LEGAL BRIEFING

Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd

[2014] EWHC 2104 (Comm), Mr Justice Teare

The Facts

On 20 October 2007 Prime Mineral Exports Private Limited ("PMEPL") entered into a contract with Emirates Trading Agency LLC ("ETA") by which ETA agreed to purchase iron ore from PMEPL.

Clause 11 of the LTC included the following provision:

"11. Dispute Resolution and Arbitration

11.1 In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned in 9.2, 9.3, Clauses 10.1(d) and/or 10.1(e) above, 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 in 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."

Following various breaches of the contract, ETA failed to lift all or any of the iron ore expected under the contract. PMEPL served a notice of termination on 1 December 2009 and claimed the sum of US$45,472,800 in liquidated damages.

Various discussions and meetings were held between December 2009 and June 2010 as to how PMEPL's claim might be resolved. As the Judge later found, the parties had sought to find a solution which would avoid PMEPL prosecuting their claim. However, no solution was reached and in June 2010 PMEPL referred their claim to arbitration under the ICC Rules in accordance with the contract.

ETA issued an application in the Commercial Court seeking an order that the arbitral tribunal lacked jurisdiction to hear and determine PMEPL's claim. ETA submitted that clause 11.1 contained a condition precedent "to engage in time-limited negotiations" before the arbitrators would have jurisdiction. ETA stated that because there had not been "a continuous period of 4 weeks of negotiations to resolve the claims" the condition precedent had not been satisfied and thus the arbitrators lacked jurisdiction.

PMEPL argued that the condition precedent relied upon by ETA was an unenforceable obligation in any event but that if it was enforceable it had been complied with by the parties so that the arbitrators did have jurisdiction.

The Issue(s)

The question at the heart of this case was: in a dispute resolution clause is an obligation requiring the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time enforceable as a condition precedent to the dispute being referred to arbitration?

The Decision

The Judge accepted that as a matter of construction before either party could refer a claim to arbitration "friendly discussions" were required. However, he did not accept ETA's

submission that "for a continuous period of 4 (four) weeks" meant that friendly discussions were required to substantively continue for four weeks. He concluded that this part of the clause did not refer to the discussions themselves but to the minimum period of time which had to elapse before arbitration could be commenced. The Judge held that the discussions aimed at resolving PMEPL's claim had lasted from December 2009 until March 2010, a period of well over four weeks.

As to the enforceability of clause 11.1, the Judge acknowledged the general principle established by the House of Lords in *Walford v Miles* [1992] 2 AC 128, which was approved in later cases, namely that an obligation to seek to resolve a claim by friendly discussions is no more than an agreement to negotiate with a view to settling the dispute. It was held in those cases that such a provision did not create an enforceable obligation.

Nevertheless, for the purposes of this decision the Judge distinguished bare agreements to agree as had been considered in *Walford v Miles* and later cases. He asked whether "*a time-limited obligation in a dispute resolution clause to seek to resolve a dispute by friendly discussions*", as appeared in clause 11.1, could be enforceable. The Judge held that it could. In reaching his decision the Judge noted that since commercial entities expect the courts to enforce obligations that have been entered into freely, and because the object of such an agreement was to avoid expensive and time-consuming arbitration proceedings, it was in the public interest to enforce such agreements.

Accordingly, the Judge held that whilst the condition precedent to arbitration was enforceable, on the facts the condition precedent had been satisfied. The Judge therefore dismissed ETA's application under section 67 of the Arbitration Act 1996 meaning that the arbitrators had jurisdiction to decide the dispute.

Commentary

The judgment includes, as one might expect, a detailed consideration of Lord Ackner's judgment in *Walford v Miles* and those cases which followed it and which led the Judge to his starting point that in English Law the clause 11.1 provision was unenforceable as an agreement to agree.

However, the Judge went on to consider a number of Australian and Singaporean authorities, as well as the approach of ICSID tribunals, by which he was able to distinguish *Walford v Miles* and reach the conclusion that a time limited requirement for commercial negotiations was enforceable and that, in this case, the relevant provision had been complied with.

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