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# Dispatch

*Dispatch* highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

## ADR agreements: conditions precedent to arbitration?

### Wah (Aka Alan Tang) and Anr v Grant Thornton International Ltd and Others

[2012] EWHC 3198 (Ch)

Wah claimed that a final award made by a Tribunal appointed by the London Court of International Arbitration ("the LCIA") was invalid because the Tribunal lacked jurisdiction. Mr. Justice Hildyard noted at the beginning of his judgment that like an agreement to agree, a provision for dispute resolution which lacks sufficient detail as to the process required to be undertaken cannot be enforced.

The arbitration clause in question included the statement that:

*"The relationships among the parties are in the nature of a long-term arrangement among professional firms. The resolution of any dispute or difference arising out of or in connection with this Agreement...requires special treatment. It is the desire of the parties that any such dispute or difference should be settled quickly and privately in a binding fashion."*

It then provided a three-step conciliation process. First, any dispute or difference was to be referred to the Chief Executive who "*shall attempt to resolve the dispute or difference in an amicable fashion within one month.*" If that failed, then the dispute would be referred to a panel of three governors who again would have a month to attempt to resolve the dispute or difference. Finally, the clause stated that until the earlier:

*"of (i) such date as the Panel shall determine that it cannot resolve the dispute or difference, or (ii) the date one (1) month after the request for conciliation of the dispute or difference has been referred to it, no party may commence any arbitration procedures in accordance with this Agreement."*

The Chief Executive declined to act because of his involvement in events relating to the dispute. Similarly no governor put themselves forward. As a result, the three-person panel was never constituted. Wah said that the steps of the pre-arbitration conciliation process were clearly set out. They were conditions precedent before an arbitral reference could be made. As they were not fulfilled, the reference was invalid and the Tribunal could not have had jurisdiction. The Tribunal in considering the issue relied on the judgment of Mr Justice Ramsey in *Holloway v Chancery Mead Ltd* (Issue 90) who said:

*"It seems to me that ...the ADR clause must meet at least the following three requirements: First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."*

The Judge considered other authorities including *Sulamérica CIA v Enesa Engenharia* (Issues 140 and 144) and was conscious of the tension in the context of provisions for mediation of disputes prior to arbitration or court proceedings between the desire to give effect to what the parties agreed and the difficulty in giving what they had agreed objective and legally controllable substance. He noted that agreements to negotiate in good faith, without more, must be taken to be unenforceable. Good faith is too open-ended a concept to provide a sufficient definition of what an agreement must involve and when it can objectively be said to be properly concluded.

The test to be applied is not whether a clause is a valid provision for a recognised process of ADR: the test is whether the obligations and/or negative injunctions imposed are sufficiently clear and certain to be given legal effect. In the context of a positive obligation to attempt to resolve a dispute or difference amicably before bringing proceedings the test is whether the provision sets out, without the need for further agreement, both a sufficiently certain and unequivocal commitment to commence a process and the steps each party is required to take to put the process in place.

Further, a court must be able to determine objectively what under that process is the minimum participation required of the parties to the dispute and when or how the process will be exhausted or properly terminable without breach. In the context of a negative stipulation preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.

The problem here was that whilst the reference to the Chief Executive was a clear requirement, nothing was said about what should happen other that it was to be undertaken "in amicable fashion". What was the Chief Executive required to do? The same was true about the Panel. Nothing was said about what the form or process of resolution should be. What would constitute an "attempt to resolve" the dispute or difference? Should the Panel at least take some step calculated to lead to resolution of the dispute or could it determine that it could not resolve it without taking any steps at all? The failure to give any guidance as to the type of attempts to be made to resolve the dispute meant that the court could not determine whether the clause has been complied with or not. The Judge therefore concluded that the proposed conciliation process was:

*"too equivocal in terms of the process required and too nebulous in terms of the content of the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration."*

## Bonds and guarantees

### Wuhan Guoyu Logistics Group Co Ltd & Others v Emporiki Bank of Greece SA

[2012] EWCA Civ 1629

The central question here was whether a payment guarantee was a guarantee or an "on demand bond". The liability of the issuer to pay under an on-demand bond does not depend on breach of the underlying contract, whereas a guarantee cannot be enforced until a breach has occurred. At first instance (see Issue 145) the court had decided that an instrument described as a "Payment Guarantee" was held to be a guarantee, rather than an on-demand bond, with the result that the bank's liability to pay was a secondary obligation.

The CA disagreed. Longmore LJ noted the following points that might be thought to favour a conclusion that the document was a traditional guarantee:

(i) The document was called a "payment guarantee" not an "on demand bond";

(ii) Clause 1 said that the Bank guaranteed "the due and punctual payment by the Buyer of the 2nd instalment";

(iii) Clause 2 described the 2nd instalment as being payable (in terms different from the Building Contract) 5 days after completion of cutting of the first 300 tons of steel of which written notice was to be given with a certificate countersigned by the Buyer;

(iv) Clause 3 guaranteed the due and punctual payment of interest;

(v) Clause 4 imposed an obligation on the Bank to pay "in the event that the Buyer fails punctually to pay the second instalment";

(vi) Clause 7 said that the guarantor's obligation was not to be affected or prejudiced by any variations or extensions of the terms of the shipbuilding contract or by the grant of any time or indulgence.

Against that, Longmore LJ thought the following points favoured the conclusion that the document was an "on demand" bond:

(i) Clause 4, the clause which required payment by the Bank, provided that payment was to be made: (a) on the Seller's first written demand saying that the Buyer has been in default of the payment obligation for 20 days; and (b) "immediately" without any request being made to the Seller to take any action against the Buyer;

(ii) Clause 7 provided that the Bank's obligations were not to be affected or prejudiced by any dispute between the Seller and the Buyer under the shipbuilding contract or by any delay by the Seller in the construction or delivery of the vessel;

(iii) Clause 10 provided a limit to the guarantee of US$10.3million representing the principal of the second instalment plus interest for a period of 60 days. This meant that it was not envisaged that there would be any great delay in payment after default as there would be if there was a dispute about whether the second instalment ever became due.

It was Clause 4 which turned out to be key.

The CA then referred with approval to the 11th edition of Paget's Law of Banking which it noted was supported by judicial authority and which states as follows:

*"Where an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay "on demand" (with or without the words "first" and/or "written") and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee.*

*In construing guarantees it must be remembered that a demand guarantee can hardly avoid making reference to the obligation for whose performance the guarantee is security. A bare promise to pay on demand without any reference to the principal's obligation would leave the principal even more exposed in the event of a fraudulent demand because there would be room for argument as to which obligations were being secured."*

This led the CA to the view that the document here was an on-demand bond, despite the fact that it was actually called a payment guarantee. Reading the document as a whole, and in particular clause 4, it was clear that the Bank had to make payment on written demand by the Seller. Longmore LJ noted that guarantees of the kind before the court here would be almost worthless if the Bank could resist payment on the basis that the foreign buyer was disputing whether a payment was actually due. That would be all the more so in a case such as the one here where the Buyer was able to refuse to sign any certificate of approval which may be required by the underlying contract.

At the end of his judgment, Longmore LJ noted that it was important that there should be a consistency of approach by the courts, so that all parties know clearly where they stand. This would seem to be a clear policy statement and one reason why the Judge quoted, again with approval, from the judgment of Ackner LJ in the case of *Esal (Commodities) Ltd v Oriental Credit Ltd*:

*"… a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence both of fraud and of the bank's knowledge of that fraud."*

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Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

**www.fenwickelliott.com**