# *Enforceability of Alternative Dispute Resolution Clauses*

*Robert Angyal considers Allco Steel (Queensland) Pty. Ltd. v Torres Strait Gold Pty. Ltd. & Ors. which casts doubts on the utility of some dispute resolution clauses.*

## 1. Introduction

A recent decision of the Queensland Supreme Court raises questions about the enforceability of contractual clauses requiring parties in dispute to use alternative dispute resolution techniques to attempt to resolve their dispute. Those techniques include:

. negotiation
. mediation
. conciliation
. independent expert determination
. mini-trial.

A recent example of such a dispute clause is the NSW Law Society's model dispute resolution clause, published in the *Law Society Journal* for June 1989. (reproduced on page 27). It is in the same form as the type of arbitration clause long known as a *Scott v Avery* clause (named after the decision of that name reported at (1856) 5 HLC 811, 10 ER 1121). Like a *Scott v Avery* clause, it provides (paragraph 1.1) that in general a party may not commence court proceedings (or arbitration) unless it has first complied with the dispute resolution procedure set out by the clause. The obvious intent of the drafters of the clause is that parties in dispute should be required to attempt to resolve their dispute by means other than litigation or arbitration before resorting to the latter techniques.

## 2. The Allco Steel Decision

The decision that raises questions is *Allco Steel (Queensland) Pty Limited v Torres Strait Gold Pty Ltd & Ors* (Master Horton QC, unreported, Supreme Court of Queensland, No. 2742 of 1989, 12 March 1990).

The primary question that arises is whether, if a party in dispute commences proceedings or arbitration without first complying with a disputes clause, the Court will give effect to the clause.

The dispute considered there arose from a contract for construction by the plaintiff of gold extraction equipment for the defendants. The contract, under the heading "Disputes", said:

> "(a) In an case, [sic] any dispute or difference shall arise between the Torres Strait Gold and the contractor ... then the aggrieved party shall give to the other notice in writing setting out in full the detailed particulars of the dispute or difference. Upon receipt or issue of the notice, Torres Strait Gold shall give written notice to the contractor, appointing a date, time and venue for a conciliation meeting to be held to discuss in detail the dispute or difference ...
>
> (b) If at the conclusion of the conciliation meeting the parties fail to resolve the dispute or difference either party may give to the other, within 14 days a notice stating that at the expiration of 30 days it will proceed to have the dispute or difference referred to a Court of competent jurisdiction ... and at the expiration therefore [sic] may so proceed." (*Allco Steel* at p.3)

A dispute arose between Allco Steel and Torres Strait Gold apparently arising from Torres Strait Gold forming the view that Allco Steel would be unable to meet its contractual obligations. Allco Steel commenced proceedings under the contract and the matter came before Master Horton on the defendants' application for a stay of the action. For the reasons discussed below, the stay was refused.

The first important thing to note about the decision is that Torres Strait Gold (the present defendant) had earlier commenced litigation against Allco Steel under the contract without, apparently, having complied with the disputes clause. An application was made to the Court and an order was made by Ambrose J that no further steps be taken in the action except as ordered and that the parties should proceed to conciliation in accordance with the disputes clause (*Allco Steel*, at 3) an order of Ambrose J on 16 September 1988 in Supreme Court proceedings no. 3438 of 1988. In other words, it appears that litigation was commenced before there had been compliance with the disputes clause; an application was made to the Court for enforcement of it; and it was enforced.

Allco Steel and Torres Strait Gold then had two conciliation meetings. They did not result in resolution of the dispute and following the second meeting Allco Steel wrote to Torres Strait Gold foreshadowing litigation. That litigation was commenced and it was in the context of that litigation that an application was made by Torres Strait Gold and the other defendants for a stay of the action brought by Allco Steel. It was that application which led to the Court's decision that no stay would be granted on the basis of the disputes clause.

On the face of it it, therefore, when the application for a stay was made to Master Horton, the disputes clause had already been enforced by the Court and apparently complied with, with the result, one might have expected, that the plaintiff, having given notice that it intended to commence litigation, would have been free to do so. But according to the report of the decision, this point seems not to have been taken by anyone.

Master Horton reasoned first that the disputes clause, calling as it did for conciliation, was not an arbitration clause under the *Arbitration Act 1973* (Qld). Accordingly, decisions dealing with *Scott v Avery* clauses were, he held, of no relevance.

