THE ENFORCEABILITY OF ALTERNATIVE DISPUTE RESOLUTION AGREEMENTS

Emerging Problems and Issues

The popularity of alternative dispute resolution ("ADR") is undoubtedly on the rise. Foremost of these mechanisms, negotiation and mediation, are increasingly resorted to as the first step to resolving disputes. In the realm of alternative dispute solutions, although the law on agreements to negotiate and mediate is developing rapidly, it is still in its infancy stage relative to the more substantial body of law that governs arbitrations. This paper thus seeks to highlight the emerging issues surrounding the enforceability of agreements to resolve disputes through amicable ADR processes.

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I. Introduction

1 While commercial disputes are inevitable, the way they are handled can have a profound impact on the profitability and viability of the business.[1] Full-blown disputes are said to always be bad news for a company. It may frighten investors, divert resources and, in some cases, paralyse a company.[2] These adverse consequences may be driving a nascent surge in ADR mechanisms.[3] In a study conducted by Herbert

* The views expressed in this article are entirely the authors' own and should not be construed as representative or in any way reflective of the views of their respective employers.

1 Nadja Alexander, *Global Trends in Mediation* (Kluwer Law International, 2006) at p 49.

2 Eric Runesson & Merie-Laurence Guy, *Mediating Corporate Governance Conflicts and Disputes* (International Finance Corporation, World Bank, 2007) at p 13.

3 There is no universally accepted definition of ADR though it is generally accepted as including negotiation, mediation, conciliation, expert determination, adjudication, and arbitration: Andrew Tweedale & Karen Tweedale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2007) at para 1.01.

Smith LLP in 2007,[4] general and in-house counsel from organisations such as Royal Bank of Scotland, Merrill Lynch and General Electric selected mediation as the most favoured ADR process.[5] In the US, approximately 800 organisations, including Time Warner, United Parcel Service and Coca-Cola, have pledged to explore ADR processes before litigation.[6] In Singapore, ADR mechanisms have flourished since the early 1990s when mediation was first promoted by the judiciary.[7] Today, the Singapore Mediation Centre, which was set up in 1997, provides numerous types of ADR services. It has administered more than 2,000 mediations alone.[8]

2 Despite the growing number of adopters of amicable ADR mechanisms, the law governing agreements to resolve disputes amicably is still relatively underdeveloped. On a global scale, at its 52nd plenary meeting on 19 November 2002, the United Nations General Assembly adopted the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Conciliation[9] ("Model Law on Conciliation"). Amongst the reasons for adopting the Model Law on Conciliation are the recognition of the value and benefits of amicable dispute settlement for international trade and the increasing trend of recourse to such amicable dispute resolution mechanisms.[10] Yet, the number of States which have adopted the Model Law on Conciliation is a paltry 23.[11] In contrast, 95 States have adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration").[12] Even States which have not adopted the Model Law on Arbitration have enacted some form of national legislation to regulate arbitrations within their territory.[13] In addition, 147 States are party to the 1958 Convention on the Recognition and

4 It merged with Freehills, an Australian-based law partnership in 2012 and is now known as Herbert Smith Freehills LLP.

5 "The Inside Track – How Blue-chips are Using ADR" (November 2007) at p 6. <http://www.hks.harvard.edu/m-rcbg/CSRI/ga/smith_adr.pdf> (accessed 24 November 2012).

6 See Eric Runesson & Merie-Laurence Guy, *Mediating Corporate Governance Conflicts and Disputes* (International Finance Corporation, World Bank, 2007) at p 13.

7 Keynote Address of Chan Sek Keong CJ at the Alternative Dispute Resolution (ADR) Conference (4 October 2012) at para 9.

8 Singapore Mediation Centre website <http://www.mediation.com.sg/mediation_statistics.htm> (accessed 26 November 2012).

9 UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, annex I (as adopted on 21 June 1985).

10 *UNCITRAL Model Law International Commercial Conciliation with Guide to Enactment and Use 2002* (United Nations, 2004) at p v.

11 See UNCITRAL website <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html> (accessed 24 November 2012).

12 See UNCITRAL website <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (accessed 24 November 2012).

13 See the English Arbitration Act 1996 (c 23).

Enforcement of Foreign Arbitral Awards,[14] more commonly referred to as the New York Convention.[15] Evidently, in contrast to arbitration, there is significantly less concentration on and harmonisation of non-arbitration ADR practices internationally.

3 The law relating to ADR agreements is presently behind the curve; it has not caught up with the advancement of ADR as a primary means of dispute resolution. This is not entirely surprising, given that the rise of the use of ADR processes in its present manifestation, as an alternative to litigation, is a fairly recent trend.[16] This paper therefore attempts to highlight key aspects of negotiation and mediation agreements which are potentially problematic, with particular focus on the issues relating to the enforceability of such agreements. As a summary, the paper argues that there is a growing trend towards promoting ADR mechanisms such as negotiation and mediation, as there is towards arbitration. The law governing negotiation and mediation is undoubtedly rough at the edges and lacking in core principles. Unfortunately, as was and remains the case with arbitration law, core principles applicable to non-arbitration ADR agreements will only concretise with the passage of time, as one would expect with a common law system. Nevertheless, we venture two submissions. First, in the context of enforceability of ADR agreements, first principles of domestic contract law are relevant and must remain the starting point. An ADR agreement is, at minimum, a contract; hence, for it to be given effect, it must satisfy the minimum requirements of an enforceable contract under the applicable contract law. Second, although negotiation and mediation agreements are both broadly ADR agreements, they must each be treated differently as the negotiation and mediation processes are intrinsically different. The criteria for enforceability are not interchangeable.

