Dispute boards: the Australian experience – Part 2

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The happy coexistence of Dispute Adjudication Boards with statutory adjudication regimes

As discussed in Part 1 of this article, published in the June 2012 edition of *CLInt*, adjudication in Australia may be initiated in exercise of rights arising out of contract, or conferred by statute. A similar state of affairs exists in the United Kingdom. While arguments have been circulated to the effect that the existence of a statutory scheme forecloses the use of contractual adjudication, it is the view of the author that in Australia, their coexistence is not problematic. Dispute Adjudication Boards (DABs) are perfectly compatible with the statutory regime and have significant utility. This Part 2 will describe the statutory schemes in both Australia and the United Kingdom and draw attention to certain important differences between the two. Further, it will explain how, in Australia, statutory and contractual adjudication can (and should) happily coexist.

Adjudication: statutory v contractual

Statutory adjudication in Australia

Statutory adjudication in Australia is provided for by security of payments legislation in the States and Territories. It forms an important feature of a scheme designed to ensure progress payments are made to contractors and subcontractors, as a measure of protection against delays and defaults in payment by owners during a construction project.

The rationale for these statutory provisions arises from the difficulty that contractors, subcontractors and those further down the contractual chain face in obtaining expeditious payment for the work they have carried out. In New South Wales, for example, the legislative intent of the Parliament was to 'stamp out the... practice of not paying contractors for work they undertake on construction'.

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This problem has two causes. The first is that, in the event of a payment dispute, the party further up the contractual chain holds the money and only a court or arbitrator can force them to pay. Due to the cost and difficulty of obtaining an award, the adage that 'possession is nine tenths of the law' is apt in these circumstances. As a result, the non-payment of legitimate claims for work done has been a serious problem in the industry, both in Australia and internationally.

The second problem arises from the risk that the party further up the contractual chain will become insolvent. In these circumstances, the absence of a contractual relationship between subcontractor and owner will mean that the subcontractor will not get paid, other than whatever amount it can obtain as an unsecured creditor in the winding-up of an insolvent head contractor.

The current scheme in Australia focuses upon easing the contractor's difficulty in getting paid by providing a quick enforcement process in the form of a statutory progress payment regime, backed by adjudication. For example, under the Building and Construction Industry Security of Payment Act 1999 (NSW) (the 'NSW Act'), if a construction contract makes provision for progress payments, the legislation effectively turns the contractor's entitlement into a statutory one. If the contract does not make such provision, then certain default provisions take effect so that the contractor is entitled to monthly progress payments. Armed with this statutory entitlement to progress payments, the contractor may make a 'payment claim' setting out the amount it claims to be due. The owner must respond with a 'payment schedule', setting out the amount the owner believes to be due and giving reasons for any difference from the payment claim.

If the amount shown in the payment schedule is less than the amount claimed, or if the owner fails to pay, the contractor may apply for adjudication of the matter. The adjudication application must be made to an authorised nominating authority chosen by the contractor who then refers the application to an eligible adjudicator. The owner is entitled to make a written response to the contractor's adjudication application but apart from that, the NSW Act does not specify any other procedures to be followed. Procedure is therefore effectively at the discretion of the adjudicator. However, a determination must be made within ten business days of the adjudicator's appointment, unless the parties agree otherwise.

If the owner does not pay the amount due under the adjudicator's determination, the contractor may give notice of an intention to suspend work and may also obtain an adjudication certificate which can be filed in court as a judgment for a debt.

The NSW Act applies to any 'construction contract' that relates to work carried out inside New South Wales. This is true even where the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.

It is important to note, for the purposes of investigating the compatibility of the statutory scheme with contractual DABs, that it is not possible to exclude the operation of the NSW Act by contract. However, when a construction contract falls under the scope of the legislation, the adjudication mechanism provided by the legislation does not limit 'any other entitlement that a claimant may have under

a construction contract' or 'any other remedy that a claimant may have for recovering such other entitlement'. Furthermore, the NSW Act does not affect any other rights that parties may have under contract, and does not affect any civil proceedings that may be commenced under the contract. The significance of these provisions will be examined below.

Statutory adjudication in the UK

The UK statutory adjudication regime is that which exists under the Housing Grants, Construction and Regeneration Act 1996 (the 'UK Act'). This legislation came into force on 1 May 1998 together with the Scheme for Construction Contracts (England and Wales) Regulations 1998 ('the Regulations'). The UK Act introduced for the first time into English law statutory rights for parties to a construction contract to refer disputes to adjudication. Where these rights are not expressly provided for in the construction contract, the Regulations operate as a default and set out those provisions that are specific to adjudication, enforcement and payment and are to be automatically applied.

Under the UK Act, there is no positive duty to seek adjudication but the right of either party to do so is now a compulsory aspect of any construction contract entered into after 1 May 1998 in England, Wales and Scotland. The definition of 'construction contract' is very broad and encompasses the main contractor, subcontractors and any other service related to the construction project. This may include contracts for the provision of architectural, design or surveying work, the provision of advice on building, engineering or interior and exterior decoration, and also landscaping.

