HERBERT SMITH FREEHILLS
DISPUTE RESOLUTION

This is the 10th in our series of **contract disputes practical guides**, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

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DISPUTE RESOLUTION CLAUSES:

PUTTING YOURSELF IN THE BEST POSITION

All too often, dispute resolution clauses may be treated as part of the boilerplate: the usual wording thrown in, with perhaps little thought for the particular circumstances.

But the question of how a dispute will be resolved – whether by litigation or arbitration, where and under what law – may make all the difference to whether or not you will be able to enforce your rights under the contract. So it is important to think about these matters at the outset. Once a dispute has arisen, it will generally be too late.



Adam Johnson QC, **Alexander Oddy** and **Nick Peacock** consider choice of law and jurisdiction/arbitration clauses, as well as clauses providing for mediation or other forms of ADR, and provide some practical tips on their use.

TOP TIPS FOR DISPUTE RESOLUTION CLAUSES:

- DO include a choice of law and either a jurisdiction or arbitration clause in your contract.
- DO remember that the court or tribunal may apply a different law to some issues, such as whether a party had authority to enter the contract.
- DON'T end up with a judgment or award that you can't enforce; think from the outset about where you might need to enforce and take local law advice as needed.
- DO think carefully about the pros and cons of litigation vs arbitration, including not only enforcement but also issues of privacy, availability of appeals, flexibility, etc.
- DON'T leave any doubt as to whether a choice of jurisdiction is exclusive or non-exclusive; use these words to make the intention clear.
- DO ensure dispute resolution clauses in related contracts are consistent unless there is a good reason to have different provisions.
- DON'T assume unilateral or one-way jurisdiction clauses will be effective everywhere.
- DO draft arbitration clauses carefully, ensuring there is a mandatory agreement to arbitrate before a tribunal of one or three arbitrators and a chosen seat of arbitration.
- DO think carefully about the choice of seat, whether you want an arbitral institution to administer your arbitration and, if so, which institution's rules are most appropriate.
- DO consider what else you might want to have in an arbitration clause, eg consolidation and joinder language (for multiple parties and multiple contracts) and an appointment mechanism for the arbitrator(s).
- DO consider including an ADR clause that specifies steps to be taken to try to resolve a dispute before commencing litigation or arbitration.
- If including an ADR clause, DO consider whether it should be binding or non-binding and ensure that the drafting is clear, with a clearly-defined process and time limits.

1. INTRODUCTION

There are all kinds of factors that come into play in determining the law to govern a party's contracts and the forum in which to deal with any disputes that arise.

There may be significant differences in how different legal systems deal with substantive issues such as how a contract should be interpreted, whether any additional terms should be implied, and what remedies should follow from a breach. The choice of forum to deal with disputes – whether by litigation or arbitration, and where and/or under which institutional rules – determines, to a great extent, the procedure that will apply (such as the extent to which documents must be disclosed and how the case will be presented) and how much flexibility there is to adjust the procedure. It also affects the rules that will apply to determine the applicable law.

A comparison of the substantive and procedural laws of different jurisdictions is outside the scope of this guide. What this guide does cover is summarised below:

Section 2 outlines how the applicable law is determined, and points out some issues to be aware of in terms of the extent to which the parties' chosen law will apply.

Section 3 considers some key factors in deciding between court jurisdiction and arbitration, including the important question of enforcement.

Section 4 looks at court jurisdiction, including the different types of jurisdiction clause, some important considerations in drafting such clauses, and the extent to which they will be effective.

Section 5 considers arbitration clauses, including the essential elements to include in such clauses.

Finally, **section 6** looks at clauses providing for steps to be taken to resolve disputes by ADR before commencing litigation or arbitration.

Where relevant, the guide considers the impact of Brexit, in particular once the current rules on jurisdiction and enforcement under the Brussels Regime (ie the recast Brussels Regulation and Lugano Convention) no longer apply as between the UK and, respectively, the EU and the EFTA countries of Iceland, Norway and Switzerland.

