Cerno

Distinguish; determine; resolve.

Date 14 December 2012

Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this article consideration is given to legality of dispute escalation clauses.

Dispute Escalation Clauses

Present day commercial contracts often include provisions for a dispute resolution process to settle disagreements between the contracting parties and it is becoming commonplace for that contractual process to be tiered, to direct the contracting parties to an "informal" process before embarking on arbitration or court action. Typically the "informal" process will be one or a combination of several including: negotiation; conciliation; mediation; and adjudication.

The purpose of such contractual provisions is to commit the parties to attempting to resolve their differences amicably, or at least consensually, quickly and cheaply. The added benefits are seen as including preventing irreparable damage to the parties' wider relationship.

With a tiered dispute resolution process both the obligation to participate and the process itself must be certain.

Perhaps surprisingly agreements of this type were not enforceable in English law until as recently as the past 5-10 years. Indeed it was the English High Court cases of *IBM v Cable & Wireless* [2002] EWHC 2059 (Comm) and *Holloway & Another v Chancery Mead* [2007] EWHC 2495 (TCC) which established agreements to partake in such tiered, or escalating processes, as legal, subject to the obligation and the process being sufficiently certain.

Recently the subject has been revisited, again by the High Court, which concluded on the facts that escalating dispute resolution clauses should be subject to scrutiny and are not automatically enforceable.

In the case of *Tang Chung Wah & Another v Grant Thornton International & Others* [2012] EWHC 3198 (Ch) the final resolution of any disputes between the parties was to be by arbitration in the London Court of International Arbitration; however the substantive contract and the nature of the business transacted between these professional required that any disputes received "special treatment".

The process was stipulated to be that the Chief Executive Officers would facilitate a conciliation process. If conciliation failed the matter would be put before a tribunal of three board members for another round of conciliation. Only once that process had occurred could either party begin arbitration.

A dispute arose and arbitration was commenced. Grant Thornton challenged the jurisdiction of the arbitration tribunal on the basis that the contractual dispute escalation provisions had not been followed. The tribunal rejected the argument and held that it did have jurisdiction.

Mr. Justice Hildyard, sitting in the High Court, reviewed the terms of the contract between the parties in light of the *IBM v Cable & Wireless* case and subsequent authorities, concluding that the contract dispute escalation provisions were not sufficiently clear and certain to be given legal effect; accordingly the arbitral tribunal did have jurisdiction.

Conclusion

The *Tang Chung* judgment does not affect the principle established from earlier cases that dispute escalation provisions can be legally binding. The fact that the court refused to uphold what were detailed and expressly stated requirements is nonetheless striking, especially so as the parties were "sophisticated" business entities that had agreed the terns between themselves. What is to be taken from this case is the need to be vigilant during the drafting of dispute clauses; but that is a lesson to be remembered for all contract drafting!

CIArb News

News for members of the Chartered Institute of Arbitrators in Trinidad & Tobago

The Trinidad & Tobago chapter of the Chartered Institute of Arbitrators (CIArb) is a sub-branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CIArb can obtain information directly from the Institute (www.ciarb.org) or by writing to info@cerno.org.

Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

Contact Information

Cerno can be contacted by e-mail to info@cerno.org.

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