COVID-19 pandemic has resulted in the Court adapting to the use of technology, it remains to be seen how the Court will continue to use technology to facilitate hearings in the absence of a Level 3 or Level 4 lockdown.
- It is likely that we will see more parties including a clause in an arbitration agreement to provide for virtual or semi-virtual hearings to be held in the event of a change in Alert Levels. This may also help to reduce the cost of arbitration and reduce carbon emissions, which is becoming increasingly important.
- The use of online platforms to facilitate a Mediation, or to allow for expert witnesses to join an in-person mediation via an online platform, could result in cost savings for commercial parties. However, there are benefits to holding in-person mediations, where possible.



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10 For example, clause 13.3.5 of NZS3910:2013.
11 Morris and Schroder, LEADR/Victoria University "Commercial Mediation in New Zealand Project Report" (June 2015) at 10.