



Enforceability of Multi-Tiered Dispute Resolution Clauses Revisited in the Court of Appeal

Multi-tiered dispute resolution clauses are an increasingly common feature in high-value domestic and international construction and engineering contracts. That is not surprising because, if such a provision can facilitate early settlement of a dispute, the time and cost savings to the parties can be substantial.

Difficulties may arise, however, where the parties do not take sufficient care in drafting bespoke clauses. This can lead to a provision that is found to be unenforceable and, ultimately, having the opposite effect of what might have been subjectively intended by increasing the time and cost incurred in resolving a dispute.

One such example of where things can go wrong is considered in the recent Court of Appeal case [Kajima Construction Europe \(UK\) Limited and Kajima Europe Limited v Children's Ark Partnership](#) [2023] EWCA Civ 292, where Lord Justice Popplewell described [at 121] the tiered dispute resolution provisions as being:

“a clumsy adoption of particular terms from a head contract into a sub-contract”

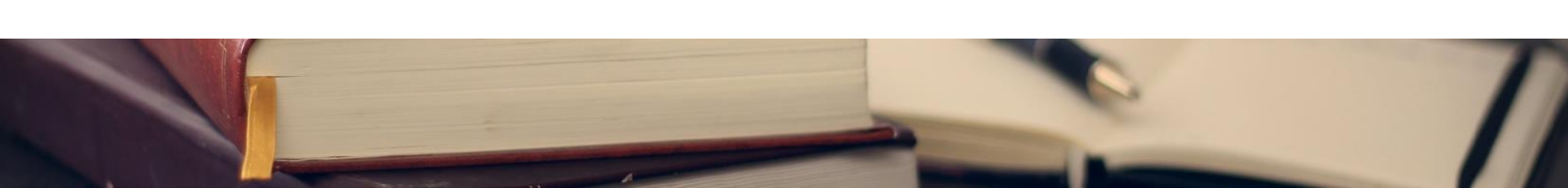
Although the case settled shortly after the appeal hearing, the judgement was nonetheless handed down because some of the points raised were of general importance.

Background

Brighton and Sussex University Hospital NHS Trust (“the Trust”) engaged Children’s Ark Partnership (“CAP”) in 2004 to design, build and finance the redevelopment of the Royal Alexandra Hospital for Sick Children in Brighton (“the Project Agreement”). This was a PFI Project. CAP in turn engaged Kajima Construction Europe (UK) Limited (“Kajima”) to design, construct and commission the Hospital (“the Construction Contract”).

As was the case with many buildings in the UK, the Grenfell Tower tragedy in 2017 caused checks to be undertaken in respect of cladding and fire-stopping works at the Hospital. Concerns were identified and notified to Kajima, who agreed to carry out remedial works without any admission of liability. The remedial works commenced in December 2018 and were ongoing until early 2022.

The [Project Agreement](#) contained a ‘Dispute Resolution Procedure’ (“DRP”), which provided that any disputes under the Project Agreement shall in the first instance be referred to the Liaison Committee and that



any decision of the Liaison Committee shall be final and binding unless otherwise agreed by the parties. By clause 68, any entitlement to refer disputes to the courts of England and Wales for final resolution was “*subject to*” the provisions of the DRP. The Liaison Committee comprised three representatives each from the Trust and CAP. The role and functions of the Liaison Committee—along with the procedures and practices to be followed—were set out in some detail in clauses 12.1 to 12.11 inclusive. Notably, clause 12.2(c) provided that one of its functions was to provide a means of resolving disputes “*amicably*” pursuant to the DRP, and clause 12.3 provided that the overarching role of the Liaison Committee was to make recommendations, which the parties may at their complete discretion either accept or reject.

In the Construction Contract, the meaning of ‘the Liaison Committee’ was defined by reference to clause 12 of the Project Agreement but, materially, clause 12 in the Construction Contract was in a very different form, such that clause 12.1 simply provided that Kajima was to provide such assistance as may reasonably be necessary to assist CAP in respect of ‘Work’ related matters under the Project Agreement that may be considered by the Liaison Committee. Significantly, clauses 12.2 to 12.11 inclusive were labelled “[*Not Used*]”. Notwithstanding this, both clause 68 and the DRP itself were incorporated into the Construction Contract in identical terms to that of the Project Agreement.

During the period of the remedial works being carried out by Kajima there was no progress made in resolving liability, or referral of any dispute to the Liaison Committee pursuant to the DRP. The parties had the foresight, however, to extend the limitation of liability period under the Construction Contract to 29 December 2021. In early December 2021, the parties were discussing the possibility of further extending the limitation period, but no agreement was reached. In the circumstances, CAP elected to issue a Claim Form on 21 December 2021 against Kajima arising out of the alleged defects and on 3 February 2022 it applied for a stay in the proceedings in order to comply with the DRP. On the same day, Kajima applied to set aside or strike out the Claim Form on the grounds that CAP had not first complied with the DRP.

