

## Dispute Resolution Update: July 2009

### A new take on the obligation to negotiate in good faith

The recent case of *United Group Rail Services Limited v Rail Corporation New South Wales*<sup>1</sup> held that an obligation to negotiate in good faith was enforceable. The decision explains when such clauses will be enforceable and identifies some of the difficulties in drafting, and enforcing, multi-tiered dispute clauses.

#### Background

Typically, multi-tiered dispute clauses, like the one in this case, specify a negotiation phase followed by mediation and if unsuccessful, a reference to either arbitration or litigation. It was agreed in this case that the mediation clause was unenforceable as it referred to an institution that did not exist. The main issue in the case was United's contention that the contractual obligation to negotiate in good faith was unenforceable as it was uncertain. As such, United argued that the final stage of the dispute resolution process, which was a reference to arbitration, was also tainted and unenforceable. This would have meant that United could proceed to litigation rather than arbitration as stipulated in the agreement.

#### The obligation to negotiate in good faith

Prior to this case, in 2007, the NSW Supreme Court in *Laing O'Rourke v Transport Infrastructure* (NSW Supreme Court, 17 July 2007) considered a very similar clause and found that clauses requiring parties to negotiate in good faith were unenforceable for lack of certainty. The reason was that a court could not measure whether a party has acted in good faith.

In the *United v Rail Corp* case the Court of Appeal disagreed with the approach in *Laing O'Rourke v Transport Infrastructure*. In coming to its view as to whether the clause in question was enforceable the Court helpfully restated a number of essential propositions, namely (a) an agreement to agree is incomplete, lacking essential terms; (b) the task of the Court is to give effect to business contracts where there is a meaning capable of being given to a word or phrase or term in a contract, ambiguity not being vagueness; and (c) good faith is not a concept foreign to the common law and has been recognised to be part of the law of performance of contracts.

The Court held that the clause was enforceable and that agreements requiring parties to negotiate in good faith are not vague, illusory or uncertain. In contrast to the approach in *Laing O'Rourke v Transport Infrastructure* the Court found that there was in fact an objective yardstick by which to measure the good faith or otherwise of a negotiating party's stance and it was "honest and genuine negotiation". The Court held that the clause had "identifiable content" and could be enforced. Parties are not obliged to reach a resolution, but they must be genuine in their efforts to resolve the dispute.

---

<sup>1</sup> [2009] NSWCA 177. A full copy can be found at <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2009/177.html>



### **Lessons to be learnt**

This decision demonstrates that courts will uphold an obligation to negotiate in good faith. When drafting a dispute resolution clause and in particular multi-tiered dispute resolution clauses, parties need to take care to ensure that the terms are sufficiently certain to be enforceable. A clause that is uncertain may be found unenforceable and result in unnecessary costs and delay in trying to enforce compliance.

For further details, please contact:

#### **Kim Middleton**

Partner

P: 02 82163016

M: 0412201672

E: [kimm@marquelawyers.com.au](mailto:kimm@marquelawyers.com.au)

#### **Damian Sturzaker**

Partner

P: 02 82163066

M: 0418102091

E: [damians@marquelawyers.com.au](mailto:damians@marquelawyers.com.au)