

To bespoke or too bespoke – the case of an ADR clause that couldn't be enforced

By Kate Holland

In a recent English decision, the Technology and Construction Court held that a clause in a construction contract requiring the parties to refer a dispute to ADR was a condition precedent to commencing litigation in the courts. However, the Court also held that this particular ADR clause was unenforceable, because the procedure it set out was not sufficiently clear or certain.

Background – the parties and the project

[Children's Ark Partnerships Ltd v Kajima Construction Europe \(UK\) Limited and Kajima Europe Limited \[2022\] EWHC 1595 \(TCC\)](#) concerned the redevelopment of a children's hospital.

In June 2004, Children's Ark Partnerships Ltd (**Ark**) entered into a development agreement with Brighton and Sussex University Hospital Trust (the **Hospital Trust**) for the redevelopment. By contract dated the same date (the **Construction Contract**), Ark engaged Kajima Construction Europe UK Limited (**Kajima**) to design and build the hospital.

A bespoke ADR clause in the Construction Contract

The Construction Contract contained a bespoke alternative dispute resolution procedure (the **ADR clause**) which the Court and parties' representatives described as *surprising and unusual*. The ADR clause required a party to refer any disputes to a 'Liaison Committee' which would seek to resolve the dispute within 10 days of the referral. As will be seen, the shortcomings and ambiguity of this bespoke ADR procedure turned out to be fatal to Kajima's attempt to rely on it as a condition precedent to commencing litigation.

Discovery of defects and requiring remedial works

The Construction Contract contained a limitation clause under which no proceedings could be brought against Kajima after the expiry of 12 years from the date of actual completion of the project. This limitation period was due to expire in April 2019.

Around six months before the limitation period expired, defects with the cladding came to light and Kajima agreed to carry out the remedial works at its own cost. To minimise disruption at the hospital, Kajima agreed to do the remedial works gradually and extend the limitation period to 29 December 2021, while the remediations were ongoing.

Ark commences litigation in the Court, Kajima applies for strike out or set aside

With issues still outstanding and the extended limitation period about to expire, Ark filed proceedings in the TCC on 21 December 2021. But it also applied to the Court to stay the proceedings so that it could refer the dispute to the Construction Contract's ADR procedure.

Kajima, in response, applied to the Court to set aside or strike out Ark's claim on the basis that the ADR clause in the Construction Contract was a condition precedent to the commencement of litigation, with which Ark had failed to comply.

Kajima's application to strike out/set aside – was the ADR clause an enforceable condition precedent to litigation?

The Court identified that for Kajima's application to succeed the ADR clause in the Construction Contract must be an enforceable condition that had to be complied with before Ark could issue court proceedings, that is, a *condition precedent*. The issues which needed to be determined included:

- Was the ADR clause a condition precedent to commencing litigation?
- If the ADR clause was a condition precedent, was it enforceable?

- If the ADR condition precedent was enforceable, did Ark fail to comply with it?

In answering the above questions, the Court found that the ADR clause was indeed a condition precedent but also that it was not enforceable. It therefore did not need to consider the third issue.

Was the ADR clause a condition precedent to litigation?

The Court held that although the Construction Contract did not expressly use the term 'condition precedent' in relation to the ADR clause, the objective purpose of relevant clauses taken together was that the ADR procedure was a condition precedent to commencing proceedings in the courts. Having answered this in the affirmative, the Court went on to consider whether this ADR condition precedent was enforceable.

Was the ADR condition precedent enforceable?

The Court held that in order to be enforceable, the ADR procedure *must be sufficiently clear and certain by reference to objective criteria*.¹ The Court drew attention to several authorities exploring the factors of the clarity and certainty² of an ADR process, and then listed a series of shortcomings of the ADR procedure in the present case. Of particular significance in this analysis was the fact that the Liaison Committee conducting the ADR comprised representatives from Ark and the Hospital Trust, but it did not include any representatives from Kajima.

The Court found that the ADR process here was not sufficiently clear or certain because:

- There was no meaningful description of the process to be followed. The Liaison Committee could make its own rules and procedures, but there was no evidence of what those rules and procedures needed to encompass. Therefore, there was no unequivocal commitment to engage in any particular ADR procedure.
- It was unclear how a dispute should be referred to the Liaison Committee or when the process of referral to the Liaison Committee came to an end, making it unclear when the condition precedent is satisfied.
- It was unclear how the Liaison Committee could identify or resolve a dispute given that Kajima was not a member of the Committee and had no obligation or right to take part in

the process. It was also unclear what impact any decision of the Liaison Committee would have on Kajima.

- It was unclear what the role of the Hospital Trust was, as a member of the Liaison Committee.

Decision

While the Court found that the ADR clause was a condition precedent to commencing litigation, it held the ADR procedure as described in the Construction Contract was not sufficiently clear or certain to make it an enforceable condition precedent. Kajima's application to strike out or set aside Ark's claim was dismissed because the ADR clause 'failed'. Accordingly, Ark's application could proceed.

Conclusion

The TCC's decision highlights the importance of choosing a robust and recognised ADR procedure. It is essential that your contract is clear and unambiguous about the procedure or rules that will be followed, to ensure you can rely upon and enforce your ADR clause when you need to. Of interest, the Court of Appeal has recently granted Kajima leave to appeal. We look forward to hearing and reporting on the outcome.

ABOUT THE AUTHOR



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* Building Disputes Tribunal is a part of The ADR Centre.

¹ Citing *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576 at [32(iii)].

² *Holloway v Chancery Mead Ltd* [2007] 117 ConLR 30 at [81]; and *Tang v Grant Thornton International Ltd* [2013] 1 All ER (Comm) 122 at [60].