

Building and Construction Update

Can litigation be faster and cheaper?

Litigants in building disputes are sometimes hesitant to dip their feet in the water, wary of the costly "rollercoaster" that litigation or arbitration can entail. Can those who will potentially become embroiled in construction disputes take charge of their own destiny by opting for a faster and more cost effective path to resolution?

Arbitration and court litigation can be lengthy, expensive, acrimonious and with uncertain outcomes. If a more effective way of mediating disputes can be discovered, it may avoid some of these problems and help preserve commercial relationships.

In the USA, several "hybrid" mediation forms have arisen. Ironically, these types of "alternative dispute resolution" seem to have more in common with the Japanese ethos of consensus problem solving rather than adversarial procedures.

Australian construction contractors, and their lawyers, should consider attempting "hybrid" forms of mediation, as section 27 of the *Commercial Arbitration Act 1984* allows such an approach. A number of alternative approaches are discussed below.

Med-Arb

There are two formats that "Med-Arb" may take. The first is where an Arbitrator acts initially as a Mediator, assisting the parties in a mediation conference. If issues remain unresolved, the Mediator becomes Arbitrator and a binding award can be made. The advantage is that there is pressure on the parties to settle if they know that the mediation will convert into an arbitration if no final settlement is agreed. Also, the parties do not incur further costs in bringing a separate Arbitrator "up to speed".

An alternate form of Med-Arb involves the pre-selection of a separate Arbitrator who must decide the unresolved disputes following the Mediation. However, this will involve separate costs and delays in "educating" the Arbitrator. A further option would be for the Arbitrator to



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Inside

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Pg 1 -2

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Can litigation be faster and cheaper? Continued

merely provide a non-binding opinion on the merits of the dispute at the end of the Mediation.

Arb-Med

As the name suggests, this format involves an arbitration hearing first. This does not have to be a 'full blown' trial, but should entail submissions and possibly evidence from the parties. The Arbitrator then prepares an award (with reasons), which is not issued to the parties. Next, the parties engage in a mediation, in which the parties will have the benefit of having heard evidence and gauging the Arbitrator/Mediator's reaction. If no settlement is achieved, the Arbitrator issues the binding award.

This format may be seen as more risky than Med-Arb, and perhaps for that reason it is less common. If the mediation resolves some of the issues but not others, it can cause complications because the award may need to be re-configured to specifically deal with the unresolved issues. The chief disadvantage is that the parties are obliged to incur the arbitration costs up front, and these could be considered costs thrown away if the matter subsequently settles at mediation.

Baseball Arbitration (MEDALOA)

Otherwise known as 'Mediation and last offer Arbitration', this method has been used in the US to resolve salary disputes for professional baseball players. There is no reason why it could not have application to other types of dispute.

Firstly, the parties attempt mediation. If unsuccessful, the Mediator considers each party's final offer, and each party has the ability to make submissions as to why their offer is the most reasonable, just and correct. The Mediator must choose between the two offers without modification, thus removing much uncertainty of outcome as the Mediator's discretion is reduced.

So when is the decision by the Mediator made? This process should be decided in consultation and by agreement between the parties and the Mediator. The decision could be made:

- At the end of the mediation conference, on the same day; or
- At a separate hearing on some future date, allowing for further submissions and possible discussion on such later date; or
- At some future date after the initial mediation conference, after the parties have had the chance to supply written submissions to support their final offers so that the Mediator can make a decision "on the papers".

The benefit of having the decision made on a later date is that it enables the parties to further refine or amend their final offers, or set them out in writing to the other party. Also, the parties can continue negotiations up to the 'decision date'.

There are various advantages to this format. It provides informality, flexibility, and more importantly speed and cost effectiveness. Further, it discourages unreasonable or unworkable offers, but still provides the ability to make lateral and interest based offers as a method of settlement.

There is legal opinion to the effect that this process is not truly an arbitration, thus limiting the ability to appeal under commercial arbitration legislation.

It is envisaged that parties would provide executed terms of settlement for their respective offers, and after the binding decision is made, the 'unsuccessful' terms of settlement are destroyed. This pre-emptive execution of two sets of terms of settlement may be unpalatable for some.

Night Time Baseball Mediation

Here, the parties do not disclose their final offers to the Mediator. The final offers are

sealed in envelopes at the end of the unsuccessful mediation, and given to the Mediator. It is then incumbent on them to make a decision on how to resolve the dispute, and the offer closest to the Mediator's decision prevails. This offer then becomes a ruling to resolve the matter.

This method could be described as "closest offer" resolution. It is perhaps best suited to disputes where the resolution is entirely financial, otherwise it may be difficult to determine which is the closest offer. It requires the Mediators to think laterally and to determine the closest offer, even where an offer contains interest based or non financial elements.

Summary

Commercial construction disputes may be the best place for experimentation for these types of hybrid mediation/arbitrations. It may be that many of the procedural objections and problems are theoretical, not real obstacles that can't be overcome. It will require willingness on the part of the parties to "put their best foot forward" at the Mediation stage, and reach agreement with their opponent as to the desired procedure before entering into the process.



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