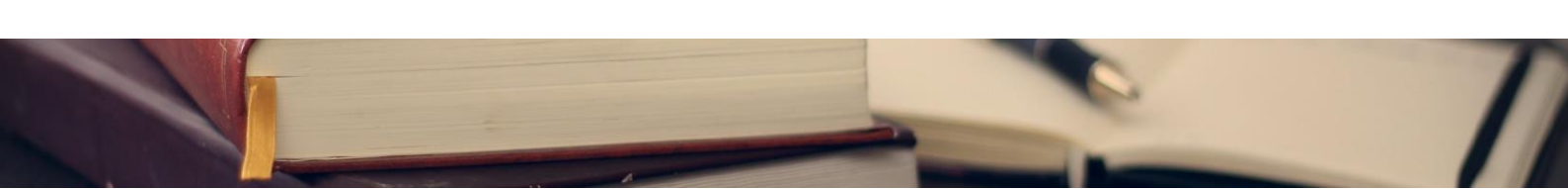
Pausing there, it is relevant to note that, if Kajima had succeeded in its application, it is likely that CAP would have been time-barred from commencing fresh proceedings. The stakes were, therefore, high.

The above applications came before Mrs. Justice Smith in the TCC. The judge decided *inter alia* that the requirements of the DRP were a condition precedent, but that it was unenforceable due to a lack of certainty ([2022] EWHC 1595 (TCC)). The decision on enforceability was one of three grounds of appeal by Kajima.

The Appeal

Lord Justice Coulson gave the leading judgment in the appeal. The following principles may be drawn from his analysis of the authorities related to the question of enforceability:

- (1) Wherever possible, the court should seek to uphold the parties’ agreement. However, where there is a dispute about the enforceability of alternative dispute resolution provisions that are relied on to frustrate court proceedings, the courts have not backed away from determining that such provisions may not be enforceable.
- (2) The starting point is that a mere agreement to seek to settle disputes amicably, and only refer the matter to arbitration or litigation in the event of being unable to settle, is not an enforceable obligation. However, while there is an obvious lack of certainty in such an undertaking (because the court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision), provisions which set out the means by which any attempt to settle matters amicably is to be undertaken, are different.
- (3) For the courts to decline enforcement of alternative disputes resolution provisions on the basis of intrinsic uncertainty would be to fly in the face of public policy. However, any alternative dispute resolution provision must be sufficiently certain to be enforceable.

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- (4) Considerations as to whether a clause is sufficiently certain include matters such as whether there exists: (a) an unequivocal undertaking in unqualified and mandatory terms, (b) provisions for the appointment of the person or entity to undertake any prescribed alternative dispute resolution role, (c) a clearly defined process or procedure and (d) clear provision that would enable a court to determine objectively what is required of the parties in terms of their minimum participation, and when or how the agreed process will be at an end or otherwise properly terminable.

The main reasons given by Coulson LJ in dismissing the appeal on the enforceability point may be summarised as follows:

- (1) On the face of it, the DRP would impose a final and binding decision by the Liaison Committee on Kajima, even though it: (a) had no representative on the Committee, (b) had no right to attend meetings, (c) was not expressly entitled to make representations to it or (d) had no right to see its documents. That could not lead to “*an amicable settlement*”, which is suggestive of a pointless and unenforceable process.
- (2) Actual or perceived bias would be inherent in the whole structure of the DRP under the Construction Contract and so, in this way, the Liaison Committee was “*a fundamentally flawed body*” which could neither resolve a dispute involving Kajima “*amicably*”, nor could it fairly provide a decision binding on Kajima in any event, again suggestive of an unenforceable process.
- (3) The DRP provides no contractual commitment to engage in any particular process either covering the referral, or the process to be followed once a dispute had been referred.
- (4) As to the process itself, it is impossible to see what is required of either party as a minimum; Kajima had no right to attend the Liaison Committee or to make representations to it, and CAP’s obligations to participate as a respondent to any referral by Kajima are also unclear.
- (5) The provision is uncertain as to when the process concludes.

Although Lord Justices Popplewell and Holroyde agreed that the appeal should be dismissed, Popplewell LJ considered that the only reason why the provision was too uncertain to be enforceable was the absence of any provision as to how and when the process is complete. He specifically did not agree that there was any other aspect of the provision rendering it unenforceable for certainty. He also did not agree that the DRP would involve an adjudicatory process that could impose a resolution on Kajima but rather, based on an interpretation that he said yields to business common sense, it had a facilitative role and, in performing its function, the Liaison Committee would need to act in good faith and give Kajima a fair opportunity to be involved in the process.

Analysis and Lessons Learned

Although the decision to dismiss the appeal was unanimous, the very different reasons given by Coulson LJ and Popplewell LJ illustrates that the interpretation of a poorly drafted multi-tiered dispute resolution clause can be far from straightforward, making the outcome of any satellite litigation on the issue, and its consequences, uncertain.

This case highlights that, in formulating multi-tiered dispute resolution procedures, parties should take care to ensure that each ‘tier’ contains:

- (1) An unequivocal undertaking to comply with the provision.
- (2) A clear procedure for identifying and/or appointing the person or entity to undertake any prescribed facilitative or adjudicative role.

(3) Clear provisions setting out the process or procedure to be followed and what is required of the parties.

(4) A process or procedure that is fair as between the parties.

(5) Clear provision setting out how and when the process is exhausted or terminable without breach.

In addition, where provisions are being stepped down from a head contract, care should be taken to ensure that they remain unambiguous in the context of the subcontract.

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