



Asia Pacific Projects Update

UNCERTAINTY IN DISPUTE RESOLUTION CLAUSES

Kyle Siebel

Partner

T +61 3 9274 5515

kyle.siebel@dlapiper.com

Rhiannon Hough

Solicitor

T +61 3 9274 5396

rhiannon.hough@dlapiper.com

INTRODUCTION

Where a dispute arises under a contract, the parties must attempt to settle that dispute through the procedure set out in the dispute resolution clause (DRC). Sometimes, one party considers that this procedure cannot be followed, or does not adhere to the procedure, and instead initiates proceedings in court to resolve the dispute. Where this occurs, the other party to the contract can apply to the court for a stay of those proceedings in order to force the litigious party to fall back upon the contractual procedure. The court's power to award a stay is discretionary.

The party opposing the stay must persuade the court that there are good grounds for the court to exercise its discretion to allow the court action to proceed and so preclude the contractual mode of dispute resolution. This can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the contractual mechanism the parties have chosen. One of these grounds is that the DRC is void for uncertainty.

A court will generally enforce a DRC by ordering a stay of proceedings when the DRC complies with the following minimum requirements:¹

1. The clause must be in the form described in *Scott v Avery*². That is, it should operate to make completion of the stages of the DRC a condition precedent to commencement of court proceedings.
2. The process established by the clause must be certain. There cannot be stages in the process that amount to an agreement to agree as the courts will not enforce this.
3. The administrative process for selecting a party to resolve the dispute and pay that person has to be defined, and in the event the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary.
4. Where the clause includes mediation, it should set out in detail the process of mediation to be followed - or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.

FACTORS GIVING RISE TO UNCERTAINTY

Based upon a review of decisions considering the uncertainty of DRCs, a DRC has been found void for uncertainty where:

- The language is unable to have a sufficiently precise meaning attributed to it.

¹ Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 25, June 1998, Chapter 6 [6.20] as cited in *Aiton*

Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236, 252 (Einstein J). Einstein J noted at 252 that although these requirements set out by ALRC related to mediation, they "ought be seen as applying to any stage in a dispute resolution clause as the case may be, not just to mediation".
² (1856) 10 ER 1121.

*For example: specification of an ADR organisation to whom the dispute would be referred for mediation, where that organisation did not exist.*³

- The dispute resolution process as a whole is uncertain.

*For example: failure of a clause to apportion a share of the mediator's costs between the parties.*⁴

*And for example: the Court held that the reference in a clause to 'dispute resolution to the Australian Commercial Disputes Centres or its successors', as opposed to 'dispute resolution by....' was uncertain in procedure and process because the use of the word 'to' meant that the ACDC's role was undefined.*⁵

- It imported terms into the contract from other documents with uncertain consequences.⁶
- It required the parties to undertake negotiations in 'good faith'. Where the dispute resolution clause requires the parties to 'negotiate in good faith', it may be binding if the parties have also agreed on the criteria or objective yardstick against which the negotiations may be objectively judged.⁷
- There is an error in cross-referencing which renders the DRC inoperable.

*For example: the Court held that a clause with the following: 'the Expert shall be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in Annexure A' failed for uncertainty because the default nomination mechanism was an essential machinery provision giving the entirety of the clause its character and certainty, and there was no such person prescribed in the Annexure.*⁸

*And for example: a clause referred to an issue of a notice of dispute under GC 12(b), however this clause did not exist.*⁹

- There is an 'agreement to agree' on a procedure to be followed, or a price to be set, or the apportionment of a neutral third party, or the agreement of third party fees.¹⁰

FACTORS RENDERING A DRC CERTAIN AND ENFORCEABLE

A DRC has been found enforceable and certain where:

- It did not include a specific mechanism to deal with the possibility of a meeting not being able to be held within a nominated time.¹¹
- It required senior representatives to undertake genuine and good faith negotiations in the performance of an agreement.¹²
- The Court could arrive at a sensible construction of a term that gave it operative flexibility, or was able to imply a 'reasonable and equitable' term to give effective operation to the agreement.

For example: the interpretation of 'or' to mean 'and/or'.¹³

And for example: a clause stated that 'the expert's fees and expenses must be shared equally between all parties' but was silent as to the fixing of the expert's remuneration and as to any other terms upon which he might be appointed. The court implied that the expert's appointment will be on terms which are reasonable having regard to his qualifications and functions he was to perform given that the implication was so obvious that it goes without saying'.¹⁴

THE VICTORIAN POSITION IN COMPUTERSHARE - AN EXCEPTION TO THE RULE?

The Victorian Supreme Court decision of *Computershare* opened the door to the possibility of DRCs being an exception to the uncertainty rule.

The case concerned a DRC which provided that the parties were to try and resolve the dispute themselves prior to it being escalated to the CEOs of each party for resolution, employing either mediation, conciliation, executive appraisal or expert determination. The DRC however, did not specify the procedures to be followed for any of the suggested dispute resolution processes, stipulating that, if the CEO's couldn't resolve the dispute within 10 days, they must endeavour in good faith during the following 10 days to either resolve the dispute, or 'agree on a process to resolve all or at least part of the Dispute without arbitration or court proceedings (eg, mediation, conciliation, executive appraisal or independent expert determination)'.¹⁵

Warren J held that the DRC was capable of being enforced and made comments regarding mediation processes generally:

³ *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

⁴ *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

⁵ *Morrow v Chinadotcom* [2001] NSWSC 209.

