Are your dispute resolution clauses enforceable?

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In preparing construction contracts, it is generally the case that the parties take great care and provide significant detail around dispute resolution provisions. Whether it is senior executive meetings, mediation, facilitation or expert determination, there is generally a multi-step process under which the parties are required to engage before they can commence proceedings. Generally, the rationale is that it is better to spend some time, and a small amount of money, in attempting to resolve the disputes, than to spend a lot of money and a lot of time in court, a tribunal or arbitration. There is also the perception that, by resolving a dispute, you can manage and maintain an ongoing commercial relationship, whereas, by the time it gets to external proceedings, the relationship is usually irreparably damaged.

The question then, is whether or not these carefully crafted dispute resolution clauses are binding and enforceable, both when the contract is on foot and after the contract has been terminated. The answer to this question depends largely on the nature of the dispute, the width of the clause, and whether it is intended to operate in the context of the dispute. Although courts adopt similar approaches to interpretation, there are many different types of dispute resolution clauses, meaning each clause may be determined on its own facts.

The nature of the clause

The first consideration is whether or not the dispute resolution clause is, by its nature, enforceable. There are generally two key considerations here.

Firstly, whether or not the clause has sufficient detail or particularity to allow it to be enforced and, secondly, whether or not the clause is expressed as being mandatory and is actually structured in such a way.

The enforceability of clauses is surprisingly still a very common issue. There are often two occurring examples of unenforceable clauses.

The first is where the clause is vague and lacking in particularity. Commonly, a dispute resolution clause will start with a mandatory meeting of representatives of the parties and then often a second meeting of senior executives if the first round of meetings does not resolve the issue. Unfortunately, many contracts do not go beyond that and do not detail a clear process to be employed. They simply make statements such as *'the parties thereafter may agree to a further form of alternate dispute resolution, including mediation or expert determination'*. A clause such as this is commonly known as an agreement to agree and is unlikely to be enforceable.

For example, in *WTE Co-Generation v RCR Energy Pty Ltd*,[1] the relevant clause required the parties to '*meet to attempt to resolve the dispute or to agree on methods of doing so*'. The Court noted the '*inherent uncertainty*' of such a clause which leaves the appropriate course of action to further agreement.[2] If one party does not want

[1] [2013] VSC 314.

[2] Ibid [47].

to participate in the process, then it is unlikely that the courts will require a party to do so where there is no certainty or agreed process.

The second commonly occurring unenforceable provision is where there is wording that does not provide for a mandatory application of an agreed process. Commonly, after the meeting of senior executives, there is a process that provides that *'if the parties cannot agree then either party may refer the dispute to mediation'*. This may be viewed as an agreement to negotiate and if the clause is left with no further particularity or certain content, then it may be unenforceable. There is no requirement for either party to refer to mediation, and there is no time limit on the right to do so. The difficulty being that if the parties wait six weeks and then one party decides that it will commence proceedings, the other party can then stymie the process by referring it to mediation. In theory, the same thing would also apply in six months time. Therefore, it is impossible to apply the clause with any certainty where the parties cannot agree. Again, this is likely to be unenforceable.

How a clause is made enforceable?

There are two key elements. Firstly, there needs to be a clear, structured and mandatory process with options on default or the parties electing not to apply a particular process and, most importantly, the process must be stated as being a pre-condition to proceedings. It is this last element that makes the parties proceed with the dispute resolution process before commencing proceedings by way of litigation or arbitration.

Pre-condition to proceedings

Does making the observance of a dispute resolution clause before proceedings prevent a party commencing proceedings? Surely the inherent jurisdiction of the courts would take priority over the terms of a contract? The answer is yes and no. The courts have been very sensible in the way they have approached mandatory dispute resolution provisions. The courts have cleverly managed to balance the inherent power of the court with the bargain reached between the parties. It is a well-established principle that courts will generally attempt to hold the parties to their bargain,[3] and dispute resolution clauses are to be '*construed robustly to give them commercial effect'*.[4]

However, this is not strictly speaking a bar to commencing proceedings but would (depending on the nature of the dispute resolution clause) be more likely to act as a stay on proceedings. Such a contractual provision is commonly referred to as a '*Scott v Avery'* clause (named after the House of Lords decision of *Scott v Avery*[5]), which prevents the parties from suing on the contract until the dispute is submitted to dispute resolution processes. In other words, the effect of a binding dispute resolution clause will not be to oust the jurisdiction of the court, but in allowing the application of the clause, the court may be willing to stay proceedings pending the outcome of the contractual process. As described by Justice Giles in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,[6] *'what is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come'.*[7]

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[3] *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114, 126.

