Agreements to agree: are multi-tiered dispute resolution clauses the exception?

1. Multi-tiered dispute resolution clauses, in particular those which provide for negotiation, conciliation or mediation prior to court proceedings or arbitration, are becoming increasingly popular amongst commercial parties.

2. This is no surprise. It is commonplace to cite the rising costs of litigation and champion arbitration as a way for parties to reduce their expenditure on legal spats. However, arbitration itself is becoming increasingly more expensive and often as lengthy as litigation. This has led to commercial parties looking for ways to resolve disputes with minimal input from lawyers. Despite the possibility that the legal profession is aiming at its own feet in the short term, encouraging the enforcement of such clauses is likely to promote a positive relationship between parties and their legal teams. This can only be beneficial in the long term across the commercial legal profession. However this must be done with care; the basic rules of certainty in contract law must be followed in order to ensure parties know their rights and obligations from the very beginning.

(a) Types of dispute resolution clauses

3. There are different kinds of multi-tiered dispute resolution clauses used in commercial contracts. One such type involves a series of stages which each operate as a condition precedent to the next. There have been a variety of these clauses mooted in the courts which range from wide wording, such as '*the parties shall attempt to resolve disputes related to this agreement through friendly negotiation*' and '*the parties shall seek to resolve disputes through mediation*' prior to referral to arbitration (or litigation), to the more specific where details such as timeframe and procedure are set out. If enforceable, then failing to comply with the clause would deprive an arbitral tribunal of jurisdiction to determine the dispute and/or the court may order a stay of any court proceedings until the relevant steps, for example, mediation, have been completed.

4. Other types of clauses can contain different alternatives for dispute resolution. For example, they can provide for mediation, arbitration or a choice of court with a unilateral option of election in favour of one party (sometimes even after the other

party has commenced proceedings)[1]. Alternatively, they can provide for different procedures depending on the occurrences and/or state of affairs between the parties[2].

5. This article is primarily concerned with the first type of clause, and there are often two sticking points when it comes to enforcement. The first point is perhaps the most obvious: if one is keen to avoid court proceedings, going to court to enforce a clause to avoid court rather defeats the point (or at least reduces its impact). Secondly, the difficulty with such clauses is that they are often wide and unspecific. Simply stating that the parties must 'mediate' gives no indication of the place, process or timeframe involved, making it too uncertain to enforce.

6. Despite these hurdles (and the court is generally less concerned about the first[3]), there is some appetite for keeping the parties to their bargain. The litigation surrounding these clauses often arises when one party attempts to bypass the negotiation or mediation specified in the clause and goes straight to arbitration or litigation. The courts then must assess whether or not the resolution procedure, for example negotiation, can operate as an enforceable condition precedent. The main issue, as noted above, is the lack of certainty. For example, the term 'friendly negotiation' can mean a variety of things depending on the parties and context, and gives no guidance on the timing, location or procedure involved. There are legal terms of art, such as 'reasonable' or 'good faith', to which the courts have attached 'certain' meanings but 'friendly negotiation' and similar terms have not been put into that bracket.

7. As will be explained further below, there was a shift in the English law attitude towards this type of clause in *Emirates Trading v Prime Mineral Exports* [2015] 1 WLR 1145. However, it is not clear that the law has completely changed its approach.

---

[1] This type of clause is often favoured by financial institutions, and can, for example, provide for default English court jurisdiction but with an option for one party (the financial institution) to refer the dispute to arbitration, whether or not proceedings have already been commenced in the English courts

[2] See *Perkins Engines Company Limited v Ghaddar* [2018] EWHC 1500 (Comm) where the clause provided for submission to the jurisdiction of the English courts but '*[t]o the extent there is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor is located, the Parties agree to submit any dispute arising between them that cannot amicably be settled to arbitration…*'

[3] Although see *Perkins Engines* at paragraph 106, and below for further discussion

(b) Pre-*Emirates Trading*

8. The lack of certainty in an agreement to negotiate meant that at first the courts were reluctant to enforce this type of clause. An agreement to agree is not enforceable under English law (see *Walford v Miles* [1992] 2 AC 128 where Lord Ackner stated at p.138 that '*a duty to negotiate in good faith is unworkable in practice*'). Although this decision has been criticised, it remains the position until the Supreme Court decides to revisit it.

9. The cases which specifically dealt with multi-tiered dispute resolution clauses followed the same theme. In *Cable & Wireless v IBM* [EWHC] 2059 (Comm) the relevant part of the dispute resolution provision stated that the Parties '*shall attempt in good faith to resolve the dispute or claim through an… (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution.*' Colman J held that the obligation to attempt in good faith to settle a dispute through ADR was sufficiently certain to be enforced because the procedure to be followed was that recommended by the Centre for Effective Dispute Resolution. However he clarified that if the obligation had been only to attempt in good faith to settle a dispute, that would have been unenforceable by reason of uncertainty, as the court would not have had '*objective criteria*' to decide whether the parties were in breach of the provision.

