Lawspeak...

Augustin & Bugg
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A monthly Legal English newsletter on contract and commercial matters

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Bugg's Boilerplate

Generally, commercial contract parties want to avoid at all costs any legal proceedings, whether they be at court or before an arbitration tribunal. They often try to achieve this in a contract by way of a conflict resolution clause. But how does English law regard such clauses, especially if they refer to general concepts of "good faith"?

This year there appears to have been a major change in the judicial approach to such tiered or escalation resolution clauses. Perhaps this will bring English law in line with existing commercial practice and the legal position in other European jurisdictions by allowing a more relaxed approached to interpretation and enforcement. Read on…

Stuart Bugg

Nürnberg
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Conflict Resolution Clauses Revisited

In the event of any dispute the Parties hereto shall seek in the first instance to resolve such dispute by way of good faith negotiations and no litigation or any other form of procedings shall be instigated as between the Parties until such negotiations have been allowed to take place.

A dispute resolution clause in a contract is widely used in jurisdictions such as Germany. It generally requires the parties to a contract to attempt to resolve any dispute by way of discussions (in good faith) and within a limited period of time before the dispute could be referred to court or arbitration.

However, until the decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm)* the English courts had held in recent years that any purported agreement to engage in preliminary (good faith) steps (so-called "escalation" or "tiered" resolution clauses) before resorting to court or judicial proceedings was unenforceable.

Indeed, up to the *Emirates* case the courts generally rejected such clauses by the application of a principle of English law that an agreement to agree is unenforceable (see *Walford v Miles [1992] 2 AC 128*). Moreover, dispute resolution provisions were often struck down because of a lack of certainty in drafting that also rendered them, it was said, too vague to be enforceable. Thus, courts were rejecting clauses which did not set out a specific, defined mediation process or refer to the services of a specific mediation provider because these contract agreements were not interpreted to create an enforceable obligation to commence or participate in a mediation process (see *SulAmerica v Enesa Engenharia [2012] 1 Lloyds Rep 671, Court of Appeal*)

But, in the new case of *Emirates* the court has held that although certainty in contract language is still required, "…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…"(per Teare J)

Notwithstanding the *Emirates* case, when drafting a conflict resolution clause, we must still take care to ensure that the particular agreement complies with the English law requirement of certainty. If the parties have to undertake any preliminary attempts at resolution, the drafting must be careful not to allow a party in default to delay the start of any litigation or referral to arbitration proceedings. This is particularly critical in cases of approaching (statutory or other) limitation periods. Time limits are therefore essential. The template clause at the top of this page falls well short of these requirements. Moreover, in some situations, because of the reasons given above, it may even be decided that a contractual dispute resolution clause is not desirable.

Lawspeak...

Miscellaneous

Lawyers going to the dogs

I always thought our North American collegues were the most innovative and inventive when it comes to marketing and bringing the law directly to the potential client. But I must admit that in recent years English solicitors are becoming just as creative as their cousin attorneys across the big water.

The following is a brief extract from the webite of the English law firm of Cooper & Co. (http://www.doglaw.co.uk/). Cooper & Co. have certainly found an interesting niche in dog law (and the animated terriers and paw imprints on the website are a real attention grabber). But who is looking after the cats?

Is your dog accused of being a Pit Bull Terrier type?

There are details on this website in the FAQ section which sets out the basis of these cases under Section 1 or 4B of the Dangerous Dogs Act 1991. If you would like to instruct us to represent you in the proceedings please phone us.

For all other dog related legal queries:

We offer a telephone advice service. This is a premium rate line and calls are charged at £1.53 per minute from a BT landline (other networks may vary and mobiles will cost considerably more). The line is generally available during normal office hours Monday to Friday. The kind of cases that we can advise on include:-

Ownership / access disputes

Disputes between breeders and buyers

Disputes between rescues and owners / former owners

Defending personal injury claims

Damages claims (dog on dog, dog on other animal, or dog damaging property)

Claims against vets

Nürnberg Seminar Workshops with Stuart Bugg for the remainder of 2014

Places (participants limited to 14 per seminar) are still available in the following seminars:

1. **Introduction to Working with Contracts in English**
   26-27 September 2014
   exact venue in Nürnberg to be announced

2. **Update 2014: Masterclass on Developments in English Contract Law**
   5-6 December 2014
   Hotel Victoria Nürnberg

REGISTRATION FORMS etc.: augustinbugg.com/en/we-do/seminars/
For further information on the above seminars and workshops please contact us by telephone +49 (0) 911 945 8867 or by email seminar@augustinbugg.com or see our homepage at augustinbugg.com/en/we-do/seminars/ for further details and seminar programmes.

Stuart G. Bugg practises law in Nürnberg, Germany with the law firm of Augustin & Bugg. He is specialised in contract and commercial law and is also qualified as a barrister and solicitor (New Zealand) and solicitor (England & Wales). Stuart has been actively involved in legal and communication training for both lawyers and non-lawyers for many years and has written several books and articles on the subjects of contract law and Legal English.

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