The Enforceability of Agreements to Mediate

- Robert S. Angyal [1]

1. Summary

Until a recent decision of the Supreme Court of New South Wales discussed in this article, there was some doubt whether the Courts would enforce an agreement to mediate. That decision, *Hooper Bailie,* enforced such an agreement. It also required some changes to the model ADR clause published by the Law Society of New South Wales in 1989 to enhance its enforceability. The revised clause which is printed at the end of this article was approved by the Council of the Law Society on 26 August, 1993.

This article explains what sort of ADR clauses the Courts are likely to enforce and how they will do it.

2. Dispute Resolution Clauses

Contracts sometimes contain a provision stating that if a dispute arises under the contract, the parties will attempt to resolve it by the process known as mediation.[2] Mediation is not arbitration; it is structured negotiation in which a neutral third party - the mediator - uses a number of proven techniques to assist the parties to frame their own agreement to resolve their dispute. The mediator has no power to impose a result on the parties.

Many proponents of mediation advocate the use of such clauses because they are thought to give more force to a suggestion of mediation than if it is first suggested after a dispute arises. But it is natural to ask: Will the Courts give effect to such disputes clause if one party is unwilling to go to mediation? If so, how?

If one were dealing with an arbitration clause rather than a clause requiring mediation, one would to answer this question in Australia have to look no further than the uniform commercial arbitration acts (e.g. *Commercial Arbitration Act 1984* (NSW), s. 53), which empower the Court to stay proceedings commenced in breach of an agreement to arbitrate. Even before the uniform acts, *Scott v Avery* and the many cases applying it stood for the general proposition that if the contract made arbitration a condition precedent to litigation, the Courts would stay litigation commenced before arbitration had been conducted.

Somewhat surprisingly, however, at common law the only remedy for breach of an arbitration clause that was not in *Scott v Avery* form (that is, it required the parties to arbitrate their disputes, but did not make arbitration a condition precedent to commencing litigation) was an action for damages for breach of the agreement to arbitrate: *Anderson v G.H. Mitchell & Sons Limited* (1941) 65 CLR 543; see also *Adelaide Steamship Industries Pty. Limited v The Commonwealth of Australia* (1974) 8 SASR 425, affirmed, (1974) 10 SASR 203.

In Australia, there is not as yet statutory recognition of disputes clauses requiring the parties to use dispute resolution techniques other than arbitration. Will the Courts give them effect? Or will they be regarded as lacking the certainty necessary for legal recognition of agreements? [3] Since the recent decision of the New South Wales Supreme Court discussed in this article, *Hooper Bailie Associated Limited v Natcon Group Pty. Limited* (1992) 28 NSWLR 194, it seems that at least in New South Wales, a disputes clause which is in *Scott v Avery* form and is sufficiently certain to be enforceable will be given effect. In reaching this result, the Court did not follow the House of Lord's decision in *Walford v Miles* [1992] 2 AC 128.

It might be thought that it is futile for a Court to order parties to attempt to agree to resolve a dispute: one cannot command consent. But those who advocate the use of mediation and similar processes for dispute resolution argue that mandatory mediation is not a contradiction in terms or necessarily futile, because these processes have in many cases the ability to produce agreement even by parties who initially were hostile to the process and to each other. As a matter both of logic and practice, it thus may make sense to require parties to abide by their prior agreement to undertake mediation.

3. The Allco Steel Decision

But in *Allco Steel (Queensland) Pty. Limited v Torres Strait Gold Pty. Limited & Ors* (unreported, SC of Qld. 12 March 1990, Master Horton QC.), the Supreme Court of Queensland refused to stay proceedings in that court on the basis of a contractual disputes clause requiring a conciliation meeting between the disputing parties.

Two schools of thought are exemplified in some of the writings and judicial decisions since *Allco Steel.* One strand of thought leads to the conclusion that disputes clauses may be unenforceable because they seek to achieve too much, by attempting to oust the jurisdiction of the Court. That seems at least in part to be the basis of the decision in *Allco Steel* itself.

