

HOW TO RESOLVE A DISPUTE AND CUT THE ACRIMONY

Mediation is one of the methods of alternative dispute resolution that is fast gaining popularity. Kim Lovegrove looks at options to consider when trouble looms.

IN JAPAN, a country where there are a mere 14,000 lawyers (as opposed to the 787,000 in the USA), mediation is preferred over litigation for dispute resolution.

The Japanese have an aversion to litigation and a preference for mediation because they see negotiation and mediation as being more conducive to developing long-term rapport with clients.

Litigation is viewed as being conducive to discord.

It is interesting to note that in Japan there are systems built into Japanese convention to eliminate as much as possible litigious dispute resolution.

Before a party embarks upon a lawsuit, the party must pay the lawyer eight

per cent of the amount of the claim.

Furthermore, there are no mandatory discovery rules. These features severely test the bona fides of the disputant and vexatious litigation is virtually a non-event.

Mediation involves the appointment of an independent, appropriately qualified and experienced mediator.

The appointment may be made by the parties, by a person in an official position such as the president of the Law Institute or by a mediation centre.

With regards to construction disputes, the best mediator will be someone who is an experienced construction lawyer, construction barrister or technically qualified person trained in mediation.

The process involves a mediator calling a meeting and probably instructing the parties to submit written submissions to the mediator before the next meeting.

At the mediation, the mediator will advise the parties that he/she is not a judge and does not have the ability to make an award.

The mediator will impress upon the parties that he/she is there to assist the parties in achieving some sort of commercial and fair resolution. Mediators usually give a stated period to assist the parties in settling the dispute. They are given the widest opportunity to deal with the problem because what is said in mediation proceedings is on a confidential and 'without prejudice' basis.

Disputants control their own destinies: If the mediator cannot assist the parties in settling a dispute, then the parties are free to decide whether they want to proceed to litigation or arbitration. If the parties engineer a settlement via mediation, the terms of the settlement are incorporated into a written document.

The document is then signed by the parties and is binding. Mediation can occur when the parties have even a mere suspicion of a potential dispute. Early dispute resolution is thus both cost effective and conducive to site harmony.

Another important feature of mediation is that the disputants control their own destinies. As soon as they relinquish that ability to the more formalised methods of dispute resolution, such as litigation, the risks increase.

There is a mediation clause which is incorporated into the 'plain English' Law Institute contract, and the Municipal Building Works Contract also has a mediation clause in it.

Most building contracts have an arbitration clause. An arbitration clause generally limits the parties' ability to resolve the dispute to the arbitration procedure. In theory many arbitration clauses are not absolutely binding.

Yet, if a disputant issues litigation procedures in the court, the fact that there is an arbitration clause in the contract, the other side will normally apply



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for a stay of proceedings.

Inevitably the stay will be granted as the judge will state that the parties signed the building contract with an arbitration clause hence either party is stopped from unilaterally going down a different dispute resolution path.

The process is as follows: One of the disputants lodges a Notice of Dispute with the other disputant and the trade association or the Institute of Arbitrators. If the dispute is not resolved within the period prescribed in the contract, the nominating bodies request the appointment of an arbitrator.

The arbitrator then arranges a preliminary conference to determine, among other things, whether:

- legal representation is required, or
- formal legal proceedings such as Statements of Claim, Statements of Defence and formal hearing are required by the parties.

Unless the matter is resolved in the interim, the dispute proceeds to hearing.

At the hearing, the arbitrator presides, hears both parties' submissions and ultimately makes a binding award. To challenge an award parties must seek the leave of the Supreme Court to appeal the decision. Unless there is a mistake in law, appeal is rarely granted.

There are a number of advantages to arbitration: It is much faster than the normal courts. Generally a matter can be heard within three months of a Notice of Dispute being lodged.

Arbitrators are not sympathetic to adjournment of proceedings on a technical basis. In the courts, proceedings are often delayed by adjournments that are orchestrated on the basis of one party's minor technical infringement.

Mindful of the fact that speed and facilitating a result can often be a matter of financial survival, arbitration can have overwhelming advantages to the courts.

There are some benefits in having a technically-qualified person presiding as a judge who has to rely upon expert evidence.

Arbitration also has some disadvantages. The system is expensive. Unlike the courts, one has to pay for the engagement of an arbitrator in addition to paying for room hire.

