DISPUTE RESOLUTION

WHEN IT COMES TO DISPUTE RESOLUTION, THERE ARE THREE ROADS ONE CAN GO DOWN – ARBITRATION, MEDIATION AND CONCILIATION – BUT WHICH ONE IS MORE EFFECTIVE? **PAUL COTT** DIFFERENTIATES EACH AND EXPLAINS WHY ONE METHOD MAY BE MORE SUITABLE THAN ANOTHER.

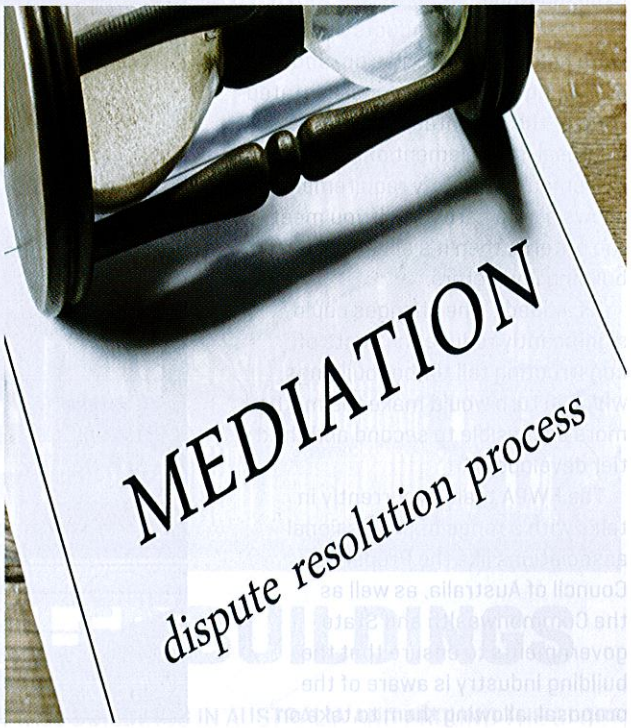
Much has been written about so called 'alternative dispute resolution' and how it is more efficient due to being cheaper, quicker and allegedly more effective as a method to resolve building and construction and other types of disputes.

But what those in the industry wish to know is which method, as an alternative to court action, is better as a method to resolve a given dispute.

There are occasions where one does not have a choice as to which method to use (e.g. where there is an arbitration clause in a contract or where the parties have agreed to submit disputes to arbitration); however it can often be the case where there is a choice (outside also, the court context).

They all have their advantages and disadvantages for various reasons, but one thing they all have in common is that they involve an independent third person in the dispute and its resolution or attempted resolution; however the involvement of that third party can differ.

It is to the first method of dispute resolution that this article now turns; mediation.



Mediation is just one type of alternative dispute resultion.

MEDIATION

This is where the third party, according to the traditional model, is merely a facilitator of the parties discussing the dispute issues. They are meant to be very neutral, with their 'backs to the chair' in the sense of staying as far out of the dispute as possible.

The mediator has to remain (as you would expect) completely neutral, and not provide any advice in the dispute and is certainly not to make any sort of determination as to who is 'right' or 'wrong'.

The cost of mediation is usually shared equally between the parties however it is unfortunately the case that a qualified mediator's fees are not overly cheap.

Of course, readers of this article may have been 'forced' into mediation when embroiled in a court action of some kind, in the sense that at some stage after a court application is made, the parties are subject to a compulsory mediation – they have no choice but to do so in the sense that if they do not, their claim may be at risk of being struck out or the claim may be decided against the defendant or respondent if that defendant or respondent refuses to mediate.

The good news, in this context, is that in the case of a court imposed mediation, there are usually no fees for the mediation, and sometimes depending on the court and the type of case, a mediator's fee does not have to be paid.

ARBITRATION

The arbitration process sees a binding decision made at the end. That makes it unusual in the context of this article as outcomes are not imposed on the parties during mediation and conciliation.

Some parties like the fact that with arbitration, there is the certainty that on the conclusion of the process, a decision is made and in that sense, subject to the somewhat limited rights of appeal, the dispute is over. It is however a formal process and it has sometimes been called 'private litigation' due to it being somewhat analogous to the court process. Hence some parties may steer clear of this option.

Be aware of the possibility of an arbitration clause in a contract where, once agreed to, make arbitration compulsory.