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Legal Bulletin

"Dispute Resolution – A SWOT Analysis on the Different Models and Dispute Resolution Institutions"

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The author has endeavoured to provide a synopsis of the various dispute resolution institutions in a fashion that is stripped down to the basics. The analysis is based on the better part of 25 years of dispute resolution experience in a variety of cross-jurisdictional dispute resolution forums. It not only accords with the author's experience but also that of his colleagues at Lovegrove Solicitors, partners John Perry and Justin Cotton, and Special Counsel Miro Djuric who collectively have about 60 years experience in construction law. *(To find out more about the backgrounds of the above mentioned senior lawyers, simply visit Lovegrove Solicitors online, www.lovegrovesolicitors.com.au).*

John Perry and the author in particular, on account of the length of time that they have practised, have witnessed the halcyon days of arbitration in the 80's, followed by the gradual demise of arbitration in the 90's. They have then witnessed the emergence of mediation as being "the next big thing" and then some developing cynicism with respect to the same, the lessening reliance upon the courts and the emergence and proliferation of tribunals. The last 25 years have been characterised by "seismic shifts in dispute resolution paradigms", the redundancy of certain models and the metamorphosis of others.

This paper will canvass the respective merits of established and emerging dispute resolution institutions.

The dispute resolution systems that will be subject to this presentation are:

- The Courts
- Arbitration
- Mediation
- Expert Determination
- Tribunals
- Adjudication

The analysis will adhere to a template rigour that will comprise

- brief description of the system
- the virtues
- the shortcomings
- cost impacts
- time impacts
- commercial impacts

1. THE COURTS

Description

In most jurisdictions there are courts of lower and higher jurisdiction, such as:

- Supreme Court - higher jurisdiction
- District or County Court - intermediate jurisdiction
- Local or Magistrates Court - lower jurisdiction

By jurisdictions, it is ordinarily meant the monetary limit e.g. $100,000.00 being the jurisdictional limit for a Magistrates or Local Court, or a Supreme Court with unlimited financial jurisdiction.

Courts are formal, very much reliant on interlocutory processes and are presided over by Judges or Magistrates. One must be a qualified lawyer and ordinarily an experienced if not outstanding barrister as a condition of appointment.

Proceedings are characterised by statements of claim, statements of defence, counterclaims, third party motions, the costly discovery process, sometimes interrogatories and ultimately if matters do not settle the matter proceeds to trial. A trial can take anything from days to weeks and in the worst case scenarios many months and sometimes years.

The Virtues

The courts have been around for hundreds of years; they are tried and true and tend to attract high calibre decision makers. Needless to say the most venerated are those in the courts of higher jurisdiction which are the epicentres of the finest legal minds.

Courts also play host to a well established interlocutory rigour that for better or worse has been honed over many of generations of decision making.

Courts of higher jurisdiction also provide determination precedents that bind tribunals, courts of lower jurisdiction and adjudicators. The courts of higher jurisdiction could be regarded as the "judicial cathedrals" in this respect. Importantly the courts allow for multi party proceedings and the consolidation of multi defendant matters. This is rarely possible with either arbitration or adjudication and is a serious shortcoming in respect of the later.

The Shortcomings

Matters can take a long time to resolve. Time is money and litigation can be a protracted and disquieting process and it tends to repudiate commercial relationships.

It is a hostile form of dispute resolution, hence the term adversarial. Just think of the parlance applicable to this arena: statements of claim, statements of defence, counterclaims, and interrogatories. It is to be about winners and losers but rarely does the winner take all. It is probably more accurate to say the loser suffers more.

Cost Impacts

Although there are court filing fees one of the advantages of the courts is that one neither pays for judges nor magistrates. This makes this form of dispute resolution somewhat cheaper than either arbitration or adjudication.

The real cost however is in the retention of the lawyers, the experts and in larger matters these costs can be exorbitant. If a case degenerates into a litigation juggernaut the cost of legal advocacy can be "eye wateringly" expensive.

Time Impacts

When compared with mediation or negotiated outcomes it is a lengthy and protracted process. Long cases are exhausting, both financially and emotionally and distract clients from core business.

