How Contractual Dispute Resolution Provisions Shape Dispute Resolution

By Kim Lovegrove FAIB partner and mediator with Lovegrove Solicitors and conjoint professor in building regulation and certification with the University of Newcastle in New South Wales

Dispute resolution pathways in commercial settings are often shaped by the dispute resolution conditions of contract. Sometimes parties to a contract have no choice or autonomy with respect to the crafting of a given dispute resolution pathway. This is evident in jurisdictions where there are Acts of Parliament that compel the parties to subject themselves to a particular dispute resolution forum. A couple of Acts of parliament that immediately come to mind are the Home Building Act of NSW and the Domestic Building Contracts Act Victoria. These Acts of parliament compel the contracting parties to resolve their disputes in tribunals; the Victorian Civil and Administrative Tribunal being one such Tribunal in Victoria (VCAT).

Any building contractual provision that purports to oust the jurisdiction of the VCAT will be read down and rendered contractually impotent in a Court of Law or the VCAT. Over the last few years we have encountered a litany of circumstances where lawyers green to the area of domestic building disputation issue proceedings in a court of Law, rather than the VCAT, only to be met with rapid response strike out applications. The basis of these actions is that the proceedings should have been issued in the VCAT and the proceedings were misconceived. Invariably the strike out application succeeds along with a sympathetic disposition on the part of the decision maker to the awarding of costs against the misconceived initiator.

It is thus very important for those charged with fashioning dispute resolution provisions to ensure that there is no act of Parliament that chorales the dispute resolution pathway and forum. Furthermore national standard industry contracts need to be amended to ensure that force of local statute is afforded paramouncy over standard contractual conditions.

Absent intrusive Acts of Parliament the parties have more freedom in the fashioning of dispute resolution pathways

In circumstances where there are no parliamentary constraints on the fashioning of dispute resolution provisions the parties are at liberty to craft provisions that best suit the preferred dispute resolution modes operandis. It is therefore paramount that each party understands what he she or it is getting into, because there are significant differences between the likes of expert determination, court, mediation or arbitration clauses. Furthermore a great many contracting parties sign up contracts in circumstances where they don't have the "foggiest idea" about the contractually specified dispute resolution pathways and the corresponding time and cost impacts.

There is also the prevalence of what has come to be known as "take it or leave it contracts", contracts that are by nature oppressive if not unconscionable, that are foisted upon contractors that are desperate for work. These types of contracts will often have convoluted if not cryptic dispute resolution provisions that are designed to lengthen the dispute resolution pathway particular when it comes round to the effecting of payments.

Contractual Provisions that are designed to have the resolution of disputes referred to Courts of Competent Jurisdictions.

Such provisions will typically state that disputes will be resolved in Courts of competent jurisdiction. It is important that the dispute resolution clause nominates the jurisdiction that will assume precedence, be it England, California, NZ or NSW. This is particularly the case where one has multijurisdictional contracting parties or in circumstances where the contract may have been entered into in one jurisdiction but the contract is performed in another jurisdiction.

There are many reasons why contracting parties choose the Courts over other forums, namely:-

There are often Court lists that are dedicated to a particular field of law such as Building Cases Lists or Commercial Causes lists. The Judges bring tailored expertise to the decision making rigour and the lists are designed to best progress the resolution of specific areas of dispute manifestation.

The Courts relative to other dispute resolution theatres are very inexpensive. One doesn't have to pay for a Judge of a Magistrate, admittedly there are Court filing fees to initiate proceedings but in the overall scheme of things the costs are relatively inconsequential.

There is a very high guarantee of judicial independence, Judges are in the full time employ of the Crown, they are not remunerated by the parties, so they are totally arms lengthed from the parties. Furthermore they are by and large appointed on account of their venerated status as lawyers, many of whom were legal doyens prior to their appointment. This being the case the combination of judicial independence and high level legal dexterity tends to install confidence in the decision making process.

The parties are also at liberty to issue proceedings against multi-defendants and the defendants are at liberty to issue third party proceedings against other actors implicated in the dispute resolution matrix. The ability to ensure that all responsible actors in a dispute can be brought to account in the one set of proceedings is a compelling virtue in contracting paradigms where there exists the potential for multi-party responsibility.

Building cases are fertile settings for multi-party proceedings because builders, engineers, architects, draftspersons and sub-contractors of varied persuasions can be implicated in proceedings where there are defects claims.

Mediation

Increasingly contracts are dictating that the first port of call dispute resolution provision will be that of mediation. A typical mediation clause is below (the provision emanates from the dispute resolution provisions of a contract that I drafted in the early nineties in conjunction with the Victorian Law Reform Commission). This provision was domiciled in a contract published by the Law Institute of Victoria.

> *The parties must mediate disputes.*
> *A party must use the mediation procedure to resolve a dispute before commencing legal proceedings.*
> *The mediation procedure is:*
> - *The party who wishes to resolve a dispute must give a notice of dispute to the other party, and to the selected mediator, of, if that mediator is not available, to a mediator appointed by the President of the Law Institute.*
> - *The notice of dispute must state that a dispute has arisen, and state the matters in dispute.*
> - *The parties must cooperate with the mediator in an effort to resolve the dispute*
> - *The mediator may engage an appropriately qualified expert to give an opinion on technical matters. Each party must pay a half share of the cost of the opinion.*
> - *If the dispute is settled, the parties must sign a copy of the terms of settlement*
> - *If the dispute is not resolved in 14 days after the mediator has been given notice, or within any extended time that the parties agreed to in writing, the mediation must cease.*
> - *Each party must pay a half share of the costs of the mediator to the mediator.*

The terms of settlement are binding on the parties and override the terms of the contract if there is any conflict.
Either party may commence legal proceedings when mediation ceases.
The terms of settlement may be tendered in evidence in any mediation or legal proceedings.
The parties agree that written statements given to the mediator or to one another, and discussions between the parties or between the parties and the mediator during the mediation period are not admissible by the recipient in any legal proceedings.

