

**BAYSIDE CIVIL & DRAINAGE PTY LTD V. MARINESTAR HOLDINGS PTY LTD [2000] WASC 17**

Supreme Court of Western Australia - 2 February 2000

**FACTS**

Bayside was a contractor engaged by the Marinestar to carry out earthworks on a subdivision project. The parties executed a standard contract using AS 2124-1992.

Bayside's received two progress certificates amounting to \$364,407.81 but Marinestar refused to pay the money owing for the progress certificates. Bayside issued legal proceedings and then applied for summary judgment to recover the amounts outstanding under the progress certificate.

Clause 47 of the contract dealt with dispute resolution and provided that when a dispute occurred a party was to deliver to the other a notice of dispute and subsequently continue to enforce the contract and comply with clause 41.1. Clause 41.1 required the parties to meet and attempt to resolve their dispute and if the dispute could not be resolved, then either party could refer the dispute to arbitration or litigation.

After giving a notice of dispute to Marinestar, the parties met but were unable to resolve the dispute. Bayside issued legal proceedings. Marinestar then sent a notice to Bayside referring the dispute to arbitration and contended that Bayside had elected to go to arbitration.

**ISSUE**

Should the court exercise its power to grant a stay of the legal proceeding or refer the matter to arbitration?

**FINDINGS**

Bayside took steps to conform with requirement under clause 47 and therefore they could not be construed to have favoured arbitration over litigation.

However, the issue of writ indicates Bayside's choice to go to litigation instead of arbitration. Marinestar's notice of arbitration was too late to affect Bayside's action. Therefore, a stay of the legal proceedings could not be granted.

**QUOTE**

*Master Bredmeyer said "Bayside's notice of dispute and the first meeting held are neutral steps. They do not favour the arbitration path or the litigation path; they are steps taken under clause 47 before a party goes to litigation or arbitration".*

**IMPACT**

The dispute resolution clause in AS 2124-1992 does not contain a mandatory arbitration clause and therefore the parties may go to arbitration or litigation.

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The party that chooses to go to court will have priority unless the other party can show a reasonable ground for a stay of the legal proceedings.

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