ADR IN CONSTRUCTION DISPUTES - THE EXPERIENCE IN AUSTRALASIA

by

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Delivered at the

INTERNATIONAL BAR ASSOCIATION

10TH BIENNIAL CONFERENCE

COMMITTEE D

Section on Business Law

Hong Kong 3 October 1991

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Probably the most distinctive development in ADR, in Australia, has been the creation of a statutory framework permitting ADR in conjunction with, and in partnership with, the established curial system. Thus the Federal Parliament has enacted the Courts (Mediation and Arbitration) Act 1991. In June 1991 the Victorian Parliament passed an Act with the same title. The Federal and the Victorian State courts now have power to refer pending proceedings to mediation or arbitration. Whilst matters may be referred to mediation only with the consent of the parties, a reference to arbitration may be ordered whether the parties consent or not. Matters may also be referred to assessors for examination and report. It is premature to comment on the success of this approach.

In the last few years an interesting hybrid process has become a regular feature of the administration of the Construction List in the Supreme Court of New South Wales. The court attempts to get the best of both worlds of litigation and ADR. Under Pt 72 of the Supreme Court Rules technical issues, customarily involved in a construction dispute, are referred to a Referee for inquiry and report. As Marks J, of the Supreme Court of Victoria, observed in analogous circumstances "in the present case, the curial system could not match the investigation which a highly qualified scientific mind of

independent spirit was able to apply in the field to the resolution of what was wrong, if anything, with the computer." Upon receipt of the Referee's report the court has the option of adopting it, rejecting it, varying it or remitting it back to the Referee. Quite a deal of learning has evolved around the question of what attitude the court should take when a report comes before it. Disappointed parties have attempted to persuade the court to allow further evidence to be lead in an attempt to dislodge the conclusions of the Referee. It is obviously counter productive to allow re-litigation of an issue determined by a Referee where the parties had a full opportunity of placing before the Referee all the relevant evidence. Single judges of the court have held that where a report appears to show a logical, thorough, analytical and scientific approach by the technical expert to the assessment of the subject matter of the inquiry the court will not attempt to go behind it. The court will proceed to determine any legal issues thrown up by the dispute and come to a conclusion in accordance with the expert's report. This marriage of ADR and the curial process has many difficulties, some of which I will mention later but on balance is probably the best procedure that can be devised.

The Victorian Attorney General's Working Party on Alternative Dispute Resolution reported recently (par 2.37) that even without the 1991 Act mediation, under close court control, was being used very successfully in building cases in the County Court. A panel of mediators has been established by the judge

in charge of the Building List. The members of the panel are generally barristers, solicitors and non lawyers from the building professions. Matters which are, in the opinion of the Building List judge, appropriate for mediation are referred by the judge to a panel mediator. A feature of these mediation arrangements is that they operate under very tight judicial control and in the context of a litigation timetable which is established at the outset by the judge at directions hearings.

One New South Wales department is using a procedure whereby the dispute is referred to a retired judge with extensive commercial and construction experience and a highly skilled engineer. All the papers are forwarded to them, together with the evidence and submissions of each party. A short oral hearing limited to one or two days, takes place with the parties splitting the available time equally between them. The result is binding. In a number of instances this has proven successful. Both the hearing time and the costs have been reduced dramatically.

Although there are no precise statistics on the extent to which ADR is effective in Australia at the present time, the overwhelming dispute work is still clearly in the courts and by arbitration.

One reason given for lack of greater progress in acceptance of ADR, which should have obvious prime facie appeal, is that in order for ADR to work both parties must have a genuine desire

to resolve the dispute. That fact lends particular point to the question whether a party, who has no intention of bringing the dispute to an end, should be permitted to use the ADR process to delay a binding determination of that dispute? In such circumstances should a court enforce an agreement to conciliate notwithstanding that at least one of the parties seems determined to resort to litigation? The view has been expressed that:-

> "The requirement to negotiate and to consider entering into an ADR procedure should not, and in any event is unlikely to, be a condition precedent to a legal right to commence arbitration. If these provisions are made or interpreted to be conditions precedent to arbitration they would provide a mechanism whereby a party seeking to delay the ultimate determination of a dispute could use the procedure to effect this objective". (Jones "Arbitration and Alternative Dispute Settling" [1991] BCL 8, 20).

The problem has arisen in two decisions in Australia, without, however, any analysis of the competing considerations. In both cases the court refused to enforce contractual arrangements to attempt, in the first instance, to mediate a dispute and allowed curial proceedings in the one case and arbitration in the other, to go ahead.

