

Resolving Building Disputes : A Homeowner's Guide

Are you and your contractor in the middle of a building dispute and you're raring to take assertive action? Here are some things you should first know.

Building Disputes

A building dispute arises when one party to a construction contract violates any of the provisions or warranties therein.

Some examples are, unreasonable delay in construction, damage to the works, defects, substandard quality, and the like.

Ways to Settle Building Disputes

The manner of settling building disputes may be adversarial or non-adversarial.

Adversarial methods include arbitration and litigation; while non-adversarial methods refer to Alternative Dispute Resolution (ADR).



**Alternative Dispute
Resolution (ADR)**



Arbitration



Litigation

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How Do They Differ?

Non-adversarial	Adversarial	
Alternative Dispute Resolution (ADR)	Arbitration	Litigation
<p>ADR is a system of settling building disputes in a non-adversarial, non-confrontational, amicable manner.</p> <p>ADR is resorted to in almost 100% of domestic building disputes.</p>	<p>Arbitration is a mode of dispute settlement that may only be resorted to if it's provided in the parties' contract.</p> <p>The process is very similar to a court litigation, with the same formalities and procedure.</p> <p>The arbitral award is binding and enforceable.</p> <p>This is not a common remedy in domestic/residential building disputes, and is generally more applicable to international construction contracts.</p>	<p>Litigation is a full-blown, formal court proceeding.</p> <p>Resort to the courts may only be had if ADR or tribunal hearings fail.</p>

ADR: Some Key Highlights

1. ADR is the general term for different processes of settling disputes in an informal manner. ADR may be broken down into several subtypes including:

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- Executive Negotiation
- Early Neutral Evaluation
- Expert Determination
- Mediation
- Conciliation
- Contractual Adjudication

2. ADR procedures are completely distinct from, and do not involve, the Victorian Civil and Administrative Tribunal (VCAT) or the courts.

3. ADR procedures are generally inexpensive and quick.

4. ADR may be voluntary or compulsory:

When SHOULD the parties undergo ADR?	When MAY the parties undergo ADR?
When their construction contract contains an ADR clause	When their construction contract does not contain an ADR clause, but the parties nonetheless agree to go through with it
When the tribunal or court where their case is filed, orders them to undergo ADR as a condition precedent or as part of directions hearings	
Note: In these cases, ADR is compulsory and the parties have no choice but to go undergo ADR proceedings	Note: This means that even without an ADR clause, the parties themselves may voluntarily apply for ADR to settle their dispute

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Common Forms of ADR



Mediation

Mediation is an informal, private, and confidential dispute settlement process. During a mediation session, the parties will meet with a facilitator (aka "Mediator"), whose role is to help the parties arrive at a settlement agreement. The mediator must be neutral and must not influence the outcome of the meeting. The goal is to settle the dispute by an agreement freely arrived at by the parties, and not by a determination of each of their rights, obligations, and liabilities.



Conciliation

Similar to mediation, conciliation involves getting the parties together before a neutral, third party facilitator (aka "Conciliator"), whose role is to help the parties arrive at a mutually acceptable resolution of the dispute. Unlike in mediation, however, the Conciliator is less involved in the discussions. While he shouldn't offer inputs or insights, he nevertheless needs to ensure that the conciliation session proceeds in a fair manner, and that no party is cajoled or intimidated by the other.



Expert Determination

Another type of ADR commonly resorted to is expert determination, wherein the parties

agree to appoint a third party expert, like a building consultant, who is tasked with making an independent valuation or assessment of things like the quality of the work performed, or whether a contractor is entitled to extension of time. This is most relevant in cases where an expert's technical know-how is required, such as when there is damage to the works or to the property. The expert's findings are generally binding.

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Your ADR Checklist

If you are required by your contract (or ordered by the VCAT or the court) to undergo ADR, or if you and your contractor decide to pursue ADR procedures, here are a few things to keep in mind:

- Know your case and all the facts and circumstances surrounding it.
- Know exactly what you want, what you're willing to settle for, and what you won't compromise on.
- Draw up a timeline of events surrounding the life cycle of the entire construction project.
- Collate all invoices and receipts and record/log them in a journal or spreadsheet.
- Take photos and prepare all relevant documents. Arrange them chronologically.
- While ADR does not involve an inquiry into the rights and liabilities of the parties, and while the dispute will not be settled on the merits, organizing your notes and documents beforehand will help you mentally prepare and keep you on top of your game during the ADR sessions.

How We Can Help

A construction lawyer would be able to give you relevant and practical legal advice, guide you throughout the entire dispute settlement process, and represent you at the VCAT or in court, if it comes to that.

Construction Lawyer Melbourne has over 10 years' experience in building dispute resolution.

Give us a call to learn more about how we can help you. First consult is absolutely free.

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