

Discretion and Dispute Resolution Clauses: doing away with a mandatory step

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PRACTICES International Arbitration, Construction, International, Litigation

Ordinarily, when a contract places an obligation on a party, one would expect the courts to enforce that obligation. But the overriding objective - to deal with cases justly and at proportionate cost – allows judges to exercise their discretion and potentially avoid the strict letter of the law. This is one element of “litigation risk” inherent in any dispute: even if the contract and the case law is clear, a contrary decision may still potentially (though rarely) be made.

One interesting arena for the operation of this discretion arises from the enforcement of contractual dispute resolution procedures. When contracts are signed, and a rosy, harmonious future lies ahead, clauses addressing potential disputes can often be boilerplate, or contain language barely considered. While reference to the contract can sometimes be sufficient to resolve any ambiguity, it may also be the case that the contractual wording is unclear and, in particular, whether the pre-action steps are mandatory or discretionary may ultimately need to be resolved by the court itself.

Usually, if such a clause is found not to be mandatory, or incomplete or uncertain, such as a generalised reference to “negotiation”, it is unlikely to be enforced by the courts. However, a clear and defined requirement to, for example, adjudicate with detailed steps and timings, is likely to be upheld.

The recent case of *Lancashire Schools SPC Phase 2 Ltd v Lendlease Construction (Europe) Ltd & Ors* [2024] EWHC 37 (TCC) dealt with just such a clause and provided a helpful overview of the relevant case law in determining its meaning. However, and more interestingly, it also provided an unusual incidence of the court deciding the pre-action adjudication provision was mandatory but nonetheless, court proceedings would neither be struck out nor stayed. In effect, the court decided that the parties did have to adjudicate, but it wouldn't make them do so. As such, it is a salient reminder that the courts may look beyond the clause and careful drafting will not necessarily guarantee the result the parties originally intended.

The facts

The decision arose from an application made by Lancashire County Council, a children's services authority (and referred to as “the Authority” in the judgment), who were the fourth defendant in a dispute with Lancashire Schools SPC Phase 2 Limited (the “Claimant”). The wider dispute involved a project to build serviced accommodation and other works at a school, in which a number of defects had been alleged. The other three defendants were contractors involved in the work. Parallel proceedings were issued relating to other phases of the project and the intention was for such proceedings to be consolidated at a later stage. Potential liability as per the four defendants was complex and interlinked, and findings in respect of one would likely impact on liability of the others.

The Authority applied early in the case, and prior to serving its defence, for an order pursuant to Civil Procedure Rules (“CPR”) 11(1)(b) and CPR 11(6)(b) to set aside service of the claim form

against it. It also sought, in the alternative, for an order striking out the claim pursuant to CPR 3.4(2)(a). Simply put, the Authority argued that proceedings had been brought in breach of the contractual requirement that all disputes must first be determined by adjudication.

The court therefore had two key points to consider: (1) was adjudication a condition precedent, or otherwise a mandatory step, prior to commencing court proceedings; and (2) if it was, what should the court do about it?

The court's decision (1): was it mandatory?

Mr Nissen KC, sitting as a Deputy High Court judge, in his judgment reviewed the two leading decisions on construing dispute resolution clauses (being *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*¹ (“*Ohpen*”) and *Children's Ark Partnership Ltd v Kajima Construction Europe (UK) Ltd*² (“*Children's Ark*”)) and decided to follow their “*combined effect*”. In essence this meant that the relevant principles were: (1) the terms must create an enforceable obligation requiring the parties to engage in ADR; (2) the obligation must be mandatory but (as *Children's Ark* had modified the principles in *Ohpen*) did not need to be a condition precedent; and (3) the ADR process must be sufficiently clear and certain to be enforced.

Taking all of this into account, the court found that the relevant contractual clause did provide for a mandatory process. The contract provided that the English Courts only had jurisdiction “*subject to*” the provisions of the dispute resolution clause. This clause was a mandatory one, in that it provided that any dispute “*shall be resolved*” in accordance with its terms. It also provided for a sufficiently certain and enforceable process, that would result in a ruling from an adjudicator. While the reference to adjudication in that clause provided that a party “*may*” give notice to do so, this discretion simply provided that a party was not obliged to adjudicate if it did not wish to. Nevertheless, “*the mere fact that adjudication is permissive in that sense, rather than mandatory, does not mean that adjudication is not a condition precedent to litigation*”. It was “*obvious*” from the way the various clauses were expressed that court proceedings could only be commenced after adjudication had taken place.