The procedure for adjudication as provided for in the UK Act and the Regulations is as follows:

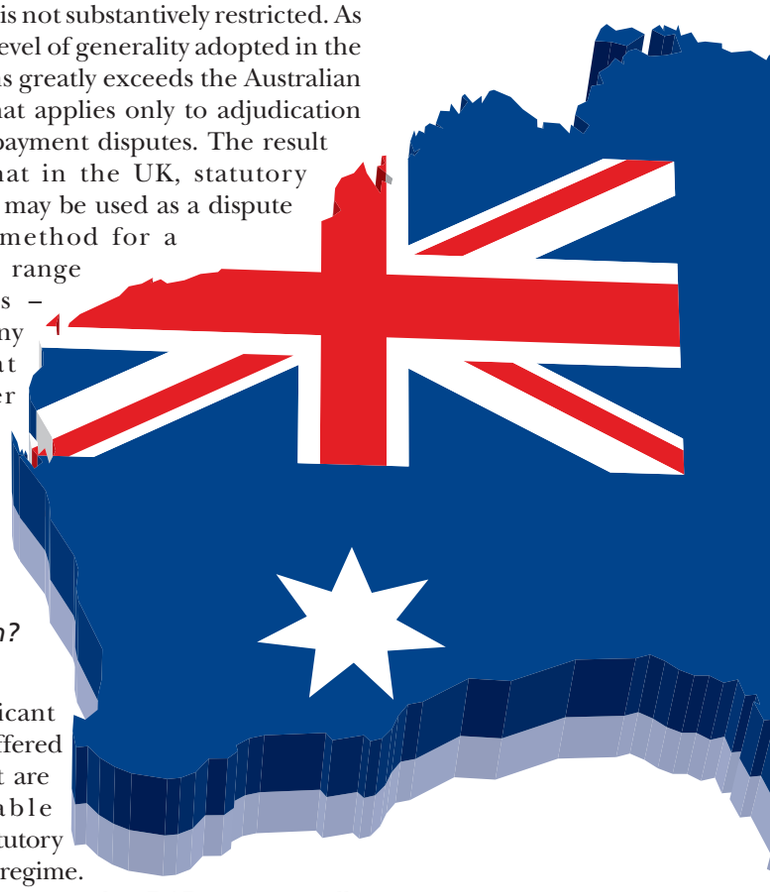
- either party may give notice at any time to refer a dispute to adjudication;
- an adjudicator is then appointed and the dispute is referred to him or her;
- once appointed, the adjudicator has 28 days to reach a decision. This may be extended by the parties upon agreement or by the adjudicator where he or she receives the consent of the party by whom the dispute was referred; and
- the adjudicator is to take the initiative in ascertaining the facts and the law.

Once a decision has been reached, it is binding in the interim until it is finally determined by legal proceedings, arbitration, or agreement between the parties.

It is important to note that the UK Act operates on quite a different basis from the Australian legislation. While the NSW Act is focused on the establishment and enforcement of a right to progress payment, the UK Act introduces a general statutory right for a party to a construction contract to insist upon adjudication of a dispute. This is drafted as follows:

> 'A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.'

The right is therefore expressed broadly, and adjudication is not substantively restricted. As a result, the level of generality adopted in the UK provisions greatly exceeds the Australian legislation that applies only to adjudication of progress payment disputes. The result of this is that in the UK, statutory adjudication may be used as a dispute resolution method for a much wider range of disputes – essentially any matter that arises under the contract.



Do DABs offer any advantages to statutory adjudication?

There are everal significant advantages offered by DABs that are not available under the statutory adjudication regime. These features mean that DABs are generally more commercially attractive to the parties to a construction contract.

First, statutory adjudicators are appointed by an authorised nominating authority, while DABs are constituted of members chosen directly by the parties. This provides a significant, although somewhat intangible benefit, as the parties are more likely to respect the decisions of adjudicators they have chosen. This feature is likely to reduce the likelihood of a challenge to a decision

and contribute to improved finality. The ability for parties to select adjudicators based upon their reputation and legal or technical expertise is a clear advantage to an otherwise unknown adjudicator appointed by a third party nominating authority, as is the case under the statutory scheme.

Secondly, DABs can be established by the parties from the outset of the project. In contrast, statutory adjudicators are appointed on an ad hoc basis, in response to progress claim disputes that have already arisen. Additionally, statutory adjudicators are expressly limited to deciding a dispute based on information derived from the statements of claim and response of the parties. Clearly, a DAB will be far better acquainted with the particulars of the parties and the project and will therefore be more likely to deliver an appropriate determination upon any dispute. By contrast, a statutory adjudicator will have no prior knowledge of the project or parties. This increases the likelihood that decisions will be unsatisfactory, perpetuating the duration of the dispute through arbitration or litigation.

A third but related advantage is that DABs, because they are established at the outset of the project and meet regularly throughout its duration, are able to identify issues that may give rise to disputes in their early stages. Routine meetings provide a forum for reporting and discussion of conflicts and encourage a more collaborative approach than exists under the statutory scheme.

