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Bulletin

The limits of uncertainty — what is the appropriate focus for the review of dispute resolution clauses by Standards Australia?

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... very frequently, whether it be in wills, settlements or commercial agreements ... the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court ... to give a reasonable meaning to the language if it can do so without doing complete violence to it.
— Lord Upjohn, *Wishaw v Stephens* [1970] AC 508.

In brief: Standards Australia advises that dispute resolution clauses should be reviewed

In *WTE Co-Generation v RCR Energy Pty Ltd* (*WTE v RCR*),[1] the Victorian Supreme Court found that a contractual clause requiring senior executives to meet "to attempt to resolve the dispute or to agree on methods of doing so" amounted to an "agreement to agree", and was unenforceable at law.

The immediate effect of that decision was an alert Australian Standard Conditions of Contract, published by Standards Australia, (quite properly) advising users to seek legal advice before adopting the standard suite of dispute resolution clauses in light of the judgment. The alert foreshadowed an intention on the part of Standards Australia to carry out a review of all dispute resolution clauses used in its suite of contracts.

This article focuses instead on the judgment in *WTE v RCR* and questions about whether the case was, in fact, correctly decided.

Enforcing dispute resolution clauses

For some time, the orthodox approach of courts has been to hold parties to the terms of dispute resolution clauses to which they have agreed and, in doing so, approach the construction of such clauses "liberally and not narrowly".

In this sense, a dispute resolution clause is no different from any other clause in a commercial contract. The usual rules of interpretation apply, including the rules that require a court to:

- give the contract a businesslike interpretation, paying attention to the language used by the parties, the commercial circumstances that the document addresses, and the objects that it is intended to secure;[2]
- construe the contract as a whole and give effect to it accordingly;[3] and
- only hold a clause void for uncertainty as a last resort, where it is not possible to give it a reasonable meaning.[4]

The dispute resolution clause

The clause that generated the controversy in *WTE v RCR* states as follows:

> Within 7 days after receiving a notice of dispute, the parties shall confer at least in the presence of the Superintendent. In the event the parties have not resolved the dispute then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
>
> If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation.

The case and the decision

In *WTE v RCR*, one or more disputes arose under the contract, but the nature of the dispute(s) is unclear from the face of the judgment. The defendant, RCR Energy Pty Ltd (RCR), sought a stay of proceedings commenced by the plaintiff, WTE Co-Generation (WTE), on the basis that WTE had failed to comply with the procedure set out in the dispute resolution clause prior to commencing litigation.

This issue was determined as a preliminary matter. WTE argued that the clause was void for want of certainty. The court agreed, relevantly stating:

> To my mind, subcl 42.2 of the relevant Contract, which provided that "In the event the parties have not resolved the dispute then [within a further 7 days] a senior executive representing each of the parties must *meet to attempt to resolve the dispute or to agree on methods of doing so*," is unenforceable.
>
> The process established by the clause is uncertain. Once the operation of subcl 42.2 is triggered, the parties are required to do one of two things, either to meet together to resolve the dispute, or to agree on methods of doing so. No process is prescribed to determine which option is to be pursued.
>
> Indeed, subcl 42.2 may indeed be complied with by the parties to the Contract without a meeting "to attempt to resolve the dispute" if instead, they meet to "agree on methods of doing so".
>
> Further, no method of resolving the dispute is prescribed, and, as expressly contemplated by the subclause, the method of resolving the dispute is to depend on the parties further agreement as to the method to be employed.
>
> Thus further agreement is needed.[5]

It is apparent from this reasoning that his Honour has construed the clause as in fact requiring the parties at the meeting contemplated between the senior executives to *either* resolve the dispute *or* agree a method for doing so.

His Honour's conclusion that the clause was void for uncertainty rests entirely on the premise that agreement on a method of resolving the dispute was *mandatory* in the event that the dispute itself could not be resolved at the meeting.

This is because, if it were the case that the parties were only obliged to *attempt* to agree on a method for resolving the dispute, then there is no reason why, following the decision of the NSW Court of Appeal in *United Group Rail Services Ltd v Rail Corp (NSW)*[6] (of which his Honour otherwise approved), that the court, absent other discretionary considerations, would not hold the parties to their bargain and require them to participate in the meeting as a pre-condition to commencing litigation.

It follows that his Honour construed the clause as meaning that the parties must meet to:

- attempt to resolve the dispute; or
- agree on methods of doing so.

However, respectfully, such an interpretation is problematic for two reasons:

- it leads to the conclusion that the clause is void for uncertainty, whereas there is an alternative available interpretation that means that it is not; and
- it fails to give any or sufficient meaning to the final paragraph of the clause, which states: "If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation."

These are discussed in turn below.