Commercial Impacts

When two businesses become embroiled in litigation they effectively go to war. In countries like Japan litigation is anathema as it destroys business relationships, it culminates in loss of face and leaves long term business scars. A negotiated outcome is more conducive to the protection of commercial relationships.

2. TRIBUNALS

Tribunals have been burgeoning in every jurisdiction. Governments have seen them as being ostensibly cheaper and faster than the courts and attended by less formality. I cannot provide an informed expose on all judicial manifestations of this institution and although our firm has had a lot of experience in NSW District and Supreme Court matters, our tribunal experience is limited to the Administrative Decisions Tribunal in NSW and the Domestic Building List in Victoria (the Domestic Building List of the Victorian Civil Tribunal (VCAT).) I will case study the latter body.

The decision makers are called members rather than judges but they have to be experienced and qualified lawyers. The interlocutory process is reminiscent of the courts, save for a couple of key differences:

- mediation at an early stage is compulsory
- compulsory conferences are common
- it is rare for interrogatories to be ordered

Virtues
There are more established systems of alternative dispute resolution (ADR). The mediums of mediation and compulsory conferences lend themselves to settlement at an earlier juncture than the courts. This has to be good.

Shortcomings
Miro Djuric, Special Counsel with our practice, finds that in his experience "the tribunal process is increasingly akin to the courts, just as costly and takes the same amount of time to resolve."

Justin Cotton, in like vein, recalls one multi-million dollar dispute to do with a multi unit development that "took four years to conclude and the time and the process proved to be both frightening and prohibitively expensive for his plaintiff clients". Justin added that: "Admittedly this case was a worst case scenario, and generally matters do get resolved faster in a tribunal forum than the courts. However this is not always so."

Cost Impacts
Like the courts, parties do not have to pay for the presiding member nor do they have to pay for mediators on conveners of a compulsory conference. In this regard the judicial machinery costs are considerably cheaper than either arbitration or adjudication. Again like the courts, the process is heavily dependant on expert advocacy and expert technical advice and in the main such deployment is not cheaper than the courts.

Time Impacts
From the initiation of a dispute resolution process to its conclusion our experience is that the Domestic Building List will probably be 20% faster than the courts. This is because as mediation and compulsory conferences are pretty much "hard wired" into the VCAT dispute resolution fabric there is a greater chance of earlier outcome, albeit a compromised outcome.

Commercial Impacts
The impacts are similar to the courts be it court or tribunal litigation.

3. ARBITRATION

Arbitration is nowhere near as popular as it used to be. When I started my construction law career in the late eighties the large majority of disputes were resolved by arbitration; particularly residential disputes. What subsequently occurred was a proliferation of inter-jurisdictional acts of parliament such as the Home Building Act NSW and the Domestic Building Contracts Act Victoria. These Acts ripped arbitration away from the residential dispute resolution fabric.

Nevertheless some commercial disputes are still arbitrated. Arbitration is governed by the Commercial Arbitration Act. Arbitrators need not be qualified lawyers. In the building sector they are often retired builders or architects or quantity surveyors who have a working grasp of the elementries of construction law or in other arenas the rudiments of the apposite legal paradigm.

The only parties that can involve themselves in an arbitration are those entities/persons that are party to the contract. Furthermore, the contract must have an arbitration clause that states that arbitration is the exclusive dispute resolution forum.

Ordinarily the interlocutory process is akin to the courts and the tribunals in that statements of claim, statement of defence, counterclaims, discovery processes and ultimately the setting down of hearings are "par for the course". People tend to say that the process is less formal than the courts. This is possibly misleading, it is probably more accurate to say that the arbitration settings are less austere than the courts as there are no wigs or gowns and the arbitrators are not referred to as Your Honour or Your Worship. Having said that, it would ill-behove one to neglect to comply with an arbitrator's determination.

Virtues
As arbitration has been largely replaced by tribunal, court and adjudicatory systems one would surmise that its virtues have not been sufficiently compelling for its retention as a primary form of dispute resolution. It is a system that has lost patronage and to reiterate in the residential sector in many jurisdictions

arbitration has effectively been "outlawed" by legislation.