At the time of writing, some elements of a draft agreement governing the UK's withdrawal from the EU have been agreed, including a transition period extending to the end of 2020, but nothing is certain until a withdrawal agreement is finalised. That is likely to take some months.

"Where parties don't include a dispute resolution clause in their contract, or the drafting is unclear, this can be a recipe for confusion, delay and satellite litigation"

2. CHOICE OF LAW

To determine whether a choice of law will be effective, you first need to consider which court or tribunal is to hear the dispute, as each will apply its own rules to determine the applicable law.

The English court, in common with other EU Member States (other than Denmark), will apply the Rome I Regulation to determine the law governing contractual obligations. The starting point is that the court will apply the law chosen by the parties. If no choice is made then, generally speaking, it will be the law of the country where the party performing the main obligation of the contract is based (eg the seller in a sale of goods contract), unless the contract is "manifestly more closely connected" with another country. Under the Rome II Regulation, it is also possible to choose the law to govern non-contractual obligations (ie torts). None of this should be affected by Brexit: under Rome I and Rome II it is irrelevant whether the chosen law is the law of an EU Member State, and the UK government has indicated its intention to incorporate these provisions into national law.

Outside the EU, most countries will respect a choice of governing law, though some countries will require the contract to have an international connection (eg one of the parties or the place of performance) before they will apply a foreign law. Where the dispute is to be determined by arbitration, the arbitration laws in most arbitration seats provide that the tribunal will decide the dispute in accordance with the substantive law chosen by the parties. If the parties have not included a substantive law, the tribunal usually determines the substantive law it considers appropriate, subject to any mandatory principles of the law of the seat of the arbitration.

Where a national court is required to apply a foreign law, this can increase costs and cause delays because of the need to prove the provisions of the applicable law, typically by expert evidence. Arbitral tribunals are generally used to applying laws in which the tribunal and counsel may not, themselves, be qualified, but this will also often entail the use of expert evidence.

A typical choice of law clause:

This Agreement and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law.

Although the English court will generally respect a choice of law, there are some circumstances where the chosen law may not apply (at all or to a particular issue). Some key points to look out for are set out below:

Counterparty's country of incorporation differs from chosen law

This will obviously be a common occurrence. The question of whether the counterparty had authority to enter into the contract will be governed by the law of the counterparty's incorporation rather than the governing law of the contract. This can cause difficulties – see *Integral Petroeum*, considered overleaf.

Jurisdiction of proceedings differs from chosen law

The court can apply overriding mandatory provisions of the law of the forum regardless of the chosen law. This might include eg competition laws or unfair contract terms legislation. The court can also refuse to apply a provision of the chosen law if that would be manifestly incompatible with public policy. This tends to be applied sparingly; it might include eg contracts in restraint of trade.

Place of performance differs from chosen law

The court has a discretion to apply overriding mandatory provisions in the place of performance which would make performance unlawful.

Particular law chosen to avoid the law which would otherwise apply

If all elements relating to the contract are connected with another country, the court will apply any rules of that country that cannot be contracted out of.

Insurance, consumers and employment

There are also special choice of law rules where insurance, consumers or employment are involved, but these are not considered further in this guide.

In *Integral Petroleum SA v SCU-Finanz AG* [2015] EWCA Civ 144 (considered here on our Litigation Notes blog), two Swiss companies purported to enter into a supply contract for the sale of oil and gas. The contract provided for English law and exclusive English jurisdiction. The contract was signed on behalf of the supplier by one of the two officers of the company, but under Swiss law the power of signature on behalf of the company could only be exercised by the two officers jointly.

The key question was how the issue of the missing signature should be characterised. If it was a matter of formal validity, article 11 of Rome I meant that English law would apply as the law governing the contract. If however it was a matter of authority to bind the company, this fell outside the scope of Rome I; under English common law rules, the law of the place of incorporation would apply to issues of capacity and internal management, including who was authorised to act on the company's behalf.

