

What Makes a Multi-tiered Dispute Resolution Clause Enforceable?

A recent High Court decision serves as a reminder that multi-tiered dispute resolution clauses are not necessarily enforceable, and provides insight into key drafting points.

Overview

Multi-tiered dispute resolution (or multi-tiered jurisdiction) clauses are commonly found in commercial contracts. Such clauses provide for alternative forms of dispute resolution (for example, mediation or negotiations by senior management) prior to the commencement of a formal claim and thus seek to avoid the time and expense of litigation/arbitration. However, as *Emirates Trading Agency LLC v Sociedade de Formento Industrial Private Ltd* recently illustrated, such clauses must be drafted carefully to ensure that they are enforceable.

A developing line of authority

The enforceability of multi-tiered dispute resolution clauses has been considered in a number of recent cases.

In *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638, the Court of Appeal upheld the High Court's finding that a clause requiring mediation prior to the commencement of arbitration was unenforceable. Although the Court held that such clauses were — in theory — enforceable, that was only the case in circumstances in which the “*matters essential to the process do not remain to be agreed*”. The relevant clause in *Sulamerica* did not contain key provisions, such as the process by which a mediator would be appointed or the manner in which the mediation itself would be run. The clause was therefore held to be unenforceable, despite the Court recognising that the parties clearly intended to be bound by it at the time of entering into the agreement.

Similarly, in *Wah and others v Grant Thornton and others* [2013] 1 Lloyds Rep. 11, the High Court held that a clause requiring that disputes be referred to a chief executive for him to “*amicably resolve...by amicable conciliation*” (failing which any disputes would be considered by a panel of three board members) — although intended to be enforceable — lacked the requisite certainty to be given legal effect.

However, the High Court case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) marked a significant departure from the previous line of authority. The Court held that an obligation to resolve a dispute by “*friendly discussion*” within a period of four weeks was

enforceable since there were no essential terms missing. The Court held that the discussions would necessarily involve a consideration of each party's rights and obligations under the contract with a view to resolving the dispute within the timeframe stipulated. Importantly, the "*friendly discussion*" would not involve an open-ended discussion of the parties' commercial interests detached from their rights and obligations under the contract. The clause was therefore considered to be sufficiently certain so as to be enforceable.

The High Court recently considered a similar provision in *Emirates Trading Agency LLC v Sociedade de Formento Industrial Private Ltd* [2015] EWHC 1452. This case again concerned an obligation to resolve disputes arising out of the contract by "*friendly discussion*", although this time within a period of three months. Ultimately the Court did not need to determine whether or not the clause was enforceable since an arbitral tribunal had dealt with the issue previously, and the award was considered final and binding. However, the case does demonstrate that the enforceability of multi-tiered dispute resolution clauses remains a contested issue, albeit one where the Court is prepared to try to give the parties some assistance in achieving their intentions when contracting.

The *Emirates Trading* cases also raise interesting questions in respect of the enforceability of multi-tiered dispute resolution clauses containing obligations to negotiate in good faith. The Court in *Wah and Others* considered good faith to be too open-ended a concept to be enforceable. However, the Court in *Emirates Trading Agency LLC v Prime Mineral Exports* disagreed, referring instead to the Australian case of *United Group Rails Services v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009) in which the Court held that an agreement to negotiate in good faith meant an obligation to conduct "*fair, honest and genuine discussions aimed at resolving a dispute*". This standard of dealing was therefore considered to be sufficiently certain so as to allow a judge or arbitrator to identify a breach, and on that basis, the Court held that such clauses should not be deemed incomplete.

Conclusion

In the words of Hildyard J in *Wah and others*, the authorities illustrate:

"the tensions...between the desire to give effect to what the parties agreed and the difficulty in giving what they have agreed objective and legally controllable substance".

Emirates Trading Agency LLC v Prime Mineral Exports indicates the courts' increased willingness to give effect to the parties' intentions, particularly in circumstances where there is a clear public interest in doing so (for example, reducing expensive and time consuming litigation). However, the courts can only do so if the terms of the contract are sufficiently clear and certain, which means that parties should still devote particular care to the drafting of such clauses.

Key drafting points to remember:

- **Defined process:** ensure that the manner in which the alternative dispute resolution process is commenced, and the steps to be taken by each party, are clearly set out. For example, if the parties intend to mediate, then they should consider referring to official rules (for example, those employed by the Centre for Effective Dispute Resolution (CEDR)).
- **Time limits:** ensure that the provision allows for the parties to commence litigation and/or arbitration within a specified period of time. For example, an open-ended obligation to resolve the dispute through mediation before the parties are entitled to refer the dispute to arbitration is unlikely to be enforceable.

- **Good faith:** an obligation to resolve a dispute through friendly discussions (which would almost certainly import an obligation to do so in good faith) should be enforceable. However, parties should ensure that the remainder of the clause clearly sets out the other key provisions of the dispute resolution process in order to attain the necessary degree of certainty.

With careful attention to these drafting points, parties are more likely to save the time and expense they originally intended when including a multi-tiered dispute resolution clause in their contract.

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