

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY

Thursday 4 March 2021

*Professional Development and Networking for the
In-House Legal Community*

When Contracts Go Wrong: Tips for avoiding and managing disputes

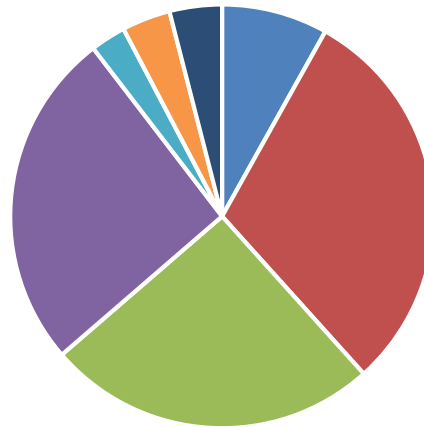
Presenters: Rebecca Jaffe, Partner and Toby Mittelman, Partner

Introduction/Overview

- Causes of a dispute
- What should you do before entering a contract?
- What should you do during a contract term?
- What if a conflict/dispute arises?
- Alternative dispute resolution
- Managing a dispute - practical issues
- Litigation

What goes wrong in contracts

Survey of the construction industry



- Principal-related
- Scope/specifications-related
- Human behaviour-related
- External-factors
- Contractor-related
- Contract-related
- Project-related

Source: Camak & Camak, Procedia - Social and Behavioral Sciences 109 (2014) 183 – 187

What goes wrong in contracts

- Are behavioural factors really the category least likely to cause disputes?
- Unsuccessful communication (including lack of clarity in the Contract itself) and poor understanding are often the true cause of disputes
- However, Contracts are also increasingly complex...

What goes wrong in contracts

The Top 5 causes of construction disputes (North America, 2020)

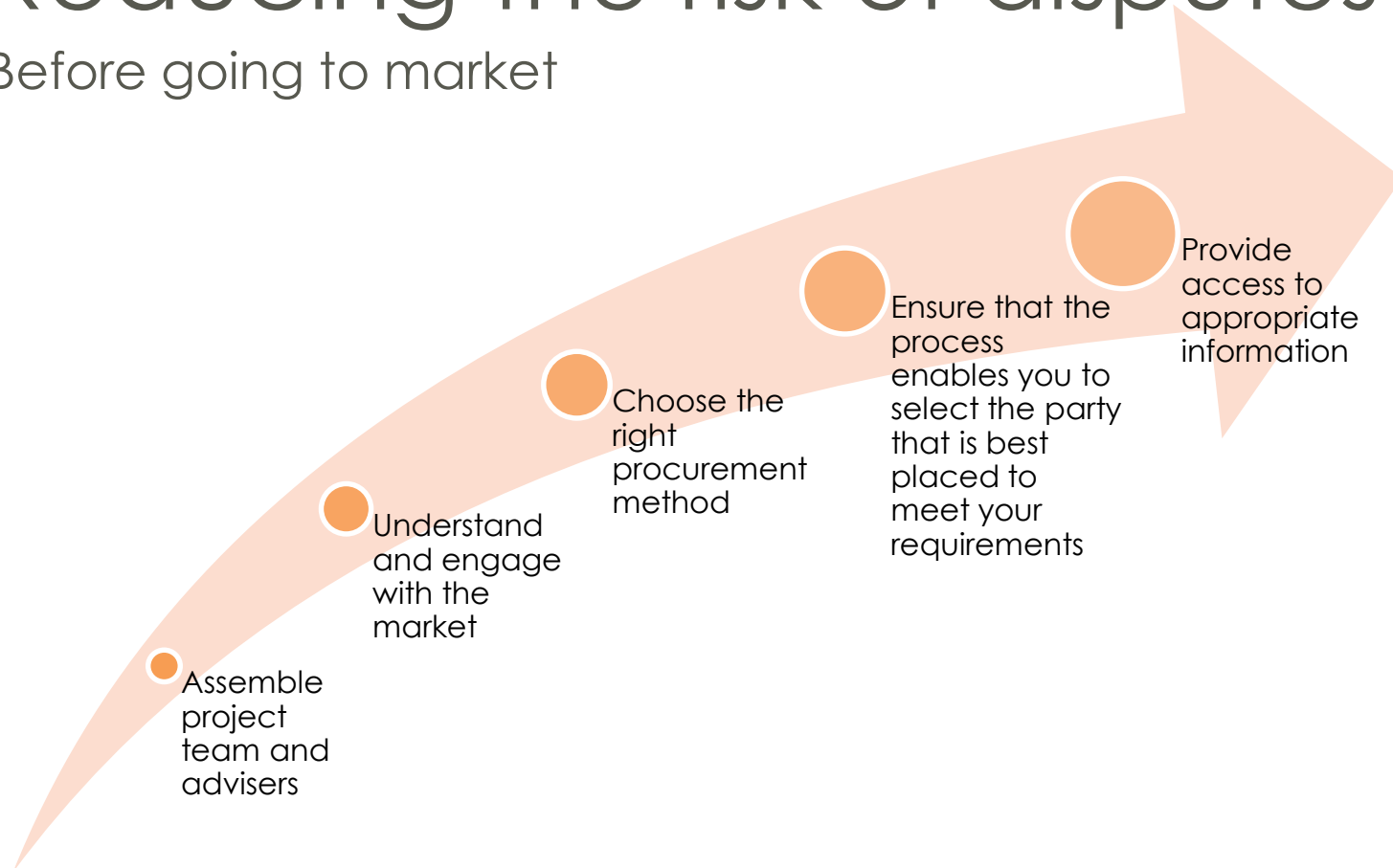
1. Owner/Contractor/Subcontractor failing to understand and/or comply with its contractual obligation
2. Errors or omissions in the Contract documents
3. Poorly drafted or incomplete and unsubstantiated claims
4. Owner-directed changes
5. Unrealistic contract duration or completion date