[4] *Burbank Trading Pty Ltd v Allmere Pty Ltd* (2009) 22 VR 623.

[5] (1856) 5HL CAS811.

[6] (1992) 28 NSWLR 194.

[7] Ibid [206].

The courts power to stay proceedings in this instance is '*obviously wide'* and '*the court should not lightly conclude that the agreed mechanism is inappropriate'*.[8] The party opposing the stay bears the '*heavy'* onus of convincing the court to allow the action to proceed by establishing that the dispute is incapable of being resolved by the contractual method to which the parties have agreed. Even if dispute resolution would be futile, courts are reluctant to decline to enforce a contractual agreement unless it is a '*completely hopeless exercise'*.[9]

As noted above, court proceedings are generally lengthy and expensive. If the parties can adopt a pre-agreed process that may be shorter and less expensive, and has been agreed as being applicable, then the courts are likely to uphold that process, stay the proceedings and only allow proceedings to commence once again if that agreed dispute resolution process is unsuccessful. In considering this, the court will most likely look at both the nature of the dispute resolution clause and the behaviour of the parties to date.

If for example, one party ignores the mandatory dispute resolution as a pre-condition to commencing proceedings and commences litigation, then if the other party applies to the court, the court is highly likely to consider staying the court proceedings until such time as the dispute resolution provisions have been observed. This makes commercial sense, as '*honest business people who approach a dispute about an existing contract will often be able to settle it*'.[10]

However, '*there are cases in which the dispute is such that justice will be best served by allowing the court to resolve it*'.[11] In some instances, courts have found that where the parties have largely complied with dispute resolution provisions, but it is clear and evident that those provisions are not likely to produce an outcome to resolve the dispute, then the court or tribunal may elect not to stay proceedings. For example, in *Contrast Constructions Pty Ltd v Allen & Anor*,[12] the court found the respondents were more concerned with '*creating obstacles to the continuation'* of proceedings and had not displayed a willingness to engage in meaningful negotiations. Accordingly, there was no reasonable utility in the dispute resolution process and the application for stay was refused.[13]

Conversely, in the case of *Santos Limited v Fluor Australia Pty Ltd*,[14] the court found that enforcing the dispute resolution clause would not prejudice either party, nor deprive them of the right for judicial determination in the event the dispute resolution process was unsuccessful.

In summary, provided that there is a dispute resolution clause that has sufficient detail to allow it to be enforced, and that it is a mandatory pre-condition to commencing proceedings, then the current judicial approach is that, in most instances, the courts will give effect to the terms of the contract and require the parties to comply before they will allow court proceedings to commence or continue.

What if the contract is terminated?

The above scenario is simple and easy where the contract remains on foot and the parties are trying to resolve disputes that have arisen during the course of the contract. What happens however, when one or indeed both parties elect to terminate the contract? Does the dispute resolution clause continue?

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[8] *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] Qd R 563 [21].

[9] *Cable & Wireless plc v IBM UK Ltd* [2002] EWHC 2059 (Comm).

[10] *United Group Rail Services Ltd v Rail Corporation of New South Wales* 74 NSWLR 637 [70].

[11] *Ferris v Plaister* (1994) 34 NSWLR 474, 497.

[12] [2020] QCAT 194.

[13] Ibid [39].

[14] [2016] QSC 129.

That of course depends very much on the circumstances, the wording of the contract and the nature of the dispute resolution clause.

If there is clear wording in the contract that states that the dispute resolution clause provisions survive termination of the contract, then, once again, it is likely that the courts will give priority to the agreed terms between the parties and require compliance with the dispute resolution clause. However, a survival clause with respect to dispute resolution (as opposed to something such as an indemnity) is often not included in a contract.

If the parties had commenced the dispute resolution process prior to termination, then, even without a survival clause, there is a reasonably strong chance that the parties will be required to continue to comply with that process. However, it must be apparent from the terms of the contract that the dispute resolution provision is intended to survive termination.[15]

It becomes more problematic though, when the contract has been terminated and one party seeks to apply the dispute resolution provisions after termination. In these instances, enforceability issues arise.

