# Making contractual ADR clauses work: a new judgment

**Speedread**

Detail is all-important to defeat long-standing authority against enforceability of clauses requiring parties to negotiate their contract disputes in good faith, before heading to arbitration or court. Such clauses, without more, are unenforceable. That's mainly because agreements to agree, which is what such clauses are said to be, are unenforceable. That follows from appellate UK and NZ decisions.[1]

A 2014 UK decision, *Emirates Trading v Prime Mineral*,[2] sensibly challenges those decisions, at least so far as there is sufficient detail to make the clauses enforceable. And that's the trick. Too vague: not enforceable. Detailed enough and the court has something to enforce.

That's good, for example, for the common type of provision involving tiered negotiation of disputes, such as: good faith negotiation within 14 days between managers: then within 14 days between CEOs; then mediation: only then can there be litigation or arbitration (outside injunctive relief).

The takeaway? The more detailed the provisions, the more likely they will be enforced. But this law hasn't settled down yet.

However even if unenforceable, such clauses can be powerful in inducing negotiation of disputes. And that's a good thing as the great majority of disputes end in settlement, even where proceedings are issued. Front-ending resolution has to be good.

We've noticed one particular problem with these clauses: sometimes the timeline before proceedings can be issued is too long, and that can lead to counterproductive delays, where there is some urgency.[3] That can be hard to solve though.

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## The Detail

In *Emirates Trading*, the new UK case, the ADR clause was lean: if there's a dispute, "*the Parties shall first seek to resolve the dispute or claim by friendly discussion*". If there is no solution within 4 weeks, arbitration can be commenced.

It was that 4 weeks which enabled the judge to distinguish the earlier cases against enforceability of good faith negotiation clauses. The defined time line gave enough certainty.

The key point for the judge was that the parties, for good faith negotiation, are not required to negotiate "*reasonably*" in the sense of coming to reasonable outcomes. They only must negotiate in good faith. They can't be forced to settle. In this way, and adopting basic contract formation principles, the agreement is complete and therefore enforceable.

Sometimes, failure to negotiate in good faith cannot be proved but sometimes it can. However just because there might be evidential proof difficulties, said the judge, does not mean that

the contractual obligation does not exist. Ability to prove something needs to be decoupled from whether the underlying legal duty exists.

That is why it's valuable to put in as much detail as realistically possible in terms of process and timing, such as the requirement for CEOs to meet within X days, and for the mediation provision to have a mechanism (such as reliance on LEADR and other mediation rules).

Then, from a wider policy perspective, the judge said that, where possible, the court should enforce contract commitments chosen by the parties. And anything that encourages early resolution, thereby avoiding expensive litigation, is to be encouraged. So the judge supported this law.

The Judge summarised his reasons as follows:

> *The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration.*

This essentially attacks the fundamental principles in the appellate cases referred to at the start of this article, but the judge only had to distinguish those cases. However, the reasoning in the judgment is strong and so the law may in due course change more widely.

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1. See *Watford v Miles* [1992] 2 AC 128, *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA). And *Porter v Gullivers Travel Group Ltd* [2007] NZCA 345.

2. [2014] EWHC 2104 (Comm).

3. Urgency that is, short of being suitable for injunctive relief.

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