The first decision, given in the Supreme Court of New South Wales, was Reed Constructions Pty Ltd v Federal Airports Corporation & Ors (unreported Brownie J 23 December 1988). The contract provided quite clearly that if any dispute arose the Construction Manager "shall give written notice to the builder appointing a date, time and venue for a conciliation meeting to be held to discuss in detail the dispute or difference. - - - The parties shall not be legally represented at said meeting but shall present in their own manner, with the assistance of witnesses and documentary evidence the details of their respective cases." The contract went on to provide that, if at the conclusion of the meeting, there was no resolution notice may be given referring the dispute to arbitration. Correctly enough, the Judge held that each step in the process was mandatory. The plaintiff did not undertake conciliation and whilst the Judge ordered a stay of the curial proceedings, he made no order to enforce the mandatory provision for conciliation. In fairness probably he was not asked to do so. Nonetheless, by implication at least, he was prepared to allow the parties to proceed to arbitration.

In Allco Steel (Queensland) Pty Ltd v Torres Strait Gold Pty Ltd (unreported 12 March 1990) a Master of the Queensland Supreme Court refused an application for a stay of the proceedings. The parties had agreed for the erection, by the plaintiff, of a crushing plant, flotation and grinding plant for a gold mine The contract provided for notice in writing of any dispute whereupon a conciliation meeting was to be held. In all relevant respects the clause was the same as the one in

the Federal Airports Corporation case. In 1989 litigation was commenced by Torres Strait Gold. An application was made to the court and an order made by Ambrose J for a conciliation meeting to be held. Unfortunately there is no record, of which I am aware, as to whether this application was contested and whether the judge gave a considered judgment. Thereafter two meetings were held. Neither was successful and there then followed some correspondence which was described by the Master as extremely belligerent in tone. Allco Steel then commenced proceedings. This time it was Torres Strait which sought the stay. The Master held that the plaintiff had made no bona fide attempt to conciliate and

> "any conciliation meeting that has been called and attended was one which did not comply with clause 4.5.6 of the contract."

The defendant submitted that the clause was a valid "postponement of the right of access to the court" and relied upon the authorities mentioned in Mustill & Boyd Commercial Arbitration p 111. The Master pointed out that all of the authorities related to arbitration clauses or an obligation to arbitrate the dispute pursuant to Statute.

He then held:-

> "Here clause 4.5.6 merely provides an agreement to conciliate (as distinct from one to arbitrate) and as such is severable from the binding agreement in which it is located. In other words, notwithstanding what I

> perceive to be a clear breach of the obligations to conciliate on the part of the plaintiff, the doctrine that the jurisdiction of the court cannot be ousted dominates any other principle that would require the plaintiff to honour its contractual obligations that might arise under clause 4.5.6. An appeal was made to the inherent jurisdiction of the court to grant a stay, the condition precedent to the accruing of a cause of action not having been met, namely bona fide conciliation. In my view, even if such relief was open, this discretionary relief must be refused as it is abundantly clear that the parties have taken up positions which effectively rule out the possibility of compromise and conciliation, the plaintiff by its assertion that 'discovery' does not lie pursuant to clause 4.5.3 and the defendants by their insistence of such process as a precondition of negotiations". (emphasis added).

With all due respect to the Master I would not agree. First, in my view, there is clear power in a court to control any abuse of process. To commence proceedings without complying with the requirements of the contractual provision for conciliation is, in my view, an abuse of process. Second, power being there, the question is whether there is any utility in requiring parties, who are clearly bent on being difficult, to submit to conciliation processes. In my view there is. An independent third party can clearly have a substantial input into such procedures and can bring about a settlement even between parties who are evidently bent on litigation In my view the Master ought to have required the parties to adhere to their freely agreed contractual obligations. If I may say so, without any disrespect to the Master, the path he followed bears a close resemblance to the attitude the Courts had taken to arbitration clauses until a couple of decades ago.

It may be useful to point out that there is a decision to the contrary effect to Allco Steel, albeit at first instance, in the United States District Court in Oregon, in Haertl Wolff Parker Inc v Howard S Wright Construction Co (unreported U.S. Dist Lexis 14756). The plaintiff and defendant were partners. Any matter in controversy on which they could not agree was to be referred to a third party for a recommendation. Very interestingly the third party provided the Court with a declaration that he was willing to assist the parties and that "the success/futility of the procedure will depend in large part on the willingness of the parties to submit the dispute to me in good faith and to give consideration to my recommendation". The judge said:-

> "A contract providing for alternate dispute resolution should be enforced, and one party should not be allowed to evade the contract and resort prematurely to the courts. Southland Corp v Keating 465 U.S. 1, 7 (1984). The success of an alternate dispute resolution procedure will always depend on the good faith efforts of the parties, particularly where, as here, the outcome of the procedure is not binding.
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> In this case, the disputes were referred to Oseran as required by the Partnership Agreement, but HWP abandoned the effort when practical difficulties arose. Oseran remains ready to consider the disputes. Therefore, the court cannot say that it would be futile to refer the deadlocked issues to him."