10. A similar position was taken in *Holloway v Chancery Mead* [2007] EWHC 2495 (TCC). The clause stated that the parties '*shall seek to resolve a dispute through conciliation by the NHBC* [the National House Builders Council]'. Ramsey J held that 'conciliation by the NHBC' was not an identifiable process, and therefore the clause was not sufficiently certain. However the remainder of the clause referred to the NHBC Dispute Resolution Service which was enough. In his discussion Ramsey J found that there were three requirements for this type of ADR provision to be enforceable[4]: firstly the parties had to have agreed on the process itself; secondly the process of choosing the tribunal and their remuneration had to be identified; and thirdly sufficient details of the process had to be set out.

11. The Court of Appeal confirmed the position taken in *Cable & Wireless* and *Holloway* in *Sulamerica v Enesa Engenharia* [2012] EWCA Civ 638 where a

[4] Paragraph 81

clause which directed the parties to '*seek to have the dispute resolved amicably by mediation*' was not enforceable as it did not define the mediation process or specify the mediation provider.

12. Despite the agreement of the Court of Appeal that the *Cable & Wireless* position was correct, the tide started to turn in *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch). Hildyard J edged towards a more liberal position when considering a clause which involved steps for the Chief Executive of the first defendant to settle the dispute by amicable conciliation, then by a panel and thereafter arbitration. The Arbitral Tribunal followed *Holloway* and held that the clause was not sufficiently certain to be contractually binding. Hildyard J agreed and emphasised the need for agreement on a process of dispute resolution to enable the court to determine the minimum obligations of the parties. However he also stated that where the provision is part of a '*concluded and otherwise legally enforceable contract the court will strain to find a construction which gives it effect*'[5]. He went on to list what this could mean in practice for example that a court may '*imply criteria or supply machinery sufficient to enable the court to determine what process is to be followed*', including the details of how it is to be treated as successful or terminated without the need for further agreement by the parties. As he concluded, the test is not whether a clause is a valid provision for a recognised process of dispute resolution, as *Cable & Wireless* and *Holloway* seem to suggest, but whether the obligations imposed are sufficiently clear and certain to be given legal effect[6]. This widens the field for custom-made methods of resolution which best suit the particular parties and contract involved, and better suits an international commercial context.

(c) <u>*Emirates Trading*: an about-turn</u>

13. Only a couple of years later Mr Justice Teare advocated a very different approach in *Emirates Trading v Prime Mineral Exports*. He focused on the commercial context in which this type of clause was often drafted and gave much more support to enforcement. Unsurprisingly, this made a splash in the area (probably to the delight of many commercial parties, and the chagrin of the legal profession). The

[5] *Obiter*, paragraph 58
[6] At paragraph 59

clause itself was a simply one requiring the parties to seek to resolve a dispute by '*friendly discussion*' for four continuous weeks followed by arbitration.

14. After detailing the authorities in the area (as above) Teare J found that in English law as it then stood the obligation in the clause was *unenforceable*. Despite this definitive conclusion, including reference to the binding Court of Appeal judgment in *Sulamerica*, he was not deterred from proceeding. He turned to Australian and Singaporean decisions concerning obligations to negotiate in good faith and which favoured enforceability[7] before distinguishing the line of English cases from the clause and context at hand. In particular he distinguished *Sulamerica* on the basis that the mediation referred to in that case was 'incomplete; as it did not name a mediator or a process by which a mediator could be appointed[8].

15. Pausing here for a moment, this distinction is no doubt a logical one, but there is something artificial in the line drawn. Surely a 'friendly discussion' is more ambiguous than 'mediation'? The former is not a recognised process in any sense, and could have very different meanings depending not only on the context but also to the individuals involved in a single case. However this issue was not a concerning one for Teare J, who decided that the obligation to seek to resolve a dispute by friendly discussions in good faith did in fact have an identifiable standard: that the parties engage in 'fair, honest and genuine discussions aimed at resolving a dispute'[9].

16. This is clearer than 'friendly negotiations' but it is nowhere near the more concrete processes of mediation and arbitration (providing a type of either is specified), a point which was recognised by Teare J when he noted that there may be difficulty proving a breach. This should be a reason against enforceability; Teare J himself drew on the Australian case *United Group Rail Services* to show that enforcement was in the public interest because commercial men would expect the court to enforce obligations they had freely undertaken, and the object of the agreement was to avoid an expensive and time-consuming arbitration. As noted above, the

[7] *United Group Rail Services Ltd v Rail Corpn New South Wales* (2009) NSWCA 177 and *International Research Corpn v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 Lloyd's Rep 24

[8] There was also a bit of discussion about the meaning of 'four continuous weeks' and whether it meant discussions for four weeks or that four weeks had to elapse. Apparently it was the latter but this is not crucial for the purposes of this article.

