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# Maintaining the alternatives in dispute resolution

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Construction projects pose a number of problems that are not as frequently confronted in other commercial contracts. These projects are often long term in nature and involve risk that is often of such a nature that it cannot be safely or easily priced at the time of entering the contract. In addition, the subject matter and scope of each construction project are often very complex. The contracts themselves can be large, technical and include various voluminous documents, and the potential for inconsistency and ambiguity between the various parts of the contract is high. This is all compounded by the fact that construction contracts are usually awarded after a process of competitive tendering. This means that the contracts are often let on slim margins, the result being that there is a greater likelihood that an aggrieved party will attempt to recover its losses.

Until recently, the construction industry has turned to either arbitration or litigation to resolve its disputes. The evolution of dispute resolution in this country in the last 10 years means that parties now have available to them legitimate alternatives to traditional litigation. Indeed, litigation has evolved to the extent that, in certain circumstances, it can also provide for the quick resolution of disputes. The dilemma is how to decide between the various options.

Arbitration has a long history as an alternative to national courts for the resolution of commercial disputes. It promotes party autonomy, can help parties save both time and money, and provides a confidential forum for the resolution of commercially sensitive disputes. The theory, and original practice, was that the parties would accept that the process may not be as thorough as that undertaken by the courts, but this would be outweighed by significant procedural advantages possible through arbitration. However, domestic arbitration has ultimately become like the system it was originally designed to replace and now has a reputation for being unable, in practice, to deliver speedy and cheap dispute resolution. One of the reasons for this is that there is a rarely resisted temptation in arbitration to imitate traditional court procedure. In many instances, the lawyer's natural conservatism and the arbitrator's fear of criticism by a court have resulted in arbitration procedure being more cumbersome than the more efficient procedures available in the commercial courts.

This does not have to be the case. Domestic arbitration is capable of offering significant procedural flexibility. The problem stems from the attitudes and approaches of the parties, their lawyers and the arbitrators. When an arbitration agreement is drafted, the parties and their lawyers should discuss what they want to get out of their arbitration.

Once a dispute has been referred to arbitration, there should be communication between all interested parties so that the parties and their lawyers can, as they should, make important decisions as to how they want the arbitration to proceed.

Court styled procedure is not the only option available, but it is necessary that the arbitrators and lawyers have the experience and expertise necessary to give effect to the parties' requirements. That this can be the case is confirmed by the practices common in international commercial arbitration.

At the beginning of the 1990s, arbitration was seen as the only serious alternative to litigation. However, the desire to find more efficient methods of resolving disputes persists, and the last decade has seen another fundamental change in the way in which disputes are resolved in the construction industry. In particular, there has been a change to other more cost effective and efficient dispute resolution procedures. Thus, innovative, flexible and non-binding processes are continuing to increase in popularity and facilitate the resolution of a large number of disputes before they reach arbitration or litigation. The array of 'alternative' processes may seem daunting, but the key is to understand that the underlying feature of alternative dispute resolution is its creativity and flexibility. Put another way, it is a case not of a party choosing *between* alternative dispute resolution procedures, but rather of deciding *what it wants to get out of* an alternative dispute resolution procedure and designing a process accordingly.

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Adjudication is the new flavour of the month. A number of standard form contracts provide for the binding determination of disputes by an expert. Since the early 1990s, government policy in NSW has been to include in its contracts an agreement to refer the dispute to an expert. More recently, statutory adjudication has been adopted in a number of jurisdictions. In NSW, the *Building and Construction Industry Security of Payment Act 1999* allows contractors and subcontractors to obtain a prompt interim payment of their claims, prior to the final resolution of the dispute. Where there is a dispute over the amount of a payment claim, the dispute can be referred to an adjudicator whose determination can be lodged with the court as if it were a judgment.

The courts have responded to the 'challenge' presented by the various ADR processes and have reformed their procedures to speed up their processes and reduce the costs of litigation. Judicial management techniques and trends have become firmly entrenched within the Australian judicial culture. This is not only a result of the increasing complexity of civil cases, but is also because of the number of cases the courts are required to handle, the cost of administering justice, and changing government policy.

Parallelling the development of new methods of case management are innovative processes designed to help the courts resolve disputes more effectively and efficiently. For example, the practice of referring questions to an outside expert or referee for determination in order to assist the court in deciding the matter is becoming increasingly common in construction litigation in NSW. Under Pt 72 of the *Supreme Court Rules 1970* (NSW), the court may make orders for reference to a referee for the inquiry and report on the whole of the proceedings or any question or questions arising in the proceedings. The referee may conduct the proceedings as he or she sees fit, is not bound by rules of evidence, and may inform himself or herself in relation to any matter in such manner as he or she thinks fit. The court may then adopt, vary or reject the referee's report in whole or in part. The court may also require an explanation from the referee, or remit for further consideration the whole or part of the matter for a further report, or decide any matter on the evidence taken before the referee, with or without additional evidence.

The options available have never been so broad. A detailed understanding of the options, their advantages and disadvantages is critical to ensuring effective application of the different methods of resolving particular issues. ●

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