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ENFORCING AN ADR CLAUSE:

Cott UK Ltd v *Barber Ltd*

I. INTRODUCTION

WITH the increasing popularity and use of alternative dispute resolution (ADR)[1] processes like mediation, conciliation and negotiation,[2] commercial contracts are beginning to see the introduction of clauses referring disputes, which arise under the contract, to ADR processes other than arbitration.[3]

In relation to these clauses, there has been doubt as to whether they are enforceable and a host of arguments have been levelled against the enforceability of such clauses.[4] As there is currently no legislation relating to this, theories of enforceability have been based on the careful drafting of the clause so that reference to the ADR process is a condition precedent to the arising of liability[5] and on the idea that ADR processes are designed for resolving disputes.[6] *Cott UK Ltd* v *Barber Ltd*[7] represents a step towards the courts acknowledging the validity of an ADR clause and accepting that it is enforceable.

1 For a discussion of the term ADR and the processes it comprises, see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan) at 414-415.

2 For a discussion of the ADR processes in general, see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan) at 415-421.

3 While arbitration is still considered to be one of the main ADR processes, it has been generally accepted by the legal community. As such, clauses referring disputes to arbitration are common place. Further, the Arbitration Act 1953 (Cap 10, 1985 Rev Ed) and the International Arbitration Act 1995 (Cap 143A, 1995 Rev Ed) have by and large resolved the issues relating to their enforceability.

4 These arguments against enforceability and related issues have been explored elsewhere. See J Lee "The Enforceability of Mediation Clauses in Singapore" [1999] SJLS 229.

5 This is commonly referred to as *Scott* v *Avery* form after the 1856 case of the same name.

6 See LV Katz "Enforcing an ADR Clause – Are Good Intentions All You Have?" (1988) 26 American Business Law Journal 575, 583; M Shirley "Breach of an ADR Clause – A Wrong Without Remedy?" [1991] Australian Dispute Resolution Journal 117, 118.

7 [1997] 3 All ER 540.

II. Facts and Decision

The defendant entered into an agreement with the plaintiff to bottle and package soft drinks produced by the plaintiff. The contract provided for "minimum" obligations on either side; the plaintiff had to provide certain quantities of soft drinks per week for bottling and packaging while the defendant had to make available the facility to bottle and package a certain minimum quantity per week.

Under the agreement, clause 14 provided:

> "Any dispute or difference arising from the construction or performance of the agreement shall be referred to the decision of a person to be appointed by the Director General of the British Soft Drinks Association. The person chosen or appointed shall be an independent consultant and shall act as an expert and not as an arbiter and his decision shall be final and binding on the parties".

Although clause 14 was headed "Arbitration", this was a clause referring the dispute for expert determination[8] which falls under the umbrella of ADR processes. Subsequently, both parties alleged a breach of the minimum obligations and the defendant invoked clause 14 and wrote to the Director General who appointed a Mr Foulsham as the expert. The plaintiff issued proceedings against the defendants and the defendants applied to the court to stay the proceedings on the ground that the parties had agreed to refer the matter for expert determination. The plaintiffs opposed the application on the grounds that clause 14 was uncertain whether the process was arbitration or expert determination and therefore a stay was inappropriate.[9]

As a start, Hegarty J noted with interest that counsel for the defendant chose to characterise clause 14 as an agreement to refer to an expert for determination as opposed to a binding arbitration clause.[10] Presumably, this was interesting because the area relating to the enforcement of an arbitration clause was clear whereas the area relating to ADR processes was not.

He went on to consider the clause to determine if it required arbitration or expert determination. He concluded that despite the use of the heading word "Arbitration", this was only a catchphrase and this could not prevail

8 *Supra*, note 7, at 546.

9 It appears that counsel for the plaintiffs were basing this argument on the requirement for certainty under principles of contract law. For a discussion of the uncertainty argument, see note 4, at 231-235.