[9] Paragraph 64

point of these provisions is to avoid litigation or arbitration, not to spend months arguing about their effect (however academically tempting that may be).

17. This sentiment has been recognised by the courts in other contexts concerning multi-tiered ADR clauses, both in England and Singapore. In the very recent case *Perkins Engines Company Limited v Ghaddar* [2018] EWHC 1500 (Comm) Bryan J considered the meaning of a clause that provided for the parties' submission to the jurisdiction of the English courts, but also for arbitration where there were no 'reciprocal enforcement procedures' between the UK and Lebanon. Although the decision concerned a different type of multi-tiered dispute resolution clause to the focus of this article, he noted that the proper construction had to be one which provided the parties with contractual certainty instead of requiring extensive legal advice and a hearing and/or detailed exercise determining the law in both the UK and Lebanon (instead of simply checking whether there is a treaty or convention between the two countries for the enforcement of judgments)[10].

18. In another vein, less than a year ago the Singaporean High Court had to consider a multi-tiered dispute resolution clause providing for med-arb in accordance with the SMC-SIAC Med-Arb Procedure in *Heartronics Corporation v EPI Life Pte Ltd* [2017] SGHCR 17. One of the issues between the parties was whether the obligations to mediate and arbitrate under the SMC-SIAC Procedure were separate and distinct or non-severable. The Court found that those obligations were not severable as they were '*closely intertwined*', focusing on the commercial intentions of the parties '*who expressly agreed to this hybridized dispute resolution mechanism*'[11]. It is apparent that the courts are becoming increasingly alive to the need for simplicity, certainty and the avoidance of unnecessary litigation in determining the proper construction of dispute resolution clauses.

(d) Towards the future

19. There have been two cases directly citing *Emirates Trading* in England, both only a few months after Mr Justice Teare's decision, and the judges concerned appear to have strikingly different views on the subject.

[10] Paragraph 106
[11] Paragraph 78

20. The first, another *Emirates Trading* case – *Emirates Trading Agency v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm) – also involved a clause which called for 'friendly discussion'. As the issue did not need to be decided in the case, Popplewell J did not conclusively decide whether or not a requirement for 'friendly discussion' was enforceable. However he took a favourable approach to the decision in the first *Emirates Trading* and expressly agreed with Teare J that such discussions to settle a dispute should have regard to wider commercial interests than simply confining their discussions to the terms of their contractual bargain[12].

21. At the other end of the spectrum, Males J took the opposite view only two months later in *DS Rendite Fonds v Titan Maritime SA* [2015] EWHC 2488 (Comm). He stated that if he had had to decide the issue, he would have held that an agreement to negotiate in good faith was unenforceable as no more than an 'agreement to negotiate'. In what could be called a rather damning tone, he commented that although he didn't have to decide on it, '*[i]t is unnecessary, therefore, to reach any concluded view as to the correctness of Teare J's decision in the Emirates case*'[13].

22. The position in English law on this issue, particularly where ADR clauses require discussions or negotiations prior to more recognised dispute resolution procedures, is clearly not settled as yet. However there is appetite for keeping parties to their bargain and recognition of the benefits of this type of clause. In terms of practical advice for drafting of multi-tiered dispute resolution clauses, there are a few big points to take away from the case law. Firstly, parties should use a recognised ADR procedure, preferably in an institution with a set of rules that you can adopt wholesale into the contract by incorporation (for example the Centre for Effective Dispute Resolution, as in *Cable & Wireless*). If that is not an attractive proposition and a more DIY approach is needed, then parties should ensure all the necessary details are in place such as time limits, the tribunal and basic procedure. Despite Teare J's enthusiasm in *Emirates Trading*, avoiding terms such as 'friendly' and 'good faith' would reduce the scope for satellite litigation concerning the ADR clause (precisely what it is designed to avoid).

[12] *Obiter*, at paragraph 61
[13] Paragraph 15

23. So the answer to the title question of this article ‘agreements to agree: are multi-tiered dispute resolution clauses the exception?’ is mixed. Promoting the enforceability of multi-tiered dispute resolution clauses is to be encouraged. This recognises the importance of keeping parties to their bargain particularly in the commercial sphere where every clause in a contract is often negotiated and drafted with care. However, there is a fine line between encouraging party autonomy and creating precedent that is too vague and uncertain to follow. *Emirates Trading* swings too far towards the latter; ‘friendly negotiations’ can have a variety of different meanings, procedures and resolutions and it is difficult to see how that decision could be practically applied in other cases. However where the parties have specified a process, but have not included every detail required, a midway approach may be found. As Hildyard J in *Tang Chung Wah* suggested, as long as the basics are there the court could imply the details in order to reach a construction consistent with the parties’ intentions. This would strike the right balance between the preserving the integrity of the law in this area whilst recognising the importance of the enforcement of contracts. Which, really, is what contract law is all about.