

Dispute Resolution - "Alternative" Cures

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Abstract

Traditionally, contracts in the upstream petroleum sector have specified either arbitration or an "independent expert" as the method for resolving disputes. Some interactions, with government and community, do not require contracts, and usually no process is in place at all, except litigation, or arbitration as specified in the Crown Minerals Act.

These methods are not necessarily appropriate in all situations. The rules applying to arbitration have changed, and the status of "independent expert" resolution must be questioned with the introduction of the new Arbitration Act. Furthermore, the procedures applying to litigation have also developed in the last few years.

In addition, new and different resolution methods are being recognised - as being not only valid alternatives, but in some cases, more effective and efficient, and less divisive, than traditional methods. These include the "pre-hearing conference"(relating to resource consents), conciliation, mediation and escalation.

The choice of dispute resolution method should be made when entering into the project. Of course, for some projects, or some situations within the project, that "choice" may be mandated. The choice made relating to governing law of the contract, may impact on the choices of resolution method available.

Where no contract (as such) is to be entered into, a clear process should be made available for communication, complaints and resolution for all participants in the "interaction" to get the project done (community groups, government or local authorities, individuals). Fewer intractable disputes should then arise. Where they do, the impartial known process can be followed to resolve the dispute.

Introduction

A major dispute can debilitate a project or even the company. Capital is eroded, management distracted, relationships devastated, (good) reputations lost, (bad) reputations made.

How to avoid such consequences? The most effective form of dispute resolution is not to have a dispute at all - "prevention rather than cure". That is the ideal.

How can you get closer to that ideal? A dispute management system is a worthwhile investment. This is a fancy name for preparations for a project

which are designed to minimise the potential for disputes and resolve any that do arise. The faster the dispute is resolved, the less potential for it to grow into full scale, destructive aggression.

The dispute may arise under a contract, or from a "public" complaint, a "governmental" decision or a breach of regulations. Not all of these may be adequately resolved by the same final dispute resolution methods, but can often be prevented by the same thorough preparations.

When the preparation hasn't prevented the dispute from arising, the dispute management system should provide for a suitable resolution method. What is suitable for the particular project, dispute and subject matter will depend on many factors. The available methods are as numerous as the factors to consider in choosing one.

This paper gives some guidelines for preparing well, and for choosing appropriate resolution methods for the disputes that do arise.

Prevention, Rather Than Cure

The investment in preparations can be well worthwhile. Failure to deal with the possibility of dispute is usually due to the perceived upfront expense. Managers often don't want to bring into the open and discuss potentially contentious issues which might go away if ignored.

The upfront investment can be substantial - extra time and energy (and money) in discussing the project fully, assessing potential risks, and setting up (and using) a credible "complaints" resolution system. Some perceived tactical advantages may be "given up" or loopholes closed.

However, the better the project is understood, the risks assessed and allocated, plans in place to deal with issues, the more likely no disputes will arise. The final accolade should be a cynical manager asking "why did you do all that preparation? It wasn't needed - no disputes arose"!

A dispute management system is really a number of commonsense parts, integrated together. These consist of:

- Contracts - full, clear and relevant.
- Consultation and Communication - full and frank, open minded.
- Expert advice.
- Complaint handling mechanisms.
- Defined dispute resolution processes.

Contracts

Any documentation, particularly any contract, which defines the project, needs to reflect the relationships and the "deal" as the parties see them. It needs to be clear and full (not leaving details out, because the negotiators "know what we mean"). Later (disputing) personnel won't know what was intended, or may ignore it if it is not advantageous to their side of the dispute.

Communication

The most effective dispute management technique is full and frank consultation and communication at an early stage, and throughout the project. It is human nature to react strongly against anything which you don't understand, don't know the implications or consequences of, or which comes as a surprise. This applies to contractual relationships, environmental agencies, neighbours, "public interest" agencies, licensing agencies, media, and other interested parties.

Expert Advice

Getting advice on areas in which the company does not have expertise may be expensive, but valuable. It sets the project up on a solid foundation, not based on mistaken assumptions about the real position. That advice may need to come from accountants, lawyers, tax advisers, engineers, geologists, safety consultants, governmental agencies, local authority, etc.

Complaint Handling

A "complaint" whether from a contractor, neighbour, local authority, public interest organisation or employee is the warning sign of a potential dispute. Effective processes are important to deal with complaints, niggles, potential disputes (whatever you call them) quickly and to everyone's satisfaction. Escalation clauses in contracts and dispute review boards (or similar) for the project are possible solutions here.

