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MEDIATION CLAUSES AT THE CROSSROADS

This article follows-up from past articles on the enforceability of mediation clauses. It comments on two cases; one English and the other Australian, and explores their different approaches to the enforceability of dispute resolution clauses. The author goes on to suggest some requirements for enforceability that the Singapore courts may choose to adopt.

I. INTRODUCTION

THE issue of the enforceability of alternative dispute resolution (ADR) clauses has been recently explored.[1] In these articles, the English case of *Cott UK Ltd* v *Barber Ltd,*[2] among others, was examined and some observations made.

Cott UK Ltd potentially represented a significant step on the part of the English courts towards enforcing an ADR clause *via* a stay of court proceedings even though at the end of the day, Hegarty J decided that good grounds were shown for opposing the stay and proceedings were allowed to continue.[3]

In response to that case, the author made two observations. The first observation was that *Cott UK Ltd* represented a move towards the recognition and enforcement of ADR clauses other than arbitration.[4] However, the writer also predicted that the English courts would not be entirely comfortable with the recognition and enforcement of all forms of clauses relating to ADR and would probably draw the line at the distinction between binding and non-binding forms of ADR.[5] Examples of binding ADR processes would be arbitration or expert determination[6] whereas non-binding processes would include negotiation and mediation.

1 See J Lee "The Enforceability of Mediation Clauses in Singapore" [1999] SJLS 229; J Lee "Enforcing an ADR Clause: *Cott UK Ltd* v *Barber Ltd*" [1999] SJLS 257.
2 [1997] 3 All ER 540.
3 *Ibid,* p 548.
4 J Lee "Enforcing an ADR Clause: *Cott UK Ltd* v *Barber Ltd*" [1999] SJLS 257, 260.
5 *Ibid,* pp 260-261.
6 As was the case in *Cott UK Ltd.*

The second observation made was that even though *Cott UK Ltd* was a step towards enforcing ADR clauses other than arbitration, the standard set for opposing a stay was so low that perhaps it was no step at all.[7] The writer went on to suggest that mere lip service should not be paid to the recognition and enforcement of ADR clauses and that the court should adopt Lord Mustill's reasoning in *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd*[8] that an analogy should be drawn between ADR clauses and jurisdiction clauses.[9]

A recent case of the English Courts, *Halifax Financial Services Ltd* v *Intuitive Systems Ltd*[10] has proven the first of the writer's observations to be accurate. This article seeks to first explore the decision in *Halifax Financial Services Ltd* and consider the direction it has taken with respect to the recognition and enforcement of ADR clauses. The writer will then look at the approach taken by the Australian courts in the case of *Aiton Australia Pty Ltd* v *Transfield Pty Ltd*[11] with respect to the same subject matter.

The approaches between the 2 jurisdictions will be contrasted and the writer will argue that the Australian courts not only offer a better approach, its approach also addresses the concerns that plague the English courts when considering the recognition and enforcement of an ADR clause.

II. The Engish Approach: *Halifax Financial Services Ltd*

This case involved a contract on the part of the defendant to supply software design services to the plaintiff. Clause 33 of the contract established a three-stage mechanism in the event of disputes.

The first stage of this mechanism is set out in clause 33.1 of the agreement and provided for senior representatives of the parties to meet in good faith and attempt to resolve the dispute without recourse to legal proceedings. This must be done within ten business days of a written notice from either party.[12]

If these good faith negotiations failed, clause 33.2 provides for the second stage where either party could propose structured negotiations with the assistance of a neutral adviser or mediator.[13] This is to be done at the meeting in stage one or within 10 business days from its conclusion. It is important

7 *Supra,* note 4, pp 262-264.
8 [1993] AC 334.
9 *Supra,* note 4, p 264.
10 [1999] 1 All ER (Comm) 303.
11 [1999] NSWSC 996; 1999 NSW LEXIS 671.
12 *Supra,* note 10, p 305.
13 *Ibid.*

to note that the process proposed by clause 33.2 would not constitute a binding form of dispute resolution.[14] In fact, clauses 33.6 and 33.7 make this fairly explicit.[15]

If the parties fail to reach agreement within 45 business days of the neutral adviser or mediator being appointed, then clause 33.8 provides for a third stage where parties could refer the matter to the court unless arbitration was agreed to within 25 business days of the end of the period provided by the second stage.[16]

The plaintiff alleged that the defendant was in anticipatory repudiation and issued a draft statement of claim. The defendant then gave a notice pursuant to clause 33.1. The plaintiff subsequently commenced proceedings. The defendant applied for a stay under the court's inherent jurisdiction and the application was rejected by Master Rose. The defendant appealed and the matter appeared before McKinnon J.

According to counsel for the defendant, there were three issues before the court. First, whether the procedure set out in clause 33 had to be complied with before proceedings were issued? Secondly, if the first issue was answered in the affirmative, whether the procedure in clause 33 was complied with? Finally, if the second issue was answered in the negative, whether the court should exercise its discretion and stay the proceedings?[17]

In this paper, the writer is not concerned with the second issue. This is a primarily factual matter and is of little interest. However, the first and third issues are significant in that they address the effect of ADR clauses and whether the court will enforce them.