The Court of Appeal found that it was a question of authority to bind the company and therefore Swiss law applied. The contract was therefore not binding on the supplier.

3. COURTS VS ARBITRATION

Parties have a basic choice between having disputes determined by a national court or agreeing that disputes will be submitted to arbitration.

If the contract is silent on the issue (though it should not be) there will still be one or more courts that have jurisdiction. So, for example, you will generally be able to sue the counterparty in the courts of its country. Each court will apply its own rules to determine whether or not it has jurisdiction over the particular dispute. In contrast, arbitration requires consent; an arbitral tribunal will not have jurisdiction unless it has been agreed between the parties.

The most important factor in deciding between court jurisdiction and arbitration will often be enforcement: where are the counterparty's assets likely to be, and will an English (or other court) judgment or an arbitral award be enforceable there?

"There is no point getting a judgment or award in your favour only to find you can't enforce it where your counterparty's assets are"

Currently, English judgments are easily enforceable within the EU/EFTA under the Brussels Regime. Post-Brexit, these arrangements are likely to continue to apply where the legal proceedings leading to the judgment were commenced before the end of an agreed transition period. (The UK's position is that current rules on enforcement should also apply where the relevant jurisdiction clause was agreed before the end of that period, but this has not to date been agreed by the EU.) Otherwise, it will depend on what (if any) alternative arrangements are agreed between the UK and the EU going forward.

If nothing else is put in place, the UK government has said it intends to accede to the Hague Convention on Choice of Court Agreements (it is currently a party by virtue of EU membership). That means English judgments should continue to be enforceable in EU Member States apart from Denmark (as well as in Mexico and Singapore) where they were obtained pursuant to an exclusive jurisdiction clause; Hague does not apply where a clause is non-exclusive.

Outside the EU, there are reciprocal arrangements between the UK and a number of countries, including many commonwealth countries, which allow money judgments to be enforced.

Where there is no reciprocal arrangement, it may well be possible to enforce an English judgment for example by suing on it as a debt. Post-Brexit, if a judgment falls outside the Hague Convention (eg because the jurisdiction clause was non-exclusive or because of uncertainties regarding the application of Hague to clauses agreed before the UK accedes in its own right), and if no other agreement is reached between the EU and the UK, the judgment may still be enforceable in EU Member States under their own national rules. That will be a matter for local law advice.

If there is significant doubt about whether an English court judgment will be enforceable where the counterparty's assets are located, you will want to agree on some other court's jurisdiction or that disputes will be resolved by arbitration. If there is significant uncertainty about where in the world the counterparty's assets are or may be in future, arbitration is likely to be a better option.

Arbitral awards are widely enforceable under the 1958 New York Convention (an international treaty to which 159 states worldwide are party including all EU Member States).

The New York Convention allows a party to approach a signatory state's court for recognition and enforcement of an arbitral award as if it were a domestic court judgment, with only very limited grounds for that enforcement to be challenged. There are also a number of other regional treaties which may allow for the enforcement of certain arbitral awards in some emerging market jurisdictions. While the New York Convention regime is generally very effective, there may be some practical or procedural hurdles to enforcing an award in particular jurisdictions, particularly those where understanding of arbitration is still in its infancy. The enforcement of arbitration awards will not be affected by Brexit.

Some other key factors to take into account in deciding between court jurisdiction and arbitration, apart from enforcement, are set out below.

Privacy/confidentiality

Arbitral proceedings are private, whereas court proceedings are generally public. Depending on the law of the seat and the parties' agreement, arbitral proceedings can also be confidential (such that the fact of the arbitration, all documents produced, and the resulting award are confidential).

Quality/choice of court or tribunal

A commonly cited attraction of the English court is the quality of its judiciary. When arbitrating, the parties can usually choose arbitrator(s) with knowledge and expertise related to the subject matter of dispute.