The second strand of thought is based on the notion that a disputes clause is no more than an agreement to negotiate and thus is not an enforceable agreement because it lacks the certainty necessary to create legally binding relations. The recent decision of the New South Wales Court of Appeal in *Coal Cliff Collieries Pty. Limited v*

Sijehama Pty. Limited (1992) 24 NSWLR 1 and the even more recent decision of the House of Lords in *Walford v Miles* [1992] 2 AC 128 may be thought to be exemplifications of this train of reasoning. A disputes clause thus in a legal sense may fail to achieve anything at all.

4. The Hooper Bailie Decision

In New South Wales at least, *Hooper Bailie* seems to have resolved the debate. After a learned consideration of the authorities and academic writings, Giles J. there held that an agreement to conciliate or mediate (his Honour noted that the terms are sometimes used interchangeably) that was in *Scott v Avery* form would be enforced by the Court by an order staying arbitration proceedings commenced in breach of the agreement until the conclusion of the conciliation. His Honour also stated that if there were proceedings on foot in the Court equivalent to an arbitration, it would be open to the Court to stay or adjourn the proceedings in aid of an agreement to conciliate.

In *Hooper Bailie*, Hooper Bailie was the contractor for the construction of dry wall partitions and ceilings of the new Parliament House building in Canberra and Natcon was sub-contracted to perform that work. Disputes arose under the contract; the disputes were submitted to arbitration; and in that arbitration Natcon claimed more than $3 million from Hooper Bailie.

But before the arbitration could start, the parties reached agreement by exchange of letters that they would conciliate a number of issues and that the arbitration would not take place until the conciliation had concluded. A conciliator was retained and a series of successful meetings took place in which the conciliator took the role of facilitating the voluntary agreement of the parties without making any determinations in relation to disputed items.

But before the conciliation could conclude, Natcon was wound up. About a year later, the liquidator of Natcon sought to proceed with the arbitration rather than continuing with the conciliation meetings. At that point, Hooper Bailie commenced proceedings to establish that Natcon was unable to continue with the arbitration, basing its claim in part on the argument that the parties had agreed that the arbitration would not continue until the conciliation had concluded, and that it had not concluded.

Giles J. commenced a lengthy analysis of the principles and authorities by noting that the value of conciliation or mediation "for dispute resolution as an alternative to curial resolution is now increasingly recognised in Australia" (28 NSWLR at 203). [4] He noted the publication by the Law Society of New South Wales of a model dispute resolution clause. He noted also the enactment of legislation by the Commonwealth and Victoria empowering courts to refer pending proceedings to mediation with the parties' consent (at 204).

And he noted the debate over the enforceability of agreements to conciliate or mediate.

Turning to the authorities, Giles J. stated that "the cases do not speak clearly or with one voice" (at 204).

His Honour first discussed *Reed Constructions Pty. Limited v Federal Airports Corporation* (Supreme Court NSW, unreported, 23 December, 1986), commenting that Brownie J. there must have thought, without giving the matter any detailed consideration, that there could be a legally binding agreement to mediate. He then considered *Allco Steel*. In that decision, while the reasoning was not entirely clear, Master Horton QC seemed to have thought that a disputes clause requiring a conciliation between the parties could not function as a prerequisite to litigation. The Court also seemed to have relied on the belief that the conciliation meeting required by the agreement would be a futility because the parties had taken up positions which effectively ruled out the possibility of compromise and conciliation.

In *Hooper Bailie*, Giles J. ultimately distinguished *Allco Steel* on the basis that there was no evidence to suggest that the present conciliation would not continue to be successful. While the parties disagreed about whether the conciliation should continue, that did not mean, his Honour held, that if Natcon were required to participate in the conciliation, it would not do so or that the conciliation would be fruitless (at 210).

Giles J. then considered in some detail the decision in *AWA Limited v Daniels* (Supreme Court NSW, unreported, 24 February, 1992) in which Rogers C.J. in Comm. Division, in the course of hearing very substantial commercial proceedings, directed the parties to enter into mediation. As Giles J. noted, while the enforceability of an agreement to mediate was not directly in question, it was clear from *AWA* that Rogers J. considered such an agreement would be enforceable.

