

Challenges of Mediation – the need to address the English approach to agreements to mediate

Maryam Salehijam*

In the CJC Report on Mediation there is a brief mention of agreements to mediate: *9.15. The other principal form of ADR at source is a contractual requirement for mediation as one of the steps in an escalation clause. These clauses are upheld and enforced by the courts (provided they are sufficiently certain). We do not recommend any change of approach.*

This submission pleads for the working group to reconsider this statement in light of the extensive research I have conducted as part of my PhD project on the various approaches to the enforcement of agreements to mediate.

Indeed, the promotion of mediation as the preferred alternative to litigation and arbitration has resulted in dispute resolution providers and commercial parties to increasingly draft agreements containing escalation clauses¹ that call for mediation prior to other binding procedures.² However, there is significant uncertainty regarding the binding nature thereof.³ Such agreements have

* Maryam Salehijam is a Canadian/Iranian PhD researcher at the Transnational Law Center of Ghent University. She holds an LL.B. in European Law and an LL.M. in International Laws from Maastricht University.

¹ Multi-tiered dispute resolution, also known as “(multi-) step”, “ADR first” or “escalation” clauses, are used to refer to a dispute resolution agreement that contains multiple tiers of dispute resolution mechanisms, usually commencing with non-binding processes such as negotiation or mediation before calling for arbitration or litigation.

² See Oliver Krauss, *The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith under English Law*, *McGill Journal of Dispute Resolution*, 2 (2016), 144; David Cairns, *Mediating International Commercial Disputes: Differences in U.S. And European Approaches*, *Dispute Resolution Journal* (2005), 64; Quek Anderson, *A Coming of Age for Mediation in Singapore*, *Singapore Academy of Law Journal*, 29 (2017), 292; *Drafting Step Clauses: An Empirical Look at Their Practicality and Legality*, Pace Law School, available at <http://www.cisg.law.pace.edu/cisg/IICL-NE.html> (12 October 2017); Sai Ramani Garimella/Nizamuddin Ahmad Siddiqui, *The Enforceability of Multi-Tiered Dispute Resolution Clauses: Contemporary Judicial Opinion*, *IIUM Law Journal* 24 (2016) 1, 166; Craig Tevendale/Hannah Ambrose/Vanessa Naish, *Multi-Tier Dispute Resolution Clauses and Arbitration*, *Turkish Commercial Law Review* 1 (2015) 1, 31; Marko Mear, *Enforceability of Mediation in Multi-Tiered Clauses: The Croatian Perspective*, *Kluwer Arbitration Blog* (2015), 1; Berger, *supra* note 3, 47; Lye, *supra* note 3, 1.

³ See Didem Kayali, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, *Journal of International Arbitration*, 27 (2010) 6, 552; Horst Eidenmüller/Helge Groserichter, *Alternative Dispute Resolution and Private International Law*, *Social Science Research Network*, (2015), 8; Anderson, *supra* note 5, 292; Tevendale/Ambrose/Naish, *supra* note 5, 31; Garimella/ Siddiqui, *supra* note 5, 160; Gary Born/Marija Šćekić, *Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'*, in David D. Caron et al. (eds.), *Practising Virtue: Inside International Arbitration*, *Oxford Scholarship Online* 2015, 227; Michael Pryles, *Multi-Tiered Dispute Resolution Clauses*, *Journal of International Arbitration*, 18 (2001) 2, 160; Lianne Sneddon/Amanda Lees, *Frequently Asked Questions: Is My Tiered Dispute Resolution Clause Binding?*, *Ashurst*, (2013), 1.

resulted in disputes about whether a party may ignore the agreement to mediate and proceed directly to binding mechanism such as arbitration, the content of the parties' obligations (whether the parties must be physical present, attempt to settle, act in good faith, etc.), as well as the forum that may address the enforceability question.⁴ Furthermore, the effect of agreements to mediate on limitation periods, the validity the arbitral awards, and subsequent proceedings is unclear.⁵ The increasing litigation regarding mediation emphasizes the need to clarify the enforceability of agreement to mediate, as the current uncertainty compromises the benefits of mediation.