Shortcomings

The fact that one cannot consolidate proceedings where there are multi party responsibilities is a very serious shortcoming. The only parties that have standing at arbitration are those that are party to the given contract. This means that in a given dispute if an engineer, an architect, a building surveyor and a builder were implicated in a defective building work with a developer, the developer and the builder would not be able to join other responsible actors as either co defendants or third parties. This is highly problematic.

Some would say they are troubled that arbitrators need not be legally qualified. The point is moot because arbitrators are required to be qualified arbitrators and the qualifications are rigorous and comprehensive.

Cost Impacts

The parties have to pay for arbitrators. An arbitrator can cost anywhere between $1500 & $10,000.00 a day and anywhere between $200 & $800 an hour. The parties also have to pay for room hire. These are costs that neither the courts nor the tribunals visit upon the parties and they add another very significant layer to the cost of dispute resolution.

Cynics would say (and I'm not one of them) that where an arbitrator can be so handsomely renumerated the desire to expedite the conclusion of a matter may not be as powerful as circumstances where a servant of the Crown, a salaried servant of the Crown that is, has no incentive in running a long trial.

Time Impacts

In my experience arbitrations are no faster than the courts but are slower than tribunals. As a result the arbitration process in some cases can be as expensive as a court proceeding, especially if one party is allowed to 'drag the matter out' with various preliminary matters and challenges.

Commercial Impacts

Again as arbitration is essentially an adversarial medium it does not lend itself to the betterment of relationships between the parties to the dispute i.e. the applicant and the respondent. To this extent it is akin to the courts and the tribunals.

4. EXPERT DETERMINATION

This is where parties to a contract agree to engage an expert as a person responsible for resolving any dispute that may emanate from their business transaction. Normally the contract will provide that any dispute of whatsoever nature to do with the contract or the subject matter of the contract will be referred to the expert.

The contract might provide that the parties agree upon an expert prior to the execution of the contract. The parties also agree that pursuant to the contractual condition, the expert's determination once forthcoming is binding upon both parties.

Ordinarily the contractual condition will provide that both parties are responsible for payment of the expert on a 50/50 basis. As long as the provision is well drafted it should be very difficult to challenge the determination in a court of law.

Some years ago, I was engaged to prepare such a condition for a very large Melbourne development and the parties to the contract were enamoured of this approach because:

- it was fast track
- kept matters in-house
- allowed a dispute to be resolved without impacting upon the critical path of the very sizeable project

There are variations to the expert determination theme, namely the condition may provide that the determination cannot be challenged until the end of the project whereupon it can be revisited and challenged. Alternatively, the determination can be binding, period.

Another variation may be that whilst the expert determination is on foot, if a contract is live, that the balance of the project be allowed to continue and the dispute coming within the jurisdiction of the expert is corralled.

Another possibility is an American form of expert determination where two experts are

retained at the commencement of a project, with one expert chosen by each key party to the contract. The experts are given a watching brief over the project from its inception, so when and if trouble develops later on, the parties already have "a dispute resolution panel", so to speak, that is already briefed on the facts. There is usually the possibility for a third expert to be chosen by joint decision between the parties' two appointed experts, to add another buffer of independence or neutrality.

The Virtues

It is a confidential process, the parties can agree upon someone who has "purpose built" expertise and a sufficient level of standing to be taken seriously by the contracting parties.

The mechanism creates the opportunity for dispute containment and the maintenance of a working relationship.

It can be incredibly fast. The provision may provide that the expert meet with the parties within 48 hours of 7 calendar days passing, and then the expert is provided with *carte blanche* to get full co-operation and accommodation to facilitate a fast track determination.

This approach is very sophisticated but contemplates the involvement again of highly sophisticated contracting parties. It is well suited to the "higher end of town".

The Shortcomings

There are none to speak of. Provided the expert is well chosen and well credentialed the merits of expert determination are compelling.