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Another important advantage that DABs have over statutory adjudication under the Australian legislation is the fact that they may be used to decide any dispute that arises under the contract. The breadth of the DAB's jurisdiction is entirely at the discretion of the parties in their contractual negotiations. The statutory adjudication regime, by contrast, is narrower and is available only for the adjudication of progress claim disputes. As explained earlier, this is unique to the Australian system as the UK statutory adjudication regime allows a general right of adjudication for any dispute arising under a construction contract.

Are DABs really compatible with the statutory scheme?

With all these significant benefits, the following question thus arises for parties interested in dispute resolution: can we still use DABs, given the existence of the statutory alternative? In contrast to the commonly held view of the law in the UK, the Australian statutory adjudication mechanism under the security of payments legislation does indeed allow for the coexistence of contractual adjudication. There are several reasons for this.

The first point to be made is that which has been previously noted as an advantage of DABs over the statutory scheme. That is that the Australian statutory scheme only provides for adjudication of progress payment disputes, while contractual DABs may be appointed to hear any type of dispute arising from a construction contract. As explained, this is a narrower statutory position than that in the UK where a general right of adjudication exists for any dispute arising under the construction contract. As such, in Australia there is no overlap between the jurisdiction of statutorily appointed adjudicators and contractually appointed adjudicators where the subject matter of a dispute does not concern progress payment claims. As such, DABs can clearly be used for disputes arising, for example, from changes to design specifications, construction methods or defect claims.

The more difficult question is whether DABs can happily coexist with statutory adjudication where the substantive issue of a dispute is a progress payment claim. At first glance it would appear that in Australia, the statutory adjudication legislation replaces contractual adjudication in Australia. There are two related reasons for this.

The first is that a party-appointed DAB is unable to act as the adjudicator under the security of payments regime. The legislation requires that an adjudication application be made to an authorised nominating authority which then refers the dispute to an eligible adjudicator. This leaves no room for the parties to select their own adjudicator. It is therefore not possible for a party-appointed DAB to make a determination under the statutory regime.

Therefore, the only way in which the decision of a DAB could survive the appointment of a statutory adjudicator is if the legislation permitted it to replace the decision of the statutory adjudicator. This, however, is also not possible because the statutory scheme explicitly states that parties cannot exclude its operation through contractual provisions. As such, a purportedly binding decision by a DAB cannot stand because the contractor retains the statutory right to have that same payment dispute decided by an adjudicator appointed by an authorised nominating authority. Exercise of this right would render any decision of the DAB voidable by the determination of the statutory adjudicator. This is the second reason why statutory adjudication is technically incompatible with contractual adjudication.

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Both these contentions, however, fail to overlook one important point. Nothing in the legislation mandates the use of statutory adjudication; it merely gives the parties the right to refer the dispute if they choose. Moreover, nothing in the legislation precludes the establishment of a DAB by the parties. As mentioned earlier, the adjudication provisions expressly do not limit 'any other entitlement that a claimant may have under a construction contract' or 'any other remedy that a claimant may have for recovering such other entitlement'. Recall also that the provisions do not affect any other rights that parties may have under contract, including the capability to commence civil proceedings under the contract.

What these provisions mean in relation to DABs is that the decision of a statutory adjudicator only operates to override a DAB decision if a party chooses to submit a dispute to statutory adjudication. If, however, they choose never to exercise the right of statutory adjudication, their contractual rights and obligations with respect to DABs remain intact. Practical experience has shown that where parties have agreed to establish a DAB to oversee a project, they prefer to allow it to make final and binding decisions on all disputes under the contract. Of course, the statutory adjudication option remains available to any contract party willing to pursue it but, from a common-sense perspective, there is no reason to choose a security of payment action when the contract provides an alternative that is commercially superior in many ways.

Australian experience strongly supports the argument that properly structured DABs, while technically incompatible with the security of payments regime and apparently redundant in terms of payment disputes, can operate very successfully in a legal environment that incorporates a statutory adjudication mechanism similar to that first developed in the UK. It is simply a case of practical considerations winning out over legal technicalities as parties favour DABs over statutory adjudication.

Conclusion

Dispute boards and their several forms clearly have a valuable role to play in the minimisation of dispute costs in the construction industry. Dispute Resolution Boards (DRBs) offer a non-binding method of dispute avoidance that attempts to provide a 'release valve' for contractual tension to prevent disputes erupting altogether combined with persuasive recommendations for their resolution if they do. DABs provide a binding method of

dispute resolution with the special benefits of ongoing close familiarity with the project and party-controlled selection of the panel.

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Combined Dispute Boards (CDBs) allow parties to avail themselves of these benefits, while retaining the flexibility to decide at a later time whether the recommendations of the board will be binding or persuasive.

While dispute boards have not yet been accepted in Australia on a scale comparable to countries such as the United States, their obvious benefits merit a genuine consideration by parties considering dispute resolution options for a construction project. The efficiencies achieved through minimising dispute costs in construction contracts are not to be understated and each of the models discussed herein may deliver upon this objective when used in projects for which they are appropriate. They are thus a valuable tool in the inventory of any party seeking to improve outcomes in the projects they undertake.

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