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THE COST OF AMBIGUITY IN DISPUTE RESOLUTION CLAUSES

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Legal Briefings – By **Leon Chung, Mitchell Dearness, Taylor Gray and Phoebe Winch**

The Supreme Court of South Australia has recently dismissed an application for a permanent stay of proceedings on the ground that the parties were not subject to a binding agreement to arbitrate.[1]

The decision highlights the importance of drafting dispute resolution clauses that clearly express the parties' intent and which can be given effect. Poorly drafted dispute resolution clauses are often the source of extended and time-consuming disputes over a tribunal's jurisdiction which can take place prior to the commencement of the substantive merits phase of the dispute. The Court in this instance found that the dispute resolution clause was "neither this nor that, that is to say it is not quite an arbitration agreement and not quite a mediation agreement".

FACTUAL BACKGROUND

The applicant in the proceedings (the defendant in separate court proceedings commenced by the plaintiffs) sought an order that the court proceedings commenced by the plaintiffs be permanently stayed on the basis that the parties were bound by an agreement to arbitrate in accordance with the Rules of the Singapore International Arbitration Centre (**SIAC**). The relevant part of the dispute resolution clause at issue provided:

"*If the parties have been unable to resolve the Dispute within the Initial Period, then the parties must submit the Dispute to a* ***mediator for determination in accordance with the Rules of the Singapore International Arbitration Centre (Rules), applying South Australian law****, which Rules are taken to be incorporated into this agreement*." (emphasis added)

The issue for the Court was whether, on the basis of the material before it, this clause constituted a binding arbitration agreement.

The applicant contended that the word “mediator” was a typographical error and should have read “arbitrator”, otherwise unintended absurd consequences would follow from the fact that the clause on its face refers to dispute resolution in accordance with the Rules of SIAC.[2] This is because there are no rules for mediation prescribed by SIAC.

The applicant also relied on the dispute resolution clause in an earlier memorandum of understanding (**MOU**) entered into by the plaintiffs and a company related to the defendant company, which contained an arbitration clause referring disputes to SIAC.

DECISION

Dismissing the application, Kelly J resolved the issue as a matter of contractual interpretation. Whilst on its face Kelly J found the terms of the clause were clear, her Honour found ambiguity arose from the requirement that the mediation be conducted in accordance with the Rules of SIAC, when there are in fact no rules for mediation prescribed by SIAC (her Honour also noted the plaintiffs’ evidence that there are rules of the Singapore International Mediation Centre).

In order to resolve this ambiguity, Kelly J referred to:

- the dispute resolution clause contained in the MOU, which indicated that what was proposed at the outset was that any dispute be settled by arbitration;
- the pre-contractual negotiations between the parties showing that the dispute resolution clause changed qualitatively in the very first draft of the agreement between the parties which did not reproduce the original proposal to arbitrate, as contained in the MOU; and
- the other sub-clauses in the dispute resolution clause which contemplated that a dispute could subsist and still be amenable to court proceedings and would have little, if any, work to do if there was really a binding arbitration agreement.

For these reasons, Kelly J concluded that the dispute resolution clause was not consistent with an intention to determine disputes by arbitration. Nor was it quite an arbitration agreement or a mediation agreement. Accordingly, the stay application was dismissed.

IMPLICATIONS FOR YOUR BUSINESS

The court’s conclusions highlight the importance of drafting a dispute resolution clause that is both free from ambiguity and a clear reflection of the intention of the parties.

In addition, it is important to ensure that the clause provides for a procedure that is possible in practice so that it can be given effect to and that the components of a dispute resolution clause operate harmoniously with each other and in particular, with the arbitration clause.

ENDNOTES

1. *Hurdsman & Ors v Ekactrm Solutions Pty Ltd* [2018] SASC 112.

2. Relying on the authority of: *Westpac Banking Corp v Tanzone Pty Ltd* (2000) 9 BPR 17, 521; *Dockside Holdings Pty Ltd v Rakio Pty Ltd* (2001) 79 SASR 374.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com

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