II. Characteristics of negotiation and mediation

4 We begin with a brief exposition of the characteristics of and key difference between negotiation and mediation. At the expense of under-simplification and over-generalisation, we posit that negotiation and mediation are substantially different in one crucial aspect, even if they may sometimes be equated by parties to mean one and the same

14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).

15 See UNCITRAL website <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (accessed on 24 November 2012).

16 See Henry Brown & Arthur Marriot QC, *ADR Principles and Practice* (Sweet & Maxwell, 3rd Ed, 2011) at para 2-001.

thing.[17] The ecosystem in most negotiations is dyadic as negotiations typically involve only representatives from the parties in dispute. Mediation, however, usually involves a neutral disinterested third party whose job is to encourage the disputing parties to bridge their differences.[18] The mediation procedure therefore involves more than just the parties in dispute. Although it is not inaccurate to describe mediation in general terms as a "problem-solving negotiation process",[19] this would be too basic for the purposes of assessing the nature and effects of negotiation and mediation agreements.

5 The major difference between our characterisation of negotiation and mediation is the existence of the mediator in the latter process.[20] In this regard, the mediator's rights and duties are crucial to the entire process. For instance, the mediator needs to know whether he or she (hereinafter referred to as "she" or "her") has wide discretion[21] in relation to the administrative aspects of the mediation such as scheduling of meetings and disclosure of documents. The mediator would also need to know the quantum of her remuneration and whether she is to bear her own costs. Conversely, the mediator needs to know the ambit and scope of her duties in relation to the parties in the mediation. Hence, for reasons which will be apparent later, this added dimension of a third party in the ecosystem introduces additional considerations when determining the enforceability of a mediation agreement. Thus, as a general proposition,[22] mediation is a far more complex procedure than negotiation.

6 Obviously, it goes without saying that form must yield to substance. A process which is labelled as a negotiation and has a neutral third party acting as a "negotiator" would not be any different from a mediation with a mediator, regardless of what may be said about the inherently different purposes or starting premises of negotiation and mediation.[23] The label given to the process by parties in their

17 See *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* [2013] 1 SLR 973 at [90].

18 Neil Andrews, *Contracts and English Dispute Resolution* (Jigakusha, 2010) at para 22.02.

19 Gary Goodpaster, *A Guide to Negotiation and Mediation* (Transnational, 1997) at p 203.

20 See also Henry Brown & Arthur Marriot QC, *ADR Principles and Practice* (Sweet & Maxwell, 3rd Ed, 2011) at paras 2-037–2.038.

21 The mediator generally has flexibility in determining how the mediation procedure is to be carried out, though her discretion is undoubtedly subject to contrary agreement by the parties.

22 See para 25 below.

23 It has been said that mediation is suitable when parties *must* deal with one another but are unwilling or unable to negotiate an agreeable resolution. The parties may have certain misapprehensions, misunderstandings and baggage which prevent them from negotiating a resolution. In such situations, outside assistance in the

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agreements, while helpful as an indicator of what they had objectively intended, cannot be determinative. The court should be careful in distinguishing a negotiation agreement from a mediation agreement as the criteria for the enforceability of one is not necessarily identical to the other.[24] Being aware of and understanding the procedural distinction between negotiation and mediation is critical to appreciating how this procedural distinction affects the enforceability and enforcement of negotiation and mediation agreements.

III. Certainty

A. General rule

7 It is trite law that for contracts to be enforceable, they must be certain.[25] A contract will be void for uncertainty if it is not possible to prescribe meaning to an *essential* term.[26] The essential term must not only be capable of bearing meaning; the meaning must be attributable to the parties.[27] This general rule for contractual formation was recently confirmed by the English Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* ("*Sulamérica*") as being applicable to negotiation and mediation agreements.[28] There can be no real dispute that negotiation and mediation agreements are a species of contracts, and it is therefore uncontroversial that the general rule of contract formation applies to them. Indeed, in the majority of disputes concerning the enforceability of negotiation and mediation agreements, it is the uncertainty over the exact procedure which constitutes the focal point of the dispute. The type of uncertainty in any given procedure straddles a wide spectrum, including the quantum and apportionment of remuneration and costs of the mediator,[29] identification of a specific mediation service provider,[30] concept of "friendly consultation"[31] and the existence of a termination procedure.[32]

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form of a mediator may be useful: Gary Goodpaster, *A Guide to Negotiation and Mediation* (Transnational, 1997) at p 205.

24 See paras 12–29 below.

25 See *Scandinavian Trading Tank v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529 at 540.

26 See *Re Vince, Ex Parte Baxter* [1892] 2 QB 478.

27 See *G Scammell & Nephew Ltd v Ouston* [1941] AC 251 at 268.

28 [2012] EWCA Civ 638 at [35].

