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Editor's Note

Hello readers --

This edition features contributions from our members in India, Mexico, England and the United States and covers hot topics in contract law. We hope you will find the articles compelling and valuable.

As always, many thanks to everyone who contributed to this issue, specially to the authors. This newsletter would not be possible without your involvement and dedication.

We continue to welcome your suggestions, your ideas and, above all, your participation.

Nelson Felipe Kheirallah Filho, Christophe Héry and Marco Cozza, Co-Editors

September 4th, 2018

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INDIA LOOKING TO MAKE CONTRACT ENFORCEMENT EASY

By Ramesh Vaidyanathan

India ranks a lowly 164 (of 190) in World Bank's 'ease of contract enforcement' rankings.[1] With an overburdened judiciary that is saddled with millions of pending cases, contract enforcement has always been a nightmare in India. This aspect has often been considered one of the key challenges of doing business in India.[2] While the aggressive push in the recent past towards alternative dispute resolution processes has definitely helped alleviate the misery to some extent, the current substantive law still gives a long rope to the defaulters.

Realising the importance of this issue in India's efforts to be an attractive destination for foreign investment, the lower house of the Indian Parliament recently passed the Specific Relief (Amendment) Bill, 2017 ("**the Bill**") to amend the Specific Relief Act, 1963 ("**the Act**"). The Bill seeks to make specific performance available as a general rule to contracting parties and also introduces the concept of substituted performance. The Bill also proposes measures to prevent unnecessary delays in infrastructure projects.[3]

The exception to become the general rule

Currently, the remedy of specific performance is generally available as an exception, at the discretion of the courts. For cases that require continuous supervision of courts, specific performance is not considered practical. Turning this logic upside down, the Bill seeks to make specific performance a general rule at the option of the party suffering the breach and monetary compensation an alternative when contracts cannot be fulfilled.

This does not imply that a party can insist on performance in all situations. The Bill prohibits specific performance claims involving the performance of a continuous duty (for example, a franchisee running the franchise store as per the franchise contract) or where the court cannot enforce specific performance of material terms or where substituted performance (as per the provisions of the Bill) is obtained.[4]

Substituted Performance

The Bill allows the aggrieved party the option to require substituted performance of the unperformed contract after serving a notice to the breaching party.[5] The party suffering the breach is entitled to get the contract performed by a third party and recover the losses from the breaching party.[6] This is intended to prevent defaulting parties from misusing the lacunae in the current law.

Emphasis on Infrastructure Projects

The Bill also seeks to address the issue of long delays in infrastructure projects by allowing courts to grant injunctive relief affecting infrastructure projects only

1 http://www.doingbusiness.org/data/exploretopics/enforcing-contracts.

2 https://thewire.in/business/how-does-india-plan-on-solving-its-crippling-contract-enforcement-problem.

3 http://www.prsindia.org/uploads/media/Specific%20Relief/Specific%20Relief%20(A)%20Bill,%202017.pdf.

4 Section 5, the Bill.

5 Section 10, the Bill.

6 Section 10, the Bill.

where such injunction would not hinder the commencement or completion of the infrastructure project.[7] Additionally, certain courts will be designated as special courts for infrastructure projects where cases filed are to be disposed of within 12 months, with the option to extend the timeline by a maximum of six more months.[8]

The Way Forward

While the Bill still awaits the sanction of the upper house of Indian Parliament, the Bill in its current form will come as a huge relief to contracting parties, especially in the infrastructure sector. It is hoped that these legislative changes would help in pushing India's contract enforcement rankings.

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[7] Section 10, the Bill.

[8] Section 10, the Bill.

MEXICO LEADS IN OPEN CONTRACTING

By Susan Burns and Eduardo Sánchez Madrigal

It is estimated that governments around the world spend US$9.5 trillion through contracts every year.[9] At the same time, much of the contract information has not been available for public review.[10] This led to the development of the Open Contracting Data Standard (OCDS)[11] for the purpose of supporting increased contracting transparency and to allow a deeper analysis of contracting data for the parties involved and society in general.[12] Open contracting encourages more competitive arrangements for governments, levels the playing field for the private sector, and benefits citizens because it results in higher quality goods and services. According to Open Contracting Partnership,

> *Open contracting is about publishing and using open, accessible and timely information on government contracting to engage citizens and businesses in identifying and fixing problems.*[13]

Mexico has been at the forefront of innovation and collaboration in this arena. It was among the first countries to validate the OCDS standard in 2014 and has pursued open contracts in a variety of venues such as implementation of OCDS for the new airport in Mexico City[14]—the 5th largest infrastructure project in the world.[15]

In that regard, Mexico's Open Contracting Partnership introduced a revised and translated version of the Open Contracting Global Principles, in hopes that in the near future local governments and business groups will adopt it. The Open Contracting Mexican Data Standard, or "EDCA-MX", seeks to allow the public to monitor public procurement using online tools that must be harmonized with Mexico's specific terminology and applicable legislation, particularly in relation to transparency and government enforcement. Also, under EDCA-MX, civil society and business entities may participate in open contracting processes by

[9] http://standard.open-contracting.org/latest/en.