In *AWA*, Rogers J. had given three indications that he so considered. First, he asked the question "whether there is any utility in requiring parties, who are clearly bent on being difficult, to submit to conciliation processes?" In his Honour's view, there was utility (at 9). Indeed, he noted (at 11):

> "In my view initial reluctance is not necessarily fatal to a successful mediation. If the parties enter into [it] in good faith, as they all said they would, the skill of the mediator will be given full play to bring about consensus."

Second, Rogers J. stated (at 10):

> "In my view in *Allco Steel* the Master ought to have required the parties to adhere to their freely agreed contractual obligations."

Third, in *AWA*, Rogers J. relied on a decision of the United States District Court for the District of Oregon, *Haertel Wolff Parker Inc. v Howard S. Wright Constructions Co.* (unreported, 4 December, 1989, WL 151765, Lexis 14756) and academic writings supporting compulsory mediation.

Having found in *AWA* support for the enforceability of mediation agreements, Giles J. then perceptively stated the arguments for and against enforceability (28 NSWLR at

206):

> "Conciliation or mediation is essentially consensual, and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent cannot be enforced; equally, they say that there can be no loss to the other party if for want of co-operation and consent the consensual process would have led to no result. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. What is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come." (emphasis added)

Giles J. then turned squarely to the question of enforceability of mediation agreements. He noted at 206-207:

> "There may still be such uncertainty in what the parties are required to do by way of participation that an agreement to conciliate does not give rise to a legally binding agreement. The writings to which Rogers J. referred show that mandatory mediation under statute, rules of court or individual court order is well recognised in the United States, and as I have indicated that first steps along that path have been taken in Australia. That suggests caution in denying legal effect to an agreement to do the same thing.
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> ...
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> United States experience does not necessarily point to the position as I should hold it to be in New South Wales, and in any event is unsettled, but it demonstrates that an enforceable agreement to conciliate is now unknown to the law. It should not be assumed that statutory provisions for court-annexed mediation such as that now available in the Federal Court and the Supreme Court of Victoria are exercises in futility. Nor ... can it readily be said that participation in a process of dispute resolution by conciliation or mediation has no meaning capable of enforcement."

Yet, Giles J. noted, "that appears to be the position in England" (at 207). And indeed, that is the position. In *Hillas & Co. Limited v Arcos Limited* [1932] All ER Rep 494, Lord Wright, in the House of Lords, had observed in dicta (at 505):

> "There is ... no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that an opportunity to negotiate was of some appreciable value to the injured party."

But those dicta were condemned by the Court of Appeal in *Courtney & Fairbairn Limited v Tolaini Bros. (Hotels) Limited* [1975] 1 WLR 297 at 301. Lord Denning said:

> "That tentative opinion by Lord Wright does not seem to me to be well-founded. If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one could tell whether the negotiations would be successful or would fall through: or if successful what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."

In *Courtney*, Lord Diplock, sitting in the Court of Appeal, agreed with Lord Denning (at 302).

Courtney was applied in *Paul Smith Limited v H. & S. International Holding Inc.* [1991] 2 Lloyd's Rep. 127 at 131. There, Steyn J., dealing with an agreement for disputes to be "adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules", said:

> "The plaintiffs rightly conceded that the provisions that the parties shall strive to settle the matter amicably, and that a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations."

And in a recent decision, *Walford v Miles* [1992] 2 AC 128, the House of Lord unanimously approved *Courtney* and disapproved the dicta of Lord Wright in *Hillas*. It is worth quoting at length (as did Giles J. in *Hooper Bailie* at 207-208) the speech of Lord Ackner:

> "While accepting that an agreement to agree is not an enforceable contract, the [United States] Court of Appeal [for the Third Circuit] appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to

> decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith". However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to re-open the negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question - how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement"? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly, a bare agreement to negotiate has no legal content." [1992] 2 AC at 138.

It will be noted that Lord Ackner's speech equates an agreement to negotiate with an agreement to agree. That is a matter to which Giles J. returned.