With regard to the first issue, counsel for the defendant sought to argue that clause 33 was akin to a *Scott* v *Avery* clause.[18] Put another way, counsel was suggesting that compliance with clause 33 was a condition precedent to liability.[19]

[14] At this point, it would be useful to clarify that the term "binding form of dispute resolution" refers to ability of the said process to impose upon the parties a settlement. It does not refer to the binding ability of the settlement derived from these processes. For example, facilitative mediation is considered non-binding because at the end of the day, the process may not yield a settlement. The mediation does not have the power to impose a decision. However, if a settlement is agreed to by the parties, this constitutes a contract and is therefore binding.

[15] *Supra,* note 10, p 306.

[16] *Ibid.*

[17] *Ibid,* p 305.

[18] So named after the case in which it was first considered. See *Scott* v *Avery* (1856) 5 HL Cas 811. This is a clause which provides for referring a dispute to arbitration as a condition precedent to liability. In the past, this became an acceptable way of overcoming the concern of arbitration clauses ousting the jurisdiction of the courts. Today, the enforcement of arbitration clauses are provided for by statute. See s 6 Arbitration Act 1953 (Cap 10, 1985, Rev Ed); S 7 International Arbitration Act 1995 (Cap 143A, 1995, Rev Ed).

[19] *Supra,* note 10, p 306.

The determination of this issue was a matter of construction. McKinnon J opined that there was nothing in clause 33 that required compliance with clause 33 as a condition precedent to liability or to the institution of legal proceedings.[20]

The writer agrees with this analysis. If clause 33 was to be enforceable as an ADR clause, it could not be on the basis that it was in *Scott* v *Avery* form. Presumably, if it was in *Scott* v *Avery* form, then it would be enforceable and the parties would be required to comply with clause 33 before initiating court proceedings.

McKinnon J goes on to consider the second and third issues. As mentioned earlier, the writer is not concerned with the second issue as this is factual. What is noteworthy is the learned judge's handling of the third issue. The basic question was whether the court should exercise its discretion to stay proceedings, in effect enforcing the ADR provisions in clause 33.

As a preliminary comment, it is useful to point out that this is a separate head of enforceability than that considered in issue one *ie,* whether clause 33 was in *Scott* v *Avery* form. If it was in *Scott* v *Avery* form, the provisions would have to be complied with before court proceedings could even have been initiated. The question here was, despite clause 33 not being in *Scott* v *Avery* form, was it nonetheless enforceable?

Counsel for the defendant submitted that while the court did not have statutory powers to stay proceedings similar to those conferred by the English Arbitration Acts, the court had a discretion to stay proceedings where there is a dispute resolution clause which is "nearly an immediately effective agreement to arbitrate".[21]

Counsel for the plaintiff submitted, on the other hand, that the dicta in *Channel Tunnel* applied only to clauses that provided procedures which were determinative. Examples of such determinative procedures would be arbitration clauses and binding expert valuations. Where a clause provided for a non-determinative procedure like negotiation or mediation, counsel for the plaintiff submitted that the courts had consistently chosen to not enforce such processes because of the "practical and legal impossibility of monitoring and enforcing the process".[22]

The learned judge accepted the submissions of counsel for the plaintiff and agreed that clause 33 did not amount to being "nearly an immediately effective agreement to arbitrate". Further, he opined that clause 33 only provided for the parties to negotiate.[23]

[20] *Ibid,* pp 306-307.
[21] *Supra,* note 8, p 352.
[22] *Supra,* note 10, p 311.
[23] *Ibid.*

Counsel for the defendant brought the court's attention to *Cott UK Ltd* and how Judge Hegarty QC had applied the dicta in *Channel Tunnel* to stay proceedings on the basis of an ADR clause.[24]

McKinnon J distinguished *Cott UK Ltd* on the basis that the ADR clause in that case provided for an expert determination and that the determination of the expert would be final and binding on the parties.[25] He also opined that forced negotiations between the parties would be futile because there had already been months of negotiations between the parties.[26]

It is clear from the judgment that the principle in *Channel Tunnel* would only apply to ADR clauses providing for binding forms of ADR. Of course, whether this distinction is valid is another matter. This distinction is primarily based on what the author terms the futility argument.[27] This has been discussed elsewhere and the author does not propose to reproduce that discussion here. Stated simply, the futility argument brings up the notion that the court will not require parties to do something that is ineffective or futile. The idea is that since non-binding forms of ADR like negotiation or mediation do not guarantee an outcome, requiring parties to engage in them would be futile. Further, futility may also be evidenced where the parties declare a non-interest in settlement.

The futility argument is closely linked to the uncertainty argument.[28] Again, stated simply, clauses requiring parties to negotiate or mediate in good faith or amicably were contractually uncertain because parties, and presumably the court, would not know when the process could be terminated.[29]

It should be briefly pointed out that the uncertainty argument is by no means universally held and there is an alternative suggestion that agreements to negotiate are enforceable.[30]

In this case, the author submits that the uncertainty argument is less significant because clause 33 provides fairly explicit guidelines as to when negotiations can terminate. It may still be a problem because clause 33 uses fairly permissive terms like "may" which perhaps does not provide a compulsion to move on to the next stage of the process. Perhaps the lesson in this is to use non-permissive terms in drafting the parameters of an ADR clause.

