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COMMENTARY

A New Approach to Agreements to Negotiate in English Law?

A recent decision from the High Court of England and Wales represents a marked departure from the English courts' approach to the enforceability of agreements to negotiate in commercial contracts. In *Emirates Trading Agency LLC v. Prime Mineral Experts Private Limited* [2014] EWHC 2104 (Comm), Mr. Justice Teare held that a time-limited obligation to seek to resolve disputes by "friendly discussions" was enforceable. In reaching this decision, the Court was influenced by judicial reasoning in a series of cases in Singapore and Australia.

How Does this Decision Affect You?

Commercial contracts usually include "multi-tiered" dispute resolution clauses that oblige parties to enter into negotiations in order to seek resolution of a dispute or difference. In the event that those negotiations do not result in a settlement of the dispute, the parties are then obliged to submit to mediation before commencing formal proceedings in arbitration or civil litigation. "Multi-tiered" dispute resolution clauses are particularly popular in construction and engineering contracts; for example, the FIDIC suite of contracts (sub-clause 20.5) provides that the parties should attempt to settle their disputes "... amicably before the commencement of arbitration." There are many commercial advantages and disadvantages with "multi-tiered" dispute resolution clauses. One advantage is that they compel parties to seek to resolve their disputes before having to incur the time and financial expense of commencing formal proceedings. One disadvantage is that the procedure can be protracted, resulting in delay, particularly if the issues that are the subject of the dispute are close to being time-barred.

Following the decision of Mr. Justice Teare, parties to contracts governed by the laws of England and Wales or laws that are heavily influenced by the laws of England and Wales should ensure that any multi-tiered dispute resolution clause is drafted in clear terms and that it is possible to assess, objectively, whether a party has complied with any conditions precedent to formal proceedings. They should also be aware that time-limited obligations to negotiate in good faith are likely to be enforceable if they are sufficiently certain on their terms, and therefore a failure by one party not to negotiate in good faith can result in them being in breach of contract.

Facts of the Case

Emirates and Prime Mineral entered into a long-term contract for the sale and purchase of iron ore. A dispute arose that resulted in Prime Mineral terminating the contract and claiming damages from Emirates. Prime Mineral then commenced arbitration proceedings in accordance with the dispute resolution clause in the contract. The dispute resolution clause provided:

> In case of any dispute or claim arising out of or in connection with or under this [Agreement] … the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any Party may notify the other Party of its desire to enter into [consultation] to resolve a dispute or claim. If no solution can be arrived at between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.

Upon the commencement of arbitration proceedings, Emirates petitioned the courts of England and Wales for an order that the arbitral tribunal lacked jurisdiction because Prime Mineral had failed to engage in "friendly discussions" before commencing the arbitration proceedings. The courts of England and Wales were, therefore, tasked with determining whether the dispute resolution clause and, in particular, the apparent obligation on the parties to "… resolve the dispute or claim by friendly discussion" was enforceable.

The Court's Reasoning

There was a common understanding, in the laws of England and Wales, that a contractual obligation on a party to seek to resolve a claim by "friendly discussions" was a mere agreement to negotiate and therefore unenforceable. This understanding was derived from a series of authorities, including *Itex Shipping v. China Ocean Shipping*, *Paul Smith v. H & S International Holding*, *Walford v. Miles*, and *Sulamérica v. Enesa Engenharia* (a case in which the Court of Appeal in England determined that a contractual obligation on parties to "seek to have the Dispute resolved amicably by mediation" was too uncertain to be enforced).

In his judgment, Mr. Justice Teare reviewed the English authorities and expressed some doubt about the common understanding. He concluded that the obligation on Emirates and Prime Mineral to "resolve the dispute or claim by friendly discussions" was enforceable by using basic legal principles. In particular, he decided that:

- No essential term was lacking;
- The term was not uncertain, because the obligation to resolve a dispute or claim by "friendly discussions" was akin to acting in good faith, which can be established on the facts;
- The parties had freely agreed to a restriction on their right to commence arbitration; and
- Enforcement of such an agreement was in the public interest because there is an overriding obligation on the court to seek to enforce obligations that have been negotiated freely in order to avoid the expense of arbitration.

The Court found (as a matter of fact) that Prime Mineral had complied with the obligation to "seek to resolve the dispute or claim by friendly discussions," and therefore the application brought by Emirates was dismissed.

Approach in Singapore and Australia

In recent years, the courts in Singapore and Australia have diverged from the position in English law before *Emirates v. Prime Mineral*. For example, in *United Group Rail Services v. Rail Corporation of New South Wales*, the New South Wales Court of Appeal held that, while an agreement to agree was clearly unenforceable, it did not follow that an agreement to negotiate in good faith to settle a dispute arising under a contract was unenforceable. Similarly, in *HSBC Institutional Trust Services v. Toshin Development Singapore Pte Limited*, the Court of Appeal in Singapore distinguished *Walford v. Miles* on the basis that that case concerned a stand-alone agreement where there was no overarching contractual framework governing the parties' relationship.

Conclusions

While there is always going to be an evidential issue as to whether a party has negotiated (or conducted the negotiations) in "good faith" or in a "friendly" manner, the decision in *Emirates v. Prime Mineral* demonstrates a shift away from the courts' traditional position of determining that "agreements to

negotiate" are unenforceable to a more enlightened position that gives effect to the intentions of the parties based upon basic legal principles.

Lawyer Contacts

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