25 The Enforcement of ADR Clauses

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The term ADR, or Alternative Dispute Resolution, refers to a variety of techniques alternative to litigation, including arbitration,[1] apt for the resolution of disputes. The main difference between arbitration and other alternative dispute resolution processes is that whilst the former is regulated by statute, that is the 1996 Arbitration Act,[2] none of the latter processes is so fettered. ADR clauses may be drafted either in simple form, referring a dispute to a single process for resolution, or in multi-tiered form, referring the dispute to two or more ADR processes sequentially, generally escalating from facilitative towards adjudicative processes. The advantage of multi-tiered clauses lies in the fact that the various facets of a complex dispute may be resolved by the most appropriate process at the relevant stage, even though such clauses may render the process more cumbersome. For the purpose of the current analysis, the enforcement of arbitration clauses, simple ADR clauses and multi-tiered clauses will be considered separately.

Arbitration Clauses

The relationship between the arbitral process and the courts has, in default of appropriate provisions regulating arbitration, proved to be a cause of great contention, not least because the courts have, in various cases,[3] refused to enforce an arbitration agreement. Courts often perceive such clauses as an attempt by the parties to oust their jurisdiction. Subsequent judgements however demonstrate that the courts did on occasion tend to give effect to the intention of the parties enshrined in the agreement to arbitrate a future dispute by ordering a *liberatio ab observantia iudicii* in view of the lack of appropriate statutory provisions specifically regulating the matter. Section 15 (3) of the Arbitration Act has radically altered the position subsisting prior to its promulgation by divesting the courts of their discretion in this matter, and thus, in accordance with that particular provision, the courts are bound in such cases to stay proceedings in favour of arbitration. This course of action is not however directed by the courts ex officio in cases where the plaintiff has, in breach of the agreement to arbitrate, instituted litigation proceedings, and thus, the court shall only order a stay of proceedings so brought when the relevant plea has been raised in *limine litis*. In fact, failure on the part of the defendant to raise the plea for a stay at the appropriate stage amounts to a tacit waiver on the part of defendant to enforce such clause at a later stage. Moreover, for the plea for a stay to succeed, the arbitration clause should comply in form with the provisions of the Arbitration Act, and thus the agreement to arbitrate must necessarily be in writing,[4] this provision being a common provision in most statutes[5] regulating arbitration, on the basis that by entering into such agreement the parties would be renouncing their right of recourse before a court of law in respect of such claim. Though the clause may include further particulars, including, *inter alia*, the number, quality and appointment of arbitrators and the applicable law or other considerations on which the award is to be based, no other particular formality is required by the act, any lacunae being regulated by the default non-mandatory provisions of the Act itself. However, for an arbitration agreement to be enforceable, its terms must be clear and certain in the sense that it must be evident that the parties intended any future contention to be resolved by the decision of an arbitrator other than by the courts.

A thorough reading of the Act proves that the courts do play a residual role, despite being limited and delayed, in respect of arbitration, such residual role consisting in the supervision and support of the arbitral process itself. Such jurisdiction arises on the issue of the award which, in virtue of section 70 enjoys the status of executive title, and therefore

1 Some authors do not consider arbitration as falling within the realm of ADR even though it is an alternative in itself

2 Prior to the enactment of the Arbitration Act, the arbitral process was regulated by a number of provisions in the Code of Organisation and Civil Procedure (Sections 968-987) and prior legislation.

3 *Portelli v. Felice Inglott* [Vol.XXII-III-195]; *Needham Foster v. Gatt* [Vol.XXV-I-1071]; *Simpson v. Huber* [Vol. XXVIII-I-647]

4 Section 2, Arbitration Act

5 Article 7, UNCITRAL Model Law on International Commercial Arbitration

equal to a court judgement. The court also exercises a residual role in that a challenge of the award on any of the grounds listed in Section 70 of the Act is to be lodged before the Court of Appeal. Finally, a meticulous examination of the arbitration clause is warranted in every case as the clause may itself limit the jurisdiction of the arbitral tribunal, by, *inter alia*, limiting the reference only to issues of quantum, or liability, such issues of substantive jurisdiction being within the power of the arbitral tribunal itself, subject to challenge in terms of section 70 (3) (iii) of the Act.

ADR Clauses

ADR clauses which refer to any process apt for the resolution of disputes other than arbitration are not subject to any statutory formalities, and on this basis, their enforcement may give rise to difficulty. It should however be noted at this preliminary stage that sub-section (7) of section 10 of the Act does refer to 'mediation, conciliation or other procedures' which may be utilized in a bid to encourage the settlement of the dispute and further that if the dispute is resolved prior to the commencement of the arbitral proceedings or prior to the issue of an award, the tribunal is to issue an order for termination of the arbitral proceedings, or, if requested by both parties, to record the settlement in a consent award.[6] Since, as stated above, ADR clauses are not fettered by any statutory formalities, the clause need not be in writing, the only applicable principles being those of general contract law, including that the parties should have achieved consensus *ad idem*, in the sense that both should have intended to refer any future dispute arising between them to some ADR process. In other words, proof of a verbal agreement to refer the dispute to any ADR process is theoretically valid and may be invoked by one party against the other. The pertinent question however relates to the enforcement of such clauses, and thus whether a court will enforce an ADR clause or decline so to do when any of the parties to such a clause has instituted litigation proceedings in breach thereof. Due to the fact that such issues have never surfaced before our courts, reference will be made to judgements of foreign courts which have sought to resolve this dilemma.