He then reasoned that, despite a clear breach by the plaintiff of its obligations to conciliate, the doctrine that the jurisdiction of the Court cannot be ousted dominated any other principle that would require the plaintiff to honour its contractual obligations under the disputes clause. He then relied on *Anderson v G H Mitchell & Sons Ltd* (1941) 65 CLR 543, where a unanimous Court, in a decision by Rich ACJ, Dixon and

McTiernan JJ, held, at p.548:

> "An agreement to refer disputes, whether existing or future, to arbitration could, apart from statute, be enforced only by an action for damages against the party who refused to carry it out."

Finally, he held that even if the Court had an inherent jurisdiction to grant a stay, the discretion to grant such a stay should not be exercised as it was "abundantly clear that the parties have taken up positions which effectively rule out the possibility of compromise and conciliation" (at 8).

He accordingly dismissed the application for a stay.

### 3. The Impact of Allco Steel on the Law Society's Model Dispute Resolution Clause

It apparently still is the law, as stated in *Anderson's* case that, apart from statute, Australian Courts can enforce an agreement to refer disputes to arbitration only by an action for damages against the party who refused to carry it out. The High Court's decision was applied in New South Wales in *Murphy v Benson* (1942) 42 SR (NSW) 66. More recently, the authorities have been discussed by Bright J in *Adelaide Steamship Industries Pty Limited v The Commonwealth of Australia* (1974) 8 SASR 425. His Honour there held:

> "... in my opinion the only power in either South Australia or New South Wales to stay an action on the ground of an agreement to refer disputes to arbitration is a statutory power" (at 439).

No doubt that is the reason that statutes such as the *Commercial Arbitration Act 1984* (NSW) expressly empower the Court to grant a stay of proceedings where there is an agreement to arbitrate (Sections 53[1] and 55[1]) and expressly abrogate the right to sue for damages for breach of an arbitration clause (Section 53[3]).

The law in England may be different. In their leading text, *Commercial Arbitration* (2nd ed. 1989) Sir Michael Mustill and Mr Boyd QC say (at 461):

> "As a matter of its own affairs, the Court has an inherent power to stay any action which it considers should not be allowed to continue. This power is independent of any specific powers conferred by statute. We submit that this power could, in an appropriate case, be employed to deal with an action brought in breach of an agreement to arbitrate. It is frequently invoked where the action in England constitutes a breach of an agreement to submit disputes to the exclusive jurisdiction of a foreign Court, and there is no difference in principle between such an agreement and one which requires the submission to be to an arbitration." (Footnotes omitted.)

Whatever the English situation, the Australian law seems to be as stated in *Anderson's* case. But that is not the end of the matter. The sort of agreement to refer disputes to arbitration discussed in *Anderson's* case was a simple arbitration agreement, not a *Scott v Avery* clause.

The clause considered in *Anderson's* case stated:

> "Should any dispute arise hereunder between the purchaser and vendor the matter shall be settled by arbitration in the usual manner ... within 20 days of the date nominated herein for delivery to be given and taken." (65 CLR at 548)

By contrast, a *Scott v Avery* clause usually provides that no action may be brought until an arbitration has been conducted and an award made or, alternatively, that the only obligation of the defendant is to pay the sum the arbitrator awards. (See Mustill and Boyd at 161.)

It is abundantly clear that Australian courts will give effect to a *Scott v Avery* clause. *Anderson's* case itself is authority for that proposition. The High Court there unanimously held that, although a simple agreement to refer disputes to arbitration will not prevent a party from commencing proceedings, a contract "so framed that it would produce no unconditional liabilities, no liabilities which did not depend upon the award or determination of arbitrators, referees or other third parties gives ... no complete cause of action until an award or determination has been obtained" (at 549). Further, the Court said:

> "... an agreement which in point of expression makes arbitration a condition precedent, not to the liability or cause of action, but to the right to bring or maintain an action, is construed as affecting, not the jurisdiction or remedy, but the obligation ..." (at 550)

and therefore will be enforced by the Court.

The High Court recently unanimously agreed that *Scott v Avery* clauses were enforceable: *Codelfa Construction Pty Limited v State Rail Authority of NSW* (1982) 149 CLR 337 per Mason J (with whom Stephen, Aickin and Wilson JJ agreed on this point) at 368 and per Brennan J at 422.

The question, therefore, that really arises from the *Allco Steel* case is whether a disputes clause in the form of a *Scott v Avery* clause will be enforced by the Courts. In other words, will the Courts enforce a clause expressed to make the use of conciliation (or other alternative resolution techniques) a condition precedent to the ability of a party to the agreement to commence Court proceedings?

