When can proceedings be stayed in favour of ADR? Ohpen Operations UK Ltd v Invesco Managers Ltd [2019] EWHC 2245 (TCC)

1. In **Ohpen Operations UK Ltd v Invesco Managers Ltd** [2019] EWHC 2245 (TCC), O'Farrell J ordered a stay of proceedings in a technology dispute which were brought in breach of a contractual dispute resolution clause. Her judgment usefully revisits an issue on which lawyers are surprisingly often asked to advise in practice: **does the contract impose binding obligations on the parties to exhaust all contractual dispute resolution processes before they can commence court or arbitration proceedings?**

2. The ADR clause in question was in the familiar form of a tiered dispute resolution process, requiring any dispute to be discussed by the parties themselves, then referred to the contract managers, then escalated to the executive committees of the parties, and, failing resolution, to mediation under CEDR rules.

3. O'Farrell J reaffirmed "*the clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation*." Similar views were expressed by Teare J in **Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd** [2014] EWHC 2104 (Comm) at [64].

4. Since the decision of Colman J in **Cable & Wireless plc v IBM United Kingdom Ltd** [2002] EWHC 2059, it has been clear that a sufficiently well-drafted ADR clause is capable of creating a condition precedent to the right to issue proceedings. The question is generally whether the ADR clause is a mere obligation to "negotiate in good faith" and thus void for uncertainty, or sufficiently certain to be enforceable by the court.

5. Colman J indicated that an enforceable ADR clause, like an arbitration clause, gives rise to a separate contract which is ancillary to the main contract. The court has an equitable jurisdiction to enforce it by granting a stay, adjournment or injunction. Since the remedy is discretionary, it can be lost (for example) by delay in making the application. (This type of stay should be distinguished from the case management stay which the courts can impose under the CPR even where there is no dispute resolution clause).

6. Colman J said that "*In principle, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.*" What this means is that the requirement to submit to ADR must be mandatory, and not qualified by

any discretion to participate. It also means that the clause must sufficiently identify the process which the parties are required to follow.

7. In **Holloway v Chancery Mead** [2007] EWHC 2495 (TCC), Ramsey J summed up 3 requirements for an ADR clause to be enforceable:

> "*First, the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.*"

8. The general approach of the courts, where one party contends that a term is void for lack of certainty, is to inquire whether there are any objective criteria which enable the court to measure whether the parties have complied with the clause: see, for example, the decision of the Court of Appeal in **Mamodoil Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery** [2002] EWHC 2210 (Comm).

9. The court's approach to ADR clauses is similar. In particular, a reference to an identified set of rules such as the CEDR rules provides sufficient certainty as to the procedure which the parties are required to follow. A provision for CEDR mediation was key to the enforceability of the clause in **Cable & Wireless,** above, although Colman J expressed the *obiter* view that an ADR clause might be enforceable even where it did not identify a particular procedure.

10. The absence of such a reference, conversely, may result in the clause being held to be unenforceable, as in **Sulamerica Cia Nacional v Seguros SA v Enesa Engenharia SA** [2012] EWCA Civ 638 and **Wah (aka Tang) v Grant Thornton** [2012] EWHC 3198 (Ch) (where the clause was said to be "too equivocal" and "too nebulous").

11. In **Emirates Trading LLC v Prime Mineral Exports Pte Ltd** [2014] EWHC 2104 (Comm), Teare J departed from the approach of the earlier authorities, and boldly upheld the validity of a clause which merely required the parties "*to seek to resolve the dispute by friendly discussion",* allowing them to proceed to arbitration where the discussions failed to reach a solution for a continuous period of 4 weeks. Applying authority from Australia and Singapore, he held that such a clause is sufficiently certain to be enforceable. A requirement to hold friendly discussions "*has an identifiable standard, namely fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving breach in some cases should not be confused with a suggestion that the clause lacks certainty*" (para 64).

12. Teare J's generous interpretation was strongly influenced by his view that public policy encourages parties to attempt to settle their disputes by discussion before engaging in expensive arbitration or litigation. He went as far as to suggest that a time-limited obligation to negotiate in good faith would be enforceable: see [51]. His judgment clearly falls within the growing group of cases which call for the reconsideration of the conclusion reached by the House of Lords in **Walford v Miles** [1992] AC 2 AC 128 that obligations to negotiate in good faith are unenforceable. That reconsideration will need to await a trip to the Supreme Court in an appropriate case.

13. In **Ohpen**, O'Farrell J did not need to venture into these choppy waters. Having surveyed the caselaw, she set out four applicable principles at [32]:

    (1) the clause must create an enforceable obligation requiring the parties to engage in ADR;

    (2) the obligation must be clearly expressed as a condition precedent to court proceedings or arbitration (in **Ohpen** itself, this was satisfied because the clause said "*if a Dispute is not resolved in accordance with the Dispute Procedure, then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts*").

    (3) the dispute resolution process must be sufficiently clear by reference to objective criteria; and

    (4) the court has a discretion to stay proceedings commenced in breach of an enforceable ADR agreement, and in doing so will have regard to the public policy in favour of upholding ADR clauses.

14. She then proceeded to hold that the clause before her met the criteria, and to order a stay of proceedings in favour of CEDR mediation. She also went on (unsurprisingly) to reject an argument that the ADR clause did not as a matter of construction survive termination of the main contract. She regarded it as "indistinguishable from an arbitration clause" in this respect.

Issues not touched on by the judgment

15. What O'Farrell J's judgment does not address is the often tricky question of determining whether the parties have failed to reach a resolution of the dispute at any stage of the ADR process. O'Farrell J merely observed that it would be possible for the court to decide "by reference to objective criteria" whether the disputes remained unresolved. However, unless the clause lays down a time limit for reaching a resolution, a recalcitrant party can

drag its heels by arguing that the dispute resolution process has not yet been exhausted. For drafting purposes, therefore, it is helpful to include clear cut-off dates.

16. It is also worth noting that even an enforceable ADR clause does not necessarily oust the jurisdiction of the court for all purposes. In particular, a party may wish to apply to the court for urgent interim relief such as an injunction, and a well-drafted ADR clause will expressly preserve its right to do so, notwithstanding the fact that the dispute resolution process may not even have started. See **Ardentia Ltd v British Telecommunications Plc** [2008] EWHC 2111 (Ch) and **Vertex Data Science Ltd v Powergen Retail Ltd** [[2006] EWHC 1340 (Comm) in both cases, the dispute resolution clauses contained express carve-outs permitting the parties to apply to the court for interim relief which were upheld by the court.

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