Alternative interpretation

An interpretation of the clause as meaning that the parties must meet to *attempt to*:

- resolve the dispute; or
- agree on methods of doing so,

gives effect to the clause as a whole, because it means that, absent resolution of the dispute at the senior executives' meeting, the parties would only be required to *attempt* to agree on methods for resolving the dispute. Such a requirement is not an "agreement to agree" and would not be void for uncertainty.[7]

It is respectfully submitted that this alternative construction was available and should in fact have been adopted by the court consistently with the principle that a construction that is reasonably available and avoids invalidity on the grounds of uncertainty should be preferred over one that does not.[8]

Relevance of the right to refer to litigation

Separately, the final paragraph of the clause may, on one view, be inconsistent with an interpretation of the clause that *requires* the parties at the senior executives' conference, failing resolution of the dispute, to *agree* on methods of resolving it, because such requirement would either mean that:

- the final paragraph of the clause is redundant, since the parties have agreed on an alternative method of resolving the dispute (and this would be contrary to the application of proper principles for the construction of commercial contracts that require clauses to be construed as a whole and given effect to accordingly);[9] or
- the application of the final paragraph would necessitate the agreed method of resolving the dispute to be undertaken and completed within the 14 or so remaining days between the senior executives' conference and the expiry of 28 days from the date on which the dispute notice was served — which does not appear to be a businesslike and commercial interpretation of the meaning of the clause and could be unworkable,[10] particularly if, for example, the agreed method of resolving the dispute was referral to arbitration in the absence of any express obligation of the parties to extend the time period.

Application to the Australian Standards form

The wording of the relevant clause in the Australian Standards suite of contracts differs from the wording of

the clause in *WTE v RCR* and also varies between the various contract suite series.

In AS 4300-1995 and AS 4303-2000, the unmodified form of the clause states:

> Within 14 days of service of a notice of dispute, the parties shall confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.
>
> If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.

In AS 4305-1996, the unmodified form of the clause states:

> Within 14 days of the giving of a notice of dispute, the parties shall together confer with the Superintendent at least once to attempt *to* resolve the dispute or *to* agree on resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.
>
> If the dispute has not been resolved within 28 days of the giving of a notice of dispute, that dispute shall be and is hereby referred to arbitration.

These versions of the clause are similar to the clause in *WTE v RCR* and, it is submitted, ought to be enforceable for the reasons set out above.

It is true that an issue may arise regarding the application of the deemed referral to arbitration in circumstances where the parties have, at their conference, agreed to resolve the dispute by other means, but have not done so within 28 days of the giving of the notice of dispute (see the discussion of this issue above). Presumably, any agreement reached in conference would supplant the referral, but this is unclear. Nevertheless, this is not a matter that impinges upon the enforceability of the obligation to confer (as opposed to agree), nor is it identified as being relevant to the conclusions reached in *WTE v RCR*.

The unmodified form of the clause in AS 4000-1997, AS 4122-2000, AS 4901-1998, AS 4902-2000, AS 4903-2000, AS 4905-2002 and AS 4906-2002 is cast in somewhat different terms. In these contracts, the clause states:

> Within 14 days after receiving a notice of *dispute*, the parties shall confer at least once to resolve the *dispute* or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
>
> If the *dispute* has not been resolved within 28 days of service of the notice of *dispute*, that *dispute* shall be and is hereby referred to arbitration.

It is submitted that, properly construed, this form of clause is also valid and enforceable.

If the word "to" in the phrase "the parties shall confer at least once *to* resolve the dispute or *to* agree on methods of doing so" is construed as denoting the "result or consequence" of the conference (compare the eighth meaning ascribed by the Macquarie Dictionary to the word "to"), then the clause may be seen as requiring agreement and be invalid.

However, once again, an alternative interpretation is available — namely, one in which the word "to" is construed as denoting the "aim, purpose or intention" of the conference (compare the sixth meaning ascribed by the Macquarie Dictionary to the word "to") and not a mandatory outcome. Such an interpretation would not lead one to conclude that the clause *required* agreement as to methods of resolving the dispute if resolution itself could not be achieved, and should be preferred over the interpretation that leads to a conclusion of invalidity.[11]

Conclusions

It is always prudent practice for practitioners to view standard contracts critically and in light of the specific needs of their clients. However, for the reasons set out above, the drafting of the current standard form of dispute resolution clauses is a far cry from that of the commercial documents the subject of Lord Upjohn's lament. It is unclear whether the decision in *WTE v RCR* would be followed by other superior courts and whether the foreshadowed review of its suite of contracts by Standards Australia is actually warranted based upon that decision.

Nevertheless, perhaps one way of avoiding doubt as to whether a clause could be challenged on the basis of *WTE v RCR* would be to clearly spell out the obligation of the parties only to confer in good faith to attempt to resolve a dispute or to attempt to agree on methods of doing so, failing which a clearly prescribed dispute resolution procedure (such as litigation, arbitration or expert determination) applies.

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Footnotes

1. *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314; BC201310337 (*WTE v RCR*).

2. See *McCann v Switzerland Insurance Australia Ltd (Allens Case)* (2000) 203 CLR 579; 176 ALR 711; [2000] HCA 65; BC200007594.
3. See *Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268; *Westgate Ports Pty Ltd v Port of Melbourne Corp* [2011] VSC 331; BC201105287; *Avranik Pty Ltd v Lloyd* [2013] VSCA 244; BC201312706.
4. See Lord Denning MR in *Greater London Council v Connolly* (1970) 68 LGR 368; [1970] 2 QB 100; [1970] 1 All ER 870; [1970] 2 WLR 658.
5. Above, n 1, at [41]–[45] (emphasis added).
6. *United Group Rail Services Ltd v Rail Corp (NSW)* (2009) 74 NSWLR 618; [2009] NSWCA 177; BC200905748 at [74].
7. Above, n 6.
8. Above, n 4.
9. Above, n 3.
10. Above, n 2.
11. Above, n 4.