

NZDRC and NZIAC launch Contractual Adjudication service

By Sam Dorne and Peter Davey

NZDRC and NZIAC have now officially launched their Contractual Adjudication process. The aim is simple – increase access to justice by introducing a quick and relatively inexpensive procedure to settle most civil disputes in a proportionate manner.

Why now?

Litigation through the courts

There are significant delays in the District Court and the High Court in dealing with ordinary civil proceedings. The Ministry of Justice has advised that in 2021 the average time from the date of filing to disposal for ordinary court proceedings was 877 days for the District Court and 836 days for the High Court.

The waiting time is frustrating for parties, and increases the costs for everyone involved. Most people and businesses want to resolve their dispute in as timely and cost-effective manner as possible. This is why NZDRC and NZIAC have launched their Contractual Adjudication services.

In November, [the Rules Committee released a report on "Improving Access to Justice"](#) which recognised the significant problems with access to civil justice in New Zealand. Quite simply, there are a broad range of disputes that cannot be litigated by the average person due to the cost of litigation and the risk of adverse costs awards for unsuccessful claims. Even if a claimant can afford to pay those costs, they are often disproportionately high compared to the amount of the claim. Parties often have to pay considerable legal costs for a lengthy period, without achieving any resolution. The Rules Committee report also noted a decrease in confidence amongst practitioners in the District Court's ability to deal with civil claims, due in part to the length of time it takes to resolve a defended case.

One of the Committee's recommendations is that the Disputes Tribunal's jurisdiction be increased to hear claims up to \$70,000 (currently \$30,000), or up to \$100,000 with the agreement of the

parties. However, this proposed change will require a legislative amendment to the Disputes Tribunal Act 1988. Further, under the increased jurisdiction proposals, lawyers will still be generally excluded from attending the Disputes Tribunal, meaning parties would be unable to have legal representation at hearings. The Committee is not recommending any changes to the District Court Rules but it is proposing some changes to the resourcing of the District Court, such as appointing part-time judges.

Adjudication as an alternative

The adjudication process under the Construction Contracts Act 2002 was introduced to address the problem of dispute-related delays affecting cashflows in the construction industry. It has proved to be an effective way to resolve most construction disputes. However, individuals and businesses outside of the construction sector can also have their cashflows badly affected by delays because of disputes over payment for goods and services.

Adjudication under [NZDRC's Adjudication Rules 2022](#) (domestic) or [NZIAC's Arbitration Rules 2002](#) (international) offers parties to a dispute a cost-effective and robust dispute resolution process that results in a determination by an independent adjudicator, **typically within 35 working days**.

Who can use it?

Almost every person or business involved in a dispute can use the NZDRC and NZIAC Contractual Adjudication processes. For example:

- disputes arising in relation to a contract;
- disputes arising in relation to a non-contractual legal relationship (such as a trust); and
- disputes arising in relation to a cause of action in tort (such as a negligence or nuisance claim).

There are limited exceptions, such as matters of public policy or where the dispute is not capable of determination by adjudication under any law. However, most disputes that could be subject to

arbitration or legal proceedings can also be resolved by adjudication.

How it works

Overview

The adjudication is conducted on the papers. This means there is no costly formal hearing for the parties to attend. Parties simply put their arguments in writing and exchange evidence, and the Adjudicator makes a decision based on what is presented. The parties can choose to be legally represented or they can choose to draft their own arguments. Importantly, adjudication is a confidential process, unlike open court.

NZDRC's and NZIAC's Adjudication Rules 2022 are written in plain language so that people from all walks of life can understand the process and what is required. Contractual Adjudication offers parties access to a simple and effective procedure that is convenient and certain, and provides a determination that is provisionally binding and enforceable within 35 working days.

If a party fails to pay an amount due under a determination, then the party who is owed the money can recover the unpaid portion as a debt in any court of competent jurisdiction, as well as the reasonable costs and expenses incurred in recovering that debt.

Agreeing to adjudicate

Unlike litigation through the courts (where the parties can be dragged into proceedings), adjudication is a consensual process. It is desirable for businesses to agree to use adjudication at the contractual stage, to avoid disagreements as to process if/when disputes arise. Businesses should consider updating their standard contractual terms to include a [clause](#) on this.

However, adjudication can be started whether or not the parties have an existing adjudication agreement in relation to the dispute. If there is an existing adjudication agreement, one party can start adjudication themselves by serving a Notice of Adjudication. If there is no adjudication agreement already in place when the dispute arises, then the parties must agree to adjudicate and enter into an adjudication agreement. NZDRC and NZIAC offer [Model Agreements](#) that parties can use at any stage if necessary.

Procedure

The process is similar to construction contract adjudications, which are well-established and have been reviewed and refined by decisions from the High



Court. The claimant serves a claim with supporting documents and evidence. The respondent then serves a response with its supporting documents. The claimant can reply to the matters raised by the respondent, and the respondent can provide a rejoinder. No counterclaims can be raised, but set-offs are permitted. If a respondent wants any additional relief, then it can either obtain the agreement of the other parties or start a separate adjudication.

Costs

The aim is to provide a service that is both proportionate and cost effective. The overall cost of the adjudication is generally met between the parties, and each party bears their own costs. The parties will need to provide a payment by way of security at the start of the process.

NZDRC and NZIAC offer a fixed-fee option for disputes that are relatively low value (under \$100,000) and of low complexity. This fixed-fee scheme provides the parties with the certainty of a transparent cost and allows them to make an informed decision about whether adjudication is right for them from the outset.

If the fixed-fee service is not an option, parties can still take advantage of adjudication by

proceeding as a General Claim. The fees for this are calculated based on the time spent by the Adjudicator at their hourly rate – however, NZDRC and NZIAC handles all the administrative and support work to ensure that the Adjudicator's time is only spent on dealing with the technical aspects of the case.

Summary

With the increasing delays and escalating legal costs within New Zealand's court system, businesses and individuals need an efficient alternative to lengthy and expensive litigation. It is expected that as time goes on adjudication will become the norm for businesses when disputes arise.

The Contractual Adjudication service offers an immediate solution to individuals and businesses looking for a cost-effective and timely way to resolve disputes, based on a well-established adjudication procedure.

Find out more about the Contractual Adjudication service on the [NZDRC website](#) (domestic) or [NZIAC website](#) (international).

About the authors



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Peter is a barrister and Fellow of the Arbitrators' and Mediators' Institute of New Zealand. He was the recipient of the Sir Ronald Davidson Award for excellence in arbitration award writing in 2020. He acts as counsel in civil and commercial disputes and also accepts appointments as a mediator and arbitrator.



Sam works remotely as a Knowledge Manager in NZDRC's Knowledge Management Team.

He recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.