Amongst the common law jurisdictions I have analysed, there is a tendency to apply differing certainty thresholds. It appears that at this stage, the Australian and Singaporean courts take a more liberal approach than English courts.⁶ English courts have been criticized for their strict approach to sufficient certainty.⁷ For instance, in 2012, in *Sulamerica*,⁸ Moore-Bick LJ found the clause unenforceable while acknowledging that the parties clearly intended to be bound.⁹ Likewise, Hildyard J in *Wah*,¹⁰ found the clause unenforceable despite it establishing a detailed procedure, as the process was not clear regarding who was to be involved, whether the neutral was to reach a conclusion or take a particular step, and as the clause contained vague terms such as 'attempt to resolve the dispute'.¹¹

The approach in *Sulamerica* and *Wah* seems to act against the 2002 celebrated judgement in *Cable & Wireless*¹² where Colman J of the Commercial Court found a clause enforceable despite the parties' lack of choosing a particular method of dispute resolution.¹³ This strict approach remains

⁴ Christian Bühring-Uhle/ Lars Kirchhoff/Gabriele Scherer, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, 2006, 229; Stipanowich, *supra* note 6, 5; Alexander Jollies, *Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement*, *Arbitration*, 72 (2006) 4, 329.

⁵ Bühring-Uhle/Kirchhoff/Scherer, *supra* note 9, 230; *White v Kampner*, 641 A2d 1381 (Conn 1994), 1387: court invalidating arbitral award in light of a mandatory negotiation requirement.

⁶ Anderson, *supra* note 5, 292; Sneddon/ Lees, *supra* note 8, 2; Joel Lee, *Mediation Clauses at the Crossroads*, *Singapore Journal of Legal Studies*, (2001), 87; Han/Poon, *supra* note 44, 474.

⁷ Neil Andrews, *Andrews on Civil Processes: Arbitration and Mediation*, vol. 2, Cambridge 2013, para. 1.52.

⁸ ECA (Civil Division), *Sulamerica CIA Nacionla De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, Judgement of 16 May 2012.

⁹ *Ibid*, para. 35-36.

¹⁰ EHC (Chancery Division), *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd. and others*, [2012] EWHC 3198 (Ch), [2012] CN 63, Judgement of 14 November 2012.

¹¹ *Ibid*, para. 27, for the dispute resolution clause and para. 63 & 82.

¹² EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 2002.

¹³ *Ibid* at para. 25.

despite the *Emirate*,¹⁴ where an escalation clause requiring “friendly discussions” was found to be enforceable, as Teare J purposefully distinguished *Sulamerica* and *Wah* on the basis that these cases required mediation/conciliation while the latter required the resolution of the dispute through friendly discussion in good faith. However, it is possible that the reasoning of Teare J will indirectly affect the courts’ policy towards enforcing agreements to mediate.¹⁵ This is because English courts’ main argument for their aversion to enforcement of agreements to mediate has been their likeness to agreements to agree, which had prior to *Emirates* were found to be unenforceable.¹⁶ Thus, it can be said that the position of English courts towards the enforceability of such agreements is “evolving”,¹⁷ while the approach to agreements to mediate in Australia and Singapore can be summarized as enforcement friendly.

Although the approach of Australian and Singapore correlates, with the passing of the 2017 Mediate Act, Singapore appears to be a step ahead of Australia in its approach to agreements to mediate. Article 8 of the Mediate Act grants Singaporean courts the statutory power to order a stay of proceedings pending a mediation as long as the parties have expressed their intention to be bound in writing. Accordingly, the Mediation Act does not appear to require the agreement to address further details about the procedure of mediation or the provider. The pro-enforcement policy of Singapore is also evident in case law. In *International Research Corp*,¹⁸ Sundaresh Menon CJ on appeal agreed with the High Court that the precondition to arbitration was enforceable although the title of the clause called for mediation, but described the process of negotiations.¹⁹ Chan Seng Onn J of the High Court in relying on the mandatory character of the dispute resolution clause relied on the reasoning of Colman J in *Cable & Wireless* and did not make a reference to *Sulamerica* nor *Wah*.²⁰

¹⁴ EHC (Queen’s Bench Division), *Emirate Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014.

¹⁵ See also Maryam Salehijam, *Enforceability Of ADR Agreements: An Analysis Of Selected EU Member States*, *International Trade and Business Law Review*, (forthcoming 2018).

