Foreword

We are pleased to present to you DLA Piper’s latest Infrastructure and Construction in Australia Legal Update.

This Legal Update provides a snapshot of the state of play of infrastructure and construction in Australia, and particularly in Queensland, focusing on delivering productivity gains, the changing landscape of PPPs and major projects and how arbitration clauses may be drafted to avoid unintended consequences.

DLA Piper understands the commercial, strategic, technical, geographical and political factors that shape and impact the infrastructure and construction industries in Australia, and the business issues and risks inherent when working in these sectors. Greater regulation, new environmental issues, more complex ownership structures and increasing pressures on margins are just some of the challenges involved in infrastructure and construction projects.

DLA Piper is well-equipped to help clients avoid, or if necessary resolve, complex infrastructure and construction problems and disputes. We work to provide in-depth and commercially astute advice and representation on a broad range of matters, from contract formation to the resolution of disputes if they arise.

If you would like further information in respect to this Legal Update, please contact Jim Holding or other DLA Piper contacts referenced in this document.
DELIvERINg pRODUCTIvITY gAINS FOR aUSTRAliAN INFRASTRUcTURe

Australia is at complex cross-roads to deliver the next generation of nation building infrastructure. The key sectors of energy, water, communications and transport face difficult challenges when recent history of large scale project delivery has been marred with cost overrun and delay in both the private and public spheres.

Over the last decade a range of studies and reports, most recently the 2014 Productivity Commissions Inquiry Report on Public Infrastructure, have attempted to shine light on reasons explaining this performance.

In many cases, the key theme of “those who do not learn from history are destined to repeat it” echoes throughout these studies.

To make things more complicated, there are now a broader range of factors including the national economic outlook, technological advancement (e.g. importing large pieces of prefabricated infrastructure or project equipment), attracting private capital and balancing labour costs that must be taken into account when developing infrastructure.
This paper does not intend to repeat or summarise these macro level factors. Rather, the purpose of this paper is to explore a suitably narrow set of fundamental themes common to all types of infrastructure projects to:

- Begin focusing industry attention on practical starting points to improve productivity
- Promote greater cross-over in skills and understanding across the wide number of stakeholders who typically participate in infrastructure projects
- Move from talking about it to doing it

**WHAT HAVE WE LEARNED**

The “Scope for Improvement” series beginning in 2006 marks the start of a iterative examination and review of large and small infrastructure projects. This long term study has identified

- scoping practices; and
- risk allocation as dominating themes governing delivery success.

In 2011 this report series was updated going into specific details in these areas.

Perhaps unsurprisingly the 2014 Productivity Commission report also provides “for risk management to be effective, risks should be appropriately priced and allocated...[and] a commonly accepted principle in these guidelines, and in the literature and among participants more broadly, is that risks should be allocated to the contractual party best able to managed them.”

We have highlighted the word “should” because that is a definable starting point to improve infrastructure and project delivery.

Returning to the 2011 Scope for Improvement report, the process of risk allocation was explored further in three main areas

- Risk identification
- Risk allocation
- Risk management

**RISK IDENTIFICATION**

On large projects there is often a disconnect between what risk means depending upon the particular stakeholder’s view. To simplify this discussion, we are limiting the field of risk to the two broad halves of a project document; the terms and conditions (T&Cs) and secondly the technical specifications.

In many cases, and depending upon the delivery model, these two sections are mostly negotiated by opposing legal and technical teams.

The focus of the legal team is usually to identify legal risks and liabilities and develop acceptable allocation and mitigation techniques. On large projects a reasonable assumption can be made that the opposing legal teams are matched in terms of capability with extensive negotiation and cross-checking (so why does it still go wrong?)

Similarly the technical teams will often negotiate directly however the dynamics and range of factors at this level is often quite different from the legal team for the following reasons:

- Lawyers can rely on fairly stable and well known precedents (and statute) whereas technical teams draw heavily from technical standards, previous designs and perhaps most critically, know-how.
- Any imbalance at the know-how level creates simultaneous risk (and opportunity).

