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## HOW TO USE SPECIAL CONDITIONS IN CONTRACTS TO STRENGTHEN YOUR POSITION AND HOW TO AMEND YOUR CONTRACT TO FAST TRACK DEFAULT REMEDIES

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### SUMMARY OF POINTS DISCUSSED

#### Residential Building

- Residential Building, governed by the Domestic Building Contracts Act for works over \$5,000.00.
- Arbitration Clauses will be null and void.
- Mediation Clauses can be used. The Mediator is located through the Institute of Arbitrators and Mediators or the Law Institute listing. Advantages include relative speed of the process, informality, working relationships may be preserved, and legal costs minimised.
- A mediator cannot make a binding decision unless all parties consent to that.
- The alternative method of dispute resolution is the VCAT. Builders can make their own application or they can use a solicitor. Filing fees and delays are involved. Small disputes, less than \$10,000, go straight to Hearing.

#### Commercial Building

- Commercial building is not covered by the Domestic Building Contracts Act.
- Adjudication clauses are possible. This is a prompt process involving binding rulings as governed by the contract. The Adjudicator is located through the Law Institute listing or the Institute of Arbitrators and Mediators. The Adjudication is not governed by any legislation.
- Arbitration can also be used, as can Mediation. The Arbitration is governed by the Commercial Arbitration Act.
- Adjudication can involve cross examination of witnesses. Although less expensive than Court litigation, there are costs such as room hire, Adjudicator costs and so on.

- If the dispute goes to Court, it will be the Magistrates Court or the County Court. You will need legal assistance and have to pay filing fees.
- Lovegrove & Lord Lawyers can assist you in drafting the right dispute resolution clause to suit your contract, and will assist all parties to the contract.

#### Introduction

- In a perfect world, all possible disputes can be foreseen and avoided before they get out of control. But it is not a perfect world. The nature of building contracts can be the science of dispute resolution.
- Effective dispute resolution clauses can be the most important part of the contract. Effective dispute resolution can avoid lengthy Court delays lawyers with a steady source of income.
- It can also avoid creating a situation where people can no longer sit in the same room.
- The Building legislation and insurance industry are consumer driven. So builders need to rely on contracts to settle disputes quickly and cost effectively.
- Effective dispute resolution clauses protect a builder's interests. Expensive Court litigation becomes the ambulance at the bottom of the cliff.

#### Residential building

- Residential building is covered by the Domestic Building Contracts Act. The Act says that Arbitration clauses will not be effective in domestic building contracts. They will be null and void.
- You can have Mediation clauses. Such a clause will provided that where a dispute arises, one party can serve a notice on the other requiring the matter to be referred to a Mediator. There will be a mechanism for appointing a neutral Mediator.
- There is a listing of Mediators at the Law Institute of Victoria. Another avenue is the Institute of Arbitrators

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and Mediators.

- Advantages of Mediation: it can be speedy, as a dispute can be referred to Mediation quickly before it spins out of control. Interim agreement can be made allowing works to continue until an overall settlement.
- The outcome of Mediation will only be binding on the parties if all parties consent to it. The Mediator does not make binding Judgements. The Mediator assists the parties by identifying the issues in dispute and the strengths of each party's claim.
- Another advantage of Mediation: it is relatively informal. Compare this to time consuming, nerve wracking Court hearings. This after months of legal involvement.
- The DBCA allows for resolution at VCAT, in the Domestic Building List. There is some self help involved. You can make your own application to VCAT and represent yourself, at least to Mediation. Or a lawyer can represent you.
- You can expect a Mediation within around two months of the claim being filed. For small claims (less than \$10,000) the dispute may go straight to Hearing).
- After a Mediation, a Hearing will follow at least 2 months afterwards. Sometimes there can be a Compulsory Conference in a last attempt to settle the matter before a Hearing.

### Commercial Building

- This is a separate ball game. Again though, clauses should be included in contracts so that the contract rules the relationship and not the threat of Court. The clause should provide for dispute resolution that best suits the parties.
- Commercial building contracts are not ruled by the DBCA. So you can have Adjudication and Arbitration clauses, as well as Mediation clauses.
- Adjudication is relatively speedy dispute resolution. It is otherwise known as expert determination. The parties agree to appoint a mutually agreed Expert to resolve disputes under the contract.
- It involves binding rulings as governed by the contract. The potency of the clause will be that the determination of the Expert is binding on the parties. Because the parties have agreed to that in the contract, a party can

rely on that later on.

- The Expert is located through the Law Institute listing or the Institute of Arbitrators and Mediators. A lawyer with a specialist background in building disputes, or even a building consultant can be used as an Expert.
- The Adjudication is not governed by any legislation. It is not strictly bound by procedural rules and rules of evidence.
- If a dispute arises written notice can be sent to the expert so that the expert can meet and confer with the parties. There can be written submissions. The expert will generate a written determination.
- Arbitration can also be used. It is governed by the Commercial Arbitration Act and will be bound by those legal rules. An Arbitrator can be appointed by a trade association such as the MBAV or the Institute of Arbitrators. Arbitration is more like a formal Court hearing. There are extensive pleadings, cross examination and so on.
- If no dispute resolution clause is used, the commercial building dispute may go to Court. This will be the Magistrates Court for disputes up to \$100,000. For disputes over that amount the County Court is involved. There are filing fees.
- Lovegrove & Lord Lawyers are proficient in drafting the clauses needed to help resolve disputes as speedily and inexpensively as possible. The right clause should be chosen for the right situation.

### WHAT YOU SHOULD DO IF YOU ANTICIPATE A DISPUTE

#### 1. Notice of Suspension

This must be used with care. Proper grounds must be used within the contract.

#### *MBAV – New Homes Contract HC5*

The grounds for suspension are wide (cl 16).

Includes:

- obstructing or interfering with Works
- the owner directing the builder's workers or trades
- failing to make payments when due
- takes early possession without builder's written consent



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A contractual number of days is allowed to remedy the default.

### 2. Notice of Intention to Terminate Contract

The builder may terminate the contract, but only if it serves a notice of intention to terminate.

The grounds for such a notice are similar to the notice of suspension.

The grounds include failing to remedy a breach in a notice of suspension.

The notice of intention must allow 14 days to remedy the default, after which the builder may terminate.

### 3. Notice of Termination

The builder cannot terminate unreasonably or vexatiously or if the builder is in substantial breach of the contract (clause 22.3 MBAV New Homes Contract).

So care must be exercised, even if the paper trail is correctly followed.

The builder should also not suspend unless they have reasonable grounds.

The danger is that it could appear to be repudiatory conduct in any dispute.

### 4. Dispute Resolution (AS2124)

Clause 47.1: a Notice of Dispute must be issued to the other party. Copied to the Superintendent.

All directions given by the Superintendent, that the Contractor opposes, should be disputed in this way.

Some directions by the Superintendent may call for a time limit to dispute the direction.

There are then 2 Alternatives to dispute resolution. Usually one conference, and then referral to **arbitration or litigation**.

### 5. Get it resolved quickly

With Architect administered contracts, make sure that you keep the paper trail.

Issue timely notices of dispute to directions if the contract allows that.

If the matter is domestic building, get it to VCAT promptly. If the matter is commercial, there will be scope for mediation, expert determination or arbitration.

*Miro is a special counsel in the dispute resolution sector of the firm. To find out more about Miro click here.*

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