¹⁶ See Salehijam, *supra* note 65.

¹⁷ Krauss, *supra* note 5, 147.

¹⁸ SCA, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55, Judgement of 18 October 2013.

¹⁹ *Ibid*, para. 54

²⁰ HCS, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226, Judgement of 12 November 2012, para. 95.

Likewise, the Australian courts' approach to dispute resolution clauses is to hold the parties to the terms of their agreement.²¹ These courts interpret such clauses in a liberal way and thus in the same manner as other clauses in a commercial contracts.²² According to Vickery J in the Australian case of *WTE*:²³

[A]s a minimum, what is necessary for a valid and enforceable dispute resolution clause, is to set out the process or model to be employed, and in a manner which does not leave this to further argument.²⁴

Yet, the requirement of certainty does not imply the dispute resolution clause must be overly structured.²⁵

In addition, the countries under analysis have differing approaches to whether a reference to a good faith obligation in an agreement to mediate warrants its unenforceability.²⁶ It seems that here the lack of consensus bypasses the common and civil law divide. English courts have been traditionally hostile to the doctrine of good faith.²⁷ The reluctance to the recognition of the duty of good faith follows a main principle of contract formation in the common law.²⁸ In *Wah*, Hildyard J ruled that the term good faith was "too open-ended" and therefore does not point to a sufficiently certain

²¹ Andrew Murray, *Enforcing the Modern Suite of Dispute Resolution Clauses*, NSW Chapter event, (2015), 3.

²² *Ibid.* In interpreting clauses in commercial clauses, the courts apply the following rules of interpretation: "Give the contract a business-like interpretation paying attention to the language used by the parties, the commercial circumstance which the document addresses, and the object which it is intended to secure" (*Mccann v Switzeland Insurance Australia Limited* [2000] HCA 65); "Only hold a clause void for uncertainty as a last resort, where it is not possible to give it a reasonable meaning" (*Lord Denning MR in Greater London Council v Connolly* [1970] 2 QB 100).

²³ Victorian Supreme Court, *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, Judgement of 21 June 2013.

²⁴ *Ibid.*, para. 46.

²⁵ In *Aiton*, Einstein J noted that "if specificity beyond essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself." However, the clause in this case fail, as it did not address the repayment of the mediator (Supreme Court of NSW, *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996, Judgement of 1 October 1999, para. 46 &174). Also see Mike Hales, Australia, in IBA Litigation Committee, *Multi-Tiered Dispute Resolution Clauses*, 2015, 11.

²⁶ "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage" (Bryan A. Garner (ed.), *Black's Law Dictionary*, 7th ed., St. Paul 1999, 701).

²⁷ Chris Parker/Gregg Rowan/Nich Pantlin, *How Far Can You Act In Your Own Self-Interest?*, Herbert Smith Freehills, (2016) 4, 3; Krauss, *supra* note 5, 148.

²⁸ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, 2nd ed., Oxford 2013, 61.

procedure that is to be followed by the parties during their negotiations.²⁹ Nevertheless, there appears to be trend towards recognizing the good faith obligation in dispute resolution clauses.³⁰

Again, the English approach is worthy of criticism, as good faith is an accepted obligation in other common law jurisdictions. In the US, the duty of good faith is recognized as a general principle of contract law that is implied in all commercial contracts.³¹ According to §205 of the American Restatement (Second) of Contracts, “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”³² Moreover, in the Australian case of *Aiton*, Einstein J reflected on a commercial contract requiring the parties to negotiate in good faith and found that:

It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest.³³

Furthermore, Raja JA of the SCA clarified in the *HSBC v Toshin*³⁴ case that it will enforce good faith negotiation clauses in cases where it is clear to the court that parties have not fulfilled or performed this obligation.³⁵ Lastly, courts in pro-good faith civil law jurisdictions, such as Germany,³⁶ imply the good faith obligation into contractual arrangements.³⁷ Evidently, “self-interest and good faith can co-exist.”³⁸

Today, in absence of a uniform framework regulating the conditions for validity and enforceability of agreements to mediate, it is important that the parties carefully draft their agreement in order to ensure its effectiveness. For an agreement to mediate to be binding regardless of the jurisdictions

²⁹ *Wah*, para 57.

³⁰ Alexander, supra note 14, 196.

