Future Opportunities for DRBs – IT, ICT, Resources and Insurance Sectors

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Introduction

The objective of this panel session is to examine a range of industries and sectors which may provide opportunities for the utilisation of a dispute resolution board (**DRB**) model to prevent and resolve disputes efficiently and effectively.

In effect, our objective is to see where the opportunities may be to exploit the success of DRB's in the construction industry, within a broader church.

In order to carry out that analysis, the starting point is to identify the features of construction projects which make the use of a dispute resolution board attractive. Armed with those 'drivers', this paper explores four sectors and asks whether or not dispute resolution within each of them could benefit from the establishment of DRBs.

The right environment for a DRB

There are a number of reasons why DRBs have worked well in the construction industry. These reasons include:

- Construction contracts generally require performance over an extended period, often years. Projects that do not go well often result in a gradually increasing backlog of claims and disputes which are left to the end of the contracts to sort out. The benefit of 'real time' resolution of disputes by a ready, willing and able dispute resolver such as a DRB is in escapable.
- Construction projects often have complex technical, scheduling and pricing features that require selected expertise across a number of disciplines. A DRB offers this.
- The evolution of a construction project will often mean that there is a significant potential for changes in the requirements of the owner and for the intervention of neutral events which influence and disrupt the performance of the contract. The intermittent nature of these 'interventions' can be accommodated particularly well in the DRB model where the DRB is available for immediate consultation and direction.
- Parties to large construction contracts often have a broader corporate agenda to develop and embed long term relationships. Faster, quicker resolution of issues and disputes on projects support that objective.
- Last, and most obviously, most construction participants have a strong desire to avoid protected, complex and substantial litigation or arbitration, not the least of which because of the drain on people, money and resources which those processes create.

IT Sector

Information technology projects have a number of parallels to construction projects:

- The projects generally have an extended delivery phase.
- There are often multiple stakeholders (such as vendors, contractors, owners and operators) with co-dependant commitments for the delivery of the project.

- The projects are generally technically complex, often with changing owner requirements and an exposure to the impact of neutral events.
- There is the added challenge of dealing with intangible subject matter.

Current approach to dispute resolution

Contracts within the industry appear to adopt a mixture of dispute resolution processes. These include:

- Escalated negotiation.
- Mediation.
- Arbitration.
- Expert determination.
- Arbitration.

In Australia, public sector Information Technology Projects are usually delivered through Federal or State Government information technology contracting frameworks (**GITCs**), although each government appears to have different philosophical approaches to contracting strategies and dispute resolution techniques.

In my home State, Queensland, the GITC Services Contract (Version 5) requires disputes to be resolved by mediation and, failing agreement, by arbitration[1].

In contrast, the Victorian GITC model includes mediation followed by expert determination. The Commonwealth model is similar, although as a further backstop, it provides for litigation in the event of the failure of the parties to agree to an expert determination.

Several organisations offer assistance and processes for disputes in the 1P and IT sectors.

Internationally, the World Intellectual Property Organisation (**WIPO**)[2] has established an Arbitration and Mediation Centre for the resolution of intellectual property disputes. WIPO is charged with administering more than 20 treaties and conventions associated with industrial and intellectual property such as the Paris Convention, the Bern Convention and the Madrid Agreement.

The Arbitration and Mediation Centre for WIPO is based in Geneva and has been operational since October 1994. The Centre provides facilities and processes for Mediation, Arbitration, Expedited Arbitration and Mediation followed by Arbitration. WIPO maintains a list of 'Neutrals' who are qualified to act as mediators or arbitrators.

Back on the Australian front, the recently established Technology Dispute Centre[3] holds itself out as 'an international centre of excellence for the provision of a range of specialist dispute resolution and avoidance of services to facilitate ADR for national and international technology disputes'.

Apart from offering a purpose built facility in Sydney, its functions are listed as including:

[1] See clause 14 of Part 2 - Customer Contract Provisions
[2] Established by the United Nations Conference on Trade and Development
[3] www.tdc.org.au

- bringing together an outstanding group of practitioners with expertise in the management and resolution of disputes involving science, technology, information technology and/or intellectual property;
- providing referral services;
- selection of appropriate experts for expert determination processes;
- creation or staffing of dispute resolution boards.

Nature of disputes

The nature of disputes in IT projects has a very familiar feel to it for construction practitioners[4]:

- Who is responsible for work, deliverables and risk management?
- Is the specification ambiguous?
- Do the deliverables provided by the contractor, subcontractor meet the requirements of the contract?
- Is the work required by the owner 'in' or 'out' of scope? If out of scope, what is the cost of the charge?
- Is the contractor entitled to extensions of time for completion?

These issues can get extraordinarily complicated and messy and there have been many recent high profile court cases to underline the potential for significant conflict.

Some examples:

- In *BSkyB v Electronic Data Systems*, litigation raged for seven years over a damages claim of £709m for damages for breach of contract.

  The case arose from the contract for the design and installation of a new customer system, terminated in 2002 by BSkyB for 'woeful performance'.