10 *Supra*, note 7, at 545.

over the actual wording of the clause. He opined that the clause itself was clear that it required disputes to be referred for expert determination.[11]

Having decided on the nature of clause 14, he went on to consider whether the court had any power to stay proceedings on the basis of a clause providing for expert determination as opposed to an effective arbitration clause. He acknowledged that the initial response to this question would have been, for many, answered in the negative. However, he also acknowledged that things were different. After deciding the court had the power to grant the stay on the basis of its inherent jurisdiction to control its own proceedings, Hegarty J went on to consider if that power should be granted in the case before him.

In answering this question, he considered the case of *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd*[12] where the House of Lords was faced with a clause referring disputes to an ADR process, other than arbitration. Lord Mustill in *Channel Tunnel* had taken the view that the courts would generally hold the parties to their contract. He also opined that the power of the court to stay proceedings on the basis of a foreign jurisdiction clause provided a "decisive analogy" to the question of staying proceedings on the basis of an ADR clause.[13]

Hegarty J acknowledged that the clause at issue in *Channel Tunnel* was one which was almost an arbitration agreement. The question then remained as to whether a similar approach would be taken in relation to clauses that were not as close to an arbitration agreement. Hegarty J concluded that:[14]

> "in light of the observations of Lord Mustill [...] and in light of the *changing attitudes of our legal system*, the court plainly has a jurisdiction to stay under its inherent jurisdiction, where the parties have chosen some alternative means of dispute resolution." (emphasis added)

Hegarty J then went on to state that in this situation, a presumption is created in favour of a stay. However, this presumption can be rebutted by the person opposing the stay to show grounds for opposing it.[15] On the facts, Hegarty J decided that there were good grounds for opposing the stay[16] and denied the application of the defendant.

11 *Ibid*.
12 [1993] AC 334.
13 *Ibid*, at 352.
14 *Supra*, note 7, at 548.
15 *Ibid*.
16 The reasons for denying the stay will be considered in the Pt III of this comment.

III. Analysis

This judgment raises 2 main questions. First, how far will the approach of Hegarty J go? Will it extend to processes other than expert determinations? Secondly, what would be sufficient to show grounds for opposing the presumption of a stay? What should be the standard? The writer will consider each of these in turn.

A. *The Extent of this Approach*

Cott UK Ltd represents a move towards the recognising and enforcement of ADR clauses other than arbitration. It extends the scope of enforceability to clauses for expert determination which is one form of ADR process. The question that must be asked is whether this scope will be widened to clauses other than almost arbitral[17] or expert determination. In particular, will clauses referring disputes to non-binding forms of ADR be similarly enforceable?

In terms of nomenclature, arbitration is considered a binding form of ADR because the arbitrator has the power to make an award. In *Cott UK Ltd*, the expert had the power to bind the parties and so this would also be considered a binding form of ADR. Non-binding forms of ADR would include Mediation and Conciliation where traditionally, the mediator/conciliator would not have the power to impose a decision upon the parties.

At one level, it is possible to say that *Cott UK Ltd* is only the first step. Hegarty J did recognise that the attitude of the legal system is changing and that what in the past might have been a negative response may now be answered in the positive.

At another level however, the writer submits that the English courts may be quick to draw the line of enforceability at whether the ADR process is binding or not. This stems from the concern that the parties utilising non-binding forms of ADR would not know when it is permissible to terminate the ADR process and move on to litigation.[18] There is also the concern that the non-binding ADR processes will not necessarily lead to resolution of the relevant dispute and would result in futility.[19]

[17] As was the case in *Channel Tunnel*.

[18] This has been termed the Uncertainty argument. For a discussion on this, see note 4, at 231-235.

[19] This has been termed the Futility argument. For a discussion on this, see note 4, at 239-241.

There are indications that this latter view is the more likely one. One of the reasons that Hegarty J had for finding good grounds for opposing the stay was that there was no specification either in the clause, or in the practice of the British Soft Drinks Association, or in practice, of the procedure, rules and principles by which the expert should proceed.[20] This is basically a statement stemming from the contractual requirement of certainty.