Defined Dispute Resolution Method

When the prevention techniques do not work completely, it helps to have the resolution method agreed and immediately available. This (hopefully) prevents another dispute - about what method to use. It also prevents the parties being forced into litigation as the default option. The courts will usually enforce a consensual choice of resolution method. Even where there is no contract, parties are often happy to be offered an alternative to litigation. Knowing the range of methods available and their characteristics gives the system designer a major advantage in choosing the most appropriate method, or tailoring one to the circumstances.

Dispute Resolution Methods

There are as many forms of dispute resolution as there are disputes to be resolved. Human imagination is the only limiting factor. However, there is a continuum along which most methods fit, ranging from "imposed decision" to "consensual resolution".

All methods use some form of "neutral" (or, at least, more objective) third party. Except in litigation, the parties can usually choose that person by agreement. That person may be an expert in the area in which dispute has arisen, or any objective professional. If you use an expert, be clear whether you expect them to exercise their expert judgment, or whether you just don't want to have to explain every technical phrase.

Litigation

Loss of control by the parties, delays in getting fixture dates, detailed evidence requirements, discovery procedures, enormous costs, little confidentiality, a decision-maker with no understanding of the area disputed, a decision made on legal rules and precedent not fairness or apparent "justice" - the common objections all apply.

However, strict case management techniques are being piloted, for commercial cases in the High Court, to reduce delays. For district court cases (under \$200,000), significant delays remain. And in some cases, it may be to your advantage to delay resolution - sometimes, it is to your opponent's advantage to do so.

Litigation can be a good forum for (veiled) aggression and revenge. Another reason to use litigation is if your case is legally strong, but morally weak.

For matters where there is no arguable defence, the summary judgment procedure is fast and effective (and not prevented by most dispute resolution clauses, as the basis of summary judgment is that there is no "dispute").

Arbitration

Although, there is scope in most convention rules and countries' legislation for an arbitration to be quick, easy and controlled by the parties, that often doesn't happen. Costs spiral, as you pay for the venue and the arbitrator's time, as well as legal counsel. Detailed preparation will be important, to present your case persuasively, to the decision maker.

Again, legal principles apply, unless the parties have agreed that the arbitrator can decide on the basis of equity (and the substantive governing law allows a decision on that basis). If they do so agree, they are subject to the arbitrator's particular sense of fairness and justice.

There is usually a limited right to challenge the award in court, where an error of law appears to have been made.

If the arbitration takes place in New Zealand, the rules of the Arbitration Act 1996 apply (at least the First Schedule, if not the Second Schedule). The substantive law to be applied will usually be the law agreed in the contract.

Two "sudden death" variants of arbitration are final offer and judgment by forecast. Final offer arbitration is where each side puts in its best offer. The arbitrator then chooses one or the other, without modification.

Judgment by forecast entails each side stating the result it would expect to get from litigation. The arbitrator chooses the result which is closest to its opinion of the likely outcome. Both methods focus the parties' minds on a realistic assessment of what the result could or should be.

Independent Expert

Traditionally, expert determination was used for, for example, determining value or market price. An expert opinion, rather than a decision based on parties' submissions, is required. This method has now been expanded into general dispute resolution. The distinction between expert determination and arbitration is becoming increasingly blurred. Arbitration rules and consequences can still be avoided, using express contract wording.

Awards can not be automatically enforced in the courts, as an arbitral award can be. Conversely, the expert's decision is truly final - it cannot be challenged in court. An expert could however be sued for negligence (subject to the contract of appointment).

But you can be very much in the expert's hands, subject to the application of their expertise and own sense of the appropriate result. After all, that's why you appointed an expert instead of a judge or general arbitrator.

Medarb

This is a hybrid of arbitration (see above) and mediation (see below) where the decision maker tries to get agreement on all issues, or as many as possible, first. For those issues on which the parties are still deadlocked, the mediator turns arbitrator and decides the result.

Mediation

This may be described as "facilitated negotiation". "Conciliation" is often used as an inter-changeable name, but in New Zealand this tends to apply to domestic relationships.

The mediator does not impose a decision, and normally would not even suggest an answer or likely outcome unless asked. The solutions reached are not necessarily supported by legal principle. The mediator helps the parties to understand each other's position better, and assists them to reach a solution based on objectives of all the parties.

This method can be powerful, but is not an "easy option". It can take courage to face the other party, without legal principles (and legal counsel) to hide behind. The parties need to understand, and be prepared to discuss, the issues (without having had the discipline of preparing pleadings, affidavits, documents for discovery, etc).

Some disputes are not suitable for mediation. Contraindications include fraudulent behaviour, a desire for revenge, a significant power imbalance, no need for speedy resolution, a need to force participation, no continuing relationship to protect, or an important precedent needs to be set.