Cost Impacts

Good experts come at a high price and rightly so. The cost of their retention is however, infinitesimal when one factors into the equation the merits of a fast track, confidential binding resolution that serves to keep commercial relationships intact.

Time Impacts

Depending upon the way the contractual conditions governing the expert determination processes are worded, one can create a set of mechanisms that make this form of dispute resolution the swiftest system on offer. A great advantage is that it brings certainty to the scenario quickly and in this respect is rather unique.

Commercial Impacts

For the reasons cited in the above mentioned virtues, expert determination along with the model of early negotiated outcome is the approach that is most conducive to the protection of commercial relationships. The Japanese would love it.

5. MEDIATION

Mediation is where, be it through the courts or a tribunal or a term of contract, the parties are compelled to refer their dispute to mediation. A mediator is appointed to convene a meeting that is designed to facilitate negotiation and ultimately compromise. The mediator is a facilitator, a cajoler if you will, and has no power to compel the parties to agree upon the outcome.

If the mediator is unable to facilitate the resolution of a dispute then the mediation fails and resort will be had to the more adversarial models of dispute resolution.

The Virtues

If matters can be mediated at the gestation of a dispute, a mediated outcome has considerable merit. It is, however, paramount that a party to a mediation, through the medium of the mediator is not cajoled into a compromise or a decision that is against his/her/its best interest. Unrepresented parties at mediations can often fall foul of being pressured into settlements they will later regret, particularly if the mediator is 'overly activistic' for a settlement, and we usually counsel against parties representing themselves at mediations.

If one has a strong case and the respondent is financially secure and correspondingly has a weak case then the party with the strength should be ill-disposed to compromising their position. It is a bit like "gun boat" diplomacy, the party with the gun boat should not capitulate to the party with the canoe.

Anecdotally, I know of instances where mediated outcomes have occurred in circumstances where a given party gave up too much. In hindsight, more than they had to, and this leads to a fair measure of disenchantment.

Nevertheless, it has to be said that mediation has become very popular, with good reason, because settlements are better than trials and moreover as long as matters are being negotiated or mediated, parties still have control over their destiny.

Shortcomings

The key shortcoming is that with mediation there is no guarantee of outcome. Although a mediator may very quickly figure out who is in the right and who is in the wrong, he or she cannot compel the parties to settle.

An additional problem is that unlike judges, tribunal members or even arbitrators, mediators do not necessarily have to be in possession of any formal training. Although by and large mediators have had some training, (ordinarily a three day course) when one considers the extraordinary persuasive power that they may have, albeit by cajolement or charisma, it is troubling that there are not more robust and rigorous mediator training courses. It is my contention that anyone who has a prominent office in the dispute resolution chain should be very well trained in their craft and in possession of a very serious rigour. This rigour should go beyond being a "settlement scalp hunter".

Cost impacts

Mediation is relatively cheap and in the tribunals such as the VCAT it is indeed free. The courts however, compel the parties to mediate whereupon the parties have to engage and pay for recognized and reputable mediators. This can cost anywhere between $1,500 and $10,000 a day but is money well spent if the matter is resolved quickly by mediation.

Time Impacts

An actual mediation rarely takes more than a day or so. The critical thing is to ensure that the mediation occurs close to the beginning of the dispute rather than on the eve of trial.

On point, I was engaged by the Law Reform Commission and the Law Institute of Victoria in the early 90's to co-author a plain English building contract with Jude Wallis (Jude worked with the Victorian Law Reform Commission). We decided to make mediation the first "port of call" in the dispute resolution process whereby it was a term of contract that no party could issue proceedings in any jurisdiction unless they had at first instance been party to a mediation. The contract also provided that the parties remunerated the mediator on a 50/50 basis, regardless of outcome.

It is critical, for fear of labouring the point, that mediation occurs at the outset. Ideally, a mediator should be engaged before a matter goes to court, arbitration or a tribunal but this requires a contractual condition that binds the parties to this course of action

Commercial Impacts

A mediated outcome at the earliest possible time can indeed arrest the deterioration of a commercial marriage.