The reason this potential imbalance (or lack) of know-how is so critical is it goes to the ability to identify the risks associated with the project.

Without extensive risk identification at this level a range of compounding issues arise.

First the general “catch-all” risk allocation clauses in the T&Cs will invariably have more work to do when these unidentified risks come into view.

Secondly, and depending upon the point in time when these risks materialise, there could be serious cost impacts depending upon the interpretation of these “catch-all” type clauses. This places further strain on the T&Cs as parties weigh up their exposure and could lead to dispute.

Finally, a history of such experiences can lead to a counter-productive increase in disclaimers, assurances, warranties and indemnities in future projects. One colourful analogy used in this space is “airplanes (Scopes) are getting worse while the parachutes (T&Cs) are improving.”

On one analysis it could be said that the failure to first identify risk prevented it from being allocated in accordance with accepted practices and this can lead to a cascading sequence of events.

From a productivity view the sequence above reveals there may be a disproportionate amount of effort being spent trying to deal with an event after it occurs rather than preventing it occurring in the first place. From an

---

1 A Blake Dawson (now Ashurst) initiative in conjunction with Infrastructure Australia.
3 One should judge success of a flight in reaching the destination rather than surviving the attempt. This also applies to projects.
engineering view this is similar to mitigating risk using a procedure rather than eliminating it entirely at the more efficient design phase.

**RISK IDENTIFICATION POLICIES**

The 2011 Scoping for Improvement report found “often material risks are only being identified when the project is well into the delivery phase.”

The key observation is this: you can’t allocate efficiently what you can’t identify. Managers sometimes use a similar expression “if you can’t measure it, you can’t manage it”.

When unidentified risks materialise often the T&C’s are (usually) stretched via creative (and expensive) argument thereby adding to project costs in an attempt to retrospectively apply allocation for the hereto unidentified risk.

The conclusion that follows is risk identification is a key development area. This of course must be balanced within a range of other infrastructure and project factors.

**Recommendation**

It unlikely to be a controversial statement to say infrastructure and project delivery could be delivered more productively if resources are directed to root cause factors such as risk identification.

How is this done at a practical level?

There are two elements a risk identification policy must address. First, it must adopt an appropriate methodology for the type of project involved and secondly it must have the right people who can bring together a mix of skills and experiences at this fundamental stage.

It is perhaps surprising that many risk identification policies are not geared around these themes and secondly they do not offer guidance on how to turn general concepts into quantifiable risk assessments.

One industry that does this particularly well however is the energy sector where risk is constantly assessed from concept, feasibility, detailed design and so forth all the way through the construction phase.

The skills element is more often achieved with a two-step process of a primary team composed of technical experts, programmers and commercial managers who are overshadowed by a secondary, and somewhat isolated, review team that act as a check-and-balance for gaps. If this check-and-balance step is not performed then the likelihood of an unidentified risk entering and perhaps lying dormant in a project for some time is increased.

Of course such a rigorous approach requires time and resources to adopt. As per the introduction to this article our intention is to focus industry attention in this space as an appropriate starting point to increasing productivity.

**RISK ALLOCATION**

Assuming the risk identification step has been comprehensive the second step is to ensure those risks are allocated appropriately.

The allocation principles in each transaction are usually influenced by a range of factors including delivery model, finance method, commercial strengths and preferences.

Independently of all of these factors is the well-trodden principle that risk should be allocated to a party best able to manage it.

Notwithstanding this, it nevertheless remains a common feature that many projects (perhaps already suffering from risk blind spots from the outset) depart from this principle.

Notably, the 2011 Scope for Improvement report observed “inappropriate risk allocation strongly contributes to adverse outcomes – particularly cost overruns, delays and disputes” and “industry participants have confirmed that there is a clear connection between the treatment of risk in the early stages of a project and issues which arise in later phases and project outcomes”.

It should perhaps come as little surprise that the industry has developed macro level solutions that, one could argue, have micro level root causes.