There is a general principle that rights and obligations that crystallised before termination are still subject to the process in the contract at the time that they arose and, therefore, the contract continues to apply, even if it is subsequently terminated. This principle derives from Justice Dixon's seminal judgment in *McDonald v Dennys Lascelles Ltd*,[16] with respect to the survival of obligations following the partial execution of a contract. His Honour observed that termination will discharge parties from further performance however rights and obligations are not divested which '*have already been unconditionally acquired*'.[17]

The first question to consider is whether the purported termination is valid. If one party invalidly terminates a contract, either because they have not followed mandatory processes in the contract or because they do not have the appropriate grounds to terminate, and the other party elects to keep the contract on foot, then it is highly likely that the dispute resolution provisions will remain enforceable as the contract is still on foot. This derives from Chief Justice Martin's observations in *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd*.[18] His Honour noted that in circumstances where parties disagree as to whether the contract has been terminated, to say that the dispute resolution clause is dependent upon a determination of valid termination, is '*manifestly inconvenient'*.[19]

It becomes more problematic if a contract has actually been terminated or one party invalidly terminates, but the other party, either by a clear and positive assertion or by conduct, elects to accept that repudiation and effectively terminate in response.

In this scenario, it will depend very much on the type and nature of the dispute resolution clause in the contract. In *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd*,[20] the phrase '*arises out of or in connection with the Contract'* in the dispute resolution clause was held to be sufficiently broad to encompass '*a dispute as to the circumstances of termination of the contract, regardless of whether or not parties regard the contract as any longer being on foot*'.[21]

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[15] *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1994] QCA 49.

[16] (1933) 48 CLR 457.

[17] Ibid [476].

[18] [2014] WASC 10.

[19] Ibid [42].

[20] [1999] WASCA 144.

[21] Ibid [40].

As previously noted, dispute resolution clauses commonly involve an initial conference process followed by another form of dispute resolution. Commonly, there is mediation, expert determination or, ultimately, arbitration.

Mediation

The process of mediation is always a non-binding process (at least until the parties clearly agree), that involves some level of compromise by both parties. Where a contract has been terminated, and one party commences proceedings, it may be difficult to see that a court will force the parties into a negotiation process where one party is clearly not interested in participating and, therefore, may have little chance of success. However, in the event a court determines a contractual requirement to engage in mediation is sufficiently certain and enforceable, it should provide an adequate basis to stay proceedings until after the dispute resolution process has been completed.

For a mediation clause to be enforceable and certain, it must be expressed as a condition precedent to litigation, detailing the mediation process with sufficient particularity.

A mediation clause expressed as a pre-condition to litigation was considered in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[22] which provided that '*the parties agree to first endeavour to settle the dispute or difference by mediation*'. It was common ground that the provision for mediation survived termination, however, the stay was ultimately refused on the basis that it lacked certainty by requiring the parties to '*attempt in good faith to negotiate'*.[23]

A similar position was reached in *Aiton v Transfield*,[24] where the court found that an obligation to negotiate in good faith includes undertaking to participate in a clearly defined process. As such, the stay was refused on the basis of the provisions failure to set out a mechanism for distribution of the mediator's costs.[25]

However, more recently, Australian courts have upheld requirements to negotiate in '*good faith*' as sufficiently certain, only where the party's obligations in the process are specifically defined – for example by detailing which parties must undertake certain acts, within defined time frames, failing which arbitration or another clearly defined step is to take place.[26]

The final requirement for enforcement, provided the clause is detailed with sufficient particularity, the party seeking to invoke the mediation process, must have undertaken the necessary steps to comply with the clause.

For example, in *VDM Construction Pty Ltd v MCC Mining (Western Australia) Pty Ltd*,[27] the court considered the operation of a clause which required the parties to undertake an initial mandatory conference in the event of a dispute. The clause then provided that if the parties were unable to resolve the dispute in the mandatory conference, within 15 days, '*either party **may** refer the dispute to mediation*'.[28] After 15 days elapsed following an unfruitful conferral, one party commenced litigation while the other party sought a stay of proceedings pending mediation. The court noted the relevant clause was not drawn in '*rigid terms'*, such that mediation did

[22] (1995) 36 NSWLR 709.

[23] Ibid [716].

[24] [1999] NSWSC 996.

[25] Ibid [66] – [78].

[26] *United Group Rail Services Ltd v Rail Corporation of New South Wales* (2009) 74 NSWLR 618.

[27] [2011] WASC 269.

[28] Ibid [10].

not become mandatory until one party ***elects*** for it.[29] Given the limited elective obligation to engage in mediation, the clause was not construed as mandatory and either party was entitled to commence litigation.

This decision demonstrates the level of certainty required for a clause to be enforceable and reinforces the importance of prior compliance with the contractual mediation process for the party seeking a stay of litigation.

The situation with expert determination and arbitration is however, different, as these have, for the most part, binding outcomes.

