

subsequent legal proceedings concerning the issues to be mediated upon.

- 6.6 The mediator shall obtain the parties' agreement prior to commencement of the mediation process that information divulged during the mediation will not be used by either of the parties in any subsequent legal proceedings without the consent of all parties.
- 6.7 The mediator shall inform the parties at the initial meeting of any limits on confidentiality such as statutory or judicial requirements for reporting.
- 6.8 The mediator shall render anonymous all identifying information when materials are used for research or training purposes.
- 6.9 The mediator shall maintain confidentiality in the storage and disposal of records.

7. Disclosure:

- 7.1 The mediator should if he/she considers it would facilitate a settlement, recommend disclosure of relevant information.
- 7.2 The mediator may encourage participants to obtain independent expert information and advice.

8. Termination of Mediation:

- 8.1 Where full agreement has been reached, the mediator should discuss with the participants the process for formalisation and implementation of the agreement.
- 8.2 Where the participants have reached a partial agreement the mediator should discuss with them procedures available to resolve the remaining issues.
- 8.3 Where the mediator believes the agreement being reached may be impossible to uphold or may be illegal, he/she should recommend to the parties that they obtain independent legal advice.
- 8.4 Without Agreement:
 - (i) Each of the parties has the right to withdraw from mediation at any time and for any reason.
 - (ii) If the participants reach a final impasse, the mediator should not prolong unproductive discussions which will result merely in a waste of costs to the participants.
 - (iii) If mediation has terminated without agreement, the mediator should suggest that the parties obtain additional professional services as may be appropriate.

9. Responsibilities to Other Mediators:

- 9.1 A mediator may, if the parties desire, act where another mediator is already employed. He/she may consult with the other mediator/s with the parties' consent.

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23. ALTERNATIVE DISPUTE RESOLUTION - CONFIDENTIALITY

To ensure the efficiency of the Alternative Dispute Resolution process, the Australian Federation of Construction Contractors has made a submission to the New South Wales Attorney General seeking legislation to protect mediators, conciliators, experts and organisations such as the Australian Commercial Disputes Centre from being called as witnesses or compelled to produce their files in any subsequent proceedings.

At present, ACDC requires disputants to sign a document in which the disputants agree not to call the mediator (etc) as a witness in subsequent proceedings. However, it remains to be seen to what extent the Court, or for that matter arbitrators, will uphold this agreement and treat ACDC and the mediator as

privileged from involvement in such proceedings in the face of particular circumstances in which evidence from officers of ACDC or the mediator might be highly relevant with respect to matters such as any settlement agreement. It might be considered that this agreement constitutes an attempt to oust the jurisdiction of the Court.

Accordingly, to support the process of Alternative Dispute Resolution and to foster the Australian Commercial Disputes Centre in its work, AFCC is seeking legislation on behalf of its members to provide the necessary protections to foster the ADR process. Extensive legislation (along the lines of the Commercial Arbitration Act in relation to the process of arbitration) is not being sought to govern the whole ADR process, as that would not be necessary or desirable. The proposal is for limited legislation to protect the confidentiality of the ADR process only.

The support of organisations such as the Alternative Dispute Resolution Committee of the NSW Law Society, the Alternative Dispute Resolution Association of Australia, the Australian Commercial Disputes Centre and the Institute of Arbitrators, Australia has been sought for the proposal. Similar submissions will be made in due course in the other States.

24. LIQUIDATED DAMAGES - WHAT LIMIT?

Most standard form construction contracts contain liquidated damages clauses, by which damages for late completion can be imposed against a party to the contract at the rate specified in the agreement. The amount of damages to be paid in the event of delay is nominated by the parties at the outset of their contractual relationship. Providing that the liquidated damages clause cannot be said to amount to a penalty, it will be enforceable and the head contractor or principal will be entitled to recover the liquidated damages as nominated under the terms of the contract.

If the principal (in the case of a head contract), or the head contractor (in the case of a sub-contract) in fact suffered actual damage in excess of the liquidated damages amount, there is authority to the effect that he is nevertheless limited to the amount recoverable by way of liquidated damages rather than his actual loss. (*Widnes Foundry (1925) Limited v Cellulose Acetate Silt Company* 1931 2KB393).

There has been recent authority which further reinforces this view, where the Court had to consider the effect of inserting the words "nil" in a schedule relating to the imposition of liquidated damages. It was argued in that case that the principal could elect as to whether or not he proceeded to establish his actual loss consequent upon late completion, or whether he was restricted to any rights he may have under the liquidated damages clause in the contract.

The Court held that because the contract provided for "nil" liquidated damages, that was an exhaustive agreement as to damages and there was no entitlement to recover damages at large. If a party wished to retain its right to general damages, without a limit being imposed on those general damages, then the liquidated damages clause in the contract presumably should be excluded. The parties, however, are then faced with the difficulties of proving actual loss consequent upon delay, which proof can be difficult and time consuming. It is to avoid such proof that liquidated damages clauses originally developed.

It is suggested that when parties consider the terms of the contract in relation to damages for delay, they give close consideration to the appropriate amount for liquidated damages on the basis that the figure nominated will generally form the upper limit of the damages which could be recoverable under the terms of the contract. In any event, care should be taken to avoid the result found above namely, that the insertion of the word "nil" meant

that no damages were recoverable at all.

- Colin Biggers + Paisley, Solicitors, News Vol. 21

25. FUTURE ISSUES

Forthcoming issues will include:

- . An alternative system to the involvement of Local Authorities in granting Building Approvals and administering Building Regulations.
- . Affirmative action and the construction industry.
- . The problems involved in consolidation of arbitral proceedings.
- . The issues involved in legal representation in arbitrations.
- . Independent appraisal.
- . Streamlined arbitration.
- . Time bars in General Conditions of Contract NPWC3.
- . Cost adjustment:
 - the Second Edition of the National Cost Adjustment Provision
 - the impact of recent developments in industrial relations and legislation on cost adjustment.
- . Frustration of construction contracts.
- . Recovery on the basis of unjust enrichment.
- . Claims and disputes - the findings of the industry research project mentioned above.
- . Alternative contract strategies.
- . Alternative Dispute Resolution.
- . The issues involved in provision of geotechnical data.
- . New industry contracts - their features. □

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