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As counterintuitive as it seems, time and time again we see disputes before the courts concerning the very clauses that were supposed to assist the parties avoid being there in the first place – the dispute resolution clauses that are most often found at the back of commercial agreements and given little thought until a dispute arises. The recent decision in *Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82 has again demonstrated the critical importance of a considered and carefully drafted dispute resolution clause.

Background

Mr Hannigan entered into an Agreement with Inghams whereby Inghams would supply batches of one day old chicks to Mr Hannigan, who would raise them and return them to Inghams for processing. For providing this service, Mr Hannigan would be entitled to a fee.

The Earlier Dispute

In August 2017, Inghams tried to terminate the Agreement. Hannigan commenced and was successful in proceedings against Inghams, with the Court finding that their purported termination was wrongful and that the Agreement remained on foot. Mr Hannigan did not make a claim for damages at the time, for the purely commercial reason that he had empty chicken sheds which were costing him money and he wanted a quick resolution of the matter. Following the decision by the Court in March 2019, Inghams resumed supplying chicks to Mr Hannigan from June 2019.

The Claim and the Dispute Resolution Clause

In May 2019 Mr Hannigan issued a notice of dispute to Inghams. Mr Hannigan claimed damages from Inghams, arguing that because Inghams failed to supply him with chicks during the period it erroneously purported to terminate the Agreement and the resumption of the supply, he suffered financial loss.

The Agreement contained a tiered Dispute Resolution Clause, which sought to provide a step by step pathway for the parties to resolve disputes and in particular, funnel a certain class of disputes to arbitration should they fail to be resolved by mediation. The clause specified (paraphrasing where necessary) that if:

the Dispute concerns any monetary amount payable and/or owed by either party to the other under this Agreement

and

the parties fail to resolve the Dispute by mediation

then

the parties must (unless otherwise agreed) submit the Dispute to arbitration.

Back to Court

After an unsuccessful mediation, Mr Hannigan tried to submit the dispute to arbitration. Inghams then commenced proceedings to prevent that happening, claiming that the nature of the dispute meant that it did not fall within the scope of the Arbitration clause – i.e. that it was not a dispute that concerned any monetary amount payable and/or owed by either party to the other under the Agreement.

Inghams lost at first instance, but appealed that decision and was ultimately successful. By majority the Court of Appeal found that Mr Hannigan's claim for damages was not a dispute that concerned an amount payable or owed by either party to the other under the Agreement and therefore did not need to be referred to arbitration. Instead, it was a dispute concerning a claim for unliquidated damages for a breach of Ingham's obligation to supply chicks. That claim, if successful, would give rise to an obligation for Inghams to pay damages to Mr Hannigan, however the obligation would not be created by or under the Agreement but by a remedy of law.

Key takeaways

It is fair to say that those who drafted the Dispute Resolution Clause did give some consideration to its scope and tried to tailor it to the nature of the Agreement. It seems that they assumed that disputes (or at least the majority of disputes) arising out of the Agreement would relate to the calculation of the fee payable to the farmer. The attempt to categorise such disputes was clearly aimed at streamlining the approach so they could be resolved without resort to formal litigation.

However, it is clear that the drafting of the Dispute Resolution Clause was not sufficiently precise enough to enable the parties to clearly determine whether the dispute was one that fell within the scope of the clause. This created uncertainty and ultimately led all the way to the Court of Appeal.

This demonstrates the importance of a carefully drafted dispute resolution clause that is either sufficiently precise so as to clearly narrow and delineate the disputes that it applies to or, alternatively, is broad enough to capture all disputes. A halfway there clause, that inadequately attempts to define a subset of disputes, will not be satisfactory.

For advice on alternative dispute resolution, or if you would like us to review your commercial agreements and existing dispute resolution clauses, please contact [Chris Kintis](#) on 02 8235 1251.