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The Belgian way: Applying Dispute Boards and Other ADR Techniques for Belgian Construction Projects

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ADR Techniques in Belgium

Three ways to solve a dispute non-amicably:

- State Courts
- Arbitration
- Binding third-party decision

Dispute Boards are uncommon (non-existent?)

Binding third-party decision is the most commonly used ADR technique in Belgium

Binding third-party decision ~ notion

A binding third-party decision implies that parties agree that a third party (who is neither a judge nor an arbitrator) will provide a binding assessment regarding one or more aspects of their (factual or legal) relationship.

Third party = independent and impartial expert

The binding third-party decision has the legal force of an agreement.



Binding third-party decision – how and what

No legal framework

Ad hoc

Institutional: <https://www.cepani.be/technical-expertise/>

Both for technical and legal disputes

Binding third-party decision – standard language

- a) In urgent cases, or regarding disputes to which the present article in this Contract has expressly been made applicable, a dispute may be presented to an independent and impartial expert, appointed by mutual agreement between the Parties. This expert may be either a physical person or a legal entity.
- b) Failing an agreement on the expert to be appointed within 6 Working Days after a Party has announced its intention to invoke the present article, the expert will be appointed by the President of the Court of First Instance of [●].
- c) Articles 970 and 977 of the Belgian Judicial Code apply mutatis mutandis to the challenge or replacement, respectively, of the expert.
- d) The Parties shall assist the expert(s) in every way in carrying out his(their) mission, namely by providing him(them) with the necessary documents and giving access to the sites where he(they) may require verifications and investigations to be carried out.
- e) The expert's costs will be borne by the Party (or Parties) ruled against.
- f) The expert will give his advice within 20 Working Days, counting from the date on which the dispute was presented to him. Failing the expert's advice within this period, each Party has the right to submit the dispute to the competent court.
- g) The expert's fact-findings and advice will definitively and irrevocably bind the Parties, except in case of any apparent unreasonableness or unfairness.

Binding third-party decision – status

The binding third-party decision = the **will of the parties**

Decision is binding, but does not have the value of a judgement or an award

- No enforcement
- Limited review by the courts

Binding third-party decision – limited judicial review

Mainly **formal review**:

- Existence of an agreement to submit the dispute to a binding third-party decision
- Out-of-scope decision
- Respect of applicable procedural rules (if any)
- Violation of public order or imperative rules
- Gross or obvious mistakes
- Absence of formal motivation
- Respect of the rights of defense

Content wise: marginal review only of whether the decision is obviously unreasonable or unfair

Binding third-party decision – in practice

It works:

- Quick and binding resolution by an independent expert
- Quick clarity helps to further project purpose, and keeps the parties out of the trenches
- Binding third-party decisions are generally respected, or lead to an agreement between the parties
- Binding third-party decisions are rarely annulled by the courts

As always: contracts do not match reality

- Unrealistic timelines (always)
- Good practice would be to instruct the expert to draw up terms of reference and establish a procedural timetable the expert that intends to follow

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