⁶ *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709; *The Heart Research Institute Limited v Psiron Limited* [2002] NSWSC 646.

⁷ *Laing O'Rourke v Transport Infrastructure* [2007] NSWSC 723.

⁸ *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503.

⁹ *Hardesty and Hanover International LLC & Ors v Abigroup Contractors Pty Ltd* [2010] SASC 44.

¹⁰ *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *Laing O'Rourke v Transport Infrastructure* [2007] NSWSC 723.

¹¹ *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290

¹² *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618; *AMCI (IO) v Aquila Steel Pty Ltd* [2009] QSC 139; *Computershare Ltd v Perpetual Registrars Limited (No 2)* [2000] VSC 233; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

¹³ *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

¹⁴ *144 Nepean Highway v Abnote Australasia Pty Ltd* (2009) VSCA 308.

Logically, parties cannot stipulate principles upon which mediation processes must produce an outcome. Of its very nature, the parties must negotiate and hold discussions to find their own solution. In essence, the parties are required to establish a protocol or framework within which the matter between them are to be negotiated. In essence, that is what mediation and conciliation are all about.¹⁵

On the issue of certainty, her Honour stated:

*Where parties have made a special arrangement requiring them to address a path to a potential solution there is every reason for a court to say such parties should be required to endeavour in good faith to achieve it. In these circumstances the court does not need to see a set of rules laid out in advance by which the agreement, if any, between the parties may in fact be achieved.*¹⁶

This decision remains good law in Victoria.

TAKE AWAY POINTS

If a party to a contract seeks to hold the other party to the DRC procedure, then based upon the preceding analysis, the following drafting mechanisms will assist.

Language and referencing

1. Ensure the dispute resolution procedure and the rights and obligations of each party is clear, such as defining exactly how and where a mediation will take place.
2. Ensure the language used by the parties is not so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.¹⁷
3. Ensure all cross-references in a dispute resolution clause are meaningful and certain.¹⁸
4. When importing terms into the contract from other documents, ensure these documents are annexed to the contract or have the parties recite that they agree to the terms in a named document and that each party has a copy of those additional negotiated terms.¹⁹
5. Avoid 'agreements to agree'. Leaving any element of a dispute resolution clause to the future agreement of the parties (such as the agreement on a procedure to be followed or a price to be set or the appointment of a third party neutral or the apportionment of a third party neutral's fees) will be uncertain and unenforceable.²⁰
6. Where including an obligation for the parties to negotiate, maintain the distinction between an agreement to negotiate (agreement to negotiate as part of a process), with an 'agreement to agree' (agreement to negotiate to achieve agreement (e.g. 'to negotiate fair and reasonable contract sums')).
7. Where there is a requirement to 'negotiate in good faith', it must be clear and part of an undoubted agreement between the parties; the clause should contain some readily ascertainable external standard or 'yardstick' against which the good faith or otherwise of the party's stance in negotiations may be judged objectively.²¹
8. If parties are adamant about selecting their own neutral third party, draft a deadlock mechanism that lists a person whom holds a certain office (President of the Law Institute etc.) rather than the name of an individual person, or class of persons (e.g. grade 3 arbitrator).²²
9. Allow for a method to ascertain the point of failure of one step (e.g after a period of time has elapsed). If the point of failure is to be left to the parties, this creates an obvious void in responsibility. Inability to determine with certainty the conclusion of one of the steps of a multi-tiered process could render the dispute resolution clause unenforceable.
10. Ensure that the parties are able to determine when the entire dispute resolution procedure has come to an end rendering the parties free to pursue litigation. This can be done by stipulating time frames within which the staged procedures for attempting dispute resolution are to be followed.²³

Structure and process

8. If parties are adamant about selecting their own neutral third party, draft a deadlock mechanism that lists a person whom holds a certain office (President of the Law Institute etc.) rather than the name of an individual person, or class of persons (e.g. grade 3 arbitrator).²²
9. Allow for a method to ascertain the point of failure of one step (e.g after a period of time has elapsed). If the point of failure is to be left to the parties, this creates an obvious void in responsibility. Inability to determine with certainty the conclusion of one of the steps of a multi-tiered process could render the dispute resolution clause unenforceable.
10. Ensure that the parties are able to determine when the entire dispute resolution procedure has come to an end rendering the parties free to pursue litigation. This can be done by stipulating time frames within which the staged procedures for attempting dispute resolution are to be followed.²³

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.

For further information, please refer to www.dlapiper.com

Copyright © 2013 DLA Piper. All rights reserved.

1201275296

This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.

¹⁵ *Computershare Ltd v Perpetual Registrars Limited (No 2)* [2000] VSC 233, [14] (Warren J).

¹⁶ *Ibid.*, [15] (Warren J).

¹⁷ *Scammell (G) and Nephew Ltd v Ouston* [1941] AC 251.

¹⁸ *Hardesty and Hanover International LLC & Ors v Abigroup Contractors Pty Ltd* [2010] SASC 44

¹⁹ *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709; *The Heart Research Institute Limited v Psiron Limited* [2002] NSWSC 646.

²⁰ *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236

²¹ *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

²² *Camillo Concrete Structures Pty Ltd v Boulderstone Pty Ltd* [2010] VCAT 285.

²³ *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 253 (Einstein J).