³¹ See Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, *Harvard Law Review*, 94 (1980), 371.

³² Restatement (Second) of the Law of Contracts § 205 (1981) [Restatement].

³³ *Aiton*, supra note 75, para 83. Also see *United Group Rail*, supra 23, para. 81.

³⁴ *SCA, HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, Judgement of 27 August 2012.

³⁵ *Ibid*, para. 40.

³⁶ §242 BGB: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”

³⁷ Alexander, supra note 14, 196. Also see Han/Poon, supra note 44, 475.

³⁸ Lee, supra note 56, 98.

seized, it must indicate the parties' intention to be bound to the mediation by using mandatory language.³⁹ In common law jurisdictions, the parties must also clarify that the binding nature of the agreement is a condition precedent to other binding mechanisms.⁴⁰ Furthermore, it should address the following points:

- i. How to initiate procedure
- ii. The scope of the agreement (disputes covered)
- iii. Applicable procedural and substantive law
- iv. Applicable institutional rules (attention must be made to the version agreed to)
- v. Description of the procedure
- vi. Procedure to select neutral(s)
- vii. Parties' obligations
 - a. Attendance obligations
 - b. Behavioural obligations (cooperate, meaningful discussions, etc.)
 - c. Temporal obligations (minimum number of sessions or hours)
 - d. Etc.
- viii. How costs are to be divided/determined
- ix. Consequence for failure to comply (stay, dismissal, damages, sanctions, etc.)
- x. Place of mediation or method for selection thereof
- xi. Language of mediation or method for selection thereof
- xii. Procedure to terminate mechanism*

*agreements to mediate that refer to the rules and procedures established by ADR institutions often meet the underlined requirements.⁴¹ Nevertheless, parties should always make sure that the version of the mediation rules they are referring to are in fact covering aspects they have not included in their agreement.

³⁹ The use of the word "shall" and "must" in dispute resolution clause indicates that the parties must first to seek mediation before arbitration (compulsory).

⁴⁰ See also ICC Case No. 9984: the wording of the clause indicated that the ADR is an obligation, the tribunals find the clause binding upon the parties.

⁴¹ See the reference to CEDR in *Cable & Wireless*, supra note 62, para. 21.

In reality, however, it runs contrary to practice to expect that dispute resolution clauses contain the above elements. Practitioners and scholars frequently refer to dispute resolution clauses as “midnight clauses” since they are often concluded so late in the day. In 2017 questionnaire regarding the perception of dispute resolution professional and experts to ADR agreements, 65% indicated that such agreements are often copy and pasted.⁴² This is problematic, as it raises the chance of the agreement being poorly drafted. Therefore, there is a probability that an agreement to mediate concluded hastily might not fulfil the enforceability criteria.⁴³ This is especially evident in cases where the party requesting the enforcement of an agreement to mediate is refused on the basis of an incomplete or uncertain clause. Unmistakably, there is a need for a **new approach** to these agreements that empowers the **courts to fill the gaps in the parties’ agreements in order to interpret in favour of enforcement.** This suggestion is in line with the modern approach to interpreting commercial contracts, which is to give meaning to the terms in order to preserve validity, as long as the parties’ agreement is formulate in mandatory terms.⁴⁴ This is not to say the courts are to rewrite the contract for the parties.⁴⁵

⁴² Maryam Salehijam, ADR Clauses and International Perceptions: A preliminary Report”, Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement, (forthcoming 2017/8).

⁴³ Pryles, supra note 8, 160.

⁴⁴ *Verba ita sunt intelligenda ut res magis valeat quam pereat* - the contract should be interpreted so that it is valid rather than effective. See also per Lord Wright in House of Lords, *Hillas & Co v Arcos Ltd* (1932) 147 LT 503, Judgement of 1932, para. 541: “business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding” defect; Llongmore LJ in ECA, *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] 1 Lloyd’s Rep 121, Judgement of 15 July 2005, para. 121: “[I]t would be a strong thing to declare unenforceable a clause into which the parties have deliberately to defeat the reasonable expectations of honest men”; Han/Poon, supra note 44, 460; Lye, supra note 3, 2.

⁴⁵ SCA, *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125, Judgement of 18 April 2012, para. 41-42, per Rajah JA.