



## LEGAL BRIEFING

### *Ardentia Ltd v British Telecommunications Plc*

[2008] EWHC B12 (Ch), David Donaldson QC

#### **The Facts**

Ardentia and BT entered into a project agreement on 18 February 2004. It related to the provision of information technology to the NHS. A dispute arose between Ardentia and BT in respect of licence fees. Ardentia also believed that BT was intending to engage third parties to develop new software in breach of an exclusive supplier clause within the agreement. Ardentia sought an injunction against BT, and BT responded with an application for a stay under Section 9 of the Arbitration Act 1996.

Clause 66.1 provided that any dispute was to be resolved in accordance with the Dispute Resolution Procedure “DPR”. The DPR was effectively a dispute escalation clause, initiated by a notice in writing. Two nominated representatives were then to meet. If they could not resolve the dispute then the dispute would move to management level, and then to CEO level. If that failed the parties were then to “consider mediation”.

Paragraph 7 of the DPR provided:-

*“The parties shall not institute court proceedings until the applicable procedures ... have been exhausted, save that:*

*7.1.1 BT may at any time before court proceedings are commenced serve a notice on the Contractor requiring that the Dispute be referred to arbitration ...*

*...*

*7.1.3 if the Contractor intends to commence court proceedings it shall serve written notice on BT of its intention and BT shall have 15 (fifteen) business days following receipt of such notice to serve a notice in reply on the Contractor requiring that the dispute should be referred to arbitration...”*

#### **The Issues**

There were two key issues:

- (i) Could Ardentia obtain an injunction against BT?, or
- (ii) Could BT obtain a stay of the litigation, thus forcing Ardentia to arbitrate?

However, essentially the court had to consider whether the parties had followed their own dispute resolution procedure?

#### **The Decision**

The Judge considered that paragraph 7 of the DPR imposed three restrictions on the commencement of court proceedings by Ardentia. These were:

- (i) The procedure up to and including the “consideration” of mediation must have been exhausted;
- (ii) Ardentia must have given a 15 day notice of its intention to commence

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court proceedings; and

- (iii) If BT served a notice within the 15 day period, then the matter was to be referred to arbitration, and so a stay under Section 9 would have to be given.

Ardentia also relied on paragraph 2.2 of the schedule which said that nothing in the DRP would prevent a court from having jurisdiction to give an interim order (such as an injunction).

From the facts of the case, it appeared that the parties had followed the initial procedure, and then considered mediation. They had also considered whether they could refer the dispute to an early neutral evaluation process. However, the dispute was not resolved. The key question then was whether the appropriate notices had been given and whether the 15 day period had expired. Ardentia argued that in any event they were able to apply to the court for an injunction because of the exception in paragraph 2.2.

The Judge held that paragraph 2.2 had to be read within the context of the DRP. Interim relief from the court was only to be given in very limited circumstances and in order to support the DRP process. It was not there to avoid the DRP process, and so in this case an injunction was not available. Ardentia had not served the initial notice; however BT had served a notice requiring a reference to arbitration. The Judge therefore gave an order under Section 9 to stay the proceedings pending arbitration.

#### ***Comment***

There are few cases dealing with dispute escalation clauses, and so this one is of interest. Although dispute escalation clauses are becoming more complex, in essence they are simply trying to replicate the sensible management and dispute resolution procedures that commercial parties are now trying to operate.

In this case, the dispute escalation clause anticipated that the dispute would be captured in a written notice, and then those people dealing with the dispute would try to resolve matters, before senior management became involved and then finally the CEOs. Mediation was then to be considered. Neither party could refer the dispute to the court until they had exhausted this procedure. However, at any time, BT could serve a notice requiring that the dispute in fact be referred to arbitration.

The court's support was only available to provide interim relief, not to deal with the substance of the dispute that was progressing through the dispute resolution process. This meant that a reference to the court could not be used to avoid the contractual dispute resolution process that the parties had agreed.

***Nicholas Gould***  
***July 2008***