Source: **Arcadis Global Survey of Construction Disputes 2020**

<https://www.arcadis.com/en/global/our-perspectives/global-construction-disputes-2020/>

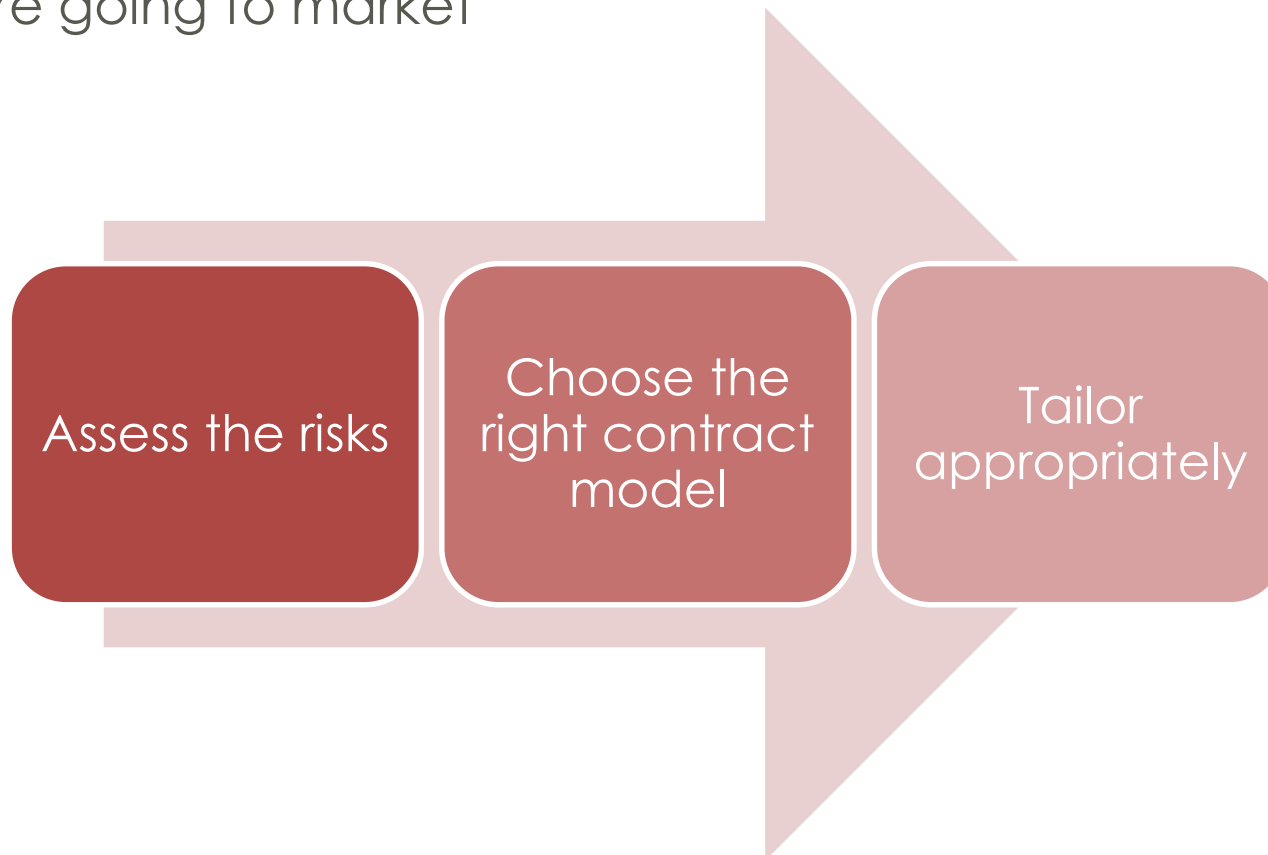
Reducing the risk of disputes

Before going to market



Reducing the risk of disputes

Before going to market



Reducing the risk of disputes

Before going to market

Communication and Governance

- Reporting, Meetings, Committees, Performance Management Framework

Risk allocation and liability

- Indemnities, warranties
- Liability caps, exclusions

Processes

- Payment claims, variations, extensions of time, delay costs, liquidated damages, approval/acceptance

