**Dispute resolution agreements**

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This element addresses dispute resolution agreements, including hybrid, multi-tiered and carve-out clauses

**Introduction**

A dispute resolution agreement, either as a free-standing agreement or more likely as a clause (or clauses) within a contract between parties, can give the parties much greater control over the way any dispute is resolved.

Consider the clause on the next page. That clause is analysed in the remainder of this element, with alternative drafting ideas also considered.

"**27. Dispute resolution**

27.1 In the event of a dispute arising out of or relating to this contract, including any question regarding its breach, existence, validity or termination, and including any non-contractual claims (whether in tort or otherwise) (Dispute), the parties shall endeavour to reach a resolution of the Dispute satisfactory to both parties. Either party may commence such process by requesting a meeting with the other party, which may take place in person, or remotely. Each party shall nominate a representative or representatives (not to exceed 3) who shall meet to try to resolve the Dispute.

27.2 If the Dispute is not resolved within 14 business days of the meeting between the party representatives taking place (or if, for any reason, such meeting does not take place within 14 days of either party requesting the meeting (or such longer period as may be agreed between the parties)), then:

(a) The Dispute may, at either party's request, be referred to mediation in accordance with the Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure, and informal negotiations need not continue. Either party may initiate the mediation process by giving notice in writing to the other party requesting mediation (Mediation Notice).

(b) If there is any aspect of the form or conduct of the mediation (including the identity of the mediator to be appointed) on which the parties cannot agree within 7 days from the date of delivery of the Mediation Notice, CEDR shall, at the request of either party, decide that point, having first made reasonable efforts to consult with each of the parties on the issue.

(c) The mediation shall start not later than 21 days from the date of delivery of the Mediation Notice.

(d) The mediation shall take place in England and the language of the mediation shall be English.

(e) The Mediation Agreement referred to in the CEDR Model Mediation Procedure shall be governed by the substantive law of England and Wales.

(f) CEDR's fees, and those of the mediator together with other expenses of the mediation, will be borne equally by the parties.

(g) Each party will bear its own costs and expenses of its participation in the mediation.

27.3 If, and only if, a party refuses or fails to participate in the mediation process or if a resolution of the Dispute is not reached within 35 days from delivery of the Mediation Notice, the other party may commence court proceedings in accordance with the provisions of clauses 28 and 29 below.”

First, note the overall structure of the clause. This is a **multi-tiered dispute resolution clause**. The three tiers relate to:

Negotiation (clause 27.1)Mediation (clause 27.2)Court proceedings (clause 27.3)

The first two tiers are ‘non-adjudicative’ – they do not guarantee a determination of the dispute.

The final tier, court proceedings, will result in a determination of the dispute.

Let us consider first the clause providing for negotiation

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**Advantages**

The advantage of such a clause is that it encourages the parties to resolve a dispute through a relatively amicable and cost-efficient process.

**Disadvantages**

An alternative perspective is that such a clause is unnecessary. The parties are encouraged to negotiate by pre-action protocols, court roles, and by legal advisors. Adding a clause to a contract to this effect is unnecessary if the parties want to negotiate, and if they do not want to negotiate, requiring them to negotiate is probably not going to achieve anything.

The enforceability of such a clause is also a developing area of law. For example, it is unlikely that ‘endeavour to reach a resolution’ is an obligation of sufficient certainty to be enforceable. On the other hand, where a negotiation procedure is certain, that might be enforceable (*Ohpen Operations UK Limited v Invesco Fund Managers Limited* [2019] EWHC 2246 (TCC)).

It is also likely to be very difficult to show that any breach of such a clause has caused loss, because it will be difficult to show that a negotiation would have produced a benefit, particularly if one or both of the parties is reluctant to participate.

Turning to the mediation provision…

"27.2 If the Dispute is not resolved within 14 business days of the meeting between the party representatives taking place (or if, for any reason, such meeting does not take place within 14 days of either party requesting the meeting (or such longer period as may be agreed between the parties)), then:

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(g) Each party will bear its own costs and expenses of its participation in the mediation."

The same principles set out on the previous page apply to a clause providing for mediation, but note that because mediation has clearer procedural aspects, the clause is more likely to be enforceable, because a court can at least require the parties to follow the procedure.

Note the following detail that helps to ensure this clause is sufficiently certain…

- A detailed procedure is incorporated by reference

- A third party is given power to resolve points of form / conduct

- The mediation period is time-limited

- The costs of the mediation are addressed

All of these provisions help to ensure that the clause is enforceable and effective.