[24] *Supra,* note 2, p 548.
[25] *Supra,* note 10, p 311.
[26] *Ibid,* p 312.
[27] J Lee "The Enforceability of Mediation Clauses in Singapore" [1999] SJLS 229, 239-241.
[28] *Ibid,* p 235.
[29] *Walford* v *Miles* [1992] 1 All ER 453, 460 *per* Lord Ackner.
[30] *Hillas & Co Ltd* v *Arcos Ltd* [1932] All ER Rep 494; *Mallozzi* v *Carapelli SpA* [1975] 1 Lloyd's Rep 229 *per* Kerr J. Kerr J's decision was reversed by the Court of Appeal [1976] 1 Lloyd's Rep 407. For a discussion on this, see note 27, pp 232-235.

Assuming, however, that clause 33 is found to be sufficiently certain, then the sole objection is the argument based on futility. On this, two points may be made. First, one must be careful not to cast the image of the ADR processes in the image of litigation. Put another way, by deciding to only enforce ADR processes that approximate the binding nature and finality of the litigation process, a mockery is made of the idea that ADR processes are intended to be alternatives to the litigation process.[31]

Secondly, one should not quickly conclude that just because parties express a non-interest in settlement or have referred the matter to litigation, that referring the dispute to non-binding forms of ADR is futile. Few parties go into a negotiation or mediation thinking that the dispute will settle. Yet, it is the design of these ADR processes that assist the parties in resolving hostility and finding common ground. The key, of course, is whether the parties enter these processes in good faith. This is a separate question that the author will return to later in this paper.[32]

In this case, where the parties have already been negotiating without avail, it may well have been futile to require the parties to negotiate further. However, the court could well have directed the parties to move on to the second stage of the process provided for in clause 33.2 and have a neutral advisor or mediator appointed. While this process is similarly non-binding, the injection of a neutral third-party perspective is often helpful in helping parties resolve their dispute.

At the end of the day, the court's approach in *Halifax Financial Services* is neither unexpected nor invalid. The decision is sound if one accepts the assumptions made by the court of the nature of ADR processes.

However, it is submitted that if one were inclined to support the ADR processes in their entirety, then this decision is conservative and litigation-centric. A better approach might be to focus on the parties' freedom to contract and give effect to their choice of ADR process as long as the provisions are sufficiently certain. Put another way, the futility argument should only be a small, if not a non, consideration.

As it stands, however, the English position seems clear. Only binding forms of ADR will be given effect and even then, the relevant provisions must be sufficiently certain. It is still unclear as to what the standard for opposing a stay would be.

By way of contrast, the author will now turn to a judgment of the Supreme Court of New South Wales *Aiton Australia Pty Ltd* v *Transfield Pty Ltd.*[33]

[31] *Supra,* note 27, p 241.
[32] See text accompanying notes 76 to 97.
[33] *Supra,* note 11. References will be to the Lexis version of this case.

III. The Australian Approach: *Aiton Australia Pty Ltd*

The Australian courts have generally been less conservative in enforcing ADR clauses.[34] *Aiton Australia Pty Ltd* represents both another step in that direction as well as breaking new ground in the law's attitude towards the notion of "good faith" as it relates to non-binding forms of ADR.

For the purposes of this paper, the facts may be stated simply. The plaintiff and the defendant entered into three contracts for a turn-key construction project. The plaintiff's claims revolve around alleged misrepresentations made by the defendant in the tender negotiations as well as during the performance of the works.[35]

Each of the three contracts involved contained clause 28, an express term relating to a procedure for dispute resolution. Clause 28 provides for any dispute between the parties to go through the ADR processes of negotiation, mediation and expert determination. Although it is very extensive, the author has decided to reproduce clauses 28.1, 28.2 and 28.3 in this article to provide the reader an idea of the comprehensiveness of this clause. Of note are the "good faith" requirements in clauses 28.1 and 28.2 (h).

"28 Dispute resolution

28.1 General

The Purchaser [Transfield] and Supplier [Aiton] shall make diligent and good faith efforts to resolve all Disputes in accordance with the provisions of this section 28.1 [General] before either party commences mediation, legal action or the expert Resolution Process, as the case may be.

If the representatives of the parties are unable to resolve a Dispute within 15 days after Notice from one Party to the other of the existence of the dispute (the "Dispute Notice") and after exchange of the pertinent information, either party may, by a second Notice to the other Party, submit the Dispute to the Designated Officers of Supplier and Purchaser. A meeting date and place shall be established by mutual Contract of the Designated Officers. However, if they are unable to agree, the meeting shall take place at the Site on the 10th business day after the date of the second Notice. The Designated Officers shall meet in person and each shall afford sufficient time for such meeting (or daily consecutive meetings) as will provide a good faith, thorough exploration

[34] *Hooper Bailie Associated Ltd* v *Natcon Group Pty Ltd* (1992) 28 NSWLR 194.
[35] *Supra,* note 11, *2-*4.

and attempt to resolve the issues. If the Dispute remains unresolved 5 Business Days following such last meeting, the Designated Officers shall meet at least once again within 5 Business Days thereafter in a further good faith attempt to resolve the Dispute.

For any Dispute which is unresolved at the conclusion of such meeting, each Party shall submit within 10 days thereafter a written statement of its position to the other party and the Dispute shall be immediately submitted to mediation pursuant to section 28.2 [Mediation].