Neutrality

Parties can choose a neutral seat of arbitration to avoid any perceived "home turf" advantage.

Party autonomy

Arbitration tends to allow more scope to craft a process to suit the particular dispute. English court procedures have also become more flexible in recent years.

Potential for appeal

An arbitration award can generally only be challenged on very limited grounds, set out in the law of the seat. In general, these relate to lack of jurisdiction or serious procedural irregularity (not usually including an error of fact or law). Parties can appeal an English court judgment if there is a "real prospect of success", subject to permission.

Summary procedures

These are available in court proceedings but less commonly in arbitration, though the parties may be able to provide for the tribunal to make determinations on a summary basis, and the arbitral institutions are increasingly including provisions allowing for summary determination.

Multi-party and multi-contract disputes

Only those who are parties to the arbitration agreement can be brought in to the arbitration, unless they agree. Similarly, if parties want disputes under related contracts to be resolved together, they need to provide for that in each contract. While many of the institutional rules now provide some default language for these situations, there may need to be additional or alternative bespoke drafting.

Speed/cost

It used to be thought that arbitration was quicker and cheaper than English court proceedings, but in fact it can be faster or slower, and either more or less costly, depending on many factors.

4. JURISDICTION CLAUSES

If the parties have agreed to submit disputes only to court jurisdiction, rather than arbitration, there are essentially three alternative types of jurisdiction clause they might wish to include in their contract:

(1) Exclusive: The parties agree that only the named court has jurisdiction.

(2) Non-exclusive: The parties agree that the named court has jurisdiction, but either party is free to start proceedings in any other court that will accept jurisdiction over the dispute (which will depend on their own conflict of laws rules).

(3) Unilateral, or one-way: The parties agree that the named court has exclusive jurisdiction in proceedings brought by one party but non-exclusive jurisdiction in proceedings brought by the other party (ie it can sue in other courts, either as identified in the clause or any court that will accept jurisdiction).

Unilateral clauses are common in situations where one party has superior bargaining power, such as loan agreements. They provide flexibility if it may not be clear where the counterparty's assets will ultimately be located. However, they are not free of risks. The English court has no difficulty with such clauses, but some courts may not uphold them, eg on grounds that they lack mutuality or are somehow uncertain. Where a foreign court considers such a clause invalid, it may accept jurisdiction over proceedings brought in breach of it, or may refuse to enforce a judgment obtained pursuant to it. Where this is a potential concern, local law advice should be sought.

It is also possible to have more complex alternatives, providing for litigation but with an option for one or both parties to refer the dispute to arbitration, or vice versa.

It is important to be clear whether a choice of jurisdiction is intended to be exclusive or non-exclusive, ideally by using those words. Otherwise, the court will need to interpret the clause to determine how it would reasonably be understood in its context. This can lead to uncertainty and satellite litigation.

Where there are related contracts, it will generally be preferable to make the clauses consistent. If there is a good reason to have different choices of jurisdiction in the different contracts, it is important to be clear in what circumstances each is intended to apply, and to recognise that this may lead to fragmentation of proceedings.

Where the counterparty does not have an address in England and Wales at which it can be served with proceedings, it is advisable to require the appointment of a service agent within the jurisdiction.

A typical jurisdiction clause

Each party irrevocably agrees that the courts of England shall have [exclusive / non-exclusive] jurisdiction in relation to any dispute or claim arising out of or in connection with this Agreement or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims).

Each party irrevocably waives any right that it may have to object to an action being brought in those courts, to claim that the action has been brought in an inconvenient forum, or to claim that those courts do not have jurisdiction.

The parties' choice of jurisdiction will ordinarily be effective, meaning that any dispute can proceed in the chosen jurisdiction, but there are a number of exceptions. These may be based on the nature of the contract (there are particular rules for insurance, employment and consumer contracts) or the subject matter of the dispute (eg land, intellectual property rights or company law matters) or a party's submission to the jurisdiction of some other court.