6. ADJUDICATION

Adjudication is a system that has been introduced by security of payment legislation in a number of Australian jurisdictions. It is very popular in NSW and QLD but has been slowly getting traction in Victoria.

Under the various Security of Payment Acts, claimants lodge claims with the recipients and there are limited numbers of days for the recipient to assess and formally reply to the written claim. There is a "sudden death" nuance to this system in that failure to formally respond to a claim within the specified time can culminate in judgement for the full amount.

If a matter is challenged then it is referred to an adjudicator and the adjudicator again has to operate within very tight time constraints with the view to formulating an adjudicated determination. The main patrons of the system are sub-contractors lodging claims against builders and to a lesser extent builders lodging claims against principals.

The Virtue

The system is swift and when the recipient or

respondent of a claim receives a claim the respondent must give the claim immediate and time intensive attention. It is a system that is possibly weighted more in favour of the claimant from a logistical and preparation point of view; reason being a claimant may take many weeks to prepare the claim but the recipient may only have ten days (depending upon the Act of parliament) to generate the schedule and reply, be it a rebuttal, in part, in full or acceptance. So whereas the claimant has the luxury of time to prepare the claim the respondent is corralled by statutory time bars.

There is little doubt however that the system (where there is strong patronage) has expedited the processing of claimants' payments.

The Shortcomings

The speed by which claims are processed and adjudications determined is both the system's virtue and its vice. In this regard I use the analogy of a construction critical path, there's a balance between building too quickly and building too slowly. If one builds too quickly, quality can be compromised. If one builds too slowly, time related costs escalate. Likewise with adjudication: expedited adjudication can generate casualties in that the adjudicator may get it wrong. This is akin to the compromising of quality.

Whereas with the courts and the tribunals, one can by and large have a high level of confidence in the quality of the decision makers on account of their experience and the reverence by which they are held to get their judicial appointments in the first place, the quality of adjudicators may be more variable. It is not terribly difficult to become an adjudicator, a 3 day training course in adjudication will often suffice. The quality of the adjudication will be very much dependant on the adjudicator, and the process that culminates in the appointment of an adjudicator may not be anywhere near as exacting as that which is conducive to a judicial appointment.

Having acted in a battery of major adjudications on the Commonwealth Games site for one of the developers/head contractors, we can vouch for the fact that when the respondent receives a claim or series of claims then they are absolutely "under the pump" within frequently prohibited time constraints, and there has to be a tremendous concentration of client, technical and legal expertise on the task of responding to the claim within the statutory time. On larger matters, the system dictates that if one does not have the critical mass of human resources that can be deployed in a moment's notice, the respondent may indeed be occasioned by misfortune. In the matter referred to we had to deploy three lawyers, full-time for three weeks to assess and prepare the responses.

Time Impacts

The time impacts equate with the cost impacts, time is the big saving here and that translates into the reigning in of costs. However, it may be cost intensive within a short space of time.

Cost Impacts

When compared to the courts and the tribunals the real cost is measured in terms of time as adjudications can be wrapped up and claims processed in a matter of weeks. The swift application of justice, so to speak, translates into much lower dispute resolution service costs. To this extent, adjudication is more akin to expert determination.

Obviously, if the adjudicator gets it wrong then significant costs will be visited upon the victim of that wrong. Whereas the courts and the tribunals are very close to being free for the participant save for filing costs, adjudication is similar to both arbitration and expert determination in that the parties remunerate the decision maker. The cost of such a retainer would vary greatly but can be anywhere between $1,500 and $10,000 a day.

Commercial Impacts

In my experience, the processing of the payment claims where lodged in accordance with the legislation, proceeds with alacrity. I have not observed that commercial relations have been cruelled by the processing of the claims rather the destruction of the commercial relationship often occurs where one of the parties considers that an adjudicator's determination has gone awry.

THE ROLE OF CONTRACTS IN DISPUTE RESOLUTION

Contracts form a critical role in the fashioning of

In the commercial and civil arena, contracting parties have far more latitude with respect to the way by which a contract, it's terms and dispute resolution mediums are chosen. If a contract dictates that a dispute must go to arbitration then that is the end of it. If a contract dictates that a dispute must be referred to expert determination then providing the contract is well crafted that will be the binding dispute resolution mechanism.