28.2 Mediation

If the Dispute is not resolved pursuant to the process established in section 28.1 [General], either Purchaser or Supplier shall submit the same for mediation and the parties expressly agree upon the following process and subject to section 28.5 [Limitation Periods] agree that Mediation shall be compulsory before either Party may commence legal action or initiate the Expert Resolution process, as the case may be:

(a) The Party initiating mediation shall provide Notice of that request to the other Party, including a summary of the Dispute, a written statement of its position and a list of 4 mediators acceptable to it.

(b) Within 5 business days following receipt of the above Notice, the recipient Party shall provide the other Party with a written statement of its position on the Dispute, any objections and amendments that it may have to the other Party's above mentioned summary of the Dispute and a list of 4 mediators acceptable to it if it does not accept an individual from the other Party's list.

(c) If the Parties are unable to agree on a mediator within 5 business days following delivery of the material mentioned in subs(b) above, then either Party may apply on an expedited basis to have the mediator appointed by the President for the time being of the New South Wales Bar Association (or paramount officer of any successor organisation). The mediator shall have suitable qualifications and standing to mediate the Dispute.

(d) The place of any mediation proceeding shall be Sydney, New South Wales.

(e) The mediator may conduct the proceedings in any manner he considers appropriate, taking into account the circumstances of the Dispute, any desires expressed by the Parties,

and the desire for speedy resolution of the Dispute. The mediator may communicate with the Parties orally or in writing and may meet with the Parties together or individually. The Party initially referring the Dispute to mediation is entitled to make the first opening statement to the mediator.

(f) The mediator shall not act as a representative or witness of either Party or otherwise participate in any Expert Resolution or judicial proceedings related to a Dispute that was the subject of mediation.

(g) Statements made by either Party or the mediator in the course of the mediation process shall not be disclosed to any third party and shall not be introduced by either Party in the Expert Resolution process or judicial proceedings, whether or not those proceedings relate to the Dispute that was the subject of the mediation.

(h) The Parties agree to use all reasonable endeavours in good faith to expeditiously resolve the Dispute by mediation.

(i) If the Dispute has not been resolved by the mediation process within 28 days of the appointment of the mediator or such other period as is subsequently agreed to by the Parties, then either Party shall have the right to initiate the Expert Resolution process or judicial proceedings, as the case may be.

28.3 Expert

Where the Parties agree to submit a dispute or difference to the Expert Resolution Process, such dispute or difference shall be resolved in the following manner:

(a) An Expert will be appointed by the Parties, or in default of Contract upon such appointment, either Party may refer the appointment to, in the case of financial matters, the President for the time being of the Institute of Chartered Accountants in Australia, in the case of technical matters, the President for the time being of the Institution of Engineers in Australia and, in the case of any other matters (including a dispute as to the interpretation of this Contract) the President for the time being of the Institute of Arbitrators in Australia. In all events, the Expert must have reasonable qualifications and commercial and practical experience in the area of Dispute and have no interest or duty which conflicts or may conflict with his function as an Expert.

(b) The Expert will be instructed to:

(i) promptly fix a reasonable time and place for receiving submissions or information from the Parties or from any other Persons as the Expert may think fit;

(ii) accept oral or written submissions from the Parties as to the subject matter of the Dispute within 10 Business Days of being appointed;

(iii) not be bound by the rules of evidence, and

(iv) make a determination in writing with appropriate reasons for that determination within 20 Business Days of the date referred to in subs 28.3(b)(ii).

(c) The Expert will be required to undertake to keep confidential matters coming to the Expert's knowledge by reason of being appointed and the performance of his duties.

(d) The Expert will have the following powers:

(i) to inform himself independently as to facts and if necessary technical and/or financial matters to which the dispute relates;

(ii) to receive written submissions sworn and unsworn written statements and photocopy documents and to act upon the same;

(iii) to consult with such other professionally qualified persons as the Expert in his absolute discretion thinks fit and

(iv) to take such measures as he thinks fit to expedite the completion of the resolution of the dispute.

(e) Any person appointed as an Expert will be deemed not to be an arbitrator but an expert and the law relating to arbitration including the Commercial Arbitration Act 1986 (SA) and the NSW equivalent, as amended, will not apply to the Expert or the Expert's determination or the procedures by which he may reach his determination.

(f) The Dispute resolution will be held in Sydney, New South Wales unless the Parties otherwise agree.

(g) In the absence of manifest error, the decision of the Expert will be valid, final and binding upon the Parties.

(h) The costs of the Expert and any advisers appointed pursuant to subs 28.3(c)(iii) will be borne by Purchaser or Supplier or both as determined in the discretion of the Expert taking into account the Expert's decision in the dispute.

(i) The Parties will give the Expert all information and assistance that the Expert may reasonably require. The Parties will be entitled to be legally represented in respect of any representations that they may wish to make to the Expert, whether orally or in writing."

Over a period of time, the plaintiff had submitted to the defendant a number of notices to invoke the provisions of clause 28 only to be frustrated by the defendant's actions.[36] On this point, Einstein J found that the defendant had not complied with the spirit and intent of clause 28.[37] It is ironic that the court was faced with an application by the defendant seeking a stay of the proceedings and therefore an indirect enforcement of clause 28.