Putting aside these exceptions, where the parties have included an English jurisdiction clause in their contract, the English court will almost certainly accept jurisdiction over the dispute – unless the clause is non-exclusive and proceedings were first commenced in an EU/EFTA court, in which case the English court must stay its proceedings until the other court determines whether it has jurisdiction.

Whether the English court will accept jurisdiction is not, however, the end of the matter. There is also the question of whether a foreign court will defer to the English court if proceedings are brought in the foreign court's jurisdiction.

Where it is an EU/EFTA court, it must defer to the English court if the clause is exclusive, or if it is non-exclusive and the English proceedings were commenced first. That is likely to remain unchanged for any jurisdiction clauses agreed before Brexit or during an agreed transition period. The position thereafter will depend on what (if anything) is agreed between the UK and the EU.

As noted above, the UK government intends to accede in its own right to the Hague Convention, which means that EU Member State courts (as well as Mexico and Singapore) will be required to defer to an exclusive English jurisdiction clause in most circumstances.

Non-EU/EFTA courts will apply their own rules to determine whether to stay in favour of an exclusive English jurisdiction clause (including an exclusive element of a unilateral clause). Many countries will respect an exclusive jurisdiction clause in favour of another court.

There are difficult issues relating to unilateral clauses, ie if one party is required to commence proceedings in the English court and the other party has greater flexibility. A number of countries, including some EU Member States (eg France), have held some types of unilateral clause to be invalid. Further, unilateral clauses are considered non-exclusive under the Hague Convention. It is not clear whether clauses providing for exclusive jurisdiction/arbitration options would be considered exclusive or non-exclusive for these purposes.

The English court may in some circumstances grant an anti-suit injunction to prevent the counterparty continuing to pursue foreign proceedings brought in breach of an exclusive English jurisdiction clause. Anti-suit injunctions cannot be granted in respect of proceedings in EU/EFTA courts, as this has been held to be incompatible with the Brussels Regime. That may change post-Brexit. If an anti-suit injunction is not available, the parties may end up with two sets of proceedings, leading to additional costs and the obvious risk of inconsistent judgments.

"Parties should balance the flexibility of a non-exclusive or unilateral jurisdiction clause against the advantages of an exclusive clause, including that the latter may be a more effective choice post-Brexit"

5. ARBITRATION CLAUSES

An arbitration clause is a contractual agreement to limit the jurisdiction of courts which would otherwise have jurisdiction over a dispute under their own conflict of laws rules. The parties instead have their disputes resolved by a tribunal of one or three arbitrators, whose award will be final and binding. There are normally limited rights to challenge that award under the law of the seat, typically restricted to grounds arising from procedural irregularity which affects the substantive fairness of the arbitration, or on the basis that the tribunal lacked jurisdiction. Some fundamental features that any arbitration clause should contain are considered below.

Unequivocal agreement

There needs to be an unequivocal agreement to submit disputes to a tribunal to be resolved by binding arbitration. The English courts will generally strive to give effect to arbitration agreements, but they can only do so where the clause shows a clear intention that arbitration will be the mandatory form of dispute resolution, either generally or in particular circumstances.

Governing law of the arbitration agreement

While an agreement to arbitrate is usually a clause in a larger contract, it is viewed as a separate contract within that main contract. So if the main contract is found to be invalid, it does not necessarily result in the arbitration clause also being invalid or non-existent. This means that the arbitration agreement can also have its own separate governing law. As the governing law of the arbitration agreement can affect whether or not the arbitration agreement was valid and enforceable, it is advisable to choose a governing law for the arbitration agreement. This will usually be the same as the law governing the main contract or the law of the seat.

Seat of arbitration

The "seat", sometimes also called the "legal place" of arbitration, should be identified in the clause. The seat of arbitration is the jurisdiction whose arbitration law will govern the arbitral process. Some aspects of that arbitration law may be mandatory, while others can be amended or added to by party agreement (such as through the choice of institutional rules).

