The dangers of defective dispute resolution clauses

By Fiona Tregonning

Recent High Court cases have highlighted the dangers of inexpertly crafted dispute resolution clauses: they can lead to unwanted additional litigation and the associated legal costs, as well as delay in resolution of the dispute. This underlines the need to ensure upfront that your dispute resolution clause is fit for purpose, including by getting drafting advice and ensuring that any entity which is to appoint the arbitrator or expert to decide the dispute is willing and able to do so. A little legal advice at the outset can save a lot of headaches further down the track, as the Tumatatoro case[1] particularly shows.

The *Tumatatoro* case: problems with appointment

Tumatatoro and HJS were parties to a lease of rural land, but had a dispute regarding entitlement by the lessee (HJS) to an abatement of rent. Clause 48 of the lease provided that:

> *If discussion between the Lessor and the Lessee fails to reach agreement in any dispute (including but not limited to the review of rent) the matter shall be decided according to the decision of an independent registered farm management consultant agreed to by both parties whose decision shall be binding. If neither party can agree on a consultant then one will be appointed by Federated Farmers of New Zealand.*

Unfortunately, when contacted by the parties to appoint such a consultant, Federated Farmers declined to do so, saying that this was not a service they had agreed to perform or did perform. Going back to the drawing board, the parties again failed to agree who should be appointed to resolve the dispute and that person's necessary qualifications, and also disagreed whether clause 48 was still live, and if so, whether it required arbitration or expert determination.

In July 2018 Tumatatoro as lessor issued proceedings in the Disputes Tribunal to recover the unpaid rent. However, the same day Tumatatoro's lawyers also wrote to HJS noting, in relation to arbitration, that the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) was the appointing body under Article 11 of Schedule 1 of the Arbitration Act and asking that, if HJS intended to approach AMINZ for an appointment, they do so within 5 working days, in which case Tumatatoro would discontinue the Disputes Tribunal proceedings. Tumatatoro also promised that it would not cancel the lease while 'arbitral proceedings are on foot'.

HJS then approached AMINZ, who appointed an arbitrator to resolve the dispute – but one who was not an independent registered farm management consultant. Tumatatoro then filed a High Court challenge to the appointment of the arbitrator as lacking the necessary qualification.

Ultimately, the High Court did not need to decide if clause 48 required expert determination or arbitration.[2] Instead, the Court found that the parties had agreed through their conduct and communications from July 2018 that there was a fresh and binding agreement to arbitrate, and that this agreement imposed no conditions on the qualifications of the arbitrator. But while arbitration will therefore (presumably) resolve this dispute in due course, that is no thanks to the dispute resolution clause in the parties' lease agreement.

Lessons for drafting

Even for low value disputes, a clumsy dispute resolution clause can cause numerous problems, and it is worthwhile getting legal advice at the drafting stage to ensure your clause will work as intended.

As the Court commented in another recent case (*Burri v Schuler Brothers*) concerning whether a valuation dispute could be litigated in Court or had to be arbitrated: "*Doubt attaches to whether the [dispute resolution] clause was shaped by legal advice. It will be noted it is silent about time, or what happens if the valuation process bogs down because of delay or some other impediment. Therein lies the problem.*"[3]

Specific lessons highlighted by these cases include:

- The need to ensure that any body which is to appoint an arbitrator, mediator or expert is still in existence, willing and able to do so – check first if there is any doubt.
- The clause should make clear the nature of the dispute resolution process involved, e.g. mediation, arbitration or expert determination.
- The clause should specify clearly any required qualifications of the person to be appointed to resolve the dispute.
- The clause should have clear timelines for steps involved in the dispute resolution process, e.g. by what date a party has to object to a valuation, or how long valuers have to try and reach agreement before a party can submit an issue to arbitration.

End Notes

[1] *Tumatatoro Limited v HJS AG Limited & Ben Vanderkolk* [2019] NZHC 1047

[2] The parties' conduct and Federated Farmers' refusal to appoint a farm management consultant meant that clause 48 was unworkable as an expert determination, and abandoned as an arbitration agreement.

[3] *Burri v Schuler Brothers Limited* [2019] NZHC 1169 at [4]

ABOUT THE AUTHOR

Fiona Tregonning
Special Counsel

Fiona is a general commercial litigation and arbitration lawyer. She leads the Arbitration team within the MinterEllisonRuddWatts National Disputes Resolution Division and has a wealth of experience in working with clients to effectively resolve complex and international disputes across a range of industry sectors. a number of industries.

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