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Case Note: Enforceability of Agreements to Mediate in English Law

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Are agreements to mediate enforceable?

The short (and incomplete) answer is: yes, they may be provided they are drafted appropriately. In this post we review a recent English judgment which sets outs guidelines for the enforceability of agreements to mediate under English law.

In August 2019, the Technology and Construction Court of the Queen's Bench Division in England made an important ruling in regard to the enforceability of agreements to mediate as a precondition to court or arbitration proceedings. Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC) provides guidance for how and when parties may rely on an agreement to mediate.

Facts

Here is a brief summary of the salient facts of this case. Invesco Fund Managers Ltd ('Invesco') had engaged Ohpen Operations UK Ltd ('Ohpen') in July 2016 for digital services. They concluded a framework agreement which contained the following multi-tiered dispute resolution clause (which included a mediation tier in 11.1.2):

"11.1 Internal Escalation
11.1.1 The Parties will first use their respective reasonable efforts to resolve any Dispute that may arise out of or relate to this Agreement or any breach thereof, in accordance with this Clause 0. If any such Dispute cannot be settled amicably through ordinary negotiations within a timeframe acceptable to Client and Ohpen, either Party may refer the Dispute to the Contract Managers who shall meet and use their reasonable efforts to resolve the Dispute.

11.1.2 During the Development and Implementation Phase, any disputes shall firstly be handled by the persons as described in Clause 22.1. If such escalation does not lead to resolution of the Dispute, then the Dispute shall be escalated to the executive committees of respectively Client and Ohpen. If escalation to the executive committee does not lead to resolution of the Dispute, then the Dispute shall be referred for resolution to mediation under the Model Mediation Procedure of the Centre of Dispute Resolution (CEDR) for the time being in force. If the Parties are unable to resolve the Dispute by mediation, either Party may commence court proceedings.

11.1.3 If any such Dispute that arises after Commencement Date is not resolved by the Contract

Managers within ten (10) Business Days after it is referred to them, either Party may escalate the Dispute through the hierarchy of the committees, as set out in the chapter on governance of Schedule 2 (Service Level Agreement), who will meet and use their respective reasonable efforts to resolve the Dispute.

11.1.4 Ohpen shall continue to provide the Services and to perform its obligations under this Agreement notwithstanding any Dispute or the implementation of the procedures set out in this Clause. Client's payment obligations that are listed in Schedule 3 (Pricing) shall not be halted during the resolution of any Dispute.

11.2 Jurisdiction
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."

Whilst Ohpen was scheduled to commence the provision of some of its digital services in March 2017, delays occurred, and the parties were in dispute over the responsibility for the delays and the revised commencement date. Invesco issued a notice of termination on 11 October 2018. Subsequently, Ohpen disputed the validity of Invesco's termination, but purported to accept the latter's repudiatory breach. Both parties had agreed that their primary obligations under the initial framework agreement had been terminated. However, they remained in dispute over which party had been in material and/or repudiatory breach of the contract.

In April 2019, Ohpen issued court proceedings claiming damages of £4.7 million, whilst Invesco counterclaimed for approximately £5.7 million. In its pleadings in May 2019, Invesco pleaded for a stay in court proceedings, hoping that the court would effectively enforce the agreement to mediate contained in the framework agreement's dispute resolution clause as a precondition to litigation. Ohpen objected to the enforcement of the agreement to mediate, as it argued that a termination of the framework agreement meant that parties are no longer bound by that agreement.

Decision of the Technology and Construction Court

First, the court ruled that the agreement to mediate survived the termination of the agreement between Ohpen and Invesco.

Next, the court issued a stay of proceedings (in accordance with its powers under rules 11(1) and 11(6) of the Civil Procedure Rules), enforcing the agreement to mediate and providing directions to the parties to facilitate the mediation process. Having examined the line of precedents in English law, Mrs Justice O'Farrell summarised (at para 32) that the following conditions must be fulfilled if parties wish to rely on an agreement to mediate to stay court proceedings:
a) The agreement shall be worded in terms which create an enforceable obligation mandating that parties shall engage in alternative dispute resolution processes;
b) The obligation shall be drafted clearly and state unequivocally that it is a condition precedent to court proceedings or arbitration;
c) The dispute resolution procedure in the agreement to mediate does not need to be a formal one, but it must be sufficiently clearly and certainly set out, by reference to objective benchmarks, including methods to appoint a mediator or to determine any other imperative actions in the process without the need for any further agreement between the parties;
d) The court holds a discretion to stay court (or arbitration) proceedings which were initiated in breach of that enforceable agreement to mediate.

e) When exercising that discretion, the court will balance (1) the public policy considerations of having to uphold any contractual agreements concluded between parties with (2) any overriding prerogatives within court processes to assist parties in resolving disputes in an efficient and effective manner.

Examining the parties' agreement to mediate, the court found that mediation was a precondition to commence court proceedings, reinforced by its clear drafting in mandatory terms.

In relation to the clause itself, O'Farrell J opined (at para 53), "Although the term 'condition precedent' is not used, the words used are clear that the right to commence proceedings [in court] is subject to the failure of the dispute resolution procedure, including the mediation process." This means that parties must resort to the CEDR Model Mediation Procedure, stipulated in clause 11.1.2 (see clause reproduced in full above), to attempt to reach an amicable resolution of their dispute – an obligation binding on both parties.

In terms of policy considerations, the court stated (at para 58):
"There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement."

In exercising its discretion to enforce the agreement to mediate by granting a stay of proceedings, the court made additional directions to improve the prospects of the parties settling their claim at mediation: the court ordered the parties to serve pleadings on each other "so that the substantive issues may be clarified before the mediation". The court (at para 59) justified its orders on the basis that "it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make."

Learning Points
1. This case underlines the court's commitment to facilitating alternative dispute resolution processes in the common law. The sentiment expressed by the Queen's Bench is unequivocal: to encourage parties to resolve disputes before they reach litigation or arbitration, courts will favour the enforcement of ADR provisions.
2. In order for agreements to mediate to be enforceable, they have to be drafted meticulously using clear, instructive and mandatory terms. Anything less than this – such as an undertaking by parties to seek to resolve a dispute at mediation – may result in an unsuccessful enforcement application (see Sul America Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others [2012] EWCA Civ 638, at para 36).

3. In spite of a termination of a contractual agreement, an obligation by parties to mediate survives alongside the entire dispute resolution clause.

4. In terms of how courts enforce agreements to mediate:
(a) courts may stay litigation or arbitration proceedings, as the case may be, in order to facilitate compliance with such agreement.
(b) In addition, courts may direct parties to make the necessary and relevant disclosures in interlocutory proceedings (e.g. to serve pleadings on each other) to ensure that mediation runs as smoothly as possible.

5. If the court thinks that a party seeks to abuse the court's process by applying for the stay of proceedings as a delay tactic, then it may decline to enforce the agreement to mediate. This is based on the principle that the court retains an overriding prerogative to facilitate the resolution of disputes in an efficient and effective manner. In such circumstances, litigation may provide parties with a better forum for dispute resolution. This is a principle founded in the equitable jurisdiction of the courts, and it has been applied in other common law jurisdictions. For instance, in Yashwant Bajaj v Toru Ueda [2018] SGHC 229, the High Court of Singapore declined to enforce an agreement to mediate contained in an international mediated settlement agreement (iMSA), as it found that the party seeking to rely on it had an ulterior motive to stymie the implementation of the iMSA. Courts may refuse to apply their discretion to enforce an agreement to mediate if parties do not appear to intend to make a reasonable or genuine attempt to resolve their dispute at mediation.

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