The courts of the seat will also have "supervisory jurisdiction" over the arbitration and will be the courts approached to support the arbitration, eg if a party wishes to challenge an arbitrator in an ad hoc arbitration, or obtain interim relief (although this may also be available from the arbitral tribunal or, on occasion, courts of another jurisdiction). A party will also approach the courts of the seat to challenge an arbitral award. The courts of the seat do not have jurisdiction over the substance of the dispute where there is a valid and binding arbitration agreement. Most seats of arbitration will take a non-interventionist approach and view their role as supportive, but there are exceptions.

The choice of seat is not necessarily where any hearings will take place. A seat should be chosen for its arbitration legislation and a strong track record of supportive, but not interventionist, judicial decision-making rather than purely on the basis of its convenience in terms of location.

"The choice of seat is an important consideration in any arbitration clause, as it determines which country's law will govern the arbitral process and which courts will have supervisory jurisdiction"

Reference to institutional or UNCITRAL rules

It is generally advisable to agree that the rules of a well-known and experienced arbitration institution will apply, to provide a procedural framework and administrative support.

It is possible to have an ad hoc arbitration, not tied to a particular institution, in which case the procedure is dictated by the parties' agreement, the national law of the chosen seat and the tribunal's procedural decisions. An agreement for an ad hoc arbitration may incorporate by reference the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL). This will generally be advisable.

Institutional rules do differ and one institution's rules may be more appropriate for a particular transaction depending on the likely value of disputes (as fees are determined either on an hourly or ad valorem basis), the availability of emergency arbitrator or expedited procedures and the rules relating to multi-party and multi-contract issues.

Number and appointment of arbitrators

The clause should specify whether there will be one or three arbitrators, and address how they will be appointed (unless dealt with satisfactorily in any relevant institutional rules).

Other aspects to consider

These include: specifying a language in which the arbitration will be conducted (important if parties have different native tongues); allowing for disputes involving multiple contracts to be resolved together; allowing for the joinder of parties; deciding whether to keep or remove non-mandatory rights of challenge or appeal; planning for interim relief and emergency/expedited processes; drafting a summary judgment process or choosing a set of rules which provide for such a process; inserting a wider confidentiality clause than that in the chosen rules or arbitral seat; and providing for a process agent for any court actions in support of arbitration where the counterparty is outside the jurisdiction of the seat. It is also possible to include more details about the arbitration process itself, eg how document production and issues of privilege will be dealt with.

A typical basic arbitration clause:

This arbitration agreement shall be governed by [X] law.

Any dispute or claim arising out of or in connection with this Agreement or its subject matter, existence, negotiation, interpretation, validity, termination or enforceability (including any non-contractual dispute or claim) (a Dispute) shall be referred to arbitration and finally settled under the Rules of Arbitration of [X institution] (the Rules) which Rules are deemed incorporated by reference into this clause.

The number of arbitrators shall be [one/three].*

The seat of the arbitration shall be [City + Country].

The language of the arbitration shall be [X].

*Note: By not providing a specific appointment process, the default appointment process under the chosen institutional rules would apply.

As noted earlier, it is possible to have an optional clause, which provides for court jurisdiction but gives one or both parties an option to submit the dispute to arbitration instead (or vice versa).

Such a clause requires particularly clear drafting, both as to the circumstances in which the option may be exercised and to ensure that if the option is exercised (or not exercised, where the clause provides for arbitration with an option to litigate) the submission to arbitration is mandatory.

Kruppa v Benedetti [2014] EWHC 1887 (Comm) (considered here) illustrates the need for clear drafting of an arbitration clause. The relevant clause provided: "In the event of any dispute ... the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction".