Arbitrators can cost between \$3,000 and \$5,000 per day when one takes into account the costs of arbitrators' fees, room hire and the legal and consultancy arsenal required to contest a dispute.

The observation that arbitration is expensive needs to be tempered with an awareness that although the courts on a day-to-day basis may be cheaper, the much lengthier delays can result in the situation where on a cost benefit analysis the courts prove to be more expensive.

Litigation is the procedure whereby the parties elect to resolve their disputes in the courts.

If a dispute is less than \$25,000, it is dealt with in the Magistrates Court and the scale fees are considerably less than

the courts of higher jurisdiction.

There is every indication that the jurisdiction of the Magistrates Court will be lifted to \$40,000. If a dispute is between \$25,000 and \$200,000 it falls into the County Court jurisdiction which in turn has lower scale fees than the Supreme Court.

With minor disputes there is always the opportunity to get the matter resolved in the small claims tribunal.

An advantage of litigation is that the judges and court rooms are provided free to the litigants.

There are also some disadvantages:

- the time is a major deterrent to litigation as cases take months and, on occasion, many years to resolve;
- The formal nature of the court system can intimidate parties.

Adjudication is a relatively novel process where the parties, before entering into a contract, agree upon the engagement of an independent adjudicator. The adjudicator is nominated in the contract.

If a dispute ensues, either party can

immediately access the adjudicator to resolve a dispute. The adjudicator will generally ask for brief submissions from both parties and has the power to issue an interim award that must be honoured by the parties until the contract works are completed.

There is also the option whereby the adjudicators' determination can be binding per se. The parties are liable to pay the costs of the adjudicators on a 50/50 basis.

Adjudication is a very popular form of dispute resolution in Europe and the US. What is particularly appealing about it is that it is conducive to fast track dispute resolution. The fact that one has a quasi judge virtually on stand-by at any time who can facilitate a determination within seven days of notification is a tremendous asset. Moreover, the no-fault nature of adjudication, such as mediation, means that both parties can share the adjudicators' costs on a 50/50 basis and there is unlikely to be any residual acrimony.

New code challenges Victorian builders

VICTORIAN builders have been given a challenge — and some incentives — to come up with new ways of providing space, price and energy-conscious housing.

The challenge comes with the introduction of VicCode — The Victorian Code for Residential Development — Subdivision and Single Dwellings.

Along with VicCode, a companion code for multiple dwellings has been released for public comment. Both codes give developers more flexibility in meeting planning and building requirements by stressing performance standards rather than prescriptive regulations. Both emphasise urban consolidation, energy-efficient development and more compact housing.

The new codes are part of an all out attack on the rising environmental, social and economic costs of urban sprawl. They are designed to reduce housing costs and make better use of resources by using less land, building more compact communities in growth areas, and increasing densities in established suburbs. They are also designed to provide more diversity in housing to meet the needs of the independent elderly and the emerging trend of multi-generation families.

Victoria has a huge supply of three and four-bedroom houses on large blocks and yet it is this type which is still being built. So it is seen as essential that new housing suits the fact that 50 per cent of demand is from one or two-person households. More adults are sharing and the proportion of single parents and elderly people is rising. Conventional housing on large blocks

is not meeting the needs of these smaller households.

The subdivision and single dwelling code, which is directed mainly towards 'greenfields' subdivisions on the urban fringe, has been introduced into all planning schemes in the State.

The code streamlines the permit process for developers and makes assessment of development applications more consistent. There are real carrots to encourage imaginative responses in subdivision design and development; the code gives developers a 30 per cent increase in the number of blocks they can get out of a subdivision.

Additionally, new road layouts, the common trenching of services such as gas, electricity and water, and the better design of lots, allow savings of \$6,000 per lot in production costs.

The Multi Dwelling Code promotes the construction of more and better quality medium density housing and aims to make better use of existing infrastructure while encouraging the stabilisation of population in the inner and middle suburbs. It stresses the role played by good design in ensuring that medium-density developments are attractive places to live in and near.

Melbourne's inner councils are already concerned that the multi-dwelling code is designed expressly for outer areas and does not address the essential contextual differences between the inner and the outer suburbs. It will be fascinating to see if these differences can finally be addressed in a way that really encourages the imaginative use of land in tight inner areas and the suburban fringe.