In *Hooper Bailie*, Giles J. then turned to the recent decision of the New South Wales Court of Appeal in *Coal Cliff Collieries Pty. Limited v Sijehama Pty. Limited* (1991) 24 NSWLR 1, a decision rendered before *Walford v Miles*. There, Kirby P, with whom Waddell AJA generally agreed, made a detailed consideration of Australian, English and United States authorities on agreements to negotiate. Kirby P concluded that he agreed with Lord Wright's speech in *Hillas,* stating that, "provided there was consideration for the promise, in some circumstance, a promise to negotiate in good faith will be enforceable, depending upon its precise terms" (at 26). The proper approach, the learned President held, depended on the construction of each particular contract: id. Handley JA was of the view that a promise to negotiate in good faith was illusory and therefore could not be binding (at 42).

In *Hooper Bailie*, Giles J. concluded that "(t)he law in New South Wales in relation to a contract to negotiate is not so uncompromising" as in England (at 208). In a perceptive passage, his Honour then dealt with the effect on dispute resolution clauses of the authorities dealing with contracts to negotiate (at 209):

> "Strangely, in none of the Australian cases concerning dispute resolution clauses or mediation was there mention of the enforceability (or lack thereof) of a contract to negotiate, or to negotiate in good faith. Although Steyn J. in *Paul Smith Limited v H. & S. International Holdings Inc.* regarded unenforceability of such a contract as fatal to an agreement to conciliate, enough has been said in these reasons to indicate why I do not think that is so. An agreement to conciliate or mediate is not to be likened (as Lord Ackner likens an agreement to negotiate, or negotiate in good faith) to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interest. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement." (emphasis added)

Applying that test to the agreement before him, Giles J. held (at 209):

> "... [T]here was a clear structure for the conciliation by which Natcon was to attend before Mr Schick [the conciliator], put before him such "evidence" and submissions as it desired and receive his determinations. As has been seen, ancillary to this arose an exchange of information between the parties for the purposes of the conciliation, and there were no determinations in any sense other than in the sense of suggested solutions. In my opinion, Natcon promised to participate in the conciliation by doing those things, and the conduct required of it is sufficiently certain for its promise to be given legal recognition." (emphasis added)

His Honour noted that this holding did not mean that Natcon was obliged to compromise the issues being subjected to conciliation (at 210). Nor was his Honour required to decide or to express any view on whether there was an implied term that the parties would participate in the conciliation in good faith, because Natcon had declined to participate at all (id).

In an important passage, Giles J. then considered the scope of the orders that could be made (at 210-211):

> "In my opinion, therefore, if there be power to do so I can and should stay the conduct of the arbitration until the conclusion of the conciliation. I do not think any question arises of ordering Natcon to continue the conciliation. It was, I think, common ground that equity would not order specific performance of the implied term [that the parties would take all reasonable steps to resolve the conciliation issues] for which Hooper Bailie contended, because supervision of performance would be impossible ... But there may be a stay of proceedings having the consequence that a party to the proceedings must give effect to an arbitration agreement, even against its will ... and that illustrates that there is nothing offensive in indirectly requiring partici-

pation in a process of dispute resolution provided there is sufficient certainty in the conduct required by way of participation."

His Honour found power to grant a stay of the arbitration under s. 47 of the Commercial Arbitration Act 1984, and continued:

> "If there were on foot in this Court proceedings equivalent to the arbitration, those proceedings could be adjourned if the parties had agreed that they would not continue until the conciliation had concluded. In my view, it would be open to the court to adjourn the proceedings on the application of Hooper Bailie, over the opposition of Natcon, in aid of the agreement to conciliate which I have found to exist. The court can do so in aid of mediation ordered under the legislation which I have mentioned, the power to do so must accompany the power to order mediation, and the same power must exist where the conciliation or mediation is consensual and the agreement to conciliate or for mediation is enforceable in the manner I have described. Alternatively, for Natcon to proceed with the arbitration in the face of an agreement to conciliate enforceable in the manner I have described would attract the inherent jurisdiction of the court to prevent abuse of its process in accordance with the principle stated by MacKinnon LJ. in *Racecourse Betting Control Board v Secretary for Air* [1944] 1 Ch 114 at 126:
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> > "... namely, that the court makes people abide by their contracts and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them will be otherwise determined.""