The Commercial Court refused to grant a stay of proceedings under section 9 of the Arbitration Act 1996, finding that the parties had not, in fact, agreed to refer any dispute to arbitration. Rather, they had agreed to "endeavour" to resolve the matter through Swiss arbitration. The parties had not agreed on a number of arbitrators or on a Swiss cantonal seat to appoint arbitrators in the absence of party agreement.

The court held that the parties had agreed to attempt to agree on a form of arbitration between them in Switzerland. If they failed to reach that agreement, the English court would have non-exclusive jurisdiction.

6. ADR CLAUSES

Parties may agree that certain steps are to be taken to try to resolve any dispute that might arise before commencing litigation or arbitration.

Such clauses may be relatively simple, merely providing for one form of ADR, most commonly mediation, or they may be more complex, with multiple stages which may include meetings between senior representatives of the parties to try to resolve the dispute, followed by mediation, and ultimately court or arbitral proceedings. These more complex clauses are sometimes called multi-tier or escalation clauses.

ADR clauses fall into two categories: binding clauses, which require the parties to take the identified steps as a condition precedent to commencing court or arbitral proceedings, and non-binding clauses, which merely encourage the parties to take the relevant steps.

Historically, there was some doubt as to whether an ADR clause could be binding. The English court would not enforce a mere agreement to negotiate, as it lacked certainty as to what the parties must do in order to comply. It is now clear that such clauses can be enforced, so long as they are clear as to what the parties must do before being able to move on to the next stage of the process.

"A binding ADR clause should set out a clearly-defined process, with clear time limits and a clear obligation on the parties to participate in it"

The courts have in some cases taken a relatively liberal approach to enforcing ADR clauses (see box below). However, parties will not wish to rely on the courts being liberal; if the intention is to have a binding clause, it should be made very clear. Equally, parties should not agree to an ADR clause lightly, thinking it won't be enforceable: there is a risk that the courts will enforce a clause even if it is less than entirely clear.

In *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), considered here, the Commercial Court considered a clause which provided that, in the case of any dispute arising out of the contract, the parties would "first seek to resolve the dispute or claim by friendly discussion". Any party could notify the other of its desire to enter into consultation to resolve the dispute. If no solution could be reached in four weeks then the non-defaulting party could refer the dispute to arbitration.

The court found that the clause was enforceable. Unlike in some previous cases where clauses had been held to be unenforceable, it was a clause within a binding contract and it was clear as to the period of time during which the parties were obliged to negotiate. In the judge's view, the agreement was neither incomplete nor uncertain. The fact that it may be difficult to prove a breach in some cases did not mean it lacked certainty. Enforcement was in the public interest, both because it meant enforcing obligations which had been freely undertaken and because the aim was to avoid what might otherwise be an expensive and time consuming arbitration.

The advantages of ADR clauses include the following:

Facilitating cooperation

Where parties wish to retain a long-term business relationship, there may be benefit in providing opportunities for forms of dispute resolution which can be achieved at a business-to-business level, before a dispute is escalated to a more formal process.

Giving time for reflection

Including a mandatory process before either party can commence proceedings may help to take the immediate heat out of a dispute, forcing the parties to take time to consider their positions rather than making hasty decisions they might regret later.

Avoiding time and cost of proceedings

By giving the opportunity for an early resolution, such clauses may enable parties to avoid the time and cost associated with litigation or arbitration. Conversely, however, where the process does not lead to a resolution, it may simply add additional layers of time and expense.

But careful drafting is needed to avoid some common pitfalls. As discussed earlier, it is very important to be clear whether or not the process is intended to be mandatory and, if it is, to ensure the process and the time limits are clearly defined. The counterpoint to having a clearly defined process, however, is the challenge in designing a process that will be appropriate for every type of dispute that may arise in future. A complex, multi-tier process might seem a good idea at the time of drafting, but may provide an unwanted obstacle once a dispute arises, the parties are entrenched in their positions, there is little prospect of reaching agreement, and one party wants to get on with proceedings.

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