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"Friendly Discussions" Obligation is Enforceable Under English law

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The English High Court has overruled an arbitrators' decision to hold that a clause requiring "friendly discussions" prior to commencing arbitration is an enforceable condition precedent to arbitration under English law. This judgment is interesting because mere "agreements to negotiate" are generally unenforceable under English law because they are too uncertain to enforce (Walford v Miles [1992] 2 AC 128). This case is especially interesting for the energy sector because it deals with the English law interpretation of escalation or multi-tiered dispute resolution clauses that are common in energy and natural resources joint venture and high value agreements (see for example the AIPN Model International Joint Operating Agreement). Multi-tiered dispute resolution clauses can provide that parties must first engage in alternative dispute resolution, such as negotiation, referral to senior management, referral to a third party expert and/or mediation (which is not without its costs) before a dispute can be referred to the Courts or to arbitration. **Background** In Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm), clause 11.1 of the Long Term Contract ("LTC") between the parties provided as follows:
"In case of any dispute or claim arising out of or in connection with or under this LTC"¦.the Parties shall first seek to resolve the dispute or claim by friendly discussion"¦If no solution can be arrived at 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."

Under the LTC, the claimant (Emirates Trading Agency LLC or "ETA") agreed to purchase iron ore from the defendant (Prime Mineral Exports Private Limited or "PMEPL"). ETA was alleged to have failed to lift the iron ore or make the required payments to PMEPL. PMEPL claimed liquidated damages by notice pursuant to the LTC. The notice stated that if the claim was not paid within 14 days, PMEPL reserved the right to refer the claim to arbitration in accordance with the LTC. Ultimately, the claim was referred to arbitration. ETA submitted that the obligation to hold "friendly discussions" was a valid and enforceable condition precedent to arbitration that had not been satisfied and, accordingly, the arbitrators lacked jurisdiction. The arbitrators, applying English law at an ICC arbitration, held that clause 11.1 did not contain an enforceable obligation under English law and that the arbitrators had jurisdiction. The English Courts were asked to reconsider the question of whether the "friendly discussions" obligation was enforceable and whether the arbitrators had jurisdiction. ETA again submitted that the obligation to hold "friendly discussions" was a valid and enforceable condition precedent to

arbitration that had not been satisfied and said that the 4 week time period in clause 11.1 "made all the difference" in making the clause sufficiently certain to be enforceable. PMEPL argued that the arbitrators were correct and that the condition precedent was a mere "agreement to negotiate" and therefore unenforceable. Under English law, "agreements to negotiate" and "agreements to agree" are generally viewed as unenforceable for lack of certainty. English law has established that contractual duties to negotiate in good faith are inherently inconsistent with the position of a negotiating party and are therefore too uncertain to create a binding contractual provision. It is said of such clauses that performance is impossible and that the court has no objective criteria to enable it to decide whether a party is in breach or not. **Decision** In overruling the arbitrators, the presiding judge, Teare J decided that the obligation to carry out "friendly discussions" was a valid and enforceable condition precedent that had to be satisfied before arbitration. Teare J said that a "good faith" obligation should be implied into the clause. Teare J set out the English authorities (which seemed to suggest that clause 11.1 should be held to be unenforceable) and cited Australian authority (especially approving of United Group Rail Services v Rail Corporation New South Wales (2009) 127 Con LR 202), Singaporean authority and the approach of ICSID tribunals. Teare J concluded (at [64]):
"In my judgment [an agreement to enter into "friendly discussions" before arbitration in the form of clause 11.1] is enforceable. My reasons" ¦ may be summarised as follows. The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration."

The elements that "saved" clause 11.1 seem to have been that (i) there was a time limit (4 weeks) and after that period the parties were left with their respective rights to pursue arbitration; (ii) the obligation appeared in a dispute resolution clause which allowed the Court to find a public interest reason (that is, the aim of avoiding expensive arbitration or litigation) to uphold it and (iii) the clause did not require any outcome from the "friendly discussions", rather all that was required was for discussions, or engagement between the parties, to occur and that was sufficiently certain and objectively identifiable for the Courts to find the clause to be valid and enforceable. **Multi-tiered dispute resolution clauses** Teare J said that there is "obvious commercial sense" in multi-tiered dispute resolution clauses. Arbitration can be expensive and time consuming and Teare J said that "it is far better if [arbitration] can be avoided by friendly discussions". The alternative view is that multi-tier dispute resolution clauses impose potentially onerous roadblocks to enforcing a contractual right which might prove cumbersome if there is an allegation of a breach of contract. One might argue, for example, that if the breach is clear, such as a simple failure to pay money when due, why should discussions or

mediation (for example) be required before the indebted party can sue for the breach? Even if the alleged breach is less clear, parties can always negotiate if they wish, so why impose that contractually when all that might be achieved is increased cost and delay before the courts or tribunal can be asked to resolve the dispute? Certainly this case shows that those roadblocks can be enforceable under English law and such clauses should be carefully considered and tailored to the applicable circumstances before they are entered into. Parties considering multi-tiered dispute resolution clauses will need to balance the "obvious commercial sense" of imposing a contractual multi-tiered structure in an effort to facilitate an amicable resolution of a dispute with the drawbacks associated with hardwiring procedural and substantive steps that must be adhered to before a court or arbitral tribunal can be asked to resolve a dispute. A copy of the judgment is available ***here***.