NSW Government ADR Clauses - Letter to the Editor

Dear Sir,

The NSW Government's precedents for Alternative Dispute Resolution clauses published in (1993) #33 Australian Construction Law Newsletter should not go without comment.

Firstly, they are biased in favour of the Principal. If any claim by the Contractor, no matter how great, is decided by the Expert in favour of the Principal, the Contractor has no right to arbitration. But if the claim is decided in favour of the Contractor, the Principal has a right to arbitration unless the amount does not exceed $500,000.

The explanatory memorandum says, "the determination shall be binding unless the quantum does not exceed $500,000". This is misleading. If fails to reflect the actual terms of the precedents and it fails to distinguish between the quantum in issue and the quantum of the expert's award.

The clause for use with NPWC3 says, "the decision of the expert ... shall be final and binding on the parties, except where the expert's decision ... is that the Principal shall pay the Contractor an amount in excess of $500,000." The precedent for use with AS2124-1986 is fairer in that it also covers the case where the Contractor must pay the Principal an amount in excess of $500,000. But neither precedent gives the Contractor a right to arbitration where the Contractor's claim is rejected by the expert or where the Contractor's claim exceeds $500,000 and the Contractor is awarded on $500,000 or less.

However, secondly and more importantly, the precedents overlook a most basic principle of law, namely that a clause which contravenes public policy is void. An explanation of the principle will be found under the heading "illegality" in any textbook on contract law, eg Greig & Davis, The Law of Contract, Law Book Co. 1987 at 1093-1097.

A clause which would deny to a party access to the courts (or alternatively, arbitration) for adjudication of the party's rights arising under the contract will be held to be void. The provisions of the precedents which purport to make decisions of the expert final and binding are ineffective. They cannot prevent the Contractor from having the Contractor's legal rights adjudicated upon by the courts even though they have been the subject of a decision by the expert.

Take the case of a claim by the Contractor for damages for breach of contract. The amount is irrelevant. Assume that the Contractor goes through the expert determination process and the expert rejects the claim or awards the Contractor less than $500,000. On the face of the precedents, the decision of the expert is final and binding on the parties.

There is nothing to stop the Contractor commencing an action in a court for damages for the same breach of contract upon which the expert has made a decision. The Principal might try to have the action struck out. Alternatively, the Principal may try to raise the decision of the expert as a defence to the claim. Either course is most unlikely to be successful.

The precedents go to some length to make it quite clear that the expert is not an arbitrator and the expert determination process is not arbitration. Therefore the adjudication of the expert is not an adjudication according to law. That means that the Principal cannot use the decision of the expert to invoke the doctrines of res judicata or issue estoppel. There can only be res judicata or issue estoppel where there has been a decision by a court or arbitrator. The Principal cannot prevent the court from hearing and deciding the claim of breach of contract.

Assuming that the Principal did breach the contract, the Contractor had a right to damages. The question is whether anything in the precedent or the expert determination process extinguished the right to damages. There are various ways a right to damages can be extinguished. The right can be extinguished by an award of an arbitrator of a judgment of a court, by a Limitation Act or by agreement. However, the adjudication by the expert does not extinguish the right to damages.

In the Government's list of ADR processes, the outstanding omission is expedited arbitration. It would be an easy matter to rewrite the precedents so that they provide for expedited and simplified arbitration. It seems that what the Government is seeking is a process for speedily and inexpensively adjudicating legal rights. Expedited arbitration is the obvious solution.

Yours faithfully,

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