The court had to consider 2 main matters. First, in what circumstances would an ADR clause be enforced, whether directly or indirectly? Secondly, what would satisfy the "good faith" requirements often found in ADR clauses? The author will consider the court's approach to each matter in turn.

With regard to the first matter, the court started from the position that parties ought to be bound by their freely negotiated contracts.[38] The author agrees with this and it is consistent with the position taken by Lord Mustill in *Channel Tunnel* when he likened ADR clauses to jurisdiction clauses.[39]

The next step the court takes is to state that, even if an ADR clause satisfies the legal requirements for enforceability, equity will not order specific performance of that clause because "supervision of performance pursuant to that clause would be untenable".[40] However, the court went on to acknowledge that by staying proceedings until the process specified in the ADR clause is completed is indirectly enforcing the that clause.[41]

On this point, the statement about ordering specific performance is not unusual. It is a traditionally held view and is part of what the author has referred to elsewhere as the Damages argument.[42]

[36] *Ibid,* *12-*18. The details of this are unnecessary to our discussion of the issues this paper is concerned with.
[37] *Ibid,* *17-*18.
[38] *Ibid,* *18-*19.
[39] *Supra,* note 8, p 352.
[40] *Supra,* note 11, *19.
[41] *Ibid.*
[42] *Supra,* note 27, pp 241-243.

With respect, the author submits that there is nothing objectionable in decreeing specific performance of an ADR clause. First, there is little difference between requiring parties to specifically perform a contract for sale of an unique item and for parties to engage in an ADR process set out in the contract. In both cases, for practical purposes, the court does not immediately seek to supervise. It is only when the order of the court is not carried out that the court may be asked to intervene. It is at this point that "supervision" has to be carried out and the author admits that supervising the performance of an ADR clause is more complex than the transaction of an unique item but it would be overstating it to call it untenable. This is especially if, and this is the second point, the clause sets out clearly the process and the time frames and triggers after which the parties can terminate the process.[43] The court can then simply ask whether the requisite period of time had passed or the triggering event had occurred.

Be that as it may, in either approach, the court will in effect be enforcing the process specified in the ADR clause. The question then is in what circumstances will the court enforce an ADR clause?

Einstein J first opined that apart from arbitration, there was no legislative basis for enforcing dispute resolution clauses.[44] He goes on to add that the court can make orders requiring parties to comply with the process as a precondition to the commencement of proceedings.[45] This is an interesting point for Einstein J to have made because it makes enforcement of an ADR clause contingent on it being in *Scott* v *Avery* form. Indeed, he goes on to make this point that it is essential for an ADR clause to be in *Scott* v *Avery* form in order to be enforceable.[46]

This is significant because this seems to exclude the possibility of enforcing a clause not in *Scott* v *Avery* form. The author submits that while enforcing an ADR clause in *Scott* v *Avery* form is a step in the right direction, enforcing only clauses in that form is too restrictive and does not make clear the different bases upon which an ADR clause may be enforced.

Enforcing an ADR clause because it is in *Scott* v *Avery* form is unremarkable. It is well accepted that a *Scott* v *Avery* clause, as it relates to arbitration, does not oust the jurisdiction of the courts because liability does not arise until the specified procedure has been complied with. It is a small step to extend this reasoning to clauses relating to other forms of ADR in *Scott* v *Avery* form.

[43] If the clause refers the dispute to an institution for the carrying out of the ADR process, for example in mediation, then the author submits this should also be treated as sufficient. See text accompanying note 73.

[44] *Supra,* note 11, *26. This is also the position in Singapore.

[45] *Ibid.*

[46] *Ibid.*

The writer submits that an ADR clause, even if it is not in *Scott* v *Avery* form and as long as it is sufficiently certain, should be enforced on the basis of three propositions. First, that parties should be held to their agreements. Secondly, such a clause does not purport to oust the jurisdiction of the courts, it only asks the court to to exercise its discretion to stay the proceedings in much the same way as an application on the basis of *forum non conveniens* or a jurisdiction clause. Thirdly, many jurisdictions are promoting ADR as a more useful way of resolving disputes.[47] As a matter of policy, courts should support this goal.

The writer submits that the Einstein J has not made this distinction and may have doomed all those clauses that could properly have been enforced under the latter basis.

The court goes on to say that apart from having to be in *Scott* v *Avery* form, the clause must be sufficiently certain for enforcement.[48] The author agrees with this but will disagree with the court's application of this to the facts.[49]

There are two aspects of uncertainty that are relevant for our discussion. The first is uncertainty as it relates to a procedure or guidelines relating to the ADR process.[50] The second is uncertainty as it relates to the requirement to negotiate in good faith.[51] Having made this distinction, it is also appropriate to point out that these aspects of uncertainty can also be seen as part of the futility argument.[52]

The plaintiff's submission in this case was that the ADR clause was uncertain in both these senses.[53] While these two aspects of uncertainty are intertwined, the author will look at conduct uncertainty later in this paper.[54]