  The English Court of Appeal found that EDS has 'lied' about the capability of its product and awarded BSkyB damages of £200m.

  When the dust settled, each party's legal costs had exceeded £40m.

- In *GEC v Marconi*[5], the Federal Court was asked to adjudicate claims and counterclaims arising out of a head contract and subcontract for the upgrading and enhancement of the Australian Diplomatic Communications Network (**ADC Net**). At issue were claims and disputes (in excess of $85m) over variations, principal supplied information, misrepresentations and implementation programs and schedules.

  When judgment was finally handed down in 2003 (seven years after proceedings were commenced), there was no clear winner. All parties were held to be variously liable for breaches of both contracts. Each of the parties was left with a sour taste and presumably a dislike for litigation and lawyers.

It is not difficult to see the potential advantages of installing a DRB to guide and watch over the performance and progress of contracts for the delivery of significant IT services.

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[4] See Erdle, Dispute Resolution Boards – A New Model for complex IT Projects
[5] (2003) FCA 50

ICT Sector

There is an excellent discussion paper prepared as a precursor to the 10th Global Symposium for Regulators in November 2010. It is titled 'The Liberalisation of ICT Dispute Resolution' and its author, Rory McMillan, has carried out a very comprehensive analysis of both the ICT Sector and the current dispute resolution mechanisms that operate within it.

In this fast moving sector, interconnection and access to wholesale telecommunication services and the 'unbundling' and privatisation of many telecommunications providers has created 'a *unique tension between the need to collaborate and the imperative to compete...against the back ground of extensive official intervention through regulation.'*[6]

As McMillan says[7]:

> *'The economics of the internet remain very uncertain and some basic tensions are visible between different groups, such as infrastructure providers and network operators on the one hand and application and service providers on the other. The world of 'ICT' is not a happily united one. Gains in market value have been predominantly enjoyed in those parts of the value chain that have benefitted particularly from 'network effects' and require comparatively low capital expenditures... On the other hand, infrastructure provision and content production and distribution have not enjoyed the same growth in market value.. with convergence, new tensions are arising between the infrastructure and content providers.'*

Nature of disputes

There are 'numerous fault lines'[8] in the ICT sector that, if not anticipated and resolved by the foresight of legislators and regulators, may and do spill into disputes and require resolution generally by Courts.

These 'fault lines' concern:

- data protection;
- privacy;
- intellectual property rights;
- adherence to, and breaches of, licence conditions;
- anti-competitive practices.

Dispute resolution processes

Generally, dispute resolution within the ICT Sector is conducted through processes established and overseen by regulators.

In a number of countries, regulators have recognised that the public judicial system is not adequately equipped to resolve the complex cases and disputes that arise within the sector. This has led to a search for appropriate alternative dispute resolution processes, outside the court system, and often quite innovative.

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[6] GSR 2010 Discussion Paper, pl
[7] ibid, p1.
[8] ibid, p3

These processes include adjudication, expert determination, non-binding expert determination, mediation, ombudsman schemes, dispute boards and hybrids between a number of these processes.

One example is the approach taken by the Telecommunications Authority of Trinidad and Tabago. Under its procedures, the Authority oversees the exchange of pleadings between the parties before handing the dispute to a panel of chosen experts to make a decision. The Authority chooses the panel members, although the parties are given an opportunity to object to the chosen members. The panel hears the dispute in much the same way as an arbitrator would, except that the terms of reference and procedural directions are all set by the Authority. The panel is required to deliver a decision within three months.

DRB opportunities

Disputes in the sector tend not to arise out of contractual breaches so there is generally unlikely to be a contractual framework within which to include a DRB.

The more likely role for DRBs revolves around the use by regulators of expert panels from which dispute resolvers can be selected. Currently, a panel member is generally only assigned when a dispute arises. There is an opportunity to explore the benefits of earlier appointment so that early intervention is more likely to prevent or mitigate that ambit of dispute.

Resources Sector

The resources sector is currently driving the Australian economy so there is a great deal of interest within the broader community around the development of new resources projects and the impacts those projects have on the community at large.

With the resources sector, activities include:

- mine development;
- the procurement of an array of plant and equipment, from the very large to the very small;
- the development of supporting infrastructure, particularly including transport, water and energy infrastructure;
- the operation and management of mines, plants and facilities.

Although there are some very large participants (Rio Tinto, BHP Billiton, Shell and Chevron to name a few), there are also many much smaller 'junior' miners and other participants. It is also a sector replete with regulation and legislation.

Contracts are a mix of modified standards (such as FIDIC and AS4300) and bespoke contracts (for example, for EPCM arrangements). Project delivery seems to follow either EPC or EPCM models though there is some evidence of alliances and target reimbursable contracts.

Dispute resolution processes

It is dangerous to over simplify a description of the processes adopted in very large and disparate industry, however, some of the common forms of dispute resolution adopted in resources contracts are:

- escalated negotiations (such as CEO to CEO meetings);

- international arbitration, particularly where the counterparties to contracts are from different countries;

- in Australia at least, the use of the expert determination and expert appraisal processes is becoming more popular as owners and contractors look for quicker, cheaper, less adversarial ways to resolve disputes;

- ad hoc dispute boards are sometimes used under FIDIC contracts.