[10] http://standard.open-contracting.org/latest/en/.

[11] The current OCDS version is the 1.1 release, published on 31st May 2017.

[12] http://standard.open-contracting.org.

[13] http://standard.open-contracting.org/latest/en.

[14] On February 20, 2015, president Enrique Peña Nieto issued a presidential decree, which regulates government use of open data and establishes that open data should be made available to the public through the webpage www.datos.gob.mx. In 2016, the Mexico City New International Airport project became the first mega-project in the world to implement the standard, through the website https://datos.gob.mx/nuevoaeropuerto/, which has published more than 321 contracts and contracting processes in relation to the project.

[15] It is important to note that the recent victory of Andrés Manuel López Obrador (AMLO) in Mexico's presidential elections has brought much incertitude to the continuation of the Mexico City New International Airport. At an initial stage of his electoral campaign, AMLO explicitly opposed the project, suggesting location alternatives for the construction of the new airport, but his stance seemed to be more open to dialogue as time progressed. According to Javier Jiménez Espriú, the president-elect's proposed Secretary of Turism and Communications, the fate of the project will be decided by a panel of experts formed by members of current president Enrique Peña Nieto's government and AMLO's own consultants, with some possible outcomes being: to cancel the project, to review the contracts already awarded through procurement, or to grant a concession over the airport's construction (and/or operation).

contributing with suggestions over public expenditure and potential areas of improvement.

The World Bank Group, the executive office of the president of Mexico, NGO Transparencia Mexicana, and constitutionally autonomous institutions such as the Mexican Institute of Access to Information (INAI), are integrally involved in building this more open and transparent process, and are optimistic that a general adoption of the standard may be achieved at a national level if enough States come to realize its relevance as a pathway to comply with modern transparency regulations. Moreover, the standard may not only be accessed by executive governmental entities or by business or civil society organizations, but also by the legislative and judicial branches at any level of government, which provides the opportunity for government to engage with Mexican society by demonstrating its willingness to be under public scrutiny.

Historically, Mexico's struggle with institutional corruption has daunted civil society's participation in public affairs for far too long. Nevertheless, over the last few decades Mexico strive for transparency has lead the country into a new era of true democratic participation and accountability. EDCA-MX is an unprecedented achievement from an increasingly critic and self-conscious nation that will hopefully become the standard that sets in motion Mexico's institutional machinery towards getting rid of paralyzing corruption.

* * *

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UK SUPREME COURT MOVES ENGLISH COMMON LAW TOWARDS INTERNATIONAL CONSENSUS ON 'NO ORAL VARIATION' CLAUSES

By Gordon McAllister, Edward Norman and John Laird

In the recent case ***Rock Advertising Limited v MWB Business Exchange Centres Limited***,[1] the Supreme Court of the United Kingdom considered whether a contractual term, which purported to preclude oral variations to a contract, was of legal effect. In holding that it was, the Court has significantly shifted English contract law. Previously, such terms were typically found to be ineffective; that is no longer the case.

The Supreme Court's ruling does not impose any formal requirements for entering into a contract. But this change should certainly give some comfort to commercial parties who want to ensure that a degree of formality is required in order subsequently to amend the terms of that contract.

The Question Before the Court

The contract in question was a licence to occupy office space in London. It contained a fairly standard clause providing that oral modifications would not be effective.

Rock Advertising fell into arrears with its licence payments, so one of its representatives called MWB and spoke to a credit controller about restructuring payment terms under the licence. The parties took different views about the nature of that discussion: Rock Advertising considered an agreement had been reached, which allowed the overdue license fees to be repaid over the remainder of the licence term. MWB thought the restructuring idea was a proposal only. Subsequently, MWB terminated the licence and sued for the outstanding payments. Rock Advertising relied upon the oral agreement and counterclaimed for wrongful exclusion from the premises.

Lord Sumption, speaking for the majority, held that MWB was not bound by the agreement made during the telephone call on the basis that "*the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation*."[2]

His Lordship noted that "[t]*he natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it*."[3] He also observed that, by failing to give effect to these provisions – thereby disregarding express provisions that certain formalities must be met to vary agreements – the Court will have actually overridden parties' intentions in the past.

Lord Sumption acknowledged that one of the dangers of enforcing a clause that made oral variations invalid was that a party might act on the contract as varied, but then find itself unable to enforce the varied contract. He was not troubled by this, however, on the basis that a "*safeguard against injustice lies in the various doctrines of estoppel*."[4]

[1] [2018] UKSC 24. The judgment may be accessed through the following address: https://www.supremecourt.uk/cases/docs/uksc-2016-0152-judgment.pdf.

[2] Paragraph 10.

[3] Paragraph 15.

[4] Paragraph 16.

Comment

It is noteworthy that, in reaching this decision, the Supreme Court appears to have taken some comfort – even guidance – from the approaches taken in the Vienna Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts, 4th ed (2016). Particularly given England & Wales is not a party to the CISG, and English law contracts are not interpreted under its aegis (and therefore Lord Sumption's desire to bring the English common law in line with these internationally-established principles is necessary even in the context of the international sale of goods).

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