DISPUTE RESOLUTION CLAUSES

by

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and

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- Is it possible to draft an enforceable agreement to negotiate?
- Will the model clause recommended by the Law Society of New South Wales be enforced by Queensland Courts?

It is clear that a clause which is merely an agreement to agree is an illusory promise and confers no legal rights[1]. Similarly, it was held in *Courtney & Fairbairn Ltd* v. *Tolaini Brothers (Hotels) Ltd and Another*[2] that if the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) then it cannot recognise a contract to negotiate as it must be too uncertain to have any binding force.

However, it has long been accepted by Australian Courts that an arbitration clause in the form known as "*Scott* v. *Avery*"[3], which is essentially an agreement to arbitrate, is enforceable, the majority of the court in that case holding that although it is a principle of law that parties cannot by contract oust the courts of their jurisdiction, a person may covenant that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the covenant. The validity of clauses in the Scott v Avery form was confirmed by the High Court of Australia in *Anderson* v. *G.H. Michell & Sons Ltd*[4].

As dispute resolution clauses providing for negotiation, conciliation or mediation between parties do not technically provide for a decision to be imposed by the third party, they have met with differing legal analysis in the few decisions in which they have been considered so far.

In *Allco Steel*[5] the disputes clause considered was contained in a construction contract and essentially provided that the parties would attend a conciliation meeting to resolve any disputes under the contract before proceeding to a court. A dispute arose and Torres Strait Gold commenced litigation without having complied with the clause. Upon application by Allco Steel, Ambrose J ordered that no further steps be taken in the action and the parties should proceed to conciliation.

Some months later, after two unsuccessful conciliation meetings litigation was commenced by Allco Steel and in the context of that action Torres Strait Gold applied for a stay of proceedings on the basis of the disputes clause. Despite a compelling initial argument that when the application for a stay was made to Master Horton QC, the disputes clause had already been apparently complied with, the Master proceeded to consider the validity and effect of the clause.

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1. *Carr & Others* v. *Brisbane City Council* 1956 St.R.Qd. 403.
2. 1 W.L.R. 297 per Lord Denning MR at 301.
3. Taking its name from the case of *Scott* v. *Avery* (1856) 5 H.L.C. 81; 10 ER 1121.
4. 1941 65 CLR 543.
5. *Allco Steel (Queensland) Pty Ltd* v. *Torres Strait Gold Pty Ltd & Ors* Unreported, SC of Qld, No.2742 of 1989, 12 March 1990.

The Master found that the disputes clause was not an arbitration clause under the *Arbitration Act* 1973 (Qld) and that those decisions dealing with *Scott* v. *Avery* clauses were of no relevance.

Accordingly he held that notwithstanding what he perceived to be a clear breach of the obligation to conciliate on the part of the plaintiff, the doctrine that the jurisdiction of the Court cannot be ousted dominated any other principle that would require the plaintiff to honour its contractual obligations.

This finding is of particular interest in two respects. Firstly, it is not clear from the judgment whether the Master considered decisions dealing with *Scott* v. *Avery* clauses irrelevant because the clause in question was not in *Scott* v. *Avery* form, or because the process called for was not arbitration.

If the former reason was persuasive, then his finding is reconcilable with the authorities to date. If however the Court's willingness to enforce Scott v Avery type clauses is to be confined to disputes clauses providing for arbitration, then this decision heralds a fatal flaw to the general enforceability of clauses providing for consensual ADR[6] processes.

In *Aztec Mining Company Limited* v. *Leighton Contractors Pty Ltd*[7] (Aztec Mining), a lengthy clause in a mining agreement provided for the parties to agree on the appointment of an "expert" to determine disputes in a specified manner. In considering the clause the court was asked to find that the clause was void as being contrary to public policy because it provided for a dispute resolution process which so lacked the requirement of fundamental procedural fairness, that the court could not enforce it. Murray J. concluded that as there was nothing in the clause to prevent a party testing in the courts the question of procedural unfairness or impropriety resulting from the expert's procedure, he did not consider the clause capable of being struck down.

Conclusions

1. The principle of law that the court will not permit its jurisdiction to be ousted by private agreement takes precedence in Australia over the rule that parties should be held to their contracts.
2. On the basis of *Aztec Mining*, a contractual provision which provides for expert determination of a dispute outside the judicial system, which expedites and truncates normal court procedures will not necessarily offend public policy as to procedural fairness.
3. Clause 1.4 of the model dispute resolution clause drafted by the Law Society of New South Wales (the model clause) provides that "the parties shall seek to agree on a process for resolving the whole or part of the dispute through means other than litigation". It is therefore arguable that the clause merely constitutes an agreement to agree on a fundamental point (ie., the dispute resolution process to be utilised) and as such is unenforceable.
4. The model clause is clearly in *Scott* v. *Avery* form but contemplates resort to dispute resolution processes other than arbitration and litigation. It is uncertain whether Master Horton QC's decision in *Allco Steel* is authority for the proposition that a disputes clause which refers to processes other than arbitration will be void and unenforceable in Queensland.

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6. Alternative Dispute Resolution.
7. Unreported, SC of WA, No.1109 or 1990, 23 February 1990.