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Client Alert Commentary

Latham & Watkins Litigation Practice

August 20, 2014 | Number 1729

4 Elements to Improve Enforceability of a Multi-tiered Dispute Resolution Clause

The English High Court decision in* Emirates Trading Agency LLC v Prime Mineral Exports Private Limited *offers guidance.

Why this case is important

Multi-tiered or dispute escalation clauses are an important means by which commercial parties try resolve disputes amicably and avoid the time and expense of formal litigation or arbitration. Typically these clauses set out a mechanism which requires the parties to engage in negotiation and/or mediation prior to the commencement of litigation or arbitration. Fulfilment of the contractual requirements is generally a condition precedent to commencing litigation or arbitration. However, recent case law, which largely analysed poorly drafted clauses, cast doubt on the enforceability of such provisions. That case law meant that if key elements of the negotiation or mediation procedures are uncertain, including the requirement to negotiate on a friendly basis and in good faith, the English courts might find the clause to be unenforceable, creating doubt as to whether conditions precedents to formal proceedings existed and, if so, whether they were satisfied.

The recent decision in the High Court (*Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm)) has provided much needed guidance on the enforceability of such clauses. In this case, the court upheld an agreement to resolve the dispute or claim by "friendly discussion" when no resolution was arrived at within a defined period of time. Subject to terms that create sufficient contractual certainty, enforcement of such an agreement is not only consistent with giving the parties what they bargained for, but is also in the public interest.

Enforceable multi-tiered dispute resolution clauses: 4 key elements

The cases involving multi-tiered clauses are fact specific and the courts will examine each clause and surrounding facts on their merits. Nevertheless, *Emirates Trading* suggests the following elements should help ensure that a multi-tiered clause is upheld as enforceable:

- **Certainty of procedure**: The negotiation and/or mediation procedure must be sufficiently detailed and certain to eliminate the possibility for parties to argue that their obligations are unclear. So, for example, a mediation procedure should refer to a particular mediation process or a specific mediation provider. The clause should not leave key procedural issues unspecified (such as the manner in which the mediator is selected and appointed). Mediation services such as the Centre for Effective Dispute Resolution (CEDR) are well respected by the courts, so referring to their rules which specify in detail the procedure to be followed can help provide clarity and procedural certainty.

- **Agreement to resolve a dispute by "friendly discussions" and/or "in good faith"**: So long as the clause articulates all of the other necessary elements of contractual certainty, these obligations are enforceable. These provisions identify a standard of behaviour, namely, fair, honest and genuine discussions aimed at resolving a dispute. The fact that proving the breach may be difficult should not be confused with the suggestion that the provisions lack certainty.

- **Mandatory**: If parties intend the negotiation and/or mediation procedure to be mandatory and a condition precedent to litigation or arbitration, ensure that the obligation is drafted in language that makes such conditions compulsory (for example, use "shall" rather than "may").

- **Time period**: Set a clear time period, perhaps from the giving or service of a notice so that parties understand when time starts to run, during which the dispute resolution mechanism is to take place and before the end of which litigation or arbitration shall not be commenced.

Emirates Trading Agency decision diverges from previous case law

In many prior cases on multi-tiered clauses, the English courts have tended to view agreements to negotiate as too uncertain to be enforceable. In *Emirates Trading*, the court looked for reasons to uphold the parties' agreement to engage in "friendly discussion" prior to commencing arbitration. Crucial to the judgment was the fact that there was enough contractual certainty: the parties were commercial persons who had specified an identifiable standard of behaviour and a time period (four weeks) from service of a notice, after which if no solution was arrived at, the parties could invoke the arbitration clause.

This decision departs from previous case law, notably the Court of Appeal decision in *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 (16 May 2012) and the High Court decision in *Wah (Aka Alan Tang) and Anr v Grant Thornton International Ltd and Others* [2012] EWHC 3198 (Ch).

In both these cases the multi-tiered clauses also specified time periods during which the parties would follow dispute resolution procedures. Both clauses intended their respective procedures to be condition precedents to arbitration, but including time periods for negotiation did not stop the courts from holding that the procedures to be followed were too uncertain to be enforceable.

The court in *Emirates Trading* held that its decision was not bound by the first instance decision in *Wah (Aka Alan Tang)* and that the *Sulamerica* decision could be distinguished. The court disagreed with the judge in *Wah,* stating that "good faith" is not too open-ended a concept to be certain, and saying that "good faith" connotes an honest and genuine approach to settling a dispute. In *Sulamerica*, the clause provided no mechanism for the selection or appointment of the mediator. In *Emirates Trading*, "friendly discussion" did not require further agreement on an aspect of the procedure ("friendly discussion" only required the two parties participate) and therefore the agreement was complete in all material respects and could be policed by the court. In taking this approach, the court relied upon Australian and Singaporean authorities and the practice of some International Centre for Settlement of Investment Disputes (ICSID) tribunals. Whether this more commercial approach to interpreting multi-tiered dispute resolution clauses will be upheld if the decision is appealed remains to be seen.

Finally, the court in *Emirates Trading* clarified that cases about multi-tiered clauses are to be distinguished from cases where parties contract to negotiate to make a new contract and fundamental commercial terms are to be negotiated. In the former situation, a pre-existing contract has given rise to a dispute. In the latter situation, as seen in the line of authorities that lead up to of *Walford v Miles* [1992] 2

AC 128, the parties agree to negotiate key contract terms and those attempts to contract fail for lack of certainty.

Conclusion

While multi-tiered dispute resolution clauses can save parties the considerable expense of arbitration or litigation, such clauses are only worthwhile if drafted properly. A poorly drafted clause can serve to exacerbate the original dispute, causing litigation over the meaning of the clause.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

John A. Hull
john.hull@lw.com
+44.20.7710.3015
London

Oliver E. Browne
oliver.browne@lw.com
+44.20.7710.1825
London

Robert Price
robert.price@lw.com
+44.20.7710.1020
London

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