MACFARLANES

CLAUSE FOR THOUGHT: ISSUES TO CONSIDER WHEN DRAFTING DISPUTE RESOLUTION CLAUSES

LITIGATION AND DISPUTE RESOLUTION

This briefing considers the Court of Appeal decision in *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638. The case highlights some important issues that need to be considered when drafting dispute resolution clauses. In particular, it serves as a reminder that an arbitration clause located within a commercial contract is separable, and may be governed by a different law, from the rest of the agreement. The case also contains some helpful guidance on the difference between an enforceable agreement to mediate and an unenforceable agreement to agree.

THE CASE IN BRIEF

The underlying dispute related to an insurance policy which was governed by Brazilian law. The policy required the parties to attempt to resolve disputes "amicably by mediation" and then, if this failed, to refer them to arbitration. The seat of the arbitration was to be London. The insured parties argued that, as a matter of Brazilian law, the arbitration agreement could not be invoked without their consent and that the insurers were in breach of the insurance policy by commencing arbitration proceedings without attempting mediation.

The Court of Appeal held that the arbitration clause was separable from the rest of the insurance policy and not necessarily governed by the same law. In the absence of express or implied choice, the governing law of the arbitration agreement would be that of the country with which the arbitration agreement had the closest and most real connection which, in this case, was the law of the seat (England). Under English law, the arbitration agreement was enforceable and an anti-suit injunction was granted restraining the insured parties from continuing with proceedings in Brazil.

The Court of Appeal also held that the obligation to attempt to resolve disputes "amicably by mediation" did not define the process to be undertaken with sufficient certainty to enable it to be enforced.

COMMENT

Alongside confidentiality and enforceability, flexibility is one of the main advantages of arbitration. As long as they comply with the mandatory rules of the seat of the arbitration, parties are free to tailor the arbitration to suit the needs of their particular dispute (although they would also be wise to consider the public policy of any jurisdiction in which they intend to enforce an award). However, once a dispute has arisen, it may be difficult for the parties to reach agreement on the manner in which the arbitration should be conducted. Therefore, key points should be agreed at the time the substantive agreement and arbitration clause are drafted to reduce the scope for expensive satellite litigation at a later stage.

In that context, it is worth remembering that the substantive law of the main contract, the governing law of the arbitration agreement, the procedural law of the arbitration, the seat of the arbitration and the venue of the arbitration can all be different from one another.

Most commercial contracts contain express provisions relating to the substantive law of the main agreement and the seat of any arbitration. As *Sulamerica* shows, however, parties should consider whether they also need to stipulate the governing law of the arbitration agreement. This is unlikely to be necessary where the governing law of the main contract and the seat of the arbitration are the same but may be appropriate where they are different.

Agreements to agree are, in general terms, unenforceable. However, it is possible to create an enforceable obligation to mediate by setting out a prescribed mediation procedure that the parties must follow. This can be done, for example, by incorporating the model procedure of an independent ADR provider, such as CEDR.

CONTACT DETAILS

If you would like further information or specific advice please contact:

GEOFF STEWARD

DD: +44 (0)20 7849 2341

geoff.steward@macfarlanes.com

SEPTEMBER 2012

MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com