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CONSTRUCTION DISPUTES

AUSTRALIA

The construction industry covers a vast collection of issues and is always subject to the potential for dispute, just like any other industry. Here, as part of *Lawyer Monthly's* Specialist Advocate feature, we turn our attention to the Australian construction sector by speaking to Dr Donald Charrett, a barrister practising in construction law, and an accredited Arbitrator, Mediator and FIDIC trainer. His legal expertise includes litigation, mediation, expert determination, facilitation of experts conferences, arbitration and membership of Dispute Boards. Prior to becoming a lawyer, he worked as an engineer for over 30 years, including 12 years as a director of a consulting engineering firm.

As a barrister in Australia, what are the common types of construction disputes that you see? How do disputes in the construction industry originate, and why do they escalate?

Construction disputes are typically about one or more of time, cost or quality. Time: is an event that delays completion the contractual responsibility of the Contractor, entitling the Employer to liquidated damages, or is it the contractual responsibility of the Employer, entitling the Contractor to an extension of time? Cost: is an identified aspect of the work within the Contractor's scope and therefore covered by the contract price, or is it a Variation, entitling the Contractor to extra payment (and perhaps time)? Quality: has the Contractor executed the work in accordance

with the contractually specified quality, or are there defects that require rectification?

The Security of Payment legislation provides for a short and economical adjudication of cost claims, which are central to many disputes. This process is now the predominant primary forum for the resolution of construction disputes, and has resulted in the majority of construction litigation in recent years.

Disputes typically arise because (known or unknown) risks eventuate and the contracting parties construe their obligations under the contract differently. The widespread use of bespoke contracts, or heavily amended standard form contracts, means that there may be little judicial guidance on how unique contract clauses are to be construed. Disputes

typically escalate because communications have broken down, and neither party is prepared to negotiate a commercial settlement, instead relying on a formal dispute resolution process.

What can contracting parties do to avoid disputes?

I have four suggestions:

- a. Get the contract right before it is signed: this requires a comprehensive definition of the scope, and a balanced allocation of the risks (time, cost & quality), ie to whichever party is best able to manage or assume them.
- b. Ensure that the contract is signed before work starts.

- c. Ensure the project is executed in accordance with the contract and the execution risks are properly managed.
- d. Resolve contentious issues as they arise, at least provisionally.

These steps require identification, understanding and management of the risks at all project stages.

The potentially adversarial nature of traditional forms of construction contracts arising from the divergent interests of Employer and Contractor often make c. and d. difficult. There is ample Australian and international evidence that an appropriately constituted Dispute Board, comprising members independent of the contracting parties, can materially assist the parties in these functions, and thereby avoid disputes.

You act as arbitrator, mediator, expert and Dispute Board member. Which method of alternative dispute resolution (ADR) is the most appropriate to resolve disputes in the construction industry?

Avoidance of disputes is the best method of "resolution", and a standing Dispute Board engaged at the start of a project and meeting regularly with the contracting parties has proved to be very effective in assisting the parties to avoid disputes, or in adjudicating disputes at least cost and time. In the absence of a Dispute Board, the most appropriate method of dispute resolution is the one that delivers an acceptable level of "justice" at least time and cost, preferably without destroying working relationships. A hierarchy of effective ADR methods in order of increasing time and cost is: negotiation between the parties, mediation /conciliation by a third party neutral, adjudication or expert determination by an appropriately qualified adjudicator/expert, with formal arbitration the most time consuming and expensive (albeit the most "just"). Ultimately, any method of ADR needs to be tailored to the needs of the particular dispute to deliver a just, quick and economical outcome acceptable to the parties.

As of the 1st of May 2015 the National Construction Code (NCC) has been adopted by all States and Territories in Australia. What does the code aim to achieve? How will the NCC develop in the future?

The NCC is an Australia wide code to specify

the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of building work throughout Australia. It is a 'performance-based code', encouraging innovation and flexibility in how it is complied with. It also includes prescriptive solutions in the form of deemed-to-satisfy provisions that comply with the Performance Requirements. The NCC is a technical document that is given legal effect through State & Territory Building Control legislation, and incorporates the Building Code of Australia (BCA) and the Plumbing Code of Australia. These documents specify uniform building and plumbing standards throughout Australia (to the extent achievable), whilst allowing for the idiosyncrasies of Commonwealth, State and Territory legislation. The three volumes comprising the NCC, plus a guide to the BCA and a volume of performance requirements extracted from the NCC, are available to download in pdf format free of charge from the Australian Building Codes Board (ABCB) website.

The broad agenda behind the NCC is to increase the productivity and competitiveness of Australian industry by removing unnecessary red tape, and achieve substantial productivity gains from building regulation reform. All on-site regulatory building requirements are to be incorporated into one national code, including the requirements for gas fitting and telecommunication pathways, and possibly electrical works.

What challenges are faced by international companies in Australia, with regards to construction?

General Conditions of Australian construction contracts are frequently bespoke, and even where standard forms are used, they are frequently heavily modified. International standard form construction contracts such as FIDIC are rarely used. Many bespoke and modified standard form contracts allocate to the Contractor risks over which it has no control or ability to manage. This results in significant additional time and cost in tendering and negotiating contracts, and can lead to an adversarial project environment in which disputes are more likely.

Although there is a single common law of Australia, significant issues impacting on construction contracts arise from State and

Territory legislation on Consumer Law, Security of Payment and proportionate liability. The uniquely Australian prohibition on misleading or deceptive conduct in trade or commerce in the Australian Consumer Law has far reaching ramifications that impact all commercial activities, and may provide a remedy not achievable via contract or tort law. Whilst that legislation is essentially the same throughout Australia, the same cannot be said for either proportionate liability or Security of Payment, in which each State and Territory has unique (and often substantially different) legislation. This proliferation of legislation, and in other areas impacting construction such as environment, health and safety, adds a burden of cost and complexity to any company operating throughout Australia.

Amongst other significant challenges are those arising from corruption, and the control that unions exert over employment on construction sites. Both of these issues are the subject of the current Royal Commission into Trade Union Governance and Corruption, due to report to the Australian Government by 31 December 2015.

How does your experience as an engineer help inform the guidance you give in construction disputes?

My engineering background not only informs my understanding of the technical issues frequently at the heart of construction disputes, but is also of considerable assistance in preparing briefs for technical expert witnesses and assisting lay technical witnesses in preparing their witness statements. Further, my engineering training and experience in structuring a problem in a logical way, focussing on the essential issues and assembling the relevant background facts and appropriate theoretical considerations is just as applicable to legal disputes as it is to engineering problems. **LM**