Even more fundamental than enforcement of agreed conciliation provisions, where one of the parties is bent on litigation, is the question whether, a party, or even both parties, who wish to engage in the curial processes, provided free of charge by the State, can be forced against their wish into ADR.

In New South Wales, in contra distinction to other Australian States, that question has been determined in the affirmative. In Park Rail Developments Pty Ltd v R J Pearce Associates Pty Ltd (1987) 8 NSW LR 123, over the objections of one and no support from the other, the parties were required to engage in the hybrid process I have earlier described. Technical issues were sent to a Referee for report.

In his judgment Smart J discussed, what may perhaps be described, without disrespect, as the traditional view. It was well expressed in the Supreme Court of Queensland by Campbell J in Honeywell Pty Ltd v Austral Motors Holdings Ltd 1980 Qd.R.355, 359:-

> "Order 97, r 1 gives to the court a discretion to order that any matter in dispute be referred to arbitration. In my opinion that discretion should rarely be exercised in the absence of consent of both parties. I think that there is much force in the argument for the defendant that every person is, as a general rule, entitled to have his civil disputes tried and determined in a court of law and that the discretion to refer to arbitration should, in the absence of consent, be exercised only in cases of an exceptional nature. The attitude of the parties to litigation towards the mode of trial is a relevant consideration. In Silk v Eberhardt (1959) QWN 29,Philp J expressed the view that, except in special cases, building contracts should not be sent to arbitration because of the great cost to the parties. His Honour said:
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> > 'If one party objects, my feeling is that we should not impose that expense - that the judges should do the work.'
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> I am not persuaded that I should make an order that the trial of the issues of fact in this case be determined by an arbitrator. The issues will involve undoubtedly a great deal of scientific and technical evidence of a complex nature but it seems to me that a judge with the help of experts in the relevant fields should be able

> to come to a proper decision. This is a case, like so many others which come before the courts these days, where expert witnesses will give material evidence but it is not they who decide the issues. Similarly, when assessors are appointed it is for them to advise and for the judge to decide.
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> The defendant wishes to have the decision of a judicial tribunal and not the decision merely of a person skilled in the appropriate scientific field. It is very likely in this case that the fact finding process will be a difficult one and it is likely that there will be contacting views an opinions of expert witnesses. In my opinion the fact finding process will be more satisfactorily handled by a judicial officer than by a person who lacks the training, experience and skills of a trial court judge. In a complex case of this sort there will be problems arising as to the admissibility of evidence and a person lacking legal training will find such matters very difficult to decide." (emphasis added).

I should perhaps mention, with reference to the last passage in the judgment that the rules of evidence do not apply in a reference under Part 72. As well, if the learned judge will forgive me saying so, in referring to cost he made no reference to the saving which would be involved in a much shorter hearing before a technical referee, particularly one not bound by the rules of evidence. In Victoria, in A T & N R Taylor & Sons Pty Ltd v Brival Pty Ltd 1987 VR 762 Beach J took a similar view (p 765):-

> "---Where a party to litigation wishes the sort of dispute which normally calls for judicial determination to be tried by a judicial tribunal it will only be in cases of an exceptional nature that his wishes will be disregarded and the matter referred to an arbitrator or special referee...."

Commenting on these decision in Rail Park(supra) Smart J said (p 129):-

> "Both Honeywell and A T & N R Taylor & Sons Pty Ltd v Brival Pty Ltd were decided prior to the Commercial Arbitration Act 1984 and the insertion of subs (2) into s 124 of the Supreme Court Act of this State. Whatever be the position in other States, in New South Wales there are a number of referees well-known to the Court in its Building and Engineering List with extensive experience in handling a variety of large complex building and engineering matters. They are used to having junior and senior counsel appear before them, ruling on evidence, controlling proceedings and resolving difficult factual and contractual issues. They are familiar with the standards required of professional engineers and architects. In appropriate cases retired judges of this Court, with experience in building and engineering matters, are appointed as referees. This Court does not make an order for a reference unless the parties agree on a referee - and this often happens even where there has been a dispute whether there should be a reference - or a suitable referee is available. As a matter of practice, if during a hearing an issue arises on which the referee feels the court should rule in the first instance he tells the parties and the matter comes back before the court and is dealt with promptly. It is not uncommon for the court to deal with the matter at 9.30 am and for the reference to resume later in the morning. The parties and the referee know that during a reference the court is available to assist on short notice. - - -
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> In New South Wales the court has no predisposition to making or refusing an order for a reference depending on the wishes of one party. It has power to appoint a referee against the wishes of both parties although it is understandably cautious in doing so. Each opposed application for the appointment of an arbitrator or referee has to be considered on its own merits in the light of all the prevailing circumstances. In some cases no reference will be appropriate whereas in others it will be appropriate to refer the whole of the proceedings or some issues. On occasions the reference will be to determine the issues and on others to inquire and report. The matters which will generally require consideration include:-