Dispute Avoidance and Resolution

- Negotiation, mediation, expert determination, adjudication, arbitration, litigation

Remedies

- Suspension, Stop Payment, Step-In, Termination

Reducing the risk of disputes

Before going to market

Draft clear terms and processes

Minimise gaps to be filled in later

Use defined terms consistently

Use active language

Don't over-complicate requirements if you don't have to

Reducing the risk of disputes

During evaluation, negotiations and contract award

Do your due diligence

Seek clarifications

Negotiate strategically and carefully

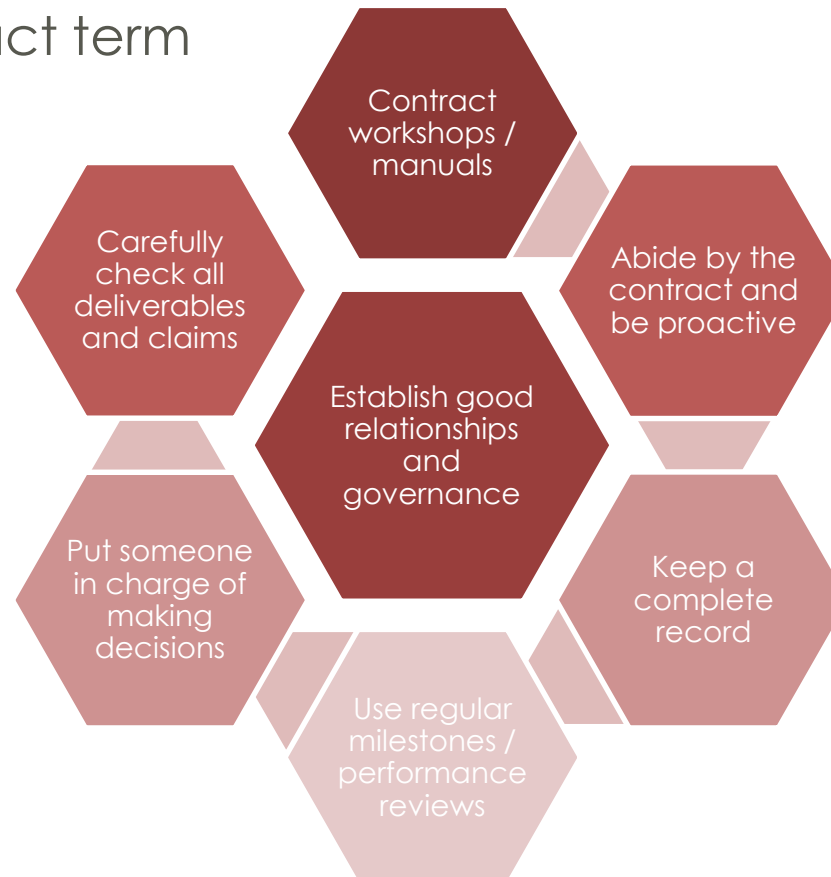
Lock in key personnel

Beware of assumptions and exclusions

Take care compiling the contract

Reducing the risk of disputes

During contract term



Disagreements vs Disputes

- As a general rule, a disagreement becomes a dispute when it is not possible for the parties to resolve it without resort to a formal resolution mechanism.
- Generally, what a dispute is and when it is deemed to have occurred is defined in the contract, often in a dispute resolution clause.

What do you do if a conflict/dispute arises?



What do you do if a conflict/dispute arises?

Understand the dispute

- Review the terms of the contract
- Any immediate considerations – statute of limitations/contractual deadlines
- What is the dispute process under the contract
- What are the key facts, witnesses and documents

What do you do if a conflict/dispute arises?

Early
response

- Escalation
- Seek early advice/prospects
- Define your objectives
- Insurance

What do you do if a conflict/dispute arises?