Expert Determination

The courts are not entirely clear on expert determination clauses. Although Justice Martin in *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd*,[30] did note that there was no relevant difference between expert determination and dispute resolution clauses that was a factual situation where the consideration was whether or not the expert determination clause was binding in a circumstance where the contract was still on foot. The court was not required to determine whether or not expert determination survived termination. Expert determination is a purely contractual arrangement as opposed to arbitration. The effect of a valid clause requiring expert determination '*is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider*'.[31]

Whether an expert determination clause is valid will firstly depend on the nature and width of the disputes in the clause '*which are or may be referred to the expert'*.[32]

Secondly, given that expert determination provisions seek to resolve disputes of a specified technical character, courts will look to whether the particular dispute is suitable for expert determination in the circumstances, by considering whether the dispute is within the expert's field of expertise.[33]

Further instances where courts have ventured away from the usual process of enforcing contractual provisions has been where the multiplicity of issues in dispute rendered it unsuitable for expert determination,[34] or where it involved mix questions of fact and law meaning it was more appropriate to be determined by a lawyer or an accountant.[35]

Therefore, whether or not expert determination or mediation will survive termination will depend very much on the construction and wording of the contract and whether the agreed processes are adequate for determination of the dispute. Conversely, it is highly likely that an arbitration clause will survive termination of the contract, absent any specific wording by the parties to the contrary.

Arbitration

Arbitration is a separate and clearly distinct process. Arbitration has separate legislation and governing rules and processes in each jurisdiction (some of which are dictated by the legislation and some of which are agreed by the parties).

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[29] Ibid [34].

[30] [2012] QSC 290.

[31] *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187.

[32] *Raskin v Mediterranean Olives Estate Limited & Ors* [2017] VSC 94.

[33] *Mr D Limited v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 322 at [54].

[34] *Raskin v Mediterranean Olives Estate Limited & Ors* [2017] VSC 94.

[35] *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135.

The current position on arbitration is that an arbitration agreement is generally considered to be a separate contract between the parties independent of the underlying contract in which it was included.[36] For that reason, in the absence of evidence of a contrary intention of the parties evident in the wording of the contract, such a clause survives termination of the underlying contract.[37] The principle being that the termination of a contract, whether by breach or repudiation, does not abrogate the prior application of the contract. It simply relieves the parties of having to further comply with the contract.[38] As previously noted, the rights and obligations that arose or were incurred before termination do not disappear and are still subject to the terms of that contract. Courts have fundamentally found that an arbitration clause will survive termination and, therefore, if the parties have agreed, as part of a dispute resolution process, to apply arbitration, then they will be bound to continue to do so, even if the contract is terminated.

It should also be noted that the application or survivability of dispute resolution provisions will always be subject to relevant legislative requirements. For example, in Queensland,[39] New South Wales,[40] Victoria[41] and the Northern Territory,[42] an arbitration clause in a domestic building contract will in no circumstances ever be enforceable. This is because sch 1B to the *Queensland Building and Construction Commission Act 1991* (Qld) makes arbitration clauses in regulated domestic building contracts void. This is clearly a policy position where there is already very substantive legislative control over domestic building disputes through the Queensland Building and Construction Commission and an opportunity to be heard through the Queensland Civil and Administrative Tribunal.

Outcomes

1. If contract is still on foot and:
   - Clause is certain (*United Group Rail Services Ltd v Rail Corporation of New South Wales* (2009) 74 NSWLR 618); and
   - Clause is a pre-condition to litigation (WTE Co-Generation v RCR Energy Pty Ltd [2013] VSC 314):
     - rights will have crystallised (*McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457); and
     - termination is not relevant (*Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10

   As such, the clause will be binding and courts will grant a stay to proceedings enforcing the dispute resolution process.

2. If the contract is terminated:

   If the dispute arose prior to termination, the dispute resolution clauses may be enforceable.

   For **mediation:**

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[36] *Ferris v Plaister* (1994) 34 NSWLR 474, 484.

[37] *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty* Ltd [2014] WASC 10.

[38] *Heyman v Darwins Ltd* [1942] AC 356, 374.

[39] *Queensland Building and Construction Commission Act 1991* (Qld) Sch 1B s 32.

[40] *Home Building Act 1999* (NSW) s 7C.

[41] *Domestic Building Contracts Act 1995* (Vic) s 14.

[42] *Building Act 1993* (NT) s 54BA(2)(b).

Whether or not a court will enforce a mediation clause will depend firstly on whether it is enforceable. To be enforceable:

- The clause must be expressed as a condition precedent to litigation;
- It must sufficiently detail, with particularity, the process for parties to follow; and
- The party seeking to invoke the mediation process must have undertaken the necessary steps to comply with the process;

For **expert determination**:

Ultimately, whether or not the court will construe the expert determination clause as binding will depend on:

- Whether the clause is wide enough to cover the dispute in question; and
- The nature of the dispute and its suitability for expert determination.