With respect to procedural uncertainty, the plaintiff's submission was specifically that an agreement to negotiate was procedurally uncertain and therefore unenforceable. Reliance was placed on the opinion of Giles J in the cases of *Hooper Bailie Associated Ltd* v *Natcon Pty Ltd*[55] and *Elizabeth Bay Developments Pty Ltd* v *Boral Building Services Pty Ltd.*[56] It was argued that the dicta of Giles J indicated that, while an agreement to mediate or

47 This is certainly the case in Singapore. Even in *Halifax,* the court acknowledges this direction. See note 2, p 312.
48 *Supra,* note 11, *26.
49 See text accompanying note 73.
50 The writer will refer to this as procedural uncertainty.
51 The writer will refer to this as conduct uncertainty.
52 *Supra,* note 27, pp 239-241.
53 *Supra,* note 11, *30-31.
54 See text accompanying notes 76 to 97.
55 *Supra,* note 34.
56 (1995) 36 NSWLR 709.

conciliate was enforceable as long as it was sufficiently certain, an agreement to negotiate or an agreement to agree was not.[57]

In dealing with this point, Einstein J points out, quite rightly, that the reasoning of Giles J did not centre on agreements to negotiate or agreements to agree. He goes on to make a distinction between an agreement to negotiate and an agreement to agree/enter into a contract.[58] Drawing on precedent and legal scholarship,[59] Einstein J posits that there is no difference between an agreement to conciliate/mediate, which is enforceable, and an agreement to negotiate. Both require a participation in a dispute resolution process which does not necessarily lead to an agreement.[60] The key to the enforceability of an agreement to negotiate is to have a clear procedure that spells out the beginning and end of the negotiation. It is on this basis that Einstein J distinguishes *Walford* v *Miles,*[61] an oft-cited case for the unenforceability of agreements to negotiate.

Einstein J also highlighted the importance of maintaining the distinction between the two types of agreements and he suggests that the case *Courtney & Fairbairn Ltd* v *Tolaini Bros (Hotels) Ltd*[62] was an example where the distinction was not maintained.[63]

It is clear that, and the writer agrees, that the focus should be on the process provided by the dispute resolution clause and as long as the clause did not at any stage provide for an agreement to agree, it is in principle enforceable.[64]

With this in mind, Einstein J went on to consider what constituted sufficient certainty for a dispute resolution process. He begins with a quote from Giles J in *Hooper Bailie:*[65]

> "What is enforced is not cooperation and consent but participation in a process from which might come"

This clearly builds on the propositions stated by Einstein J earlier. The learned judge goes on to state that it is not essential for the process to be overly structured. Otherwise, and the writer agrees, the dispute resolution procedure might be counter-productive.[66]

57 *Supra,* note 11, *27-*31.
58 *Ibid,* *34-*38.
59 D Cremean "Agreements to Negotiate in Good Faith" (1996) 3 Commercial Dispute Resolution Journal 61.
60 *Supra,* note 11, *35-*36.
61 *Supra,* note 29.
62 [1975] 1 WLR 297.
63 *Supra,* note 11, *36.
64 *Ibid,* *37-*38.
65 *Supra,* note 34, p 206.
66 *Supra,* note 11, *37-*38.

Counsel for the plaintiff submitted that clause 28.2 was procedurally uncertain because it did not provide for the remuneration of the mediator or how parties might resolve a disagreement with the fees proposed by a mediator or what would happen should a mediator decline the appointment.

On this, Einstein J listed the minimum requirements to satisfy procedural certainty as established by Australian cases and noted by legal scholars. There are four such requirements.[67]

First, it must be in *Scott* v *Avery* form. Secondly, the process established must be certain, in that there cannot be stages in the process where agreement is needed on something before the process can proceed. Thirdly, the process for selecting a mediator and his/her remuneration should be specified. Finally, the clause should set in detail the process of mediation to be followed, in particular the mediation model.

On this basis, Einstein J found the mediation clause unenforceable as it did not satisfy the third requirement. He also went on to consider if the third requirement could be implied and found that it was not "so obvious that it goes without saying".[68] Therefore, it could not be implied.

As for the plaintiff's submissions relating to the appointment of a mediator, the court found this submission to be without substance[69] and that but for the uncertainty of the mediator's remuneration, the remainder of the procedure was sufficiently certain.[70]

Einstein J also opined that the mediation clause is not severable from the negotiation clause and therefore that too was unenforceable.

There are a number of comments that can be made at this point. First, it is useful to know that where a term is not *prima facie* sufficiently certain, it is possible to imply certainty. This implication of certainty is based on the same rules as the implication of any term into a contract.[71] In this case, Einstein J opined that the implication of a term relating to the remuneration of the mediator was not "so obvious that it goes without saying".[72]

The writer agrees in principle with this approach. The ability to imply terms into a dispute resolution process in order to meet the requirement of certainty is to be welcomed. At the end of the day, the finding of the court with respect to the uncertainty of the remuneration provisions could well be correct. However, the writer submits that the learned judge only considered one way in which term could be implied and did not consider two other available methods.

67 *Ibid,* *41-*43.
68 *Ibid,* *40.
69 *Ibid,* *43.
70 *Ibid,* *44-*45.
71 *Ibid,* *39-*41.
72 *Ibid,* *40-*41.