The provision allows for mediatory intervention before a matter is referred to the Courts. It was designed to contain and quarantine the dispute before the conflict embers were fanned. The contract compels the parties to mediate as a prerequisite to the initiation of legal proceedings. Note that it does not bestow an option or choice to mediate and the compulsory resort to mediation gains its legal efficacy from a term of contract that compels the parties to mediate.

Arbitration Clauses

In the commercial contracting setting arbitration is common form of contractual dispute resolution. It really comes into it's own in multi-national contracts and third world countries. In the multi-national and third world setting arbitration is popular because courtesy of the medium of the contract crafted arbitration clauses one can nominate the international arbitration body and the location for the arbitration of the dispute. The way the arbitration clause is drafted and incorporated into the contract will be one of the key factors that determines the operational mechanics of how the arbitration will crystallise.

In third world countries joint venturers and contracting parties often prefer to resolve their disputes by arbitration and if they can via the arbitration contractual provisions they will endeavour to oust the jurisdiction of the local sovereign ports. This is particularly the case where there exists circumspection with regards to the competency or possible corruptibility of those whom make decisions in the local dispute resolution theatres.

If the parties decide through the medium of the contract to opt for arbitration then the dispute resolution modus operandis will by and large be governed by commercial arbitration acts within the sovereign setting. These Acts of parliament will by and large dictate that it is impossible for either party to opt out of arbitration once they have executed a contract that compels them to arbitrate. Contracting parties often fail to understand this and in circumstances where a dispute involves many parties, a number of whom may not be party to the contract they find that their ability to involve third parties in arbitration proceedings is thwarted, both by the contract and the lack of mechanisms that enable one to compel third parties to subject themselves to the jurisdiction of the arbitrator. This is a very serious limitation that applies to arbitration when compared with courts and tribunals. In the later forums contracting parties are

at liberty to sue or join any defendant or third party that may have found themselves in the “dispute mix”. It follows that great care must be taken by those responsible for the drafting of the dispute resolution provisions to ensure that an election to utilise arbitration is done so with full cognisance of the ramifications of arbitration.

Another consideration that needs to be bought to mind with respect to the incorporation of an arbitration clause into a contract is that the parties do indeed have to pay for and share the costs of arbitration proceedings. Such costs can run at a rate of many thousands of dollars a day whilst an arbitration is on foot. So again this is a consideration for prospective contracting parties to bear in mind before they choose arbitration as the contractual dispute resolution mechanism.

Expert Determination

Sophisticated and high end companies often incorporate expert determination clauses into their contracts. Expert determination clauses provide that where there is any dispute to do with the contract the parties must refer the matter to a contractually designated expert to preside of the dispute and issue a determination. Some contractual provisions dictate that the determination once issued will be binding, period. Other contracts may provide that the determination is binding until the end of the contract whereupon the parties will be at liberty to have the matter reconvened and retried in another jurisdiction.

An example of an expert determination clause is below:

> *If any dispute arises concerning this contract or the works it must be resolved by expert determination.*
> *If either party wishes to resolve the dispute wither party must give a Notice of Dispute to the other party and the expert.*
>
> *The Notice of Dispute must:*
> - *State that a dispute has arisen;*
> - *State the matters in dispute;*
> - *Request the expert to commence expert determination forthwith*
>
> *The parties must co-operate with the expert to facilitate resolution.*
> *The expert will have 14 days to resolve the dispute unless the parties otherwise agree in writing to an extension of the period of expert determination.*
> *Whilst the dispute is being determined the Contractor must continue with the works to achieve completion by the date of completion.*

The expert at the end of the (14) days or the extended period must make an award which will be binding upon the parties.
The expert may engage an expert with technical expertise to give an opinion on matters of technical import.
Each party must pay a half share of the costs of the expert determination an a half share of the costs of any expert engaged.
The name and address of the expert is:

Any notice given to the expert and the other party must be sent by fax or hand delivery.

An expert determination clause will be designed to oust the jurisdiction of other theatres of dispute resolution system and will often be agreed upon in light of its fast track dispute resolution methodology. Furthermore there can be confidentiality provisions that dictate that the resolution will be shrouded within a confidentiality provision.

Conclusion

Contractual dispute resolutions are “game changers” with regards to the shaping of the destiny of the resolution of a dispute. Through the medium of the contract the parties can have a say with respect to the way by which conflicts can be worked through and concluded.

One must understand the consequences of choosing a given dispute resolution pathway because there can be significant cost, timing and logistical ramifications that flow from the contractual election and conditions of contract. Surprisingly highly sophisticated individuals are often caught unawares when they embark upon a dispute resolution pathway once appraised of the ramifications of their contractual election. It is the responsibly of corporate counsel or lawyers retained to fully amplify the nature and differences of the different dispute resolution system before one’s constituency chooses a particular model.