In *Allco Steel*, Master Horton accepted a submission by senior counsel for the party opposing a stay that cases dealing with *Scott v Avery* clauses had no relevance. But it is unclear whether he accepted that submission because the disputes clause was not an arbitration clause or, on the other hand, because he found a relevant distinction between an arbitration clause of the *Scott v Avery* type and a disputes clause modelled on *Scott v Avery*.

Whichever line of reasoning the learned Master adopted, it is submitted with respect that, if he proceeded on the basis that the disputes clause was in *Scott v Avery* form, the result reached was not correct. If the distinction drawn was between disputes clauses and arbitration clauses, there is an inherent illogicality in refusing to apply the many decisions enforcing *Scott v Avery* clauses to a disputes clause because it is not an arbitration clause, and then refusing a stay on the basis of *Anderson's* case, which dealt with arbitration clauses.

## DISPUTE RESOLUTION

1.1 Unless a party to this agreement has complied with paragraphs 1-4 of this clause, that party may not commence court proceedings or arbitration relating to any dispute arising from this agreement except where that party seeks urgent interlocutory relief in which case that party need not comply with this clause before seeking such relief. Where a party to this agreement fails to comply with paragraphs 1-4 of this clause, any other party to the agreement in dispute with the party so failing to comply need not comply with this clause before referring the dispute to arbitration or commencing court proceedings relating to that dispute.

1.2 Any party to this agreement claiming that a dispute has arisen under this agreement between any of the parties to this agreement shall give written notice to the other party or parties in dispute designating as its representative in negotiations relating to the dispute a person with authority to settle the dispute and each other party given written notice shall promptly give notice in writing to the other parties in dispute designating as its representative in negotiations relating to the dispute a person with similar authority.

1.3 The designated persons shall, within ten days of the last designation required by paragraph 2 of this clause, following whatever investigations each deems appropriate, seek to resolve the dispute.

1.4 If the dispute is not resolved within the following ten days (or within such further period as the representatives may agree is appropriate) the parties in dispute shall within a further ten days (or within such further period as the representatives may agree is appropriate) seek to agree on a process for resolving the whole or part of the dispute through means other than litigation or arbitration, such as further negotiations, mediation, conciliation, independent expert determination or mini-trial and on:

(a) The procedure and timetable for any exchange of documents and other information relating to the dispute;
(b) Procedural rules and a timetable for the conduct of the selected mode of proceeding;
(c) A procedure for selection and compensation of any neutral person who may be employed by the parties in dispute; and
(d) Whether the parties should seek the assistance of a dispute resolution organisation.

1.5 The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this clause is to attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process established by this clause for any purpose other than in an attempt to settle a dispute between that party and other parties to this agreement.

1.6 After the expiration of the time established by or agreed under paragraph 4 of this clause for agreement on a dispute resolution process, any party which has complied with the provisions of paragraphs 1-4 of this clause may in writing terminate the dispute resolution process provided for in those paragraphs and may then refer the dispute to arbitration or commence court proceedings relating to the dispute.

If, on the other hand, the distinction drawn by the Court was between a conciliation clause modelled on *Scott v Avery* and an arbitration clause in *Scott v Avery* form, this seems like a distinction without a difference. As a matter of principle, a disputes clause drafted in the form of a *Scott v Avery* clause (namely, one which postpones the ability to commence proceedings until after dispute resolution has been attempted) should, like a *Scott v Avery* clause, operate as a valid postponement of the right of access to the Court. The reasoning behind the many authorities enforcing *Scott v Avery* arbitration clauses seems to be equally applicable to a disputes clause in this form.

In any event, given the disputes clause under consideration in the *Allco Steel* case, it was not entirely clear that it was considered to be of the *Scott v Avery* type, because the Court seemed to rely on the holding in *Anderson's* case dealing with arbitration agreements not of the *Scott v Avery* type. *Allco Steel* thus apparently is not authority for the proposition that a conciliation clause of the *Scott v Avery* type is unenforceable.

When one considers the Law Society's model clause, it is clear that it is intended to work a postponement of the right of access to the Court. Paragraph 1.1 of the model clause provides in part:

> "Unless a party to this agreement has complied with paragraphs 1-4 of this clause, that party may not commence Court proceedings or arbitration relating to any dispute arising from this agreement except where that party seeks urgent interlocutory relief in which case that party need not comply with this clause before seeking such relief."

and paragraph 1.6 provides:

> "After the expiration of the time established by or agreed under paragraph 4 of this clause for agreement on a dispute resolution process, any party which has complied with the provisions of paragraphs 1-4 of this clause may in writing terminate the dispute resolution process provided for in those paragraphs and may then refer the dispute to arbitration or commence Court proceedings relating to the dispute."

