



CDR Insight April 2008 Edition

april 2008

The Arbitration Edition

Reports of the death of arbitration in this country have been greatly exaggerated.

Following a downturn in the popularity of arbitration as the commercial dispute resolution method of choice in the late 1990s and early years of this century, there are indications that a resurgence may be around the corner.

Commercial contracts that include dispute resolution clauses frequently provide for executive negotiation and/or mediation as the first step in the process of identifying the scope of a dispute and attempting its resolution (refer CDR Insight March 2008). Many commercial contracts – such as in the construction and engineering industry, or in transactions where confidentiality is key – also contain an arbitration agreement.

An arbitration agreement is an agreement between parties to refer disputes between them to arbitration conducted before an arbitrator (or arbitrators) appointed by agreement or by an appointing body.

Arbitration provides a binding outcome to a dispute (in most instances – there are very limited rights of appeal to the Courts on points of law). Arbitration can have advantages over Court-based litigation for a number of reasons including:

- it is typically restricted to the parties to the arbitration agreement – usually a bilateral arrangement;

- the parties have an opportunity to select the arbitrator(s);
- it is typically heard in private and determined in an award confidential to the parties; and
- it can be less formal and more flexible than Court proceedings, in that arbitrators have some latitude about how arbitral proceedings are conducted and an arbitration need not be conducted in accordance with the rules of evidence.

However, the following aspects of arbitration can be disadvantageous to parties:

- it is a direct “user pays” arrangement in the sense that the arbitrating parties directly pay the arbitrator(s) for their time and services;
- the time it takes to resolve a dispute from notice of dispute, through points of claim, points of defence and so on to final award can be similar to the typical time elapsed from the issue of Court proceedings to judgment; and
- the processes of arbitration can closely resemble court procedure.

Fast Track Arbitration

As if in answer to the latter two points the Institute of Arbitrators and Mediators

Australia recently released Fast Track Arbitration Rules.

By specifying the Fast Track Arbitration Rules in their arbitration agreement (or by subsequent agreement), the parties provide for an arbitration designed to identify the points of dispute, hear the dispute (if the arbitrator determines that experts’ conclaves and/or a hearing is appropriate or necessary) and deliver an award within 150 days from the arbitrator’s entry on the reference to arbitration (acceptance of appointment).

To achieve completion in 150 days, each step by the parties is limited as to time (for example, the claimant has 20 days in which to set out its claim – actual and legal issues, arguments, statements of evidence including expert evidence – and the respondent has a similar time to respond). This time limit would tend to reduce the length and complexity of such claim and response. Alternatively, the arbitrator can direct that a joint experts’ report be produced. If the arbitrator decides to hold a hearing, rather than determining the dispute on the papers, he or she can conduct a “stop clock” arbitration, in which the time allocated to each party in the hearing is recorded progressively and strictly enforced.

All this is the mere mechanism through which – or in spite of which – the arbitrator and parties must conduct the arbitration in accordance with the following overriding objectives:

- to achieve a fair, expeditious and cost effective outcome; and
- to ensure a process conducted in a manner that is proportionate to the amount of money involved and the complexity of the issues.

Proportionate Liability

The advent of broad-based proportionate liability arrangements around Australia in the early years of this decade presents some important questions (not yet resolved by the courts) as to the position of arbitration and multi-party disputes.

The NSW legislation (the *Civil Liability Act* 2002) allows parties to “contract out” of the proportionate liability regime.

However, other jurisdictions have adopted different approaches – with their own complexities – which could have starkly different results in the context of arbitration.

Under some schemes (Queensland’s is an example), the determining body may have regard to the relative wrongdoing of persons *not* before the court. By contrast, the Victorian approach in Part IVAA of the *Wrongs Act* 1958 has been to forbid the determining body from having regard to the relative contribution of persons who are not formal parties before the court or tribunal.

Under the former approach, if one concurrent wrongdoer were a respondent in the arbitration, but another

concurrent wrongdoer were not party to the arbitration agreement (and not “joined” in to the arbitration by consent or under the limited consolidation mechanism), the claimant could be at risk of recovering less than all of its loss from the respondent. This by reason of the arbitrator’s legislatively sanctioned regard to the contribution to the loss by non-parties, whom the claimant stands little chance of joining to the arbitration.

Under Victorian law, by contrast, the claimant would presumably better enjoy arbitration, in that the respondent concurrent wrongdoer would be anxious to join non-party contributors to the loss, but would have little prospect of joining them into the exclusive arrangements that are arbitrations. The result may be the award of the whole loss against the respondent, with non-party concurrent wrongdoers untouched by that arbitral process.

Which contracting party is more likely to be claimant, or respondent, in the event of a dispute? Often that is a largely imponderable question at the outset of the parties’ contractual relationship. But until judicial clarification of the proportionate liability laws, that may prove to be a matter parties are willing to take a punt on in seeking to control proportionate liability risks – including by agreeing to arbitrate any disputes or differences that arise.

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