As such, it was either mandatory or a condition precedent for adjudication to take place before a party could commence court proceedings. It was common ground between the parties that this had not occurred, and so the existing proceedings were in breach of that obligation.

The court's decision (2): exercising discretion

As an overarching point, the judgment made clear that any decision to stay proceedings should take into consideration the overriding objective of assisting the parties to resolve their dispute. The court is not bound to refuse jurisdiction or order a stay of proceedings (or give any other relief), but may exercise its discretion as to whether or not to do so. As such, while (and as was set out in *Children's Ark*) the usual order from the court is a stay, it is not required to do so. Where, for example, a requirement to stay proceedings until another dispute resolution process had been complied with would “*fly in the face of common sense and proportionality*” or be “*pointless*”, “*useless*” or “*futile*” in light of the specifics of the relevant proceedings and prior negotiations between the parties, the court may well choose not to exercise its discretion.

While the judgment makes clear that there is a presumption that such provisions must be complied with, it is therefore open to a party to argue that this presumption should be overturned. Although the Authority had a strong argument that the parties intended adjudication to take place, the reality of the dispute meant that the various proceedings were likely to be consolidated, and the Authority

was the only one of the five entities involved insisting on adjudication. Furthermore, it was clear that findings in the other proceedings would impact on the Authority's case and vice versa.

As per *Children's Ark*, a relevant point was to consider the utility of a stay which, in this case, would lead to procedural complications, case management issues and delays which were not in the interest of justice. In particular, while the clause anticipated an adjudication process of, at most, 42 days, the reality was that this period would have to be extended "*considerably*" to take account of the complexity of the claims and the need for expert evidence. Proceedings were already progressing "*very slowly*" and "*should not be further delayed without good reason*".

It was also of relevance that, regardless of the court's decision, it was still open to the Authority to commence adjudication in respect of its own claims, if it wished to do so. As such, the "*benefits of adjudication*" remained open to it, even if the litigation continued.

Taking all this into account, the court declined to exercise its discretion to order a stay of proceedings.

With respect to the Authority's application for a strike out and claims of abuse of process, these were dismissed swiftly. The existence of a mandatory dispute resolution process did not affect the substance of the claims themselves. It was rather a matter of jurisdiction. It was also not abusive for a party to commence proceedings without first adjudicating. In any event, the court would also have exercised its discretion not to strike out even if it were, in light of the overriding objective and the reasons given to refuse a stay.

Practical takeaways

As this case demonstrates, even carefully worded dispute resolution clause can still turn out not to achieve the intended result. If the court decides practicality and the interests of justice require it to ignore the clear intentions of the parties, it has the discretion to do so. While the first instance and appeal judgments in *Children's Ark* have rightly reminded parties of the need for any such clauses to be clearly worded and provide for an enforceable and certain mechanism of operation, this may still not be enough. This is a position hard to reconcile with the oft-cited requirement for the law to be clear and predictable. Nevertheless, it remains clear that the more precise and explicit the wording, and, in particular, including express reference to steps as being mandatory or a condition precedent, the greater the protection.

While the court's reason for declining to exercise its powers was case specific, it is clear that relevant factors include: the length of any necessary stay; the impact of such a stay on all the parties and their rights, particularly when related disputes are ongoing; and whether or not the dispute resolution process would be likely to resolve matters. Fundamentally it will be a practical decision, based on the reality the parties find themselves in.

In light of the recent much reported decision in *Churchill v Merthyr Tydfil*³, where the court found that parties can be compelled to mediate, the important distinction to make is that, here, the court felt any ADR would hinder rather than help the efficient resolution of the dispute. Had it been clear there was value in insisting on adjudication, it is likely the court would have reached a different conclusion.

¹ *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC),

² Both the first instance decision in *Children's Ark Partnership Ltd v Kajima Construction Europe*

(UK) Ltd [2022] EWHC 1595 and the appeal in *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd* [2023] EWCA Civ 292.

³ On which, see our alert at <https://www.haynesboone.com/news/publications/fiona-cain-and-charlotte-mullis-in-solicitors-journal-on-mediation-and-impact-of-churchill>