29 See *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

30 See *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638.

31 See *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR(R) 23.

32 See *Walford v Miles* [1992] 2 AC 128 at 138.

8 Although certainty is a prerequisite for an enforceable ADR agreement, the degree of certainty required is not entirely crystal clear. What is clear, however, is that it is not necessary for an ADR agreement to be overly structured for it to be enforceable.[33] One must be careful not to pay too high a price in the effort to attain certainty.[34] *Verba ita sunt intelligenda ut res magis valeat quam pereat* – the contract should be interpreted so that it is valid rather than ineffective.[35] The counter-argument to a microscopic examination of the terms of a contract can be found in Lord Wright's famous words in *Hillas & Co v Arcos Ltd* where he said:[36]

> Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defect …

9 This is in line with Lord Steyn's views expressed in his extra-judicial writing that while the objective theory of contract is generally not concerned with the subjective expectations of parties, the court should always aim to protect the *reasonable* expectations of parties.[37] He opined that though clarity is the aim, *absolute clarity* is unattainable. It is simply impossible for contracting parties to foresee all the vicissitudes of commercial fortune, particularly where business bargains are struck under great pressure of events and time.[38] Lord Steyn is not alone in holding this view.[39] His view was endorsed by Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobas* ("*Petromec*") where he cautioned:[40]

> [I]t would be a strong thing to declare unenforceable a clause into which the parties have deliberate and expressly entered … To decide that it has 'no legal content' to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men …

33 See *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at [62].

34 See Arthur Corbin, *Corbin on Contracts* vol 3 (West Publishing, 1960) at para 609.

35 *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897 at 910; [1996] 3 WLR 493 at 505; [1996] 3 All ER 545 at 557.

36 (1932) 147 LT 503 at 514.

37 Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 434.

38 Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 439.

39 See Michael Furmston & G J Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press, 2010) at para 11.06 and *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634.

40 [2006] 1 Lloyd's Rep 121 at [121].

10 Longmore LJ's observation is all the more illuminating as *Petromec* concerned the enforceability of an agreement to negotiate. It is also consonant with the modern approach to construing commercial contracts which strives to give meaning to terms in order to preserve the validity of the contract.[41] Thus, it is suggested that while certainty remains a cornerstone for the enforceability of negotiation and mediation agreements, courts should strive to construe a contract as certain as far as the certainty is permitted by the context.[42] This, however, does not mean rewriting the contract for the parties. Effective interpretation is not a license for creative interpretation.[43]

11 Having established the general rule that the doctrine of certainty of contracts applies equally to ADR agreements, and the general content of this rule, it is apposite to now consider its application to specific ADR agreements.

B. Agreements to resolve disputes by negotiation

12 We begin with an analysis of the enforceability of bare agreements to negotiate. In this respect, there is no better starting point than to consider the seminal but hugely debated House of Lords decision in *Walford v Miles* ("*Walford*") where it was held that a bare agreement to negotiate is unenforceable.[44] In this case, the defendant seller entered into an oral agreement with the plaintiff buyer under which the defendant agreed that if the plaintiff could provide a letter of comfort from its bank, the defendant would terminate negotiations with any third party in respect of the sale of certain property. The plaintiff provided the letter of comfort but the defendant eventually sold the property to a third party. The plaintiff argued that there was a term implied in fact into the oral agreement that the defendant would continue to negotiate in good faith with the plaintiff. The House of Lords held that this implied bare agreement to negotiate was too uncertain to be enforceable, and the addition of the standard of "good faith" did not clarify matters, especially given the adversarial position of the parties in negotiations.[45] Lord Ackner's oft-cited statement bears mentioning:[46]

> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. … How can a court be expected to decide whether, *subjectively*, a proper reason

41 See *Meehan v Jones* (1982) 149 CLR 571 at 589.
42 See *Mannai Investments Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 at 767.
43 See *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 at [41]–[42].
44 [1992] 2 AC 128.
45 *Walford v Miles* [1992] 2 AC 128 at 138.
46 *Walford v Miles* [1992] 2 AC 128 at 138.

> existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. … In my judgment, while negotiations are in existence, either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content. [emphasis in original]

13 Despite recent doubts in England over its sustainability,[47] *Walford* still represents the state of the law on bare agreements to negotiate under English law.[48] However, although ADR agreements are a sub-species of contracts generally, the principles enunciated in *Walford* ought to have limited application to agreements to negotiate a *resolution of a dispute under a contract*.

14 First, it must be noted that the agreement in *Walford* was a bare agreement to negotiate prior to the entering of contractual relations. In so far as agreements to negotiate the *resolution of a dispute under a contract* are concerned, *Walford* has been interpreted in Australia and Singapore to be of diminished persuasiveness. In Australia, in *Con Kallergis Pty Ltd v Calshonie Pty Ltd*, Hayne J recognised that where the agreement to negotiate is part of a broader contract which contains a dispute resolution mechanism, the difficulties with determining when negotiations are terminated mentioned in *Walford* do not attract.[49] That an agreement to negotiate which is part of a dispute resolution process is different from an agreement to agree was also affirmed by Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* ("*Aiton*").[50] The Singapore Court of Appeal too took the opportunity in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* ("*Toshin*")[51] to examine *Walford*. Mirroring the approach taken by the Australian courts, the Court of Appeal pointed out that *Walford* involved "pre-contractual" negotiations and was thus distinguishable from circumstances where agreements to negotiate are contained in an

47 See *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2006] 1 Lloyd's Rep 121 at [121]; Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 438 and 439; Patrick Neill QC, "A Key to Lock-out Agreements" (1992) 108 LQR 405; Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at paras 14.21–14.23.

48 Edwin Peel, "Agreements to Negotiate in Good Faith" in *Contract Formation and Parties* (Oxford University Press, 2010) at p 37. See also *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297.

49 (1998) 14 BCL 201 at 211–212.

50 (1999) 153 FLR 236 at [59].