(a) the suitability of the issues for determination by a referee and the availability of a suitable referee;

(b) the delay before the court can hear and determine the matter and how quickly a suitable referee can do so. Building and engineering matters, because of their length and complexity, often require either the judge or the referee to devote extensive time after the hearing to considering and resolving the issues.

(c) the prejudice the parties will suffer by any delay;

(d) whether the reference will occasion additional costs of significance or is likely to save costs;

(e) the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.

In this case I am satisfied that the issues are suitable for determination by a referee and that there are a number of suitable referees used by the Court who could hear and determine the matter, that the delay in the Court being able to hear the matter is too long and that the plaintiffs will suffer serious financial prejudice by such a delay. I do not think that the extra expense is likely to be significant overall. It will be offset by the matter being resolved promptly rather than in two years time. Witnesses' memories and their availability are likely to be better now than after the lapse of another two year."

The Supreme Courts of some of the other States are not prepared to go this far. Just lately Carter J in the Supreme Court of Queensland in Re Feez Ruthning's Bill of Costs 1989 1 Qd.R 55 said (p 75):-

"It is a well known fact that modern day litigation involves the resolution by this Court of many disputes which involve complex commercial and financial transactions and arrangements as well as disputes about building and engineering contracts which require a consideration of modern day technology including, for example, aspects of computer science. Again everyday litigation in this Court requires that a decision be made between the competing views of eminent medical practitioners. In short the court must necessarily respond to the many complexities which are inherent within the whole range of civil litigation that has to be determined. So too must practitioners - both solicitor and counsel. The courts have from time to time been requested to have complex disputes resolved out of court by proceedings conducted before experts in a particular discipline. Sometimes that may be necessary in a particular case but the court has consistently and jealously protected litigants against the over-use of extra-curial remedies and proceedings. The court has, as a result, assumed burdensome obligations in ensuring its familiarity with dealings and matters to which it is not used so that it can properly adjudicate between the litigants." - - -

He then referred to Honeywell (supra) and said:-

"The submissions made to W B Campbell J (as he then was) by the applicant is summarised in the judgment at 357 as follows:-

'The submissions made by counsel in support of a trial of the issues of fact by an arbitrator were, in summary, as follows: The technical, complex and complicated issues involved cannot properly be dealt with by a judge, to understand such issues the judge would have to spend an inordinate length of time in acquiring the necessary specialist knowledge; the case involves areas of knowledge which are quite beyond the capacity of a layman to comprehend; there is a serious risk that a judge will arrive at a wrong result; a specialist arbitrator familiar with this technical and complex field is far better fitted than a judge to decide whether

the equipment was defective as alleged and what were the adverse consequences, if any, of those defects; the involved scientific issues are more appropriate for decision by a technically qualified person than for one not so qualified; the trial will probably extend over several weeks and its length will be extended by some weeks in familiarising the judge with the basic technical and conceptual matters associated with computers in general and in amplifying and explaining the technical and expert evidence which will comprise most of the oral evidence in the case; the majority of the plaintiff's witnesses will be drawn from the plaintiff's technical officers and it will be necessary for the parties to call independent expert evidence; much of the documentary evidence will be in the form of reports, specifications, plans and calculations regarding highly technical matters; in contrast, the questions of law which are raised in the pleadings are of short compass and of no great complexity. It was also said that the resolution of the dispute will involve detailed and close examination of the computer systems documentation kept by both the computer purchaser and the computer supplier.'"

Carter J concluded (p 359):-

'I am not persuaded that I should make an order that the trial of the issues of fact in this case be determined by an arbitrator. The issues will involve undoubtedly a great deal of scientific and technical evidence of a complex nature but it seems to me that a judge with the help of experts in the relevant fields should be able to come to a proper decision. This is a case, like so many others which come before the courts these days, where expert witnesses will give material evidence but it is not they who decided the issues. Similarly, when assessors are appointed it is for them to advise and for the judge to decide.