Further, there is some allusion to the futility argument where Hegarty J expresses concerns that there are no sanctions which the expert can impose should the parties decide not to co-operate.[21]

In relation to the uncertainty point, this is certainly valid. It is therefore important for an ADR clause (regardless of whether the ADR process is binding or not) to be sufficiently certain for enforcement. However, it is not necessary, as the learned Judge seems to indicate, for the clause to set out the entire procedure by which the ADR process must function. Indeed, there may not be one set procedure for any given ADR process.[22] Indeed, it is an asset of the process to adapt to the conflict resolution needs of the parties.

The writer submits that it should be sufficient for the clause to provide certainty in terms of the appointment of the expert (or mediator/conciliator as the case may be) and this may be done by reference to an organisation or body.[23]

In relation to the point on futility, the writer submits that the learned Judge's concerns, while valid, stem from a non-understanding of the ADR processes. The assumption made seems to be that non-binding forms of ADR will only work if the parties are initially amicable to settlement. This does not recognise that ADR processes are designed to deal with parties who do not believe that resolution of their dispute is possible.[24] Through the ADR process, hostility between the parties is reduced, the needs of the parties are identified, the scope of agreement established and settlement encouraged. Very often, parties who start out hostile and in disagreement end up finding common ground and settling. The parties initially resorting

[20] *Supra*, note 7, at 548.

[21] *Ibid*, at 549.

[22] *Eg*, in mediation, while there are identifiable set stages to the mediation process, the operational framework will differ from mediator to mediator. See LT Lim & J Lee "A Lawyer's Introduction to Mediation" (1997) 9 SAcLJ 100, 108-111 for a discussion of the stages of mediation.

[23] By this argument, a clause referring disputes to the Singapore Mediation Centre for mediation should be sufficient.

[24] M Shirley "Breach of an ADR Clause – A Wrong Without Remedy?" [1991] Australian Dispute Resolution Journal 117, 118.

to litigation is only a statement about their inability at that point to communicate and find common ground. It is not a statement about whether settlement is possible and certainly not a suggestion that reference to an ADR process would be futile.

It is submitted that the futility argument should not be allowed to prevent the enforcement of a clause referring disputes a non-binding ADR process.

B. *What Constitutes Good Grounds?*

Assuming then that the court is prepared to consider clauses referring disputes to ADR process (binding or otherwise) as enforceable, the question then becomes, what is sufficient to rebut the presumption of a stay? Hegarty J expressed it as the party opposing the stay having to show good grounds.[25] It is not clear however what constitutes good grounds although it would appear that the circumstances and reasons he considered in *Cott UK Ltd* were sufficient.

Many of Hegarty J's reasons seem to be variations on the theme of uncertainty. The writer has mentioned the learned judge's concern requiring the lack of a procedure by which the expert is to proceed.[26] He also alludes to the lack of stated powers on the part of the expert to order discoveries or impose sanctions.[27] This to his mind also contributes to the uncertainty of the clause. Following from this, he suggests that the parties and the expert would then have to make their own procedural rules which would then produce confusion and delay and thereby contradicting the objective of a short, speedy and cheap determination of the dispute.[28]

Apart from these variations to the theme of uncertainty, Hegarty J also seems to consider the expert's appropriateness for the resolution of the dispute. He acknowledges that Mr Foulsham is an expert in the soft drinks industry but was unsuited for determining questions of construction of a commercial agreement and quantum of compensation.[29]

It would appear that on the basis of these concerns, the learned judge found that good grounds for opposing the stay had been shown.

There are a number of comments that can be made on this point. While the judge's concerns relating to uncertainty are certainly valid, the writer disagrees with the amount of certainty required as some forms of ADR

[25] *Supra*, note 7, at 548.
[26] *Ibid*.
[27] *Ibid*, at 549.
[28] *Ibid*.
[29] *Ibid*, at 550.

have their strengths in a flexible procedure. It would be far too onerous to require parties to spell out every procedure that the expert or mediator/conciliator would have to undertake. It should be enough if the clause is sufficiently certain as to the procedure for appointment.