For example, the rise in popularity of different delivery models “forces” some of these micro level issues into the open.

Specifically the 2011 report found the industry perceives the most successful delivery model (in terms of delivering projects on time, budget and quality) is alliancing.

This raises the crucial question: what specifically happens in an alliance model that differs from other traditional delivery models such as EPC that gives rise to this popular view?

The literature is deep on this question but in short a key feature of alliancing, which traces back to the scoping issue, is the parties are “forced” by virtue of the alliance model itself to spend more time identifying project risk.

Similar sentiments can be said about Early Contractor Involvement (ECI) models. At this point it must be said that for every problem solved another may be created but

---

4 Scope for Improvement 2011 – Project Risk – Getting the right balance and outcomes pg 10
5 Op cit pg 18
6 Op cit pg 19
on balance alliance and ECI are inherently geared towards improved risk identification and the subsequent benefits that flow in terms of allocation and management.

Does that mean that infrastructure projects should move towards alliancing and ECI models? While it might be tempting to simply say “yes” to such a generalisation that would be over simplifying a fundamental issue.

That fundamental issue is this; there is no avoiding the step of identifying risk as a precursor to appropriate allocation. As risk identification in the early stages is a feature of alliancing and ECI models, it is a bridge too far to say these models are superior to other models such as EPC. As the hypothesis above proposes, the more appropriate focus is getting the risk identification methodology and team right. Hence, delivery model is consideration but not necessarily the answer from a first principles view.

**RISK MANAGEMENT**

Once identification and allocation of risk has been documented the management phase deals with those risks intermixed with any new risks that arise. It follows that fewer resources are required to manage an infrastructure project that has reduced likelihood of unexpected risks.

Here is should start to become obvious that the investment in risk identification at the outset gives compounding returns in the delivery phase where, in many cases, cash burn is highest and dormant risks come to the surface. The reduction of management resources, potential variation claims (that may or may not attempt to exploit general risk allocation clauses) means infrastructure and projects can be delivered more productively provided we focus, and in some cases redirect, resources to higher return activities in the project cycle.

**SKILLS CROSS OVER**

There are many examples of successful and unsuccessful projects and many more explanations as to how these outcomes were achieved. The key to any truly valuable analysis is identifying what are deep, underlying themes that are difficult to isolate or masked by other factors.

One theme we have observed on successful projects time and time again is a high degree of skills overlap at interfaces across the broader project team. For example financiers who have come from legal backgrounds are able to “reach into” the nuances of the T&Cs and effectively act a check-and-balance. Similarly lawyers with scientific knowledge are often skilled in comprehending the technical aspects of the infrastructure project ensuring T&Cs such as the performance regime are clear and operable. Project managers are sometimes also engineers who have specialised in this discipline.

**Recommendation**

Our previous recommendation of developing appropriate risk identification policies goes hand-in-hand with selecting the right people to develop that methodology.

As the above stakeholders, or the interests they represent, will be exposed to risks on infrastructure projects we recommend, as a practical suggestion, that such a group assists in the development of a comprehensive risk identification policy or at the very least provides some feedback.

**AUTHORS**

Dan Brown  
Partner, Finance & Projects  
T +61 7 3246 4005  
dan.brown@dlapiper.com

Chris Case  
Senior Associate, Finance & Projects  
T +61 7 3246 4267  
chris.case@dlapiper.com
Most PPPs and major infrastructure projects are procured by government conducting an open competitive tender process, ultimately selecting the successful consortium and entering into a binding agreement. However, increasingly, some major projects are being procured following the private sector making the first approach to government, by way of an unsolicited proposal.

Increased flexibility in the treatment of such proposals by some Australian governments has encouraged the private sector to invest significant time and money in assisting those governments in achieving their objectives and, in the past 18 months, we have seen a marked increase in the number of instructions we have received to assist private sector clients in the development of innovative proposals in respect of public infrastructure and services.

