

Dispute resolution protest

A recent High Court decision highlights the importance of being clear on the meaning of dispute resolution clauses in a contract and only selecting the options best suited to the specific circumstances.

THE HIGH COURT recently considered a standard dispute resolution clause in a subcontract. The parties to the dispute were an Australian company, Eltek Australia, and Hawkins Construction. Eltek and Hawkins were in dispute over liability for an electrical system supplied by Eltek.

Liability for costs in contention

Eltek claimed that Hawkins owed it for additional costs investigating a failure in the system and replacing damaged parts. Hawkins argued that Eltek was responsible for the costs of the replacement parts as well as additional construction costs allegedly caused by the failure of the system.

Under the parties' subcontract, they agreed to submit any dispute between them to an international arbitration under the Arbitration Act 1996. However, the subcontract also contained a clause that said 'disputes may be dealt with by adjudication as provided for in the Construction Contracts Act 2002'.

Protest against adjudication

Hawkins acted under this clause and referred the dispute to adjudication. Eltek protested the adjudicator's jurisdiction. The adjudicator issued a determination finding that he did have jurisdiction to consider the dispute referred to him. It was that determination that Eltek sought to judicially review in the High Court.

Eltek argued the clause meant parties may refer their disputes to adjudication but not that a party had actually consented to use that

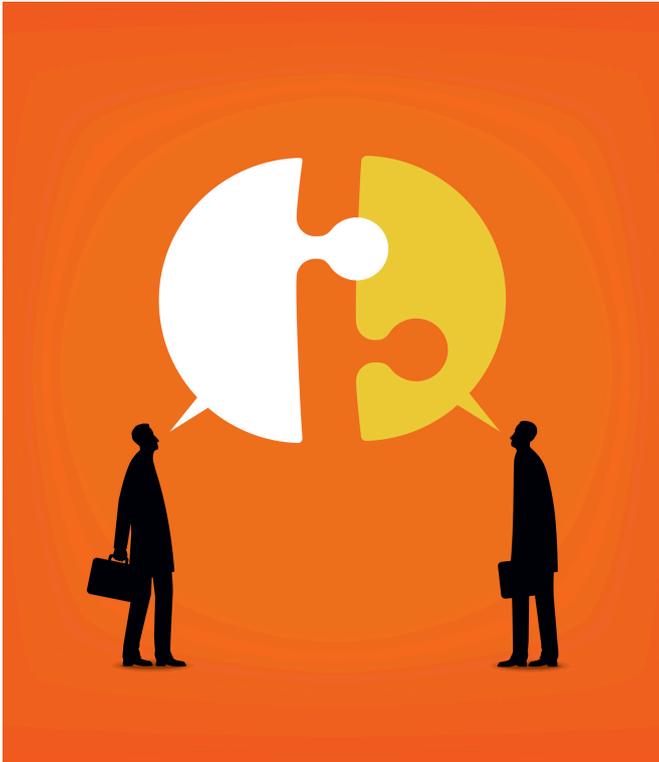
procedure under s 25(3) of the Construction Contracts Act 2002. That section requires parties to consent to proceed to adjudication where they have agreed to arbitrate and are parties to an international arbitration.

Eltek also argued that the adjudicator had failed to take the commercial context into account. It said that context included that the dispute resolution clause was widely used in New Zealand and that most parties would not regard the clause as providing consent to an adjudication procedure.

Parties had knowledge of adjudication

Justice Wylie did not agree with Eltek's arguments. He found that the commercial context for the subcontract included the parties having knowledge of a number of the features of adjudication under the Act:

- The Act is legislation that all significant constructing parties must turn their minds to.
- The Act provides a fast-track process for resolving claims.
- The right to refer a dispute to adjudication exists even if the dispute is the subject of proceedings in the court or a tribunal.
- Where money is in dispute, an adjudicator must determine whether either party is liable but also consider questions in dispute about the rights and obligations of the parties under that contract.
- Determinations about liability for payment are enforceable, but determinations about rights and obligations under a contract are not.
- The adjudication process is quick and cheap.



Parties accepted adjudication

Justice Wylie also found that the parties would have known that their contract required them to proceed to an international arbitration if their dispute could not be resolved in good faith. They would also have known that the dispute could not be referred to adjudication without the consent of both.

Against that background, Justice Wylie said it was unlikely that the parties were simply recording in the contract that adjudication was an option available to both of them. The word ‘may’ in the clause was not just permissive, it did confer the consent that is required by s 25(3) of the Act. Signing the subcontract was a positive and affirmative act of acceptance by the parties to use the adjudication process.

Consider dispute resolution clauses carefully

This case illustrates that it is important to consider the dispute resolution clauses in a construction contract carefully. Those clauses should not be overlooked as standard clauses that always appear.

Parties should think carefully about the options selected and always consider whether or not they consider that those options will be suitable for their circumstances. If a dispute resolution clause is not understood, you should seek clarification of what is involved from your legal advisor. ◀

Note ▶ This article is not intended as legal advice. For further information, contact your legal advisor or the Harkness Henry Building and Construction team on (07) 838 2399 or email build@harkness.co.nz.