51 [2012] 4 SLR 738.

overarching contractual framework that existed between the parties.[52] It recognised that there was a public interest in encouraging the resolution of disputes through amicable means such as negotiation and mediation.[53] Indeed, it is undeniable that a broader judicial policy in favour of amicable dispute resolution is truly well and alive in Singapore.[54] This policy is best exemplified in the realm of arbitration, where the Singapore courts have been extremely generous in upholding arbitration agreements. In *Insigma Technology Co Ltd v Alstom Technology Ltd* ("*Insigma*"), the Court of Appeal stated:[55]

> Where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, *even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party*. [emphasis added]

15 Interestingly, the English position as regards dispute resolution agreements may not be as different as a cursory transposition of *Walford* to all agreements to negotiate may lead one to believe.[56] In *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd*, Coulson J held that:[57]

> [I]t is settled law that if the parties have agreed a particular method by which their disputes are to be resolved, then the Court has an inherent jurisdiction to stay proceedings brought in breach of that agreement … even where the term of the contract on which the claiming party is said to be in breach was a *general agreement* to refer disputes to ADR. [emphasis added]

16 Of course, notwithstanding the judicial reluctance to invalidate agreements to negotiate a dispute under a contract, the converse of the position in *Walford* does not hold true. All agreements to negotiate a resolution of a dispute, being a species of contract, must *still* be sufficiently certain to be enforceable. In short, there are two steps: first, ascertaining whether the agreement to negotiate is a standalone or bare

52 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [37].

53 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40]–[43].

54 Keynote Address of Chan Sek Keong CJ at the Alternative Dispute Resolution (ADR) Conference (4 October 2012) at para 9. See also *Petrie Christopher Harrisson v Jones Alan* [2005] 2 SLR(R) 387; Mohamed Faizal, "Enforcement of Mediation Clauses: Is the Flexibility of Mediation Being Hindered by the Inflexibility of the Law?" [2001] 1 Asian JM 21 at 28.

55 [2009] 3 SLR(R) 936 at [31].

56 See Henry Brown & Arthur Marriot QC, *ADR Principles and Practice* (Sweet & Maxwell, 3rd Ed, 2011) at para 26-035.

57 [2008] EWHC 3029 at [15].

agreement to negotiate, or whether it is part of a broader contractual framework such as a dispute resolution mechanism; second, if the agreement to negotiate is part of a broader contractual framework, the inquiry proceeds into whether the agreement is sufficiently certain. For agreements to negotiate, the element which needs to be certain is the *process* of negotiation. As Giles J held in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* ("*Hooper Bailie*"), what is enforced is not co-operation and agreement, but participation in a process from which agreement might come.[58]

17 At this juncture, the key distinction set out earlier between negotiation and mediation comes to the fore.[59] Most of the leading authorities dealing with specific procedural defects in ADR agreements – *Aiton*, *Hooper Bailie*, *Sulamérica* – are generally concerned with mediation clauses. Cases involving the enforceability of negotiation agreements are typically resolved by the application of the principle in *Walford*. The remaining cases *assume* that what constitutes a sufficiently certain mediation agreement applies equally to negotiation agreements.[60] For example, the Court of Appeal noted "in principle, there is no difference between an agreement to negotiate in good faith and an agreement to submit a dispute to mediation".[61]

18 The Court of Appeal's observation in *Toshin* is patently correct *in principle*.[62] This is because in principle, an agreement to negotiate in good faith is as much an enforceable promise as an agreement to mediate is, assuming all the preconditions for an enforceable promise are present. At a broad conceptual level, the promise to partake in an ADR process is enforceable *because* it is promissory as opposed to declaratory. However, the test for certainty of each type of ADR agreement – which was not in issue in *Toshin* – requires a closer examination. The agreements are fundamentally different in so far as what is required to establish the certainty requirement for the promise. For instance, in determining the prerequisites for an enforceable negotiation procedure, it would not be necessary to require the presence of a specific mediation provider.[63] Similarly, while it may be necessary for a mediation clause to provide how the costs of the mediator are to be apportioned amongst the disputing parties,[64] such a requirement would

58 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206.
59 See paras 4–6 above.
60 See Alistair Mills & Rebecca Loveridge, "The Uncertain Future of *Walford v Miles*" [2011] LMCLQ 528 at 542.
61 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [43].
62 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 209.
63 See, *eg*, *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [36].
64 See *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at [66]–[71].

be out of place (indeed, oxymoronic) in an agreement to negotiate since negotiations, by the conventional definition alluded to above, do not involve the participation of a neutral third party.

19 Nonetheless, broad but minimum guidelines can still be laid down for *all* ADR clauses, as was helpfully done so by the English High Court in *Tang Chung Wah v Grant Thornton International Ltd* ("*Grant Thornton*"). There, Hildyard J laid down three criteria which he felt must be present in any ADR clause before it can be said that the rights and obligations in the clause are sufficiently clear and certain to be given legal effect.[65] First, there must be an unequivocal commitment to commence a process. Second, it must be apparent from that process what steps each party is required to take to put the process in place. Third, the process must be sufficiently clearly defined to enable the court to determine objectively (a) what under that process is the minimum required of the parties in terms of their participation in the process; and (b) when or how the process will be exhausted or properly terminable without breach.