**DEFINITION OF ‘UNSOLICITED PROPOSAL’**

Unsolicited proposals are defined slightly differently in each State and Territory (and are known as ‘exclusive mandates’ in Queensland). Each of the State and Territory guidelines require some level of ‘uniqueness’ in the proposal if it is proposed to proceed with the proponent directly, e.g. the proposal could not reasonably be delivered by another private party or achieve the same value for money through a competitive tender process. Unique characteristics may include the proponent having a unique idea or intellectual property or owning strategic assets integral to delivering the proposal. In Queensland, the guidance requires the proponent to own genuine existing intellectual property rights without which the proposal could not proceed to implementation.

The processes each involve an assessment of the proposal against published criteria including uniqueness, value for money, fulfilment of a public requirement and the capabilities of the proponent. If the proposal does not meet the assessment criteria, the government may either reject the proposal or open the proposal to competition. If it does meet the criteria and the government decides to proceed with the proponent, the proponent will develop a binding proposal for the government to accept.

In respect of Commonwealth procurement, the Commonwealth Procurement Rules require exceptionally advantageous conditions that arise only in the very short term to justify not tendering and Defence procurement guidance emphasises the requirement for innovation.
UNSOLICITED PROPOSALS TO DATE

The first PPP undertaken in NSW (the Sydney Harbour Tunnel) resulted from an unsolicited proposal. In 1986, the Transfield-Kumagai joint venture approached the Labor Government with a proposal to build the Harbour Tunnel. The Government directly awarded the contract to the joint venture. A 1994 report on the project by the Auditor-General noted that there was no formal policy to deal with unsolicited proposals at the time when the proposal was submitted and that the Government did not call for tenders in relation to this proposal. It observed that while the particular tunnel design proposed by the joint venture may have incorporated “a significant component of intellectual property, the concept of a tunnel as a second harbour crossing does not appear to be new”.

As a result of the criticism of this project, in 1998 the government published the first guidelines for the public sector in dealing with unsolicited proposals. Since then, the number of unsolicited proposals has steadily increased. For example, the NSW Government received 36 unsolicited proposals during 2012 (although 85% of these did not make it beyond the first stage as they were not considered sufficiently unique to warrant a direct dealing). The number of unsolicited proposals is likely to increase over coming years as more jurisdictions publish new or updated guidelines in order to promote the development of innovative ideas by the private sector.

Current and recent unsolicited proposals of note include:
- NorthConnex – proposal by Transurban and Westlink M7 shareholders to construct a tunnel link between the M1 and M2 motorways in Sydney;
- Crown Sydney Hotel Resort Project (see section below);
- Sale of the Queen Mary Building to be used for affordable student housing (NSW);
- Proposal from MTR, John Holland Construction and UGL Rail Services for a circa $2.5 billion upgrade of the Cranbourne-Pakenham suburban rail line in Victoria;
- Surat Basin Railway – 204 kilometre rail corridor to enhance the existing coal network and allow coal reserves in the Surat Basin to be mined and transported to the Port of Gladstone in Queensland;
- Upgrade of the CityLink-Tullamarine Freeway corridor proposed by Transurban (Victoria); and
- Wiggins Island Coal Export Terminal – a coal export terminal with an ultimate capacity of 84 million tonnes per annum, together with rail and supporting infrastructure in the Port of Gladstone.

CASE STUDY – CROWN SYDNEY HOTEL RESORT

A recently completed project which followed the unsolicited proposal procedure was the Crown Sydney Hotel Resort. Crown entered into an exclusive agreement with Lend Lease providing it with an exclusive right to develop a hotel at Barangaroo South. The proposal sought certainty from the Government in relation to the provision and cost of a VIP gaming licence, access to land issues, and taxation and other legislation.

Crown’s bid was approved in November 2013 and the NSW Parliament passed legislation that enabled Crown to apply for a restricted gaming facility licence at the new facility. A competing bid by Echo to develop The Star, its flagship casino in Sydney, and to develop its exclusivity arrangements beyond 2019, was not successful.

Due to criticisms of the Crown project in the media, including in respect of transparency of the procedure, NSW Government reformed the process and these criticisms also influenced the development of the Victorian Government’s guidelines.

