SVENSON BARRISTERS

A Lawyers Role in Mediation

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TEMPLE SAVILLE

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What is mediation?

- Mediation is a form of Alternative Dispute Resolution (ADR)
- Others forms of ADR include:
  - Conciliation
  - Arbitration
  - Expert Appraisal

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Role of Lawyers and Mediators

- Lawyer
  - Advise the client about the process
  - Consider the issues
  - Consider and advise the client about any offers made
  - Assist in drafting settlement documentation
- Mediator
  - To manage the dispute resolution process

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Confidentiality

(a) A lawyer must not disclose any information disclosed during the mediation unless such disclosure is required by law.

(b) Without prior permission of the mediator and the other parties a lawyer must not reveal any information disclosed by the mediator during private sessions to the other parties or their legal representatives.

(c) All information and documents disclosed during the mediation, including any settlement or draft offers/counter-offers, are confidential and privileged between parties to the mediation and their legal representatives.

(d) A lawyer should consider rules about confidentiality (which may vary from jurisdiction to jurisdiction) before attending a pre-mediation conference so that they may be established by the parties and the mediator at the premediation conference.

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Good Faith

(a) A lawyer should advise clients about what it means to act in good faith. A lawyer should not continue to represent clients who act in bad faith or give instructions which are inconsistent with good faith.

(b) Likewise, if a lawyer suspects the other parties to the mediation are acting in bad faith this should be raised privately at first with the mediator.

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When to Mediate

- Court ordered mediation
- Selection of mediator
- Dispute resolution clauses
  - Avoid “agreement to agree”
  - Select a third party
  - Incorporate other documents as required
  - Use precise language

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Uncertain & Unenforceable

42.2 Conference

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.

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WTE Co-Generation v RCR Energy Pty Ltd [2013] VSC 314

1. The general rule is that equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable.

2. The Court may, however, effectively achieve enforcement of a dispute resolution clause by default, by ordering that a proceeding commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed. What is enforced by this means is not co-operation and consent of the parties but participation in a process from which consent might come.

3. A circumstance which will operate to preclude the ordering of a stay on this ground arises where the particular dispute resolution clause is determined to be unenforceable, as where for example, the clause is found to be uncertain.

4. Dispute resolution clauses in contracts should be construed robustly to give them commercial effect. The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.

5. Honest business people who approach a dispute about an existing contract will often be able to settle it. If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which nevertheless have sensible and ascribable meaning, the task of the court is to give effect to and not to impede such solemn express contractual provisions. Uncertainty of proof does not detract from there being a real obligation with real content.

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WTE Co-Generation v RCR Energy Pty Ltd [2013] VSC 314

6. A dispute resolution clause in a contract, consistently with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.

7. The trend of recent authority is in favour of construing dispute resolution clauses where possible, in a way that will enable those clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.

8. The court does not need to see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved. The process need not be overly structured. However, the process from which consent might come must be sufficiently certain to be enforceable. A contract which leaves the process or model to be utilized for the dispute resolution ill defined, or the subject of further negotiation and agreement, will be uncertain and unenforceable.

9. An agreement to agree to another agreement may be incomplete if it lacks the essential terms of the future bargain.

10. An agreement to negotiate, if viewed as an agreement to behave in a particular way, may be uncertain, but is not incomplete. The relevant question is whether the clause has certain content.

11. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete.

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Preparing for mediation

- Preparing the client
- Identify skills required to mediate

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The preliminary conference

- Opportunity to address practical matters with the mediator including:
  - Date, time, place
  - Who is participating
  - Who has authorityy to make decisions
  - Are there any variations required

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The mediation

- Opening statement
- Joint Session
- Private Session
- Agreement (hopefully)

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Settlement

- Heads of Agreement
- Terms of Settlement
- Deed of release

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Accord Executory / Accord and Satisfaction

McDermott v Black (1940) 63 CLR 161 Dixon J as he then was:

The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one.

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Post Mediation

- Communication with the client

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Questions

- Any questions?
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