First, remuneration could have been implied through industry practice. This means that the parties could have adopted the fee scale and arrangements that are usually used. Of course, the writer does acknowledge that this require the existence of industry or past practice and perhaps this did not exist sufficiently for such a term to be implied. In Singapore, this is arguably the position at the moment. However, as the mediation movement develops, there may well be industry practices relating to the remuneration of mediators.

Secondly, the writer submits that where the dispute has been referred to an organisation for the appointment of a mediator, it should not be fatal that provisions of remuneration have not been specified since the organisation in question may have guidelines regarding these matters. If it does, then the writer submits that a reference to the organisation should be sufficient. In this case, the reference was to the President of the New South Wales Bar Association to appoint a mediator.[73] It is not clear if the New South Wales Bar Association has guidelines relating to remuneration. If it did, then the writer submits that the learned judge had erred in this respect. Following from this discussion, the writer submits that in Singapore, a reference of a dispute to the Singapore Mediation Centre should be sufficient as it has its own rules relating to the appointment and remuneration of mediators.

Therefore, depending on whether there was industry practice and/or rules of the New South Wales Bar Association relating to remuneration of mediators, the finding of the court with respect to this issue could have been different.

The second comment that can be made at this point is the writer finds it unusual that the learned judge accepts that a dispute resolution clause should be in *Scott* v *Avery* form in order for it to be enforceable at all. This has been discussed earlier.[74] It is sufficient to say that this represents a step backwards if it is in the interests of public policy to promote forms of dispute resolution other than litigation.

The final comment is that the writer also finds it ironic that the learned judge accepts the proposition that the agreement must set out clearly the process of mediation and in particular the model of mediation. This irony is particularly evident when one considers Einstein J's earlier statement that the process should not be overly structured as this could be counter-productive.[75] Such a requirement can lead to tremendous difficulty in 3 ways.

The first is a definitional difficulty. Teachers and practitioners of mediation know that it is already difficult to suggest that there is one mediation process or indeed one mediation model. The processes and models can be as varied

[73] Clause 28.2(c), *ibid,* *6-*7.
[74] See text accompanying notes 45 to 47.
[75] *Supra,* note 11, *38.

as there are schools and organisations. This is not to say that for pedagogical purposes, it is not possible to identify a process or a model. However, and this leads to the second difficulty, in practice, a mediator may shift from process to process, model to model. In fact, one of the advantages of mediation as a dispute resolution process is its flexibility. Specifying the mediation process and model and requiring compliance would rob mediation of this advantage and that it would unnecessarily limit the mediator's ability to function. The final difficulty relates to mediation's relationship to negotiation. Mediation is often referred to as assisted negotiation. If we accept this requirement for a mediation clause, why should we not apply it to a negotiation clause? However, if this happened, then negotiation clauses would never be enforceable for how could one specify a single process or model of negotiation?

In closing this discussion relating to procedural uncertainty, the sense from the judgment is a mixed one. While the court's inclination to enforce dispute resolution clauses is certainly right, the imposition of certain requirement of form go beyond the need for certainty and is contrary to its initial inclination. Of course, in fairness, perhaps the learned judge did not have some of these considerations just raised in his mind while making his decision. It is hoped that this writer's comments will assist towards a rationalization of this area of law and practice.

This paper will now turn to the question of the good faith requirement in ADR clauses or what the writer has referred to as conduct uncertainty. There are two aspects to this. The first is the suggestion that the notion of acting in good faith was inherently inconsistent with the self-interested position of the parties. This is clearly the rationale adopted by the court in *Walford* v *Miles*[76] and *Elizabeth Bay*.[77] The second is that the concept of "good faith" was too vague and uncertain to be enforceable.

On the first aspect, Einstein J accepts that there is indeed a tension between a party's self-interest and the maintenance of good faith.[78] However, the existence of a tension is by no means the same thing as suggesting that self-interest and good faith are mutually exclusive. Hence, it is possible to negotiate in both self-interest and in good faith.

While Einstein J could have made a more complete argument on this point, the writer agrees with this view and has made this same point elsewhere.[79]

[76] *Supra,* note 29.
[77] *Supra,* note 56.
[78] *Supra,* note 11, *47-*48.
[79] *Supra,* note 27, p 234.

Essentially, suggesting that the notions of self-interest and good faith are mutually exclusive betray an impoverished model of negotiation. In this model, the concept of "win-lose" is the order of the day. This positional model is only one way of thinking about negotiation. The interests-based model adopts a collaborative approach to negotiation and it is entirely possible for parties to work together to meet each other's interests. Therefore in this model, good faith and self-interest may not result in a tension at all. While most negotiations will result in some tension, the point is that self-interest and good faith can co-exist.

On the second aspect that the notion of good faith was too vague and uncertain to be enforceable, Einstein J rejected this proposition and proceeded from the position that vagueness in a contractual term is not synonymous with uncertainty and that courts should strive to give effect to the agreement and expectations of parties.[80] The subsequent discussion on an appropriate standard is fairly involved and the author does not propose to traverse every step here. Instead, the author will highlight the significant steps that the learned judge took to arrive at his conclusion.

