ARBITRATION INSIGHTS: AUSTRALIA

MULTI-TIERED DISPUTE RESOLUTION CLAUSES

In our last briefing, we provided some drafting tips for an effective arbitration clause. In this briefing, we take it one step further and talk about multi-tiered dispute resolution clauses.

> “Tiered dispute clauses simply provide a structure for parties to attempt different alternative dispute methods before incurring the cost of arbitration or court.”

Multi-tiered (or simply tiered) dispute resolution clauses provide a sequence of dispute resolution methods, typically requiring parties to attempt alternative dispute resolution before engaging in arbitration or court litigation. Each tier or step in the dispute process is more formal and more costly than the previous tier. The first stage is often a meeting of senior managers, the second stage is often mediation with the final stage, arbitration or court. Tiered disputes clauses are common in contracts for large and complex projects, such as construction or energy projects.

Usually there are only three stages, although sometimes there can be more. These clauses may also provide for different pathways for different types of disputes. It is possible to include for instance a decision of a Disputes Board to be pre-requisite to a part of the process.

It should be noted however that in Australia, it is not possible to contract out of the statutory adjudication regime for construction projects and adjudication sits alongside the contractual disputes processes.

Why include a Tiered Dispute Clause?

Tiered dispute clauses simply provide a structure for parties to attempt different alternative dispute methods before incurring the cost of arbitration or court. It is always useful to attempt to negotiate or mediate a dispute prior to arbitration. ADR is useful because it very often works. ADR is:

1. cheaper;
2. less time consuming; and
3. better at preserving relationships,

than either court or arbitration. In a traditional adversarial dispute resolution setting, parties are often concerned that proposing a compromise will be perceived as a sign of weakness. By including ADR as a mandatory step, parties are given the opportunity to communicate more freely without such concern. Similarly having a disputes board or a disputes advisor provide an opinion on the dispute before arbitration may also help the parties reach a compromise.

Of course, it is possible to be cynical about tiered dispute clauses and it is the case that some parties require their opponent to go through each stage without any real intention of settling the dispute. However in our experience, this is the exception rather than the rule.

Are Tiered Disputes Clauses Enforceable?

In a word yes. If a party has not completed any pre-requisite steps before commencing court proceedings, it is likely that a court will stay the proceedings to require the parties to comply with its contractual obligations. In an arbitration, the tribunal may lack jurisdiction if the claimant has not complied with any pre-requisites to issuing the arbitration notice.

In *Santos Limited v Fluor Australia Pty Ltd*[1], for example, Santos commenced proceedings before carrying out the negotiation required in the contract, arguing that such negotiations would be useless and would only further delay the resolution of the dispute. The Supreme Court of Queensland, however, disagreed and concluded that the parties should be held to their bargain and the proceedings commenced by Santos should be stayed pending the negotiations.

Issues to consider when drafting an MTDRC

Parties drafting a tiered disputes clause should first consider whether any ADR process should be a pre-condition to the final dispute resolution process.

If the intention is to require the parties to go through each tier, then it is important that the clause is clearly drafted. The requirements and the time frame for each step should be clearly identified.

1 [2016] QSC 129

It is also important to identify the parties involved within the process and if the parties cannot agree who they should appoint to assist them, the clause needs to identify which organisation will step in to help.

Finally and something which often causes problems in practice is to ensure that the scope of the dispute is properly defined. If the intention is to ensure that:

1. all possible disputes relating to the contract are referred to arbitration and
2. before any arbitration can be commenced, the claimant must take the dispute through the tiered dispute clause,

then it is vital to ensure that at the outset of the clause, the term "dispute" is drafted very widely. Often the disputes clause begins by allowing only contractual claims to be referred to the initial tiers of the disputes process and this then creates problems for the jurisdiction of the arbitration tribunal later on.

Our next briefing will take this process one step further again. We will talk about the med-arb process.

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