AN OVERVIEW OF THE CURRENT POSITION IN EACH JURISDICTION

Most States and Territories have adopted a formal procedure for assessing and proceeding with unsolicited proposals (except for Western Australia and Tasmania). One of the main objectives of the procedures is to provide consistency and certainty to private sector participants as to how their unsolicited proposals will be assessed within a transparent framework. This includes the assessment criteria against which each submission will be evaluated.

---

7 NSW Auditor-General’s Office, note 2, p258
Victoria recently launched its guidelines in February 2014. The guidelines have taken note of the criticisms made of the 2012 NSW guidelines as a result of the Crown project and have attempted to address them. A principal objective is to ‘incorporate open competition wherever possible’.

The Government may open a proposal to competition at the end of the second and third stages of the process.

Transparency is a key feature of the Victorian guidelines. Once the Government enters into an exclusive negotiation with the private party, it will disclose headline details of the proposal online and will update details of the proposal at the end of each assessment stage. The Government will also release a Project Summary within ninety days of contractual or financial close summarising key aspects of the proposal, including reasons why an exclusive negotiation was pursued, how the proposal was evaluated and what value for money was achieved for Government.

The NSW Government also updated its guidelines in February 2014 to enhance, clarify and streamline certain aspects to improve outcomes for industry and Government. Where a proposal is assessed as not meeting the criteria, including uniqueness, the Government reserves its right to go to market.

A brief summary of each jurisdiction’s unsolicited proposals guidance is provided below.

**NEW SOUTH WALES**

*Guide for Submission and Assessment of Unsolicited Proposals* – first launched in January 2012 and updated in February 2014. This is a four stage assessment process with the following assessment criteria: uniqueness; value for money; whole of government impact; return on investment; capability and capacity; affordability; risk allocation. [Click here for current guide.](https://www.nsw.gov.au/innovate).

**VICTORIA**

*Unsolicited proposal guideline* – first launched February 2014. This is a five stage assessment process. Proposal will only be pursued where: consistent with policy & public interest; financially, economically and socially feasible and capable of being delivered; offers a degree of uniqueness; and represents value for money. Guidance provides that the Government may approach an organisation directly. [Click here for current guide.](https://www.nsw.gov.au/innovate).

**QUEENSLAND**

Forms part of the Project Assurance Framework – launched in 2008. Known as an ‘exclusive mandate’ rather than an unsolicited proposal. Initial stage to assess against criteria; then follow standard bidding process. Criteria: community need and government priority; fairly and sustainably priced; existing intellectual property rights; significant preliminary investment; no risk transfer to State; financial and technical capacity; feasible; public interest; and no competing proposals. [Click here for current guide.](https://www.nsw.gov.au/innovate).

**NORTHERN TERRITORY**

*Unsolicited Proposals Policy* – launched October 2013. Three stage process with the following assessment criteria: financial viability; capital requirements; rationale for not participating in an open competitive process; level of overall public benefit; strategic importance and consistency with the government’s plans; capability and capacity of proponent; degree of previous experience; value to government; and level of contribution required of government. [Click here for current guide.](https://www.nsw.gov.au/innovate).
AUSTRALIAN CAPITAL TERRITORY

The Partnerships Framework – Guidelines for Unsolicited Proposals – published in January 2014. Four stage process with the following assessment criteria: conflict with Government policy; possibility of managing by existing process; uniqueness; effect on competition; requires a change or impact to Government; and previous rejection. Click here for current guide.

SOUTH AUSTRALIA

State Procurement Board Market Approaches Guideline Version 3.1 – July 2014. Seven stage process. Criteria: unique or innovative; not in response to a formal request; not readily available in the marketplace; advance the objectives of government by providing improved value, benefit and opportunity. Detailed evaluation criteria developed as part of the process. Click here for current guide.