Indications that mediation may be suitable include wanting the dispute kept private or the results confidential, a quick settlement is preferred, the remedy may best be a customised solution (a product of some lateral thinking), where it may be useful to assess the strength of the other side's case or impress them with yours, an important ongoing relationship to protect, and constructive communication between the parties may be an advantage.

The choice of a mediator, who is committed to an interest-based approach, with an empathetic style, is important. Equally so is advice from counsel, who understand the process. It must be for the parties themselves to define their objectives and ongoing business strategies, and articulate their feelings which need to be factored into the process.

It is "not a panacea for all ills" but can provide workable solutions, which meet the parties' (rather than the mediator's) sense of fairness and justice.

Escalation Clause

This is a type of dispute resolution clause which requires no formal steps to be taken until after a meeting between the two chief executives. There are numerous variants, for example, providing two or more steps up the corporate ladder before involving the CEOs, or a "Dispute Review Board" which meets regularly to deal with any disputes and recommend a solution. Penalties for failing to follow the recommendation may arise if the dispute is raised again.

This "escalating" resolution is usually followed by "compulsory" mediation, before resorting to litigation or arbitration.

The courts will usually enforce such clauses - not requiring the parties to reach agreement but requiring them to embark on, and carry through, the agreed process, in good faith. Only where there is a serious imbalance in power between the parties would the courts be likely to not require mediation.

Pre-Hearing Conference

This is really part of litigation, available under the Resource Management Act 1991 (s.267). Any party or the Environment Court judge in the case may require a conference before the hearing. This can be used to set a timetable, define or narrow the issues, prioritise issues to be heard, limit the witnesses or cross-examination of them, determine evidence admissibility questions, or otherwise streamline the process of the hearing itself. The judge is only entitled to make these directions with agreement of the parties. (Refusal to agree may be a factor in awarding costs later.)

Choice of Method

The advantages or disadvantages of the methods (as discussed above) may point towards an appropriate method. The relevant legislation may require a particular method. The substantive governing law chosen for the contract may make one method more advantageous than another, or prohibit use of some.

Where the dispute is over a breach of environmental requirements, and your dispute management system hasn't been able to prevent or contain it, the required method is obviously prosecution in the courts under the Resource Management Act.

The Crown Minerals Act 1991 (s.44) requires arbitration to be used for settling the terms of a permit work programme.

The Environmental Court may refer a matter to mediation (s.268) or arbitration (s.356) (with the parties' consent). Some matters with a strong public interest element may not be so referred. Use of an Environmental Commissioner as mediator is free of charge.

It may be valid to refuse mediation or arbitration, even it may be legally available. For example, when the power imbalance may coerce a party into an "agreed" solution, or when the outcome may affect the public at large (eg an environmental case) because the proceedings and result are confidential.

If there is no contract (as such) in place between you and potential disputants (eg a neighbouring business or resident, local authority, public interest organisation), your dispute management system will be important in preventing or containing disputes. Set up a clear consultation/communication/complaints channel, possibly with a regular disputes review meeting, or an identified Disputes Panel. Advertise support for independent expert or arbitration as a "final resort" resolution method. Although that may not be able to be enforced (because there is no contract), disputants may use the "advertised" method anyway, because it is expected and becomes the next logical step.

Whichever method is chosen, try to choose at the start a project. At that point, most parties will agree that they want "a fair resolution of disputes by an impartial tribunal, without unnecessary delay or expense". Once the dispute arises, all noble intentions are forgotten. You and your opponent will want to win or to make it as difficult as possible for the other to win. Better by far to choose a method coolly, acknowledging that some of your tactical advantage may be given away. However, the same concessions are being made by the other party, and either of you may reap that benefit, depending on the dispute.

Conclusion

A dispute management system and appropriate dispute resolution clause in all contracts should prevent or discourage disputes, and provide the means to control those that do arise.

There are numerous methods, and variants on those, available. Litigation, arbitration and independent expert determination are not the only options. Many of the emerging methods allow the parties to retain control of, and responsibility for, their disputes. One of these methods, with an imposed decision as a final resort, combined into an escalation clause can be a powerful means of resolving disputes quickly, effectively, with minimal loss of time, money and control. Relationships may be retained or even enhanced.

Mediation is a widely recognised method, endorsed by the courts and legislation. It can be a powerful tool, but is not the final resort. In the end, a binding decision imposed on the parties may still be needed. Whatever the end result of a particular dispute, the dispute should have been material enough to have started only in the face of a dispute management system and with an agreed process to its resolution.

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