Nature of disputes

There is an obvious and significant similarity between disputes in the resources sector and those we experience in the construction sector. There are disputes over the quality and performance of deliverables, time and progress, scope variations and the allocation of risk for a variety of neutral (and sometimes not so neutral) intervening events.

Disputes also commonly arise in the interpretation and application of 'price reset' clauses in long term supply and O&M contracts.

The resources sector has its fair share of cross border disputes – not to be unexpected given the number of equipment vendors based in foreign countries.

When the parties to resources contracts are in dispute, the disputes can often be very substantial. One relatively recent example of this is the dispute between Anaconda and Fluor over the Murrin Nickel Project.

Fluor was engaged as an EPCM contractor for a lateral nickel processing plant at Murrin Murrin. The plant was completed in 1999 but was consistently unable to meet contractual performance requirements. Anaconda claimed losses of AUD1.6 billion and Fluor had counterclaims of over $100 million. In 2000, the claims were referred to arbitration which was conducted in stages and included 'stop clock', examination of witnesses and submissions.

Four years after the arbitration proceedings were commenced, the parties settled the dispute with Fluor agreeing to pay Anaconda a reported $155 million.

In four years, Anaconda is reported to have incurred legal costs of $40 million. Presumably, Fluor's costs were of a similar magnitude.

Although the use of the 'stop clock' arbitration format has been widely regarded as an efficient and effective process, it is easy to see the potential for a DRB to either prevent or substantially mitigate those outcomes.

DRB opportunities

A number of the FIDIC contracts include the option of employing ad hoc dispute resolution boards so the concept of a DRB is not completely foreign to many of the larger, cross border sector participants.

However, our experience in Australia is that the mining houses question the value proposition of DRBs and generally tend to default to the more traditional dispute resolution mechanisms.

It is also true that the EPC model used throughout the Resources Sector is not readily complimentary to the relationship based philosophy of a dispute resolution board.

Those are likely to be the key challenges in successfully implementing DRBs on major resources development projects.

The increasingly widespread use of framework agreements for long term supply arrangements between mining houses and large equipment and material suppliers creates a new and interest dynamic in the Resources Sector. Because framework agreements are generally based on priority corporate relationships, there are some symmetry and consistency to be gained by implementing a more relationship based dispute resolution process such as a DRB to facilitate the 'rollout' of these agreements across multiple jurisdictions.

The sector is badly in need of some education on both the features and the benefits offered by dispute resolution boards.

Insurance Sector

The insurance industry is quite different to those sectors discussed above. It is now a global industry (although there are many regional insurers) and includes insurance policies with an almost infinite variation of characteristics and magnitude.

The great majority of policies (in number, but perhaps not value) are small, private policies with a real 'consumer' focus. Sitting above those policies, there is a sophisticated business and projects insurance market which plays a central role to most industries and sectors within the world community.

Policies are generally written annually, although many, particularly in the construction and resources industry, are project based.

Nature of disputes

There are primarily four categories of disputes that might arise in the context of an insurance policy:

- whether the policy responds to a particular claim;
- whether the insured or insurer has breached the terms of the policy (and what the ramifications of that breach might be);
- where more than one insurance policy potentially responds to the same event or loss, how is the loss apportioned between the policies;
- should a claim which is to be funded by both the insurer and the insured (through the deductible) be settled or not?

Dispute resolution

Although generally, the preferred form of dispute resolution for insurers is litigation, some policies contain 'QC' clauses, particularly where it is necessary to break the deadlock over whether or not to accept an offer made by a counterparty to a claim or litigation.

In many countries, governments have established an ombudsman model with the intention of providing a relatively quick and cheap industry-wide dispute handling process. In Australia, this model has been adopted by the establishment of the financial ombudsman service (**FOS**).[9]

[9] See www.fos.org.au

The Insurance Council of Australia also has a general insurance code of practice which sets out complaints-handling procedures, including internal and external dispute resolution process (the external dispute resolution process is a reference to the FOS.

This combination of internal dispute resolution (**ICA**) and external dispute resolution (**FOS**) has led to substantial criticism.[10] There is a generally held perception that the process takes far too long and many complainants suffer from 'complaint fatigue'.

Opportunities for DRBs

Some of the bigger policies, for example where project owners obtain project-wide insurance programs, lend themselves to a DRB model in much the same way as the project itself. A one person or three person DRB could conceivably be appointed at the outset of the project to monitor the lodgement, progress and resolution of claims under the insurance program.

At an industry level, some insurers (and possibly the Insurance Council of Australia) may be receptive to a DRB panel being appointed with respect to a particular form of policy so that there is a ready dispute resolver available for complaints, who understands the industry, the insurer and the insurance policy wording.

Ian Briggs
Minter Ellison

[10] See, for example, the criticism made by the Australian Securities Investment Commission in Report 245 'Review of General Insurance Claims Handling and Internal Dispute Resolution Procedures' August 2011