In short, it is my opinion that this case is concerned with the sort of disputes which normally call for judicial determination and which should, <u>if one of the parties so wishes</u>, be tried by a judicial tribunal in accordance with the proper rules of evidence and procedure in an

> open public forum. The parties will have available to them persons with the relevant experience and specialised knowledge who will be able to impart the necessary knowledge not only to counsel but also to the trial judge. I do not consider that the factual issues are so technical or complex as to warrant my taking them away from a judge. Of course, the trial judge may, in certain events and in relation to specific issues, determine to seek assistance from scientifically qualified assessors or to obtain the report of a special referee, but at this juncture a court is not in a position to make up its mind as to whether any issues should be so dealt with, or to make any proper adjudication as to whether any and which issues should be referred to arbitration.'" (emphasis added).

This conflict in judicial approach is replicated in the opinion of many members of the legal profession which in turn, in my opinion, fuels the resistance to ADR. That is not to say that both views do not have a great deal to recommend them What I think is missing is the input from the properly informed consumer of these services. It is all very well for a judge, or the lawyers concerned, to accept with equanimity the additional length of time the trial will take before a judge but what about the State and therefore the taxpayers who have to provide the Courts and support facilities and the parties who have to pay for the lawyers and the experts whilst the judge is taught the technical information?

The problems of mandatory dispute resolution and settlement coercion were examined by the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution. Its Report was published in 46 Arbitration Journal 38 (March 1991). It recommended that mandatory dispute resolution be imposed only when a number of criteria are met. These include the requirement that a high quality programme be readily accessible, permitting party participation, as well as lawyer participation, when the parties wish it and clarity about the precise procedures that are required. A further recommendation is that funding for mandatory dispute resolution programmes should be provided on a basis comparable to funding for court proceedings. In contrast, parties are required to pay for the cost of referees in New South Wales. However, clearly enough, an order would not be made forcing a party to participate in a reference where the party is unable to provide for the cost of the exercise.

The Report considers all processes in which the third party neutral lacks authority to issue a binding decision such as mediation, conciliation, early neutral evaluation, moderated settlement conferences and summary jury trials. The warning is given that policy makers should be cautious not to give undue emphasis to the desire to facilitate the efficient

administration of court business and thereby subordinate other interests. Participation should be mandated only when the compulsory programme is more likely to serve the broad interests of the parties, the justice system and the public than would procedures that would be used absent mandatory dispute resolution.

It is further recommended that mandatory dispute resolution have the same compulsory character as hearings and trials, so the public commitment to provide litigation facilities without charging the users, except through the imposition of a filing fee and allocation of court costs should be expanded to provide access to mandatory dispute resolution processes on a comparable basis.

If I may be forgiven for pointing this out consideration of such like questions is present in the judgment of Park Rail (supra) but absent in the other judgments to which reference has been made.

One of the emerging difficulties in ADR has been the protection to be extended personally to referees, mediators and indeed arbitrators and to the information and evidence given before them. A number of statutory provisions have recently been put in place but there is no complete coverage. Thus, whilst the

Federal and Victorian Acts, I have earlier mentioned, give the same protection to mediators appointed under them, in relation to the discharge of their functions, as a judge would have, there is no similar statutory protection in place in the other States. There are persons who consider such protection to be inappropriate. Why,they argue, should a mediator be entitled to immunity any more than a surgeon. On the other hand if liability for negligence were to be permitted what would be the appropriate standards which should apply? The very novelty and diversity of mediation technique would make an answer difficult. Again the requirements for disclosure of any possible conflict are not clearly spelt out. The Institute of Arbitrators Australia has a Practice Note directed to the question but that would cover only a very small section of the field. Problems of this nature need to be addressed.

There is a somewhat related problem which is at present the subject of examination by the New South Wales Law Reform Commission. The training and accreditation of mediators is of increasing concern. Some of the Australian Universities offer courses in ADR as optional courses. The Institute of Arbitrators Australia conducts training courses in ADR and has a Register of Mediators and Arbitrators. The New South Wales Law Society has prepared "Guidelines for Solicitor Mediators"

and the Victorian Institute has published "Standards of Practice for Lawyer Mediators in Family Disputes". Some measure of control by the State is also in place. However the various measures lack co-ordination or an overall philosophical concept. As the Law Reform Commission said:-

> "There are diverse ways of being a mediator. Regulatory controls will need to recognise the different institutional settings and subject areas in which mediators perform, the varying models they use, the different backgrounds from which mediators are drawn, the different paths by which they enter the practice of mediation, the differing terms of employment and remuneration they work under, and their varying levels of opportunity for practice and experience."

There are great issues at stake and it is important that they be fully and fairly addressed.

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