Investigation phase

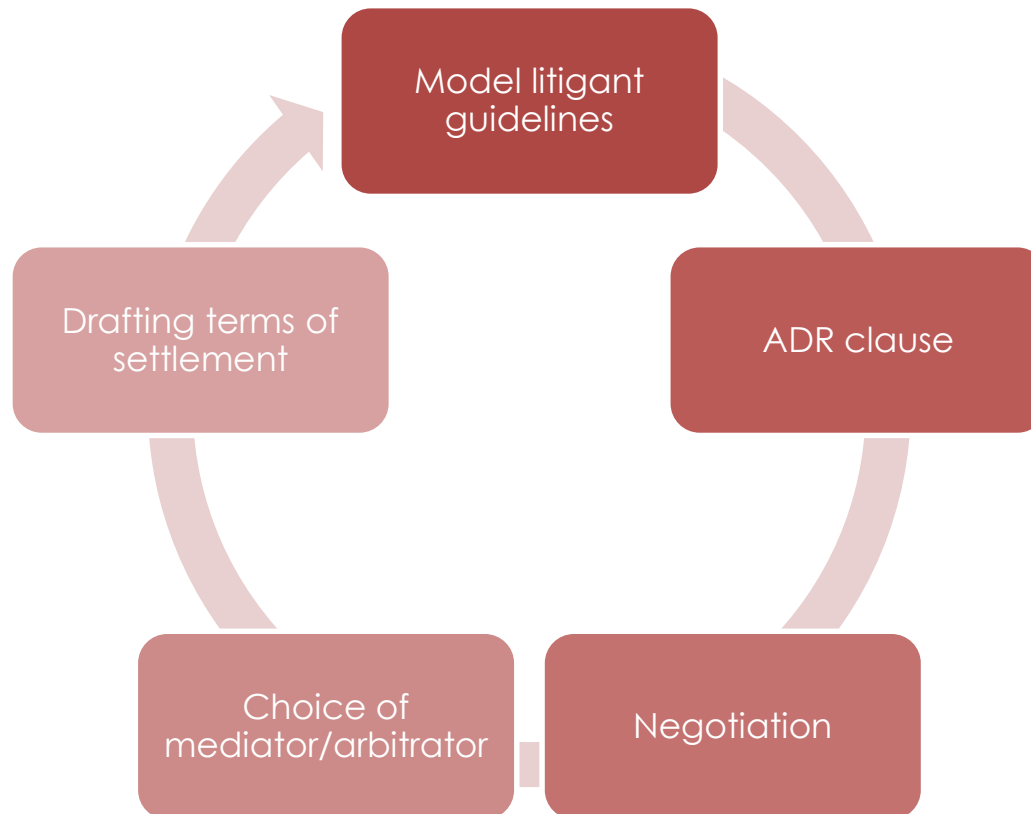
- Analyse the contract terms. Are they clear and/or do they represent parties' intention
- Consider the other side's position
- Prepare a detailed chronology
- Identify all witnesses and obtain witness statements

What do you do if a conflict/dispute arises?

Management of dispute

- Breach notice
- Dispute resolution clause
- Termination
- Enforcing security
- Litigation

Alternative dispute resolution



Alternative dispute resolution

Model Litigant Guidelines

- The Legal Services Directions 2017
- Obligation to act as model litigant: act honestly and fairly
- Deal with claims fairly and don't cause unnecessary delay
- Make an early assessment
- Pay out legitimate claims
- Endeavor to avoid or limit litigation, failing which keep costs to a minimum
- Technical defences
- Apologise!

Alternative dispute resolution

Negotiation

- Facilitative, advisory or determinative
- Identify the best person to represent the client
- What is the opportune time(s) to negotiate
- Preparation

Alternative dispute resolution

Choice of Mediator/Arbitrator

- Consider your opposition
- What does your contract require
- What traits in a mediator will help reach a resolution
- Mediation agreements

Alternative dispute resolution

Terms of Settlement

- No settlement until terms are signed!
- Heads of Agreement
- Ensure terms are clear and unambiguous

Managing a dispute – practical issues

Without prejudice privilege

Client legal privilege (LPP) - avoid waiver

Documentation

Preservation of evidence

Use of technology

Do you need a media strategy?

Litigation

Urgent action
needed?

Jurisdiction

Prerequisites to
commencing
litigation? Dispute
resolution?

Evidence – lay
and expert

Confidentiality

Plan for things to
not go to plan –
costs, delay, etc

Stress, emotion

Uncertainty/risk

Recovery risk

| Questions?

Contacts



Rebecca Jaffe
Partner
P +61 3 8644 3530
E rjaffe@hwle.com.au



Toby Mittelman
Partner
P +61 3 8644 3427
E tmittelman@hwle.com.au

This seminar and accompanying documentation is not intended to be legal advice and should not be relied upon as such.

The copyright of this material is and will remain the property of
HWL Ebsworth Lawyers.

HWL LEBSWORTH

LAWYERS

hwlebsworth.com.au

Adelaide

Brisbane

Canberra

Darwin

Hobart

Melbourne

Norwest

Perth

Sydney