Finally, the adjudicative part of the clause…

"27.3 If, and only if, a party refuses or fails to participate in the mediation process or if a resolution of the Dispute is not reached within 35 days from delivery of the Mediation Notice, the other party may commence court proceedings in accordance with the provisions of clauses 28 and 29 below.”

It is, of course, of paramount importance that a dispute resolution agreement does ultimately provide for an adjudicative mechanism that will result in a binding agreement – neither negotiation nor mediation is guaranteed to resolve the dispute.

This example clause provides that the claim will ultimately be resolved by court proceedings if negotiation / mediation have not been successful. Alternative adjudicative processes are arbitration or expert determination, which could be stipulated in such a clause instead of court proceedings.

In the case of a clause providing for arbitration, such a clause would need to include more detail. For example, the London Court of International Arbitration recommends the following:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ]."

If a party wanted to provide for expert determination rather than arbitration or court proceedings, much more detail still would be needed, as there are no standard rules or processes underpinning expert determination. The process and timetable would need to be set out in the clause or in some areas, could be given to the appointed expert to decide. It would also be important to ensure that expert determination is an appropriate form of dispute resolution for the types of dispute likely to arise under the contract.

**Hybrid clauses**

The clause above commits to a single adjudicative form of dispute resolution – court proceedings. In contrast, a **hybrid** clause is one that seeks to give either one party, or both parties, a choice of adjudicative resolution process – usually a choice between arbitration and litigation.

Where both parties are given the choice (a **mutual option clause**), this can cause difficulties. If a dispute arises and Party A prefers arbitration, but Party B prefers court proceedings, then each may race to start the proceedings in their chosen forum. This can result in parallel court and arbitration proceedings and a dispute as to which should proceed. It can also lead the parties to omit pre-action negotiations that might have been fruitful.

Where only one party is given the choice (a **unilateral option clause**), this problem is avoided.

Given its complexity, a hybrid clause must be particularly carefully drafted and steps taken to check that it is enforceable both:

In the forum where the dispute is intended to proceed; andIn any forum where a judgment might ultimately need to be enforced.

In this regard, a unilateral clause is more likely to be problematic than a mutual option clause, because of its asymmetry / lack of mutuality (although it is likely to be acceptable in England and Wales).

**Carve-out clauses**

It is also possible to provide that part of a dispute is subject to a different form of dispute resolution to the remainder. The most common form of such a clause is one providing for the dispute as a whole to be referred to arbitration / court proceedings, but ‘carving out’ a particular issue – such as a question of valuation or accounting – to be determined by an expert.

Finally, consideration needs to be given to how all these provisions fit together and to making the clause work as a whole.

"**27. Dispute resolution**

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27.2 **If the Dispute is not resolved within 14 business days of the meeting between the party representatives taking place (or if, for any reason, such meeting does not take place within 14 days of either party requesting the meeting (or such longer period as may be agreed between the parties)),** then:

(a) The Dispute may, at either party's request, be referred to mediation in accordance with the Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure, and informal negotiations need not continue…

**27.3 If, and only if, a party refuses or fails to participate in the mediation process or if a resolution of the Dispute is not reached within 35 days from delivery of the Mediation Notice, the other party may commence court proceedings** in accordance with the provisions of clauses 28 and 29 below.”

Note how the clause makes clear how and when the parties move from tier to tier

A distinctive feature of this clause is that not only does it provide an option for the parties to refer to mediation, but it prevents the issue of court proceedings by Party A if Party B is participating in the mediation process and the time limit stipulated has not been reached.

An alternative option is to require mediation but to nonetheless allow court proceedings at the same time. The following is an example of such provision.

"If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure…The mediation must be started by no later than [ ]. **The commencement of a mediation does not prevent the parties from commencing court proceedings** in relation to any matter, whether connected to the subject matter of the mediation or otherwise."

**Summary**

• A dispute resolution agreement can give the parties much greater control over the way any dispute is resolved.

• A multi-tiered dispute resolution agreement generally provides for one or more forms of non-adjudicative dispute resolution processes and one adjudicative process.

• The enforceability of a non-adjudicative clause depends on the certainty of that clause.

• The enforceability of a clause providing for mediation will be greatly assisted by clear and detailed provisions as to procedure (which can be incorporated by reference) and timing.

• A clause providing for adjudicative dispute resolution may ‘carve out’ particular issues to be decided by a different adjudicative mechanism.

• Care needs to be taken to ensure that the agreement works as a whole and that it is clear how and when to move from one tier to the next.

• The agreement should also make clear whether engagement with the non-adjudicative processes is a pre-condition to the adjudicative processes.