



INTERNATIONAL
BUILDING
QUALITY CENTRE

Ways to Improve Efficiencies and Generate Cost Savings in Construction Dispute Resolution Theatres

An IBQC Conference

Some insights on ways by which construction dispute resolution systems can improve, derived from advice given on the writer's various law reform deployments in Japan, Africa and China.

Adjunct Professor Kim
Lovegrove MSE, RML

The Construction Index: Claims and Disputes Plague Projects

- Claims advisory and dispute resolution experts HKA investigated claims and disputes on 1,602 projects in 100 countries for its 2022 annual Crux Insight report. The combined value of the projects investigated exceeds US\$2 trillion (roughly £1.7 trillion).
- Total claims analysed in the report exceeded US\$80 billion in value, while the cumulative overruns add up to 840 years. [1]



- Less than optimum construction dispute resolution systems:
 1. Work against utilitarian outcomes for parties embroiled in legal proceedings
 2. By and large destroy commercial relationships and contracting relationships per se
 3. Lead to divergent rather than convergent outcomes
- Therefore, in many respects, it is misleading to describe construction dispute resolution as 'dispute resolution'; for dispute resolution in its purest form is more about resolving a conflict - resolving being the operative word, rather than the imposing of an outcome on the parties
- Courts and Tribunals impose outcomes on parties
- Mediation and ADR enable the parties to fashion and collectively design outcomes on the basis of a mutually of interests
- Just because there is a dispute does not mean that there cannot be a meeting of the minds and an affable convergent outcome – an outcome where water is poured on the fire as it were rather than the infusion of benzine

Convergent dispute resolution



Negotiation and mediation works like water: it puts the fire out

Insights on: How to improve Construction Dispute Resolution systems. Adj Professor Kim Lovegrove MSE RML



LOVEGROVE & COTTON

Construction & Planning Lawyers

Divergent dispute resolution



Can create an inferno as it repudiates
any potential accord

Insights on: How to improve Construction Dispute Resolution
systems. Adj Professor Kim Lovegrove MSE RML



LOVEGROVE & COTTON

Construction & Planning Lawyers

Some best practice proposals

- Mandatory front end and early-stage mediation
- Dedicated construction dispute resolution divisions
- Consolidation mechanisms that allow for joinder of all relevant parties to a single proceeding
- Court or tribunal appointed highly qualified expert witnesses, venerated by peers of good repute



LOVEGROVE & COTTON

Construction & Planning Lawyers

Mandatory front end and early-stage mediation support

In keeping with the philosophy of convergent dispute resolution, where the mantra is to put the fire out:

- Mediation will be mandatory
- Will occur shortly after legal proceedings are issued ie within 6 months or so
- All key actors, responsible and affected parties will be required to attend the mediation

This allows the parties to better navigate an amicable solution by way of negotiation and the impartial guidance and cajoling of the mediator

Dedicated construction dispute resolution divisions

- Best practice jurisdictions ensure that there exists within the courts or the tribunal, specialised lists dedicated to construction dispute resolution which concern themselves exclusively with that area of speciality.
- Within those divisions, arbiters will practice either exclusively or predominately construction dispute resolution.



LOVEGROVE & COTTON

Construction & Planning Lawyers

Consolidation mechanisms to better ensure joinder of relevant parties to a single proceeding

- Best practice jurisdictions will have mechanisms that ensure that all implicated parties can be compelled to participate in a consolidated set of single proceedings



LOVEGROVE & COTTON

Construction & Planning Lawyers

Court appointed, highly qualified expert witnesses

- In this writer's submission, and this is based upon personal experience, in the order of 30% of the cost and time involved towards construction dispute resolution can be attributed to the adversarial culture that in many jurisdictions that has become part of their DNA.



LOVEGROVE & COTTON

Construction & Planning Lawyers

Best practice construction dispute resolution systems recognise and manage well expert witness testimony

- There are those that are of the view that the role of the expert witness is even more important than the role of the legal advocate.
- They would contend that as most building disputes are about building defects, cause of same, allocation of responsibility for defects and their cost of rectification, that the expert witness is indeed the paramount actor.
- I tend to agree with those that prosecute this view



LOVEGROVE & COTTON

Construction & Planning Lawyers

A best practice expert witness protocol will have an expert witness accreditation system

- It is submitted that expert witnesses that wish to offer their professional wares, in a best practice jurisdiction will be:
 - Accredited by the apposite government department
 - Appointed to court or tribunal panels of expert witnesses
 - Required to complete annual professional development training to continue to hone their craft



LOVEGROVE & COTTON

Construction & Planning Lawyers

How a court appointed witness system will operate

- After the initiation of legal proceedings there will be a directions hearing where appropriate experts are appointed to:
 - Inspect
 - Diagnose
 - Cost
 - Prepare a report on point
 - Copy the report to disputants, court or tribunal member



LOVEGROVE & COTTON

Construction & Planning Lawyers

The benefits of court appointed expert witnesses

- Shorter trial length
- Earlier settlement
- A reduction in costs of the proceeding
- A reigning in of expert witness 'pugilism' in that court appointed experts will remove the adversarial modus operandi



LOVEGROVE & COTTON

Construction & Planning Lawyers

Conclusion

- Best practice construction dispute resolution ecology will feature:
 - Mandatory front-end mediation
 - Dedicated building lists
 - An accreditation system which accredits expert witnesses
 - Courts/tribunal appointed expert witnesses
 - The remuneration of both mediators and the expert witnesses on the basis that the parties pay for their retention
- If these elements are enshrined in construction dispute resolution apparatus, I predict that the costs of dispute resolution will dramatically reduce and will be conducive to a more holistic and utilitarian outcome that is in keeping with the philosophy of convergent dispute resolution.



LOVEGROVE & COTTON

Construction & Planning Lawyers

References

[1] The Construction Index, 'Claims and Disputes Plague Major Projects' *The Construction Index: The Construction Search Engine* (Research Article, 28/10/2022) <https://www.theconstructionindex.co.uk/news/view/claims-and-disputes-plague-major-projects?utm_source=tci&utm_medium=sharing&utm_campaign=linkedin>.

Presented by Adj Professor Kim Lovegrove MSE, RML

- Founder – Lovegrove and Cotton, construction and planning lawyers Australia
- Chair of the IBQC, past Senior Law Reform Consultant to the World Bank



The views expressed in this paper are of the writer only and are not the views of any other body.



INTERNATIONAL
BUILDING
QUALITY CENTRE

