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Enforceable obligation to be friendly: a new principle of law

Written by Irvine Marr and Nicholas Braganza.

A recent judgment from the Commercial Court in London established a new principle of law, in one of the cases brought by Clyde & Co's dispute resolution team in Dubai.

It has been held by Mr Justice Teare that a clause providing for friendly discussions prior to resorting to arbitration is an enforceable condition precedent to the right to invoke arbitration.

This is of specific interest to contracting parties who enter into contracts under English law, and are considering multi-tiered dispute resolution clauses in their agreements.

Agreement to agree

Multi-tiered dispute resolution clauses are clauses in a contract in which parties are required to mediate, negotiate or at least to attempt to resolve their disputes amicably before they resort to arbitration or litigation. Such clauses are common, particularly in contracts between Asian parties.

Traditionally, these clauses have been held to be unenforceable by the English courts because they have been considered to be agreements to agree and too uncertain to be enforced.

It should be noted that not all multi-tiered dispute resolution clauses have been found to be unenforceable. If the procedure is set out in sufficient detail, for example, if the clause specifies that mediation under the auspices of a specific ADR or mediation body or with a named mediator must take place before litigation or arbitration, then the English courts have usually agreed to enforce them.

However, notwithstanding that it frustrated the reasonable expectation of parties that the courts will uphold what they have agreed, an obligation to conduct "*friendly discussions*" or "*negotiations in good faith*" have not been upheld.

This is likely to change as a result of the recent judgment of the Commercial Court.

Friendly discussion

In this case, clause 11.1 of the Long Term Agreement between the parties provided as follows:

"*In case of any dispute or claim arising out of or in connection with or under this LTC….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.*"

Our client, the claimant, was quite rightly concerned to ensure that it was not prejudiced by its contractual counterparty side-stepping an important, particularly negotiated contractual term, requiring both sophisticated parties to resolve their differences in a "*friendly*" way, rather than becoming embroiled in lengthy international arbitration.

Our client was correct that it is a condition precedent of its contract that the parties shall have friendly discussions before arbitration.

Accordingly, Mr Justice Teare has held that the clause is enforceable. Our client was steadfast in its view from day 1, and is therefore, vindicated by the decision of Mr Justice Teare.

International precedents

The decision of the Commercial Court is especially notable because it brings the English Courts into line with precedents from other jurisdictions, namely judgments issued by the Court of New South Wales in Australia, and the Singaporean Court of Appeal, and also into line with the increasing trend in the field of international arbitration to enforce such clauses.

The judge relied especially on the Australian decision in his judgment and the key principle set in that judgment that such a clause could be enforced because it is complete. He distinguished another case where a similar clause was found to be unenforceable on the grounds that the absence of a named mediator or an agreed process whereby a mediator could be appointed rendered the clause in that case incomplete.

Mr Justice Teare stated in this case, "*the agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty*"

Ramifications of judgment

This decision is important because, firstly, it clarifies the legal effect of multi-tiered dispute resolution clauses in English law contracts, and secondly, the case demonstrates the Commercial Court in England willingly applying the reasons stated by courts in Australia and Singapore, thereby ensuring a consistent approach in different jurisdictions.

Ultimately, this will give further certainty to international parties entering into such agreements, and seeking to resolve their disputes by friendly discussions in good faith and within a limited period of time before these disputes are referred to arbitration.

Irvine Marr and Nicholas Braganza of Clyde & Co, Dubai with Vasanti Selvaratnam QC, acted on behalf of the claimant.

Further information

If you would like further information on any issue raised in this update please contact:

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