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A COPPER BOTTOMED AGREEMENT?

LITIGATION AND DISPUTE RESOLUTION

COURT OF APPEAL PROVIDES GUIDANCE ON AGREEMENTS TO AGREE

It is well established that agreements to agree are unenforceable. On the other hand, as Lloyd J said in Pagnan SpA v Feed Producers [1987] 2 Lloyd's Rep 60, contracting parties are *"masters of their own contractual fate"* and *"there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later"*.

Where, then, is the dividing line between an unenforceable agreement to agree and a contract which binds the parties, despite leaving some issues for future agreement? Guidance can be found in the recent case of *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156. In that case, the Court of Appeal held that a contract for the sale of copper concentrates, which left certain charges and the delivery schedule to be agreed by the parties at a later date, was enforceable. This was because the language used showed that the parties intended their agreement to be binding and the contract was an integral part of a wider overall transaction. In such a situation, the court should strive to preserve parties' bargains, rather than destroy them – if appropriate by implying terms and/or reaching its own conclusions on any outstanding matters by reference to what is fair or reasonable.

The case demonstrates that it is possible for parties to commercial contracts (particularly long term ones) to preserve a degree of flexibility by leaving some issues to be decided at a later date. The court will not allow a party to use the rules on agreements to agree as an excuse to escape from its contractual obligations. However, in order to reduce the scope for future disputes, it is a good idea to be as prescriptive as possible about the mechanism by which any outstanding issues will be resolved, if the parties cannot reach agreement between themselves. For example, it may be appropriate to provide for any such issues to be referred to expert determination, which will be quicker and cheaper than litigation or arbitration.

BACKGROUND FACTS IN BRIEF

Following a dispute about a contract for the sale of copper concentrates, the parties entered into a settlement agreement, which provided, amongst other things, for Erdenet Mining Corporation LLC (EMC) to sell MRI Trading AG (MRI) a consignment of copper concentrates in accordance with the terms of a new contract, which was set out as a schedule to the settlement agreement. However, EMC subsequently argued that the new contract was an unenforceable agreement to agree because it provided for the parties to agree on the shipping schedule and on certain treatment charges and refinement charges, which were to be deducted from the purchase price. An arbitration panel agreed. However, MRI appealed to the High Court under s.69 Arbitration Act 1996 on the basis that the arbitration tribunal had made an error of law and the award was overturned by Eder J. EMC appealed to the Court of Appeal.

THE COURT OF APPEAL DECISION

The Court of Appeal held that the critical question was whether the parties intended that the contract would be binding in the event that agreement on the outstanding points was not achieved. There was a distinction between situations:

- where the parties must be taken to have intended that the matter should be left to their future agreement on the basis that either was to remain free to agree or disagree about that matter as his own perceived interest dictates – in which case there would be no bargain to enforce; and
- where the true intention of the parties was that the matter to be agreed in the future was capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness.

The contract in this case fell into the second category and was, therefore, enforceable. The obligation to sell the copper concentrates was expressed in mandatory and unqualified terms in both the settlement agreement and the new contract. This was inconsistent with EMC having no obligation to deliver anything at all unless agreement could be reached on the treatment/refinement charges and the shipping schedule. The new contract was part of a wider overall arrangement between the parties, which included entering into the settlement agreement and complying with the other terms of that agreement. In that context, and given the fact that the parties had agreed all the other terms of the new contract, it would be "almost perverse" not to attribute to the parties an intention to conclude a binding agreement. Furthermore, the new contract contained an arbitration

clause which provided a commercial and contractual mechanism, which could be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, could resolve a dispute about the charges and/or the shipping schedule.

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