20 This two-step process appears to have been applied in a recent Singapore High Court decision which dealt with the enforceability of a dispute resolution mechanism which contained an ADR procedure. In *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* ("*Lufthansa*"),[66] the relevant clause of the dispute resolution mechanism, cl 37.2, provided that disputes shall first be referred to three different committees consisting of the disputing parties' designated officers for their review and opinion with the view of obtaining a resolution of the dispute. If the matter cannot be resolved by either of the committees, the matter shall then be resolved by arbitration. As the parties had referred to the procedure in cl 37.2 as a negotiation and mediation procedure interchangeably and nothing appeared to turn on the description of the procedure, the court understandably elected to follow the nomenclature of "mediation procedure" prescribed by the dispute resolution mechanism.[67] That said, strictly speaking, in the absence of a neutral external third party, the process resembled more of a negotiation through the consensual committees formed rather than a mediation. After several rounds of unfruitful negotiations over a payment dispute, the defendant commenced arbitration. When the arbitral tribunal held that it had jurisdiction as the arbitration was properly commenced, the plaintiff commenced court proceedings seeking a declaration that

65 *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 at [59]–[60].

66 [2013] 1 SLR 973.

67 *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* [2013] 1 SLR 973 at [90].

cl 37.2 had not been complied with and the arbitration was therefore prematurely commenced.

21 One of the arguments canvassed by the defendant was that following *Walford*, cl 37.2 was unenforceable. Chan Seng Onn J, following the lead of *Toshin*, held that the proposition in *Walford* should not be interpreted as rendering cl 37.2 unenforceable as the latter was not a standalone agreement to negotiate but part of a dispute resolution mechanism expressly chosen by the parties.[68] Having ascertained that cl 37.2 was not a bare agreement to negotiate, Chan J then went on to determine whether the procedure provided for in cl 37.2 was sufficiently certain. He found that the unqualified agreement to refer the dispute to the contractually agreed committees for resolution was sufficiently certain as it was both mandatory and the process was delineated.[69] Chan J was no doubt drawn in by the language from Colman J in *Cable & Wireless plc v IBM United Kingdom Ltd* ("*Cable & Wireless*") that "where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find".[70] Given the judicial attitude and policy towards the promotion of ADR, including the principle of effective interpretation endorsed by the Court of Appeal in *Insigma* for arbitration agreements,[71] and bearing in mind Longmore LJ's and Lord Steyn's reminders of not defeating the reasonable expectations of honest men,[72] it is not difficult to comprehend the finding that cl 37.2 which formed part of the specifically drafted dispute resolution mechanism met the requisite certainty requirements.

22 Moreover, cl 37.2 arguably meets the guidelines proposed by Hildyard J in *Grant Thornton*. The only element which may be in doubt is the requirement that the procedure should prescribe when and how the process would be terminable without breach. This is not an insuperable objection. Although there are no time stipulations within cl 37.2, whether the committee can agree on a course of action as regards the dispute referred to them is a matter of fact. Consequently, whether a party breaches cl 37.2 by prematurely commencing arbitration where the committee has not yet determined that it is unable to resolve the matter is a question of fact. Just as with any other question of fact, the court will look at all the circumstances to arrive at its

68 *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* [2013] 1 SLR 973 at [92]–[93].
69 *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* [2013] 1 SLR 973 at [94]–[97].
70 *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] CLC 1319 at 1327.
71 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [31].
72 See para 9 above.

finding.[73] Indeed, Chan J observed that the parties had been in several negotiations for a number of years before the defendant commenced arbitration.[74] That, he held, was evidence of the fact that negotiations had not worked.[75] Again, while the parties were content to treat the process as a mediation process, the truth is that the process resembled more of a negotiation as it appears that the only actors involved in the process were the parties' representatives and there was no neutral third person. The actors in the negotiations were decision-makers themselves. In that context, having gone through the process of negotiating, it cannot be gainsaid that the substantive bargain inherent in cl 37.2 had been achieved. The defendant was therefore entitled to commence arbitration.

23 There is plainly no need for the entire schema of the negotiation procedure to be spelt out in a negotiation clause for the latter to be sufficiently certain. Hildyard J's second and third requirements in *Grant Thornton* should not be read so restrictively.[76] They are good guidelines and as all good guidelines should be, they serve as guideposts but do not crystallise into inflexible rules. The test for certainty is not whether parties are alive to every step of the procedure and what is expected of them; that is unrealistic of any agreement, much less an agreement to negotiate to resolve a potential *future* dispute under a contract. The minimum criterion of certainty for such a procedure should only require that a reasonable person looking at the terms of the agreement is capable of appreciating how the procedure will be administered. There may be innumerable details missing from the negotiation agreement such as the venue of negotiations, the number of representatives that should be present, the length of each negotiation session *etc*. These are not true "gaps" that would render the contract uncertain. One should not forget that negotiations is a process between the disputing parties and, as such, is a process within their control. In short, ordinarily, the threshold for certainty for agreements to negotiate disputes under a contract would be low.

73 See the English Court of Appeal's decision in *Walford v Miles* [1991] 2 EGLR 185 at 188.

74 *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* [2013] 1 SLR 973 at [107]–[110].

75 It has been said that clear acts of performance when carried out against a backdrop of an intention to be bound will carry a lot of weight and rarely will a contract be held to be void for uncertainty or incompleteness if these are in evidence: See Michael Furmston & G J Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press, 2010) at para 11.12.

76 Darius Chan, "Setting Aside an International Arbitration Award Based on Deficient Pleadings" *Singapore Law Watch Commentary* Issue 1 (Nov 2012).

C. Agreements to resolve disputes by mediation

24 The same low threshold, however, should not apply to agreements to mediate as the latter are, as alluded to above, a relatively different creature from agreements to negotiate. A sufficiently certain mediation agreement must contain a mediation procedure which will enable a mediator to know her rights and duties in such degree as to enable her to conduct the mediation. Conceptually, the relatively greater emphasis on procedure apropos mediation can be attributed to the involvement of a third party as mediator. The introduction of a new variable to the equation (*ie*, the mediator) represents both the ceding of control and autonomy over the dispute resolution process by the contracting parties. This is a significant procedural fork where negotiation and mediation part company.