WESTERN AUSTRALIA & TASMANIA

Do not have policies on unsolicited proposals and therefore we assume they would follow the National Public Private Partnership Policy and Guidelines, which have some general guidance on unsolicited proposals. Click here for current guide.

COMMONWEALTH

The Commonwealth Procurement Rules state that a limited tender procedure can be used for procurements made under exceptionally advantageous conditions that arise only in the very short term, such as unsolicited innovative proposals. However, there does not appear to be guidance specific to unsolicited proposals. Click here for current guide.

DEFENCE

Two programs that exist to receive and assess unsolicited product and service offers received by Defence and the Defence Materiel Organisation from industry: (1) the Unsolicited Promotional Product Offer (UPO) scheme/Industry Initiated Product Awareness Scheme (II PAS) (proposal made by industry, or an individual, to promote and raise awareness of one or more of their existing products or services to Defence) and (2) the Unsolicited Innovative Proposal (UIP) program (puts forward an innovative solution that has the potential for Defence capability, business processes or resource utilisation enhancements). Details can be found in the Defence Procurement Policy Manual. Click here for current guide.

THE FUTURE OF UNSOLICITED PROPOSALS

Notwithstanding the desire to encourage private sector innovation, Australian governments remain wary of the potential for criticism of decisions to proceed with unsolicited proposals and are cautious in their approach. Before investing significant time and expense in developing proposals, private sector proponents should carefully consider with their advisers the prospects of success under the specific guidance relevant to the proposal (noting that the bar is much higher in some jurisdictions than others) and engage early in confidential, high level discussions with the relevant government agencies to explore the merits of the proposal.

AUTHORS

Alex Guy
Partner, Finance & Projects
T  +61 7 3246 4072
alex.guy@dlapiper.com

Brendan Hanvey
Senior Foreign Legal Associate
Finance & Projects
T  +61 7 3246 4049
brendan.hanvey@dlapiper.com
A critical feature of Australia’s infrastructure strategy is the encouragement of foreign investment.8 With an anticipated rise in foreign investment and the continued pro-arbitration support from Australian Courts in recent cases coinciding with Australia’s renewed commitment to increasing infrastructure development, it is timely to look closely at arbitration clauses in construction and infrastructure agreements and how they might be drafted to avoid unintended consequences.

The use of arbitration in construction and infrastructure agreements is already commonplace in Australia, and international arbitration has enforcement advantages under the New York Convention that commend its use over domestic litigation in most Australian projects involving foreign parties and investment.

---


---

AVOIDING UNCOMFORTABLE QUESTIONS AFTER THE EVENT
‘Does my arbitration clause work?’ and ‘With the benefit of hindsight, should I have spent more time drafting it?’
A potentially costly mistake can however be made by contracting parties who blindly use standard form arbitration clauses in their project agreements without tailoring those clauses to the specific circumstances of the parties, the project and the disputes that might arise.

This article examines the types of questions that should be asked when drafting an arbitration clause in order to prevent or limit the parties commencing litigation, in the face of the arbitration clause, as an alternative process and/or to challenge the validity of the arbitration clause.

As recent cases demonstrate, the intended speed, efficiency and savings of arbitration can quickly evaporate if the arbitration clause and the arbitration are subjected to costly, complex and disruptive satellite litigation.

**INVEST IN THE DRAFTING NOT IN FUTURE LITIGATION**

While it can be counter-intuitive for parties at the outset of a project to try to forecast the types and scope of disputes that might arise, and while using standard form arbitration clauses as boilerplates is convenient and understandable when there is collective goodwill between the parties during the marriage of a project, real thought should be given to how the arbitration clause will withstand forensic scrutiny if and when a dispute arises and the parties and their lawyers are looking to achieve any available strategic advantage.

When a dispute has escalated to the point of one or both parties wanting to commence an action, it is naïve to think that all parties will be content to proceed under an arbitration clause without question, or that they will not take the opportunity to challenge an arbitration clause if it might improve their legal or commercial position and/or prejudice the position of their counterparty.

