Courting peril: the lessons in Ohpen Operations UK Ltd v Invesco Fund Managers Ltd

The recent judgment of Mrs Justice O'Farrell in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) provided a boost for anyone entering a contract who would prefer to utilise a pre-agreed dispute resolution process in the event of a future contractual disagreement. Specifically, the case provides valuable guidance on the court's approach if asked to enforce a contractual dispute resolution clause providing for alternative dispute resolution (ADR).

Resolution of Differences

In taking a decision to include dispute resolution machinery in their contract, parties intend to give themselves the best opportunity to resolve contractual differences in the most appropriate fashion for them. Hopefully, in as amicable a way as possible.

Unsurprisingly, the best time to agree such machinery is before any dispute arises: when parties first negotiate their contract or lease. If pre-agreed dispute resolution machinery is incorporated, and later successfully called into play, future problems can be resolved speedily, and without the parties ever having to darken the doors of the courts.

As such, the existence of an effective dispute resolution provision guards against the potential for future acrimonious disruption to an on-going working relationship, and the delay and cost that a court based adversarial process may involve.

The *Ohpen* case considered the question whether court proceedings had been issued in breach of an agreed dispute resolution process and, if so, whether the court should stay (that is suspend), the court proceedings whilst the parties

dispute was mediated in accordance with the specific provisions in their contract.

Mrs Justice O'Farrell held that there was indeed a breach of the agreed process. The clear purpose of the clause the parties had agreed and incorporated was the mandatory requirement to operate the dispute resolution procedure set out before the parties become entitled to institute proceedings. In the circumstances, it was just that the court should exercise its inherent discretion to stay the case under the procedural rules in CPR Part 11.

The parties' dispute related to a framework agreement for the development and implementation of a digital online platform. However, the contract could have been of any kind. These types of clauses are often found in agreements involving public authorities. They also commonly appear in major development agreements and construction contracts.

By way of illustration, it is helpful to consider the content of the contractual provision which the parties in *Ohpen* had chosen to incorporate in their contract. Their dispute resolution clause provided for a series of escalating steps to be taken in an attempt to enable early resolution within a timetable. If the various prescribed steps failed, then the parties were entitled to commence court proceedings thereafter (subject to an exceptional right to do so at the outset in the set circumstances described). The clause was as follows:

Clause 11

11.1 Internal Escalation

11.1.1 The Parties will first use their respective reasonable efforts to resolve any Dispute [defined as “a dispute or failure to agree.”] that may arise out of or relate to this Agreement or any breach thereof, in accordance with this Clause. 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 [defined as “The employee of Ohpen and Client respectively appointed as a contract manager in accordance with …”], 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 a subsequent clause]. 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 Schedule], 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 […] (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 [defined as “the procedure for resolving Disputes contained in Clause 11 of the Agreement”], then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts.

11.3 Urgent Relief

Nothing contained in Clause 11.1 shall restrict either Party’s freedom to commence summary proceedings to procure or ensure performance of obligations and/or any required action to prevent further damages, preserve any legal right or remedy or to prevent the misuse of any of its Confidential Information.

Condition precedent to proceedings

In reviewing the relevant case law, Mrs Justice O'Farrell said it evidenced "the clear and strong policy" was in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation.

In a tellingly strong general expression of judicial support for ADR, she said that for the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty:

"would be to fly in the face of public policy as expressed in the Civil Procedure Rules", and

> "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…".

The case law demonstrated that a sufficiently well-drafted clause was capable of creating a condition precedent to the right to issue proceedings (*Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059).

It also showed that a contractual agreement to refer a dispute for resolution through an alternative dispute resolution procedure can be enforceable by a stay of proceedings. In that sense, a contractual provision of this kind is analogous to an agreement to arbitrate. It is a free-standing agreement that is ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction (if there are no pending proceedings).

In *Holloway v Chancery Mead Ltd* [2008] EWHC 2495 (TCC), Ramsey J had identified three requirements for such agreements to be enforceable. He had said:

"the ADR clause must meet at least the following three requirements: First, that 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."

The central question will, therefore, always be whether any given clause simply comprises a mere obligation to "negotiate" in good faith, which is void for uncertainty at law (*Walford v Miles* [1992] 2 AC 128), or whether it is sufficiently certain to be enforceable by the court.

Most helpfully, the Judge set out a series of principles to be applied. She said:

i) The relevant agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.

ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.

iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties.

iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the Court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

Separate and distinct procedures

Applying these principles, *Ohpen's* clause 11 passed the test.

Starting with the language in clause 11, the clause was not simply an agreement to attempt in good faith to negotiate a settlement. The parties had gone further than that. They had decided to put in place separate and distinct dispute resolution procedures that would apply at different stages.

They had also identified a particular procedure, namely an ADR procedure as recommended to the parties by the Centre for Dispute Resolution. That created an enforceable obligation requiring the parties to engage on mediation. Resort to CEDR, and participation in its recommended procedure, were steps of sufficient certainty for a court readily to ascertain whether they had been complied with.

Although the words "condition precedent" had not been used, the words that were used were clear that the ability to commence proceedings was dependent upon the failure of the mediation process described. The commercial purpose of the tiered procedure was plainly also to enable the parties to achieve swift resolution to any disputes that arose and avoid litigation. In particular, the purpose served by clause 11.1.2, including the provision for mediation, was to avoid disruption to development and implementation.

On the facts, the parties had referred the dispute to their executives and held a 'without prejudice' meeting. The dispute remained unresolved.

They should, therefore, have proceeded to use the CEDR Model Mediation Procedure to attempt to reach a settlement of the dispute. In circumstances where one party had chosen to commence court proceedings instead, this was an appropriate case for the Court to exercise its discretion to stay the proceedings initiated pending mediation. Directions were given to that end.

All in all, a valuable ready reckoner for anyone considering the enforceability of the dispute resolution clause in their own contract, as well as for transactional lawyers approaching the drafting of such provisions. Once included, such provisions cannot be ignored.

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