Some civil and commercial contracts, contain a potpourri of mediation/arbitration/quasi expert determination provisions and the dispute resolution routes can be a tad cryptic and unnecessarily protracted. In doing so they are not conducive to "the nipping of a dispute in the bud" and in fact can on occasion exacerbate rather than contain the disquiet.

It is for this reason that our lawyers have a tendency to amend some of the standard contractual dispute resolution mechanisms.

Our preference is to have a clear and succinct, swift process. The contract can have a mechanism for either rapid mediation with the fall back position of a rapid expert determination or rapid expert determination. This is of course, save for the situation where one "absents" an Act of Parliament such as is the Home Building Act or the Domestic Building Contracts Act (Vic) (by virtue of such legislation mandating the dispute resolution body).

Great care must characterise the fashioning of dispute resolution provisions. A naïve or ill-considered dispute resolution mechanism can escalate a dispute and can be conducive to the obliteration of commercial rapport. As the building industry is very much built upon return work, it is implicit that commercial relationships should develop, evolve and mature. The dispute resolution model is therefore supreme importance and gravitas.

SUMMARY AND CONCLUSION

Courts are dispute resolution venues of last resort. When a matter goes to court, disputants have relinquished their ability to resolve their differences by negotiation. The initiation of legal proceedings in a court of law is a final and drastic step and generally signifies the repudiation of a commercial relationship and commercial history.

Litigation is very expensive and takes a very long time to conclude. It is misleading to call the process of court commandeered dispute resolution "dispute resolution" in the true sense of those words, the fact of the matter is courts conclude disputes but they do not facilitate reconciliation.

What I have referred to as "the top end of town" comprises those organizations that are consumed with resolving disputes quickly, cost effectively and with the least amount of commercial collateral damage. Expert determination as described in the paper is a very sophisticated form of dispute resolution and is well suited to this echelon. Where informed institutions are able to choose the umpire to "circuit break" a problem, as is the case in sport, they are generally happy to defer to the umpire's ruling.

In recognizing the virtues of expedited dispute resolution through the mediums of mediation and expert determination; the author is nevertheless at pains to point out such observation is not in derogation of the role courts. The higher courts will always be the seminal judicial cathedrals because after all it is these institutions that established the binding precedents that provide guidance to all other judicial and quasi decision making institutions. The paramouncy of the courts is to provide certainty and guidance rather than to provide the swiftest routes to decisions of moment.

The concept of dispute resolution is often misunderstood. The community often confuses the idea that particular established forums are designed to resolve disputes. Judicial determinations are construed as dispute resolution mechanisms but they are more in the nature of a sanction and in a sense can be heavily punitive. The "loser" would not ordinarily opine that their dispute was resolved. The contrary might be the case, he/she/it may say that a dramatic and unceremonious form of

True and pure dispute resolution is where resolution process has a reconciliation mechanism. Disputes can be resolved in a manner that is characterized by a happy ending. Such encounters will have witnessed the ingredients of a conflict or potential conflict, a willingness to solve the problem by both parties, a lack of arrogance, a preparedness to take cognisance of the other party's point of view and a willingness to pay homage to wise and impartial counsel. Mediation, negotiation and expert determination are all dispute resolution mediums that sit comfortably with this dispute resolution pathology and the net effect will be resolution, reconciliation and possibly even the "adding of mortar" to a long term and constructive union.

Below are a number of other articles and papers that have been written on the various dispute resolution models. They are summarised below and can be accessed by visiting the e-library on www.lovegrovesolicitors.com.au

'The Rise of a "Trigger Happy" Litigious Culture' Published Thursday 4th November, 2004 in The Australian (found in the 'Kim Lovegrove's Column in The Australian Newspaper' section).

'How to Resolve a Dispute and Cut the Acrimony' Published in Building Today Magazine, August 1992 (found in the 'Mediation' section).

'Mediation' Adapted by Miro Djuric, 1 October 2010 (found in the 'Mediation' section).

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