His Honour therefore ordered a stay in the arbitration proceedings "until the conclusion of the conciliation between the plaintiff and the first defendant" (at 214).

5. When Does a Conciliation or Mediation Conclude?

An interesting and important question that is likely to arise in the wake of *Hooper Bailie* is: When does a conciliation or a mediation conclude? For of course it is on the conclusion of the mediation that the parties will under their agreement be free to arbitrate or litigate.

If the mediation results in the parties settling all the issues in dispute, the question is likely to be academic. But it is not academic if they are unable to settle.

In *Hooper Bailie*, Giles J. did not have to deal with this question, except to the extent that one party had simply declined to continue with the conciliation at all (by seeking to resume the arbitration and by opposing the other party's application for a stay of arbitration). His Honour's holding of necessity rejected the submission that this had concluded the conciliation (at 203). For this reason, Giles J. also did not have to decide whether there was an implied term in the agreement that the parties would participate in the conciliation in good faith, or the legal content of such a term (at 210).

The agreement to conciliate in *Hooper Bailie* made it clear, however, that the conciliation might end without all issues being resolved. In other words, "the conclusion of conciliation was not the same as resolution of the issues by conciliation" (at 203). How then, one might ask, can one know when a conciliation or mediation has concluded?

The answer, it is submitted, is to be found in the conciliation or mediation agreement itself. If it is sufficiently certain in its content to be enforceable, it should be possible by reference to the agreement to determine when the dispute resolution process that it requires has come to an end.

The typical mediation agreement requires a preliminary conference with the mediator at which the issues in dispute are outlined and a timetable is set for the exchange of documents between the parties and their furnishing to the mediator. Then comes the mediation or conciliation itself, at which the parties and their legal representatives meet with the mediator and discuss the parties' positions on the issues in dispute and (individually in private with the mediator) the interests that lie behind those positions. Once the parties have done what the agreement requires of them, they are usually free to terminate the mediation, whether the issues in dispute have been resolved or not. It is submitted that it should in most cases be obvious if one party is not participating.

There will of course be cases in which a party participates grudgingly or appears to be rendering no more than lip service to the requirements of the agreement to mediate. Those cases will be a great challenge to the mediators involved: to attempt to convince the unwilling party that, given it is required to attend, it might as well use the time productively in an attempt to resolve the dispute. Of course, not all such attempts will succeed.

It might be thought that there would be insuperable difficulties for the participating party in establishing that the unwilling party declined to participate, because of the privilege against admission into evidence of "without prejudice" communications. Communications that take place during a mediation or conciliation are normally explicitly agreed to be made on this basis and would generally fall within the privilege even without explicit agreement: *Rodgers v Rodgers* (1964) 114 CLR 608 at 614.

While space does not permit a full analysis of the position, it is submitted that evidence could properly be given of communications not made genuinely for the purpose of negotiating a settlement, in order to establish that a party declined to participate: see Byrne and Heydon, Cross on Evidence (Australian Edition) paragraphs 25375 and 25385; George and Green, "Without prejudice communications", Law Society Journal December 1990, 63 at 64; and the authorities there analysed.