With that perspective in mind, parties should take preventative steps by crafting their arbitration clause to the specific project. Even where the final agreed clause is not materially different to the standard clause first contemplated, the value in those circumstances will be in the parties’ consideration of the relevant issues and their agreement to commit to arbitration according to the express terms of that clause.

**EXAMPLE ISSUES TO CONSIDER**

1. **Assume each word used in an arbitration clause will be interpreted broadly**

   There is now a considerable body of Australian caselaw in which the Courts have looked to interpret arbitration clauses more broadly than typical contractual interpretation.

   In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* the Full Federal Court said that the Court should construe an arbitration clause ‘giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration’. It also held that ‘This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy’.

   In *Pipeline Services WA P/L v ATCO Gas Australia P/L* the WA Supreme Court said that ‘effect may be given to an arbitration clause despite some ambiguity or vagueness, provided that judicial assistance is not required to rewrite the contract between the parties’.

2. **Ask whether arbitration should apply to disputes arising outside the contract**

   Arbitration is the product of the parties’ written agreement which means that typically one would expect it to apply only to disputes arising under the specific contract. It is common, however, to see arbitration clauses that apply to ‘any dispute arising out of or in connection with this agreement’.

   The use of phrases such as ‘arising out of’ and ‘in connection with’ have been held to mean that the parties agree to arbitrate disputes that arise outside the agreement provided there is a connection with its subject matter.

   In *Amcor Packaging (Australia) Pty Ltd v Boulderstone Pty Ltd & Ors* the Federal Court followed a line of authorities to hold that such phrases “should exclude only claims entirely unrelated to the commercial transaction covered by the contract”.

   This raises the drafting question of whether the arbitration clause is intended to be that broad or whether, for example, arbitration is only to apply to disputes arising strictly within the four walls of the agreement.

---

9 (2006) 157 FCR 45
10 [2014] WASC 10
11 [2013] FCA 253
The *Amcor* decision provides a good example of the unintended practical consequences of the use of such phrases because in that case the Court held the arbitration clause applied to a dispute involving representations made during negotiations about another contract that was not ultimately executed but which related to the broader project. It held that Court proceedings commenced in relation to those pre-contract representations should be stayed pending arbitration.

3. Will the project involve multiple parties to multiple agreements?
   
   a. What will that mean when a dispute arises?

   As the Singapore High Court recently confirmed in *The Titan Unity (No.2)*, arbitration clauses only apply to the parties to the agreement and not to genuine third parties. Those third parties cannot be joined to an arbitration without the consent of all participating parties.

   In construction and infrastructure projects there are necessarily multiple parties to multiple agreements, all of an interrelated but contractually separate nature. Given the liberal approach taken by Courts when interpreting arbitration clauses, this can create issues where, for example, an event during a project gives rise to a series of disputes across those agreements.

   This should be clearly addressed when drafting the agreements because if it is not then it can lead to a multiplicity of proceedings with the risk of different factual findings and arbitral awards. In large projects, particularly those involving international parties, one solution has been to draft an overarching (‘umbrella’) arbitration agreement that provides a streamlined procedure for all disputes arising under any one or more of the agreements. While this can give rise to a complex arbitration procedure, the complexity can prove commercially advantageous by encouraging negotiations and settlement prior to having to arbitrate.

   b. Do the project agreements uniformly adopt arbitration?

   The recent Victorian Court of Appeal decision of *Flint Ink NZ Ltd v Huhtamaki Aust Pty Ltd L & Anor* provides a good illustration of the difficulties that can occur when related entities become caught up in separate litigation and arbitration involving the same subject matter. In that case a New Zealand company (*H NZ*) entered into an ink supply agreement with another New Zealand company (*F*) and that agreement included an arbitration clause. The ink was then used by an Australian company (*H Aus*) related to *H NZ* to supply packaging to Lion Dairy in Australia. Lion Diary sued *H Aus* in the Supreme Court of Victoria for defective packaging. *H Aus* sought to join *F* as a third party on the basis that if *H Aus* was liable then it was due to the ink supplied by *F*. The joinder application was opposed by *F* which sought a stay of the third party proceedings pending an arbitration under its agreement with *H NZ*. *F* argued that the relationship between *H NZ* and *H Aus* meant that *H Aus* was bound by *H NZ*’s agreement to arbitrate. Despite losing at first instance, *F* succeeded in the Victorian Court of Appeal and a stay of the third party proceedings was granted against *H Aus*. This created the unusual circumstance whereby *H Aus* was both party to existing litigation and subject to pending arbitration involving the same factual circumstances. Justice Mandie recognised this issue and proposed that:

