COMMENT

There has been a move in recent times to include dispute resolution clauses in contracts which require the parties to engage in conciliation or mediation procedures for a certain period e.g. 21 days prior to commencing arbitration or court proceedings. This decision obviously casts doubt on the efficacy of such clauses.

The problem which arose in the above case would not occur where the Institute's recommended conciliation clause is used:-

> "If any dispute or difference arises between the parties to this contract they will consider resolving it in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Conciliations'.

This clause does not impose an obligation upon the parties to conciliate and recognises that there is little point in placing an obligation upon parties to engage in a voluntary process unless they genuinely wish to.

DRAFTING OF AGREEMENTS AND CONTRACTS TO REFLECT PARTIES INTENTIONS

CAPRICORN INKS PTY LTD v LAWTER INTERNATIONAL (AUSTRALASIA) PTY LTD [1989] 1 Qd.R

Lawter International (Australasia) Pty. Ltd. ("Lawter") supplied to Capricorn Inks Pty. Ltd. ("Capricorn") printing vanishes which were admitted to be defective. The parties appointed a firm of accountants to determine the measure of damages payable to Capricorn by Lawter. Terms of settlement between the parties contained the following clause:-

> "The Quantum of Damages as per our letter of 7th July is to be assessed by an independent firm of Accountants to be jointly instructed by the parties. The Accountant's role is not to determine whether or not the heads of damage noted in our letter of 7/7/87 have been suffered by our client (that being admitted); rather, their function is to simply qualify the losses under these heads. In this regard, they will have to refer to our client's own Accountants and possibly another firm of ink manufacturers. The independent Accountants do not have to assess the losses in respect of Accountant's fees to date and loss-assessor's fees. We are to simply produce to you invoices evidencing those losses".

The letter to the accountants from the parties stated:-

> "An agreement has now been reached between Capricorn and Lawter . . . that your firm are to be appointed as assessors to investigate and advise the parties as to the extent of the loss suffered by Capricorn as recorded in our letter to Lawter dated 7th July, 1987. Lawter has agreed to compensate our client for the loss which it has suffered as a result of the defective products. Your firm is to assist the parties by investigating the loss as claimed in the Heads of Damage noted in our letter of 7th July, 1987. Your report will determine the amount of compensation to be paid by Lawter to Capricorn. You do not have to investigate the claims for Accountant's fees to date or loss assessor's fees . . . You are to be assisted in your enquiries by our client's Accountant . . . In determining the quantum of some of the claims (e.g. claim for lost time) you may require the assistance of another firm of ink makers . . .
>
> For the purposes of your investigation, you are to have full access to the books, records and personnel of Capricorn. It is agreed that Capricorn is to fully co-operated with you in your investigation. Would you therefore please contact . . ., the managing Director of Capricorn . . . to arrange a meeting".

The accountants made a determination as to the sum owing by Lawter to Capricorn. Capricorn then sought to enforce the determination of the accountants as an award pursuant to the Queensland Arbitration Act 1973. Lawter sought to have the award set aside for misconduct under the same Act. Both the trial judge and the Full Court on appeal held that the agreement to refer the matter to the firm of accountants was not an arbitration agreement. The proceedings were not quasi-judicial in nature. It was not intended the evidence be called nor was there a right to the parties to be heard. Further, the instructions were to a firm of accountants rather than to an individual who would act as an arbitrator. The partner in the firm of accountants who had made the determination had made an assessment or appraisal rather than an award as an arbitrator. As a consequence, the provisions of the Arbitration Act were not available to the parties.

COMMENT

Those drawing dispute resolution clauses for insertion in commercial agreements should take care to ensure that the clause accurately reflects their intentions. If the parties wish a matter to be determined by arbitration and to have the benefit of the relevant arbitration act, appropriate provision should be made for this in the clause. If however the parties require instead expert appraisal or assessment, it is essential that this be clearly spelt out in the clause.

Those drafting a dispute resolution clause where the parties want something akin to expert appraisal or assessment in the case of a dispute should be well aware of the flexibility provided by the provisions of the uniform Commercial Arbitration Acts. An arbitration clause can be drawn pursuant to which the arbitrator may act in virtually the same manner

as an assessor or expert. Provision can be made that he can make his own enquiries without disclosing the result of his enquiries to the parties (section 19 (3)), that he can make his award by reference to principles of general justice and fairness (section 22 (2)) and that he does not have to give reasons (section 29 (1) (c)). The parties can then call upon the assistance of the relevant Commercial Arbitration Act and in addition the arbitrator cannot be sued for negligence (section 51).

APPLICATION FOR STAY OF PROCEEDINGS

(Unreported, Federal Court of Australia, Wilcox J. 11 April, 1990)

DODWELL & CO (AUSTRALIA) PTY LTD v MOSS SECURITY LIMITED & ORS

Dodwell & Co (Australia) Pty. Ltd. ("Dodwell") issues proceedings in the Federal Court against Moss Security Limited ("Moss"), an English company, Moss Security Pty. Ltd. and the managing director of Moss Security Pty. Ltd. Moss applied for a stay of proceedings so that the matter could be submitted to arbitration in England. The application was made, not pursuant to section 53 of the New South Wales Commercial Arbitration Act but pursuant to section 7 (2) of the Commonwealth International Arbitration Act 1974 (formerly the Arbitration (Foreign Awards and Agreements) Act 1974).

The relevant statutory provisions were:—

"7. (1) Where—

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) . . .

(c) . . .

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country,