Einstein J noted the two opposing lines of authority on the question of conduct certainty. One line was represented by *Renard Constructions (ME) Pty Ltd* v *Minister for Public Works*[81] and argued for the recognition of an implied obligation of good faith in the performance and enforcement of contracts.[82] The opposing line was represented by *Service Station Association Ltd* v *Berg Bennett & Associates Pty Ltd*[83] and argued for the leaving of good faith as a matter of conscience and no more.[84]

Einstein J considered considered the weight of legal and academic authority on this and adopted the former view that an obligation of good faith can be implied into contracts. It follows then that an express obligation of good faith should similarly be acceptable.[85]

However, Einstein J does highlight the distinction between a good faith obligation to negotiate in good faith in an endeavour to reach agreement and a good faith obligation to negotiate in good faith to achieve an outcome satisfactory to the parties.[86]

At first blush, these might seem the same. However, this distinction was alluded to earlier[87] and is essentially the distinction between an agreement to negotiate which is enforceable and an agreement to agree which is not.

[80] *Supra,* note 11, *48-*51.
[81] (1992) 26 NSWLR 234.
[82] *Supra,* note 11, *52-*53.
[83] (1993) 117 ALR 393.
[84] *Supra,* note 11, *55-*56.
[85] *Ibid,* *59-*60.
[86] *Ibid*, *61-*63.
[87] See text accompanying notes 58 to 64.

The learned judge goes on to consider what constitutes the content of a requirement of good faith. It is clear that merely attending the stages of a dispute resolution process is insufficient. This was suggested by counsel for the defendant and rejected by the learned judge.[88] This must surely be correct. A party could attend a mediation or negotiation with no real intention to resolve the dispute. This would be a waste of time and lend weight to arguments relating to futility.

Einstein J noted that some attempts have been made to define what good faith is not[89] and his view was that this was not sufficient. He goes on to suggest that a notion of good faith was implicit in any dispute resolution procedure[90] and that the standard of good faith in every case is fact-intensive and determined on a case by case basis using the broad discretion of the court.[91] However, Einstein J goes on to say that there can be core principles of good faith to provide a framework for the court.[92]

After referring to academic writings[93] and discussions on statutory requirements of good faith,[94] Einstein J proceeds to delineate a working framework for the notion of good faith.

He begins by highlighting the importance of the courts not hampering themselves by laying down an exhaustive principle of what would constitute a compliance or non-compliance with an obligation to negotiate or mediate in good faith.[95] However, it is possible to identify the core content involved. According to Einstein J, the core content of an obligation to negotiate or mediate in good faith are:[96]

> "1. To undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable).
>
> 2. To undertake in subjecting oneself to that process, to have an open mind in the sense of:
>
> (a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate.

88 *Supra,* note 11, *51-*52.
89 *Ibid,* *63-*65.
90 *Ibid,* *70-*71.
91 *Ibid,* *72-*73.
92 *Ibid,* *74.
93 *Ibid,* *74-*79.
94 *Ibid,* *80-*86.
95 *Ibid,* *87.
96 *Ibid,* *87-*89.

(b) a willingness to give consideration to putting forward options for the resolution of the dispute

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:

(a) to act for or on behalf of or in the interests of the other party;

(b) to act otherwise than by having regard to self-interest."

There are three comments that can be made at this point. First, this proposed core content of good faith is certainly a bold step in the law relating to the enforcement of dispute resolution clauses and is to be welcomed. Secondly, Einstein J's proposal does meet to some extent the concerns of the English courts relating to inability to determine whether parties are approaching the dispute resolution process in good faith. Thirdly, in some cases, there will be some difficulty in proving the breach of an obligation of good faith. After all, a party could pretend to be negotiating or mediating and still not have good faith participation in the process. The same comment can be made about proving fraud or recklessness. That some cases may be evidentiarily difficult is not the same thing as suggesting that the obligation lacks sufficient certainty for enforcement. This point was specifically made by Einstein J and the writer agrees.[97]

IV. Conclusion

Singapore has yet to consider the issues that faced the court in *Halifax Financial Services Ltd and Aiton Australia Pty Ltd*. Neither case is binding. Indeed, Einstein J's proposed core principles are *obiter*. The Australian courts in *Aiton Australia Pty Ltd* is obviously less conservative in its approach towards the enforcement of dispute resolution clauses.[98] The English courts in *Halifax* have shown a willingness in principle to enforce dispute resolution clauses but may be too litigation-centric in its approach.

Singapore is in a position to choose between these two approaches. The author submits that Singapore should adopt an approach that favours the enforcement of dispute resolution clauses. This is consistent with the encouraging of the resolution of disputes through mediation and arbitration.

[97] *Ibid,* *89-*90.

[98] Although it must be said that there are varying degrees of liberalness in approaches.

The Singapore approach should allow for the enforcement of dispute resolution clauses if it is procedurally certain. On this, it should be sufficient to refer a dispute to an organisation which have the rules to govern matters like appointment, remuneration and process. In the case of mediation, it should not be necessary to state the particular model of mediation. There should not be a need for the dispute resolution clause to be in *Scott* v *Avery* form. Further, where the clause provides for a good faith requirement, Singapore should adopt the guidelines set out in *Aiton Australia Pty Ltd*. Of course, the author is not suggesting that the court has to enforce every dispute resolution clause that appears before it. This is still within the discretion of the court. However, the starting position must surely be to hold parties to their agreement as to a dispute resolution procedure. Only when the parties have participated in the agreed process should they turn to litigation.

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