It is sound to state that under English law the enforceability of ADR clauses depends on the intrinsic nature of the clause itself and the processes to which it refers. In *Walford v. Miles & Courtney*[7] and *Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.*,[8] the English courts asserted that an agreement to negotiate is not enforceable at law, and this on the basis that a court cannot establish with sufficient certainty what the obligations which it is being asked to enforce are, nor can a court monitor or assess compliance thereto. However, English courts have demonstrated their willingness to enforce such clauses when compliance thereto was easily determinable, such being especially applicable when the process provided for is a process which is binding as to its result. Thus, in *Jones v. Sherwood Computers Services plc.*,[9] a clause which provided that any disputes should be referred to the expert determination of a neutral, which determination was to be final, conclusive and binding on the parties, was enforced by the courts.

A clause which refers any future dispute to a non-binding ADR technique may also be enforced if, other than being in *Scott v. Avery* form, that is by making the reference to such ADR process a condition precedent to the right of either party to refer the dispute to arbitration or litigation, the clause includes a time-limit within which settlement of the dispute must be attempted. A clause drafted in this form overrides the difficulties faced by the courts in *Walford v. Miles*, in which case the relevant clause provided for negotiations 'for such time as is reasonable'.

Though early decisions of the Australian courts have declined to enforce ADR clauses, the same courts have recently found grounds on the basis of which an ADR clause may be enforced. The courts, in one of the earlier decisions, that is *Allco (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*[10] refused to enforce an ADR clause, and this on the basis that such clauses constituted an attempt by the parties to oust the jurisdiction of the courts, whilst in another case, *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.*,[11] the courts decided, in consonance with the decision of the English Courts in *Walford v. Miles*, that an agreement to negotiate lacks the necessary certainty to create legally binding obligations. With regard to the Allco case it is noted that such clauses do not oust the jurisdiction of the Courts, but, as our own courts have held with reference to arbitration clauses, ADR clauses merely limit and delay such jurisdiction so that the right of either

6 Section 46(1), Arbitration Act
7 *Walford v. Miles* [1992] 1 All ER 453
8 *Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.* [1975] 1 All ER 716
9 *Jones v. Sherwood Computers Services plc.* [1992] 1 WLR 227
10 *Allco (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*, unreported, Supreme Court of Queensland, 12th March 1990
11 *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.* [1992] 28 NSWLR 194

party to refer the dispute to litigation subsists unless the parties have successfully negotiated settlement and reduced such terms to writing, in which case they would be contractually bound thereto. The same arguments relating to the issue of uncertainty raised above with regards to the status of ADR clauses under English law may be availed of to counter the Australian court's decision in *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.* The Supreme Court of New South Wales, in *Hooper Bailie Associated Ltd. v. Natcon Group Pty. Ltd.*[12] whilst ordering the stay of arbitration proceedings pending the conclusion of conciliation proceedings, held as follows:

> An Agreement to conciliate or mediate is not to be likened... to an agreement to agree... Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.

And the same court, in *AWA Limited v. Daniels and Others*,[13] whilst expressly disapproving of the decision handed down in *Allco (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*, considered the commencement of litigation without compliance with contractual provisions as an abuse of the process. The obtaining situation in Australia is applicable in the United States, so that the courts, in *Southerland Corp. v. Keating*[14] held that

> A contract providing for alternative dispute resolution should be enforced and one party should not be allowed to evade the contract and resort prematurely to the courts.

It is evident, from the judgements of the courts themselves that the specific problems relating to enforcement of ADR clauses are reminiscent of the difficulties which emerged in the past in relation to contractual agreements to arbitrate, and thus it is envisaged, as the evolving situation within the English and Australian jurisdiction demonstrates, that due to the developing nature of ADR, problems of enforcement should be gradually eradicated and the status of ADR clauses clearly defined.

Multi-Tiered Clauses

A theoretical analysis of the enforcement of ADR clauses involves an admixture of the principles and suggestions outlined above. Hence, a multi-tiered clause gives rise to the same problems above with regards to the enforcement of ADR clauses, even though the extent of such problems depends on the type of processes for the use of which such clause provides. In other words, a multi-tiered clause which comprises, *inter alia*, a reference to arbitration should be capable of enforcement, at least in so far as it relates to arbitration, and this in view of section 15 (3) of the Arbitration Act providing for a stay of court proceedings. An essential requirement which must be satisfied nonetheless is that of writing, and thus, unless such multi-tiered clause is written into a contract or incorporated by reference, such clause, or part thereof, would not be capable of enforcement. It is noted that the UK Arbitration Act expressly provides for the enforcement of such clauses, article 9 (2) thereof providing that an application requesting the court to stay proceedings brought before it may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures. The introduction of a similar clause in the Arbitration Act would alleviate some of the difficulties which could arise in an attempt to enforce a multi-tiered arbitration clause.

On the other hand, multi-tiered clauses which are entirely devoid of a reference to arbitration, enjoy the same status of a simple ADR clause, to which the above analysis applies.

[12] *Hooper Bailie Associated Ltd. v. Natcon Group Pty. Ltd.* [1992] 28 NSWLR 194
[13] *AWA Limited v. Daniels and Others*, unreported, Supreme Court of New South Wales, 24th February 1992
[14] *Southerland Corp. v. Keating* [1984] 456 U.S. 17