25 As noted by Boulle and Teh, a wide variety of mediation models have developed over the years, which can be broadly categorised into the following: facilitative, evaluative, settlement and therapeutic.[77] Among these, it is generally accepted that the facilitative and evaluative have gained primacy as the most widely used and popular models.[78] The facilitative model involves the mediator facilitating the discussion between the parties without evaluating the merits of the case or recommending possible solutions to the parties while under the evaluative model, the mediator assesses the relative strengths and weaknesses of the parties' cases and gives an opinion of the likely outcome of the case and provides recommendations as to solutions.[79] It has been noted that there has been much debate in the international mediation scene in relation to the facilitative-evaluative dichotomy as the two approaches are seen to be, in many aspects, polar opposites of each other.[80]

26 The foregoing paragraph provides a hint as to the sheer variety of mediation environments, accompanied with different expectations and obligations of both the parties and the mediator. To begin with, the mediator has to be clear as to what is expected of her. Do the parties expect her to give an opinion and provide recommendations as to possible solutions, or should she merely facilitate the process and leave it to the parties to generate the solutions themselves? The mediation

77 Lawrence Boulle & Teh Hwee Hwee, *Mediation – Principles, Process, Practice* (Butterworths Asia, 2000) at p 28.

78 See, *eg*, Jeffrey W Stempel, "The Inevitability of the Eclectic: Liberating ADR from Ideology" (2000) 2 J Disp Resol 217 at 247.

79 Lum Kit-Wye, "The Singapore Mediation Model – Are We Facilitative or Evaluative, and how Should We Choose?" [2012] Asian JM 19 at 20, para 3.

80 Lum Kit-Wye, "The Singapore Mediation Model – Are We Facilitative or Evaluative, and how Should We Choose?" [2012] Asian JM 19 at 20 and 21, paras 4 and 5.

model to be used has to be stated in particularity, not least because each model obliges the mediator and the parties to act in a different ways. The mediation process is thus, generally speaking, more complex and sophisticated than the negotiation process. Accordingly, a putative mediation agreement ought to contain sufficient parameters to ensure procedural fairness and prevent the stultification of the dispute resolution process.

27 In *Sulamérica*, the mediation clause was deemed to be incapable of giving rise to a binding obligation of any kind: it did not set out any defined mediation process, *nor* did it refer to the procedure of a specific mediation provider.[81] The provision of a procedure of a specific mediation provider can be a certainty multiplier, even where other usual conditions of certainty for mediation agreements are lacking. The inclusion of a mediation service provider has the added advantage of ensuring that the entire administrative process is taken care of. Thus, in *Cable & Wireless*, the fact that the clause provided for an ADR procedure as recommended to the parties by Centre for Dispute Resolution ("CEDR") was critical to the court's finding that the clause was sufficiently certain, partly because the CEDR model procedure stipulates how a mediator ought to be appointed.[82] The mediation procedure and rules of other institutions such as the Singapore Mediation Centre similarly provide for the appointment of a mediator from a panel of qualified mediators.

28 The utility of this was also apparent on the facts of *Grant Thornton*. *Grant Thornton* involved a dispute between an international group of accounting firms known worldwide as Grant Thornton and local accounting partnership called JBPB & Co, relating to the expulsion of the latter from Grant Thornton's international network. The relevant ADR clause provided first for any dispute or difference to be referred to the chief executive of Grant Thornton ("Chief Executive") for conciliation, failing which it was to be referred to a panel consisting of three members to be selected by the board of governors of Grant Thornton. The Chief Executive, however, recused himself as he was involved in the decision to expel JBPB & Co and the three-member panel was never constituted as none of the eligible persons put themselves forward to serve. Hildyard J eventually found the clause too uncertain to be enforceable but it is worth noting that *had* the parties provided for the specific procedure of a mediation provider, such an impasse in relation to the selection of a mediator might perhaps have been obviated.

81 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [36].

82 *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] CLC 1319 at 1326D.

29 In *Aiton*, the mediation clause was found to be unenforceable as it lacked a provision setting out a mechanism for the apportionment of the mediator's costs.[83] Once again, it is obvious that the specification of the rules and procedure applicable to the mediation will address this difficulty. What is interesting, however, was the court's observation that a term may not imply that the parties would jointly share the reasonable remuneration of the mediator.[84] Indeed, given that that the choice of mediation procedure and the identity of the mediator are highly personal and subjective, it is unlikely that by applying the traditional "business efficacy" and "officious bystander" tests for the implication of terms, the court will be able to salvage an otherwise uncertain mediation agreement.

IV. Potential gap-fillers

A. Good faith

30 Gaps in a seemingly uncertain ADR procedure often prompt the argument that an obligation to act in good faith may apply to salvage the otherwise uncertain and unenforceable agreement. Indeed, agreements to negotiate or mediate a dispute under a contract frequently contain an ancillary term to conduct the process in good faith. Whether the law of contract recognises good faith as an enforceable obligation is still a matter of some dispute.[85] Assuming for the present purposes that a provision providing for good faith is an enforceable obligation, it may be construed in at least two ways when used in conjunction with an ADR procedure. The first is that the entire process is to be conducted in good faith in the sense that the parties should act honestly and above-board towards each other during the process. The second construction is a consequence of the first, in that *because* the parties shall act in good faith, they should take *certain* steps to ensure that the process is not frustrated prematurely. Here, we are concerned with the second construction. The issue is this: If a negotiation or mediation agreement is *prima facie* unenforceable for want of certainty, does a mere reference to an obligation to negotiate or mediate in good faith alone salvage the agreement? The answer, in our view, is that it does not.[86]

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83 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at [66].