   “two conditions should be imposed (subject to any submissions by the parties). The first condition should, in my view, provide that the arbitration is not to commence unless and until this Court has determined the questions of liability and damages as between Lion-Dairy and [H Aus]. Otherwise, any arbitration would be premature – indeed the matter referred is entirely hypothetical unless and until it is determined whether, and if so, upon what basis, [H Aus] is liable in damages to Lion-Dairy. Without such a condition being satisfied, there can be no viable matter for referral to arbitration. The second condition should, in my view, provide that [F] is entitled to participate in and is bound by the result of the proceeding in this Court involving the determination of liability and damages as between Lion-Dairy and [H Aus]. Without such a condition, inconsistent findings would be possible and a fundamental object of third party proceedings might be frustrated.”

   Bearing in mind the outcome in this cases, it is suggested that if arbitration is to be adopted by parties to a project then it should be adopted throughout the agreements on consistent terms including, for example, using the same procedural rules.

---

12 [2014] SGHCR 4
13 [2014] VSCA 166
4. Can the clause be drafted without using terms such as ‘good faith’ or ‘best endeavours’?

Arbitration clauses, and dispute resolution clauses more generally, often oblige the parties to act ‘in good faith’ and/or use their ‘best endeavours’.

While these terms are well meaning and appear to be innocuous, and while it may not be possible to frame the arbitration clause without them, by the time the parties are engaged in a dispute and every point (technical or otherwise) is being taken, these terms can sometimes be used by a party to create a satellite dispute as to whether the other party has or has not met such an obligation. The difficulty with such terms is that they are good at indicating the broad intention of the parties but are nebulous in nature. Additionally, whether they have been satisfied involves consideration of the party’s general conduct in the dispute process, being separate from the conduct involved in the underlying dispute. This effectively creates a dispute within a dispute.

This was one of several issues considered by the Queensland Supreme Court in Parsons Brinkerhoff Australia Pty Ltd & Anor v Theiss Pty Ltd and Anor. In that case a significant part of Justice Boddice’s reasons addressed whether the respondents had failed to use their ‘best endeavours’ to settle the dispute. While his Honour held that the respondents had not failed in that obligation, the case provides another example of satellite litigation arising out of the terms of a dispute resolution (arbitration) clause.

CONCLUSION

Disputes are not an attractive feature of the commercial world however as part of the negotiating and drafting process, parties to construction and infrastructure projects should expect that disputes are likely to arise during the life of a project. Adopting that frame of mind, the parties should draw on their collective experience and carefully consider the types of disputes likely to arise, between which parties, and under which project agreements. The issues and cases considered above provide examples of the types of challenges that have been made, via Court proceedings, to arbitration clauses and arbitrations and, in turn, provide food for thought for those drafting any arbitration clause (or wider dispute resolution clause). While it may not be possible to avoid an unknown future circumstance, it is suggested that had some of these parties known they might end up in expensive and distracting Court proceedings fighting over the arbitration or the arbitration clause then they may have drafted the clause in different and potentially more specific terms. Equally, the investment in the expertise of a dispute resolution practitioner during the drafting process may be money well spent in avoiding the need for their services in the future.

AUTHORS

Liam Prescott
Partner, Litigation & Regulatory
Brisbane
T +61 7 3246 4169
liam.prescott@dlapiper.com

James Kahika
Graduate Solicitor, Litigation & Regulatory
T +61 7 3246 4082
james.kahika@dlapiper.com