The regimes of dispute resolution

by DOUG JONES

IN THE LAST few years "alternative" dispute resolution regimes in construction contracts have became more and more detailed - and often, more and more convoluted. So it's not surprising that the enforceability of these regimes is more and more an issue before the courts - ironically, the very same courts the regimes have been designed to bypass.

It is common, these days, to encounter contracts with four or five tiers of supposedly mandatory alternative dispute resolution procedures before either party is allowed to proceed to arbitration or litigation.

Frequently, the parties must first participate in direct "on the run" negotiation, followed, if this is unsuccessful, by successive bouts of executive negotiation, mediation, non-binding expert determination, binding expert determination, arbitration and/or litigation.

These provisions are usually drafted in quite specific terms, stipulating the notices that must be given, the timeframes and procedures for each of the processes and the consequences of success or failure at each stage.

Conversely, some regimes lack detail, and this "haziness" creates its own difficulties.

When a dispute arises and it comes to the crunch, one of the parties to a contract will often not want to participate in the stipulated dispute resolution procedures, even though at first glance it has bound itself to do so.

The party may just want to be difficult. It may be keen to delay things as long as possible. It may genuinely believe the procedures in the contract are inappropriate. It may doubt the other party's bona fides. Or it may be concerned about the rules for the processes - or the lack of rules.

The issue generally comes to a head when one of the parties commences litigation, even though the contract says the parties must participate in the alternative dispute resolution procedures before going to court.

The party wishing to enforce the contract's procedures then typically responds by applying to a court for a stay of the litigation. There is no legislation enforcing dispute resolution clauses in contracts, other than arbitration clauses.

However, it is clear that if parties have entered into an agreement (for example) for the mediation of their disputes as a pre-condition to the commencement of formal proceedings, a court may make an order staying any litigation and effectively enforcing the agreement.

But the agreed dispute resolution regime must be sufficiently "certain", as well as being a pre-condition for litigation or arbitration.

In addition, the courts draw a distinction between "agreements to agree" and "agreements to negotiate". The former require the parties to reach agreement through the negotiation process, and are unenforceable, while the latter simply require genuine participation in the process.

Five recent court cases provide some guidance on the types of regimes that may be enforced.

In the first, the contract said the parties must participate in mediation, but the process for doing so was not defined, except for a requirement to negotiate in good faith.

A dispute arose. The parties wrote to each other, setting out the procedures to apply and agreeing that arbitration proceedings commenced by one of the parties would not continue until after the mediation.

The court decided that these procedures, developed and agreed only after the dispute arose, were sufficiently certain to render the dispute resolution regime enforceable, and ordered a stay of the arbitration pending the conclusion of the mediation process.

The second court case provides a contrast. The same judge refused to enforce a mediation clause in a contract because it was not sufficiently certain.

This time the contract said the mediation was to be administered by a certain body. This body had a set of guidelines for mediation and a "standard form" mediation agreement, but the contract did not refer to either of them.

The court decided the clause failed to confine the mediation process to a process in accordance with the guidelines. It also decided the guidelines themselves did not require the parties to adopt the standard form mediation agreement.

As the judge put it, the mediation process was "open-ended, indeed unworkable", because it would "come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered".

The judge also regarded the agreement's requirement for the parties to negotiate in good faith as "obscure", saying it would be difficult for a party to assert a state of mind it did not in fact have - and even more difficult to compel a party to commit itself to the "vagueness" of an obligation to negotiate in good faith.

In the third case, the dispute resolution clause called for expert determination. One of the parties argued the clause was void for uncertainty, and could not be enforced by the court, because it failed to specify a way of determining, with sufficient certainty, the procedures to be adopted by the expert and the rules for evidence, representation of the parties, discovery and inspection, confidentiality and costs.

Certainly enforceable

The judge decided the court had no jurisdiction to determine the procedures to be followed in the expert determination. This was a matter either for agreement between the parties or for determination by the expert once he or she had been appointed. On this basis, the court concluded the dispute resolution clause had sufficient certainty to be enforceable.

In the fourth case, a judge of the NSW Supreme Court set out a useful series of criteria he believed would need to be satisfied before a mediation clause (or any other alternative dispute resolution clause) would be enforceable:

❑ The contract should make completion of the agreed dispute resolution process a condition precedent to the commencement of court (or arbitration) proceedings

❑ The agreed process must be certain. There cannot be stages in the process where further agreement on some course of action is needed before the process can proceed.

❑ The administrative processes for selecting a mediator (for example) and determining his or her remuneration need to be included in the agreement. If the parties cannot reach agreement, a mechanism for a third party to determine the mediator and his or her remuneration will be necessary.

❑ The contract should set out in detail the process of dispute resolution to be followed, or incorporate these rules through references to other documents.

The fifth case returned to an issue dismissed for "vagueness" in the second case: the scope and enforceability of a duty to negotiate "in good faith".

The court acknowledged that the parties in a dispute resolution process must be free to use all the tactics available to them to secure a favourable outcome.

It said that while tactics such as threatening to withdraw, actually withdrawing and delaying the acceptance of a proposal for a resolution could possibly be regarded as conflicting with a duty of good faith, these tactics are not necessarily in breach of such a duty.

But on the facts the overall conduct of one of the parties indicated it was not complying with the "good faith" clause. Instead, it was essentially seeking to frustrate the other party's attempts to invoke the dispute resolution provisions.

The offending party was found to have crossed the "good faith" line by:

❑ Not demonstrating its willingness to participate.

❑ Rejecting the process suggested by the other party - even though it was the process set down in the contract.

❑ Acting contrary to its word.

❑ Flatly refusing to pay claims, without discussion.

❑ Failing to attend or prepare for meetings prescribed by the dispute resolution clause.

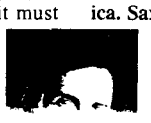
❑ Failing to respond to communications.

In the light of these findings, one could be forgiven for thinking the victim of these tactics would win in court.

But the court went on to find some "essential" details were missing from the dispute resolution clause, so it was void for uncertainty and could not be enforced! ■

❑ *Doug Jones AM is a construction partner with the national law firm Clayton Utz.*

■ Clough chairman **Harold Clough** has won an Australian Export Heroes award for 2000 from the Australian Institute of Export. "For any Australian company to survive and grow these days, it must benchmark its performance globally," Clough says. "We have done this through export-



art has led the successful development of business for Thiess in Indonesia in recent years and has helped develop the company's presence in South America. Saxelby has been responsible for significant growth of the company's operations in NSW and ACT.

network and has established the company's first office outside the Asia Pacific region, a London office now employing 43 engineers and support staff. **Ian Hopkins**, who has been the company's md and ceo, continues as ceo.

■ *Parbury Technologies has appointed*

service engineer for mobile equipment in Victoria. Ward, based in Melbourne, will be responsible for the company's drilling, compacting and paving products in Victoria, SA and Tasmania. He has worked for Svedala for five years in the WA goldfields, where he has been mainly involved with the company's drilling

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