84 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at [66].

85 See Colin Liew, "A Leap of Good Faith in Singapore Contract Law" [2012] Sing JLS 416, and also Lye Kah Cheong, "A Persisting Aberration: the Movement to Enforce Agreements to Mediate" (2008) 20 SAcLJ 195.

86 *Cf* Joel Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] Sing JLS 229 at 234.

31 We are of course aware of *Toshin*, where the Court of Appeal observed that "there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld".[87] The court held that such agreements are in the public interest as they promote the consensual disposition of potential disputes.[88] Indeed, the court went on to note that that such agreements to negotiate or confer in good faith are a common feature in Asian commercial contracts and are consistent with Asian cultural values of promoting consensus whenever possible. It would thus be in the wider public interest to promote such an approach towards resolving differences.[89] Given the strong public policy grounds in favour of upholding an express agreement to negotiate in good faith and the court's finding that the concept of good faith is reducible to a core meaning,[90] it is tempting to conclude that this represents the panacea to the impediments highlighted in *Walford*: The use of the words "negotiate or mediate in good faith" immunises any ADR clause from being held to be pathological for reasons of want of certainty.

32 A bare reference to good faith, and the hope that it is the panacea for uncertainty is, in our view, erroneous and goes against the grain of authorities. First, despite the apparent endorsement in *Toshin* of express agreements to negotiate in good faith, it is clear that the requirement of certainty remains cardinal to the enforceability of such agreements. While the Court of Appeal in *Toshin* approved Lord Ackner's observations in *Walford* about the need for the requisite certainty, it also noted that the "impediment of the uncertainty referred to in *Walford* is *not relevant* in the present case" [emphasis added].[91] Thus, *all* that the court in *Toshin* held was that the obligation to negotiate in good faith, being reducible to a core meaning, was not uncertain. This does not, however, obviate the need to examine the rest of the clause for compliance with the requirement of certainty.

33 Indeed, there was no question that the relevant clause in *Toshin*, cl 2.4(c)(i), satisfied the certainty test. As part of a lease agreement, cl 2.4(c)(i) obliged the parties to "in good faith endeavour to agree on the prevailing market rental value" ("the agreement to negotiate in good faith") of the leased property as the first of three stages of a rent review

87 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

88 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

89 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

90 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45].

91 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [43] and [44].

mechanism. Under the rent review mechanism it was also provided that Stage Two would be triggered if parties failed to reach an agreement three months before the new rental term. This provided a clear indication of when the parties' obligations under Stage One would come to an end. Furthermore, since the dispute only arose during the last rental term of a 20-year lease – the rental terms being divided into successive three-year periods except the last rental term, which was for a two-year period – there was also a consistent pattern of course of dealings between the parties in relation to the negotiations. Based on the above factors, it was sufficient to conclude that the rent review mechanism in *Toshin* was certain. The specific discussion over the agreement to negotiate in good faith concerned not so much the certainty of such an agreement, but whether one of the parties had acted contrary to good faith by procuring valuations without informing the other party during the negotiations. The concept of good faith negotiations and how it was possible to determine the content of the duty of good faith figured against this backdrop. In any case, *Toshin* should be restricted to negotiation agreements. As argued earlier, the threshold of certainty for enforcing a negotiation agreement is lower than that for a mediation agreement. Good faith, in the context of negotiation agreement, therefore has very little to "plug".

34 The presence of a good faith obligation on its own cannot support the enforceability of an ADR agreement. This was made clear in *Cable & Wireless* which Chan J cited with approval in *Lufthansa*:[92]

> Colman J held that the relevant clause was enforceable because *it did not **merely** require an attempt in good faith to achieve resolution of a dispute*. The parties were obliged to participate in a procedure as recommended to the parties by the Centre for Dispute Resolution. Reference to the Centre for Dispute Resolution and participation in its recommended procedure were, in Colman J's view, sufficient indicia of certainty as the court may look at these indicia to determine if the clause was complied with. [emphasis in original omitted; emphasis added in italics and bold italics]

In other words, *Lufthansa* accepted the position in *Cable & Wireless* that a mere agreement to negotiate in good faith may not be sufficient to meet the certainty threshold. Clearly, although Chan J applied *Toshin* and the finding of the general public policy in favour of dispute resolution clauses, he nevertheless considered the certainty of the clause and found that it met the requisite standard. Thus, this further buttresses the proposition that the general rule that certainty of contracts is required for agreements to resolve disputes by ADR remains the law in Singapore, and while an obligation of good faith may

92 *International Research Corp plc v Lufthansa Systems Asia Pte Ltd* [2013] 1 SLR 973 at [96].

supplement the content of certainty, there can be no supplementation where there is no content to begin with.