In discussing his concerns about uncertainty, Hegarty J seems to operate out of the framework of an arbitration. He compares the lack of certainty of clause 14 as it relates to expert determination to the process of arbitration where there is judicial and customary precedent as to the powers of the arbitrator and procedure of the arbitration.[30] Presumably, a short form reference to arbitration in a contract would not be unenforceable for uncertainty whereas a short form reference to expert determination would be.

It is submitted that this approach takes too narrow a view of the ADR processes. As most of the ADR processes are new to the legal system, there would of course be a certain amount of uncertainty in relation to the practice of it. This was the same situation when arbitration was introduced as an alternative to litigation. There is nothing objectionable about the expert and the parties designing a procedure to resolve their dispute. While this may take a little more time, this would not necessarily mean that it would defeat the objective of a short, speedy and cheap determination of the dispute. Even with this added element, it could still be better than going through the process of litigation. Further, there is the intangible value to the parties owning their dispute and having a hand in resolving it.[31]

The judge's mental framework of arbitration is also evident in his comment about the expert's suitability to resolve questions of construction and quantum of compensation. While it may be true in the case before Hegarty J that the expert may not be able to resolve these issues, arbitrators are frequently not lawyers and yet this does not prevent them from functioning as effective arbitrators. Why then should it affect the expert's ability to resolve the dispute?

Further, the dispute resolution paradigm used by litigation and arbitration (and perhaps expert determination) is only one model. The mediator or conciliator would approach a commercial dispute differently from how the arbitrator would.[32] Therefore mediators and conciliators should not have their suitability assessed on the basis of a dispute resolution paradigm that

[30] *Ibid*, at 548.

[31] One of the criticisms of litigation is that it disempowers the parties by removing ownership of the dispute from them and transferring it to the lawyers and the courts. For a discussion on this, see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan) at 421-427.

[32] For a discussion on different dispute resolution paradigms of the ADR processes, see J Lee "The ADR Movement in Singapore" *The Singapore Legal System* (Singapore University Press, Singapore, 1999, ed Kevin YL Tan) at 423-425.

draws from litigation or arbitration.

Finally, the writer submits that it is important not to pay mere lip service to enforcing ADR clauses. Lord Mustill's reasoning in *Channel Tunnel* was to draw an analogy between ADR clauses and Jurisdiction Clauses. The starting point with both is that it is desirable to hold parties to their freely negotiated contracts. Before the court will allow one party to behave in contradiction to a jurisdiction clause, that party must show "strong cause".[33] The writer submits that in relation to a party seeking to behave in contradiction to an ADR clause, the court should subject that party to a similarly high standard.

IV. Conclusion

Cott UK Ltd has the potential to represent an important step towards the acceptance of ADR by the legal and business community. In order for the processes of ADR to serve their function, it is vital that ADR clauses be enforceable. In so far as *Cott UK Ltd* moves in this direction, it is to be welcomed.

The danger however, is that *Cott UK Ltd* seems to withdraw with one hand what is being offered by the other. While Hegarty J acknowledges the changes in the legal system and attitudes and supports the enforcement of the ADR clause, the standard he sets for opposing the stay is so low that the ADR clause is basically ineffective. This stems from a preoccupation with certainty as well as an incomplete understanding of the nature and scope of the numerous ADR processes.

The writer suspects that Singapore will soon face similar issues. The push in the legal system for ADR, in particular mediation, has seen the increasing use of ADR clauses and at some point, the courts will have to address the question as to their enforceability and the standard by which a stay may be opposed. The writer submits we can learn from *Cott UK Ltd* so that we can avoid the problems raised by this case when the time comes for us to address this issue in our courts.

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[33] *The Eleftheria* [1970] P 94; *The Asian Plutus* [1990] 2 MLJ 449; *The Vishva Apurva* [1992] 2 SLR 175. For a discussion of the principles and standard involved in opposing a stay based on a jurisdiction clause, see KS Toh , "Stay of Actions Based on Exclusive Jurisdiction Clauses under English and Singapore Law" [1991] SJLS 103 and 410.

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