If the *Allco Steel* decision is not authority for the proposition that a disputes clause in this form (that is, in the *Scott v Avery* form) is not enforceable, such a clause should, as a matter of principle, be enforceable for the same reasons that *Scott v Avery* clauses have long been held to be enforceable.

While there does not appear to be any Australian authority directly on point, there is at least one recent American decision supporting this proposition. In *Haertl Wolff Parker, Inc v Howard S Wright Construction Co* (1989, WL 151765 D. Ore., 4 December 1989), the United States District Court for the District of Oregon dismissed a law suit which had been commenced by a party in breach of a contractual provision calling for disputes to be first submitted to a designated third party for a recommendation. The plaintiff argued that because the third party could make only a non-binding recommendation, which either party could ignore, it was not obliged to refer the dispute to the third party before commencing proceedings. That argument was specifically rejected by the Court and the provision enforced.

There appears to be no reason why a similar result should not follow in Australian Courts, thus giving to a clause like the Law Society's model dispute resolution clause the same operation as a *Scott v Avery* arbitration clause.

Finally, a word should be said about how such a clause operates. According to Mustill and Boyd:

> "A *Scott v Avery* clause does not prevent the parties from bringing an action in the High Court. A writ issued in respect of the matter falling within the clause is not irregular or a nullity; and if, for example, a defendant waives the right to insist on an award, the action proceeds in the normal way. The effect of the clause is not to invalidate the action, but to provide a defence; and since the effect of the condition precedent is to prevent any cause of action from arising until an award has been obtained, there is no ouster of the jurisdiction of the Court, since there is nothing to oust. It has been said that such a clause 'postpones but does not annihilate the right of access to the Court'." (at 162, footnotes omitted)

**4. Summary of Conclusions**

(i) The disputes clause considered in *Allco Steel* apparently was enforced by Ambrose J of the Queensland Supreme Court.

(ii) *Allco Steel* holds that a disputes clause that is like a simple arbitration clause will not be enforced by means of a stay of proceedings.

(iii) *Allco Steel* is apparently not authority for the proposition that a disputes clause in *Scott v Avery* form is not enforceable.

(iv) As a matter of principle, a disputes clause in *Scott v Avery* form should be enforceable as a defence to Court proceedings concerning the dispute to which the clause relates.

(v) The Law Society's model dispute resolution clause clearly is in *Scott v Avery* form and should therefore be enforceable in this manner. ❑


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## Hang 'Em From the High Trees: Denning Supports Death Penalty

Former Master of the Rolls Lord Denning, the erstwhile promoter of "High Trees" estoppel and of a variety of constructive trusts has never been a stranger to controversy. Now he has hit the British headlines again, in an interview couched in "the famous Hampshire voice" but delivering itself of trenchant statements on the death penalty, juries, prominent judicial figures, homosexuals and illegitimacy.

Not surprisingly, his comments, made in an interview with *The Spectator* in August, have generated a number of outraged Letters to the Editor and various other comments.

The comments made by Lord Denning include:

**On Marriage:** "I think that one of the most deplorable things today is that the institution of marriage is going down. No end of people living together without being married. No end of one-parent families. They're never called bastards or illegitimate - those are words which are not allowed to be used, if you please."

**On the Death Penalty:** "It ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would have been satisfied."

**On Sentencing People to Death:** Q: "It must have felt terrible when the black cap was put on your head?" A: "Not really ... there could always be a reprieve if it was a proper case."

**On the Jury:** "In my young days juries were all middle-aged, middle-class and middle-minded, to use Devlin's phrase. The present system of random juries may lead to random justice. Look how bad it is for these fraud cases, the Guinness trial, all that sort of thing. The jury aren't bright people, they aren't versed in accounts ... I'd have a panel of suitable jurors. I'd let names be nominated if you please by trade unions and the like, by big employers, by the banks. In other words, I'd have a list of respectable, responsible citizens. I wouldn't have every Tom, Dick or Harry, as they do now."

**On Legalising Homosexuality:** "Oh, I don't mind 'em not being put in prison, but I hate it being put on a par with other things. And lesbianism - Oh no! I'm still against it."

**On Legal Fees:** Q: "Isn't it a terrible indictment of the legal system that barristers charge such high fees that people can't any longer afford to defend their interests in law?" A: "Yes ..."

The comments not only sparked off a number of outraged responses, but also thoughtful comment by Marcel Berlins on the abolition by Lord Mackay of the Kilmuir Rules forbidding British judges to talk to the press. The article predicts, among other things, that such freedom will lead to public disclosure of judicial prejudices on a number of social and political issues.

❑ Richard Phillipps