35 The position is similar in England, Australia and Hong Kong. In England, Hildyard J in *Grant Thornton* made reference to the following observations in *Cable & Wireless*:[93]

> I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms or whether, as is the case with the standard form of ADR orders in this court, the duty to mediate was expressed in qualified terms – 'shall take such serious steps as they may be advised'. The wording of each reference will have to be examined with these considerations in mind. *In principle, however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.* [emphasis added]

Hildyard J registered his "puzzlement" over the last phrase in the above quotation,[94] before going on to note that the phrase was "strictly *obiter*", and could not have been intended to signify that the court may, as it were, extrapolate from a clause those parts of it which it considers are sufficiently certain to be enforceable and treat that as being the enforceable content of the clause.[95] He further added that the court must be satisfied that each part of the clause which was intended to be operative can be given certain legal content and effect.[96]

36 In the Australian decision of *Aiton*, despite finding that the requirement of good faith was sufficiently certain for legal recognition,[97] the court found that as the mediation clause failed to spell out how responsibility for payment of the mediators' costs was to be dealt with and the mediation clause could not be severed from the negotiation clause, both the ADR clauses were unenforceable for lack of certainty. Also, in Hong Kong, the Court of Appeal in *Hyundai Engineering and Construction Co Ltd v Vigour Ltd*,[98] after considering the views expressed by Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*[99] ("*Coal Cliff Collieries*") held that in order for an ADR clause to be enforceable, on top of a promise "to proceed in good faith" there has to be a

93 *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 at [51].
94 *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 at [52].
95 *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 at [53].
96 *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 at [53].
97 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at [153].
98 [2005] HKEC 258.
99 (1991) 24 NSWLR 1.

readily ascertainable external standard such that the procedure is sufficiently precise.[100]

37 What then of the contention that post-*Toshin*, the threshold of certainty of an ADR agreement – negotiation and mediation alike – is now comparably lower in Singapore (and arguably, Asia) compared to in England (and other Western countries), especially in light of the Singapore courts' express recognition that the promotion of consensus is a cultural value worthy of promulgation?[101] This view draws its provenance from an excerpt from an article by McConnaughay entitled "Rethinking the Role of Law and Contracts in East-West Commercial Relationships"[102] which was cited in *Toshin*. The relevant excerpt reads as follows:

> A core term of many Asian commercial contracts – the 'friendly negotiations' or 'confer in good faith' clause – captures the essence of contractual obligation in the Asian tradition. Such clauses typically recite that, if differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably. The Western view of such clauses is that they impose no real obligation at all; at most, they represent a mechanism for making unenforceable requests for novation, or perhaps an initial formality in a multiple-step dispute resolution process culminating eventually in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in Asia. *From a traditional Asian perspective, a 'confer in good faith' or 'friendly negotiation' clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies.* ***Characterizing a 'confer in good faith' or 'friendly negotiation' clause as a 'dispute resolution' clause tempts a misapprehension of this essential nature, for no 'dispute' exists if all of the parties to the contract share an Asian understanding of its evolving and responsive (through good faith conferences and friendly negotiations) nature.*** [emphasis added by the Court of Appeal in italics and bold italics]

The Court of Appeal in *Toshin* commented that as such "confer in good faith" and "friendly negotiations" clauses are consistent with the Asian

100 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKEC 258 at [28], [29] and [30].

101 See, *eg*, Darius Chan, "Setting Aside an International Arbitration Award Based on Deficient Pleadings" *Singapore Law Watch Commentary* Issue 1 (Nov 2012).

102 (2000–2001) 41 Va J Int'l L 427 at 448–449.

cultural value of promoting consensus whenever possible, it would be in the wider public interest (at least in Singapore) to promote such an approach towards resolving disputes.[103]

38 The cultural difference in approach across jurisdictions suggested by McConnaughay – be it Western or Asian – while real, should not be overstated. As already noted above, even in England, the courts have shown a general proclivity towards promoting ADR whenever possible, as this would be in line with the reasonable commercial expectations of the parties who entered into such ADR clauses. An obvious illustration is Colman J's *obiter* in *Cable & Wireless*, which though was met with some scepticism by Hildyard J in *Grant Thornton*, does in broad terms represent the dominant approach under English law.[104] In any event, it bears pointing out that in an increasingly globalised world where contracting parties are often of different nationalities and cultures, it would be difficult and unhelpful to generalise how the parties subjectively understood the nature of the obligations entered into. Interestingly, it has been observed elsewhere that a fundamental difference of approach may be seen between the common and civil law systems, with the civil law systems recognising an overriding principle of good faith in the formation and performance of contracts.[105] The civilian legal system's acceptance of the doctrine of good faith accounts for the presence of a general obligation of good faith in the 1980 United Nations Convention on Contracts for the International Sale of Goods.[106] Yet, civilian and common law legal systems are not separated by physical geography; there are both Asian and Western civilian and common law systems. The distinction between East and West may be a distinction without a significant difference.

39 Simply put, to say that ADR agreements, with a good faith requirement, entered into between Asian parties are more enforceable than an exactly identical agreement entered into one Asian party and a non-Asian party (or two non-Asian parties) is splitting hairs. As far as the common law goes, certainty should remain the cornerstone, if nothing, for the sound policy justification of certainty. A certainty requirement, irrespective of any good faith obligation, is not just a matter of doctrine, but also conduces towards commercial practicality. It is one thing to say that parties are expected to, after a dispute has arisen, negotiate or mediate in good faith, *ie*, negotiate or mediate honestly and in accordance with standards of commercial morality. It is,

103 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738.

104 See para 35 above.

105 Henry Brown & Arthur Marriott QC, *ADR Principles and Practices* (Sweet & Maxwell, 2011) at para 4-091.

106 Article 7.

however, quite another to say that the parties are also expected – in the course of good faith negotiations – to agree on the procedure for the conduct of such negotiation or mediation. While the argument that ADR processes need not entail adversarial positions overcomes Lord Ackner's difficulty with marrying ADR processes with adversarial positions of parties, it unfortunately misses the more important point, *viz*, the certainty of the ADR procedure is independent of the parