

# Construction and enforcement of multi-tiered dispute resolution clauses (Ohpen v Invesco)

20/08/2019

**Dispute Resolution analysis: Dispute resolution clauses often solely provide for a dispute to be resolved by court proceedings or arbitration. If alternative dispute resolution (ADR) is entertained, it usually happens outside the parameters of the parties' agreed dispute resolution mechanism. However, as ADR continues to grow in popularity and prevalence, multi-tiered dispute resolution clauses may become more common. The Ohpen v Invesco case address the criteria that needs to be satisfied when such mechanisms are construed and enforced in the English courts. In particular, the case provides a helpful checklist of the criteria that needs to be satisfied, to the benefit of both commercial lawyers responsible for drafting such clauses as well as those who ultimately may seek to enforce them. Written by Jon Felce, partner at PCB Litigation LLP.**

*Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [\[2019\] EWHC 2246 \(TCC\)](#)

## What are the practical implications of this case?

The case provides helpful guidance on the factors the court will consider when considering whether or not to stay proceedings in favour of a multi-tiered dispute resolution clause. Not only is this relevant to parties, in-house counsel and litigators once a dispute has arisen, but to those drafting dispute resolution clauses. The judge's helpful summary of the principles to be considered provides a useful checklist for practitioners in this regard. Given the nature of some of those principles, it may be prudent for a dispute resolution specialist to input on such drafting, in particular to ensure that the clause contains a clear and certain dispute resolution mechanism by reference to objective criteria.

Also of note is that the court only has a discretion to stay the proceedings pending ADR notwithstanding the mandatory nature of a dispute resolution clause. The decision therefore leaves open the possibility that, even if the aforementioned criteria are satisfied, a stay may not be mandatorily ordered. Although the court did not hypothesise as to situations in which a stay would not be ordered, the prospect of such an eventuality should be highlighted to practitioners advising parties on the terms of a multi-tiered dispute resolution mechanism. Indeed, in this case, whilst the court did stay proceedings, the court did permit the proceedings to advance to close of pleadings with the purpose of assisting the parties' attempts to resolve the dispute.

## What was the background?

In 2016, Invesco engaged Ohpen to develop and implement a digital online platform. Two years later, Invesco issued a notice of termination on the grounds of incurable material breach and/or repudiatory breach. Ohpen disputed this and the validity of the termination and purported to accept Invesco's repudiatory breach.

In January 2019, the parties attended a without prejudice meeting but were unable to settle the dispute. The following month Ohpen sent a letter of claim and subsequently issued proceedings seeking £4.7m in damages for the alleged wrongful termination. Invesco has intimated a counterclaim of £5.7m.

Invesco subsequently applied to the court for a declaration that the court would not exercise any jurisdiction it may have to hear Ohpen's claim and to stay the claim pending compliance with a contractually agreed dispute resolution procedure. In that regard, Invesco relied upon clause 11 of the framework agreement between the parties, submitting that a mandatory escalation and mediation procedure should have occurred before proceedings were commenced. Ohpen's position was that the relevant provisions did not apply outside a particular phase, or after the termination, of the agreement.

The parties agreed that a mandatory obligation to follow a specified dispute resolution process can create a condition precedent to the commencement of court proceedings.

## What did the court decide?

The court considered a number of authorities in reaching its decision—*Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041, *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), *Tang v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), [2013] 1 All ER (Comm) 1226, *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm), [2014] All ER (D) 40 (Jul).

Drawing together these authorities, the judge derived the following principles as applying when a party seeks a stay of proceedings in order to enforce an ADR provision:

- there must be an enforceable obligation requiring ADR
- that obligation must be expressed clearly as a condition precedent to court proceedings or arbitration
- although there is no need for a formal dispute resolution process, it must be sufficiently clear and certain by reference to objective criteria, including machinery to determine any requisite step in the procedure without needing the parties' further agreement
- the court may stay proceedings commenced in breach of an enforceable dispute resolution clause, having regard to the public policy interest of upholding the parties' commercial agreement and in order to further the overriding objective of assisting parties to resolve disputes

The judge reviewed the terms of the agreement and concluded that—(i) it contained a dispute resolution clause that applied to the parties' dispute, (ii) the clause created an enforceable obligation mandating a mediation, (iii) the clause operated as a condition precedent to the commencement of proceedings, and (iv) the dispute resolution mechanism was sufficiently clear and certain. In the circumstances, the judge considered that a stay of proceedings was appropriate, albeit these statements of case should be served so that the parties were clear as to the ambit and basis of the claims and defences relied upon ahead of the mediation.

## Case details

- Court: High Court, Queen's Bench Division (Technology and Construction Court)
- Judge: O'Farrell
- Date of judgment: 16/08/2019

[Jon Felce](#) is a partner at PCB Litigation LLP, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact [caseanalysis@lexisnexis.co.uk](mailto:caseanalysis@lexisnexis.co.uk).

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

FREE TRIAL