6. Summary and Conclusions

1. *Hooper Bailie* holds that a Court will give effect to an agreement to conciliate or mediate in *Scott v Avery* form by staying an arbitration commenced in breach of the agreement. The stay will endure till the end of the conciliation. To be enforceable in this way, the agreement to conciliate must provide sufficient certainty in the conduct required of the parties who are to participate in the conciliation.
2. Where an agreement provides a clear structure for the conciliation by requiring attendance before a named conciliator; the giving of "evidence" and the making of submissions; and rulings or determinations, it is sufficiently certain to be enforceable.
3. The same relief is available where Court proceedings are commenced in breach of an agreement to conciliate or mediate.
4. Because the Court is quite unlikely to order specific performance of an agreement to conciliate or mediate, *Hooper v Bailie* emphasises the importance of putting a disputes clause in *Scott v Avery* form.
5. Because *Hooper Bailie* recognises that compulsory conciliation or mediation is not a contradiction in terms, it may lend support to the suggestion that Courts (assuming power exists) should in appropriate cases order parties before them to enter into mediation, even where they have not agreed to do so. It may also lend support to Courts being given that power if it does not presently exist.
6. Thus it would seem that a clause in *Scott v Avery* form providing for mediation of disputes by a mediator selected by the parties from a list of three names provided by (for example) LEADR or, in default of agreement, selected from that list by (for example) the President of the New South Wales Bar Association, to be conducted under the provisions of (for example) the Law Society of New South Wales' Settlement Week 1992 mediation agreement, would provide the "sufficient certainty" required by *Hooper Bailie*.
7. The structure suggested above has been used in the revised model dispute resolution clause recently approved by the Council of the Law Society of New South Wales and published in its Journal (October 1993, page 71). The model clause is reproduced at the end of this article. The Law Society's original clause, published in 1989, was revised in the light of *Hooper Bailie* because of the possibility that it might be held to be no more than an agreement to agree. (And in fact, the Queensland Supreme Court so held in *In the matter of a contract and dispute between T.A. Mellen Pty. Limited and Allgas Energy Limited* (16 July, 1992, unreported, O.S. No. 525 of 1992, Mackenzie J.)

   The Law Society's revised clause allows the parties to choose a dispute resolution process but, if they cannot agree on one, they must mediate in accordance with mediation rules recently issued by the Law Society. If they cannot agree on a mediator, the President of the Law Society selects one.
8. In most case it will be clear by reference to the terms of the agreement to mediate or conciliate when the mediation or conciliation has come to an end. It may be possible to lead evidence of what occurred during the mediation or conciliation in order to establish that a party declined to participate in accordance with the agreement and that therefore the mediation or conciliation has not yet concluded.

Model Clause Making ADR Mandatory - Law Society of New South Wales

"If a dispute arises out of or relates to this contract (including any dispute as to breach or termination of the contract or as to any claim in tort, in equity or pursuant to any statute) a party to the contract may not commence any court or arbitration proceedings relating to the dispute unless it has complied with the following paragraphs of this clause except where the party seeks urgent interlocutory relief.

A party to this contract claiming that a dispute ("the Dispute") has arisen under or in relation to this contract must give written notice to the other party to this contract specifying the nature of the Dispute. On receipt of that notice by that other party, the parties to this contract ("the Parties") must endeavour in good faith to resolve the Dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or determination or similar techniques agreed by them.

If the Parties to not agree within seven (7) days of receipt of the notice (or such further period as agreed in writing by them) as to:

(i) the dispute resolution technique and procedures to be adopted;
(ii) the timetable for all steps in those procedures; and
(iii) the selection and compensation of the independent person required for such technique,

the Parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales and the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration."

Footnotes

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2 For a useful description of mediation, see "Guidelines for solicitors who act as mediators", in Riley, New South Wales Solicitors Manual paragraph 11381

3 See *Trawl Industries of Australia Pty. Limited -v- Effem Foods Pty. Limited trading as "Uncle Bens of Australia"* (1992) Aust. Contracts Reports 90-011; McDonald and Swanton, "Contract Law-Agreements to 'negotiate', 'deal', 'consult' or 'confer'", (1992) 66 ALJ 744.

4 His Honour could have adverted to the observation if Kirby P. in the Court of Appeal in *Hemmes Hermitage Pty. Limited -v- Abdurahman* (1991) 22 NSWLR 343 at 351:

> "This case is good illustration of the need of a mediation procedure to help parties to a reasonable solution to a neighbourly dispute before they become locked into the rigidities of litigation with its attendant risks, costs and inconvenience. Each of the parties to this case could appeal to important but competing principles of law. Each could appeal, as well, to the unreasonableness of the case for the opponent perceived by them. There might, of course, have been attempts to settle the dispute of which the Court is ignorant. But it would be no misfortune if, associated with the Court's procedures facilities were available to add the authority of the Court to attempted consensual resolution, at least for cases between persons such as family or neighbours who must continue to live in relation with one another. At present, there is no such machinery. Litigation must take its chancy course. That course is only slightly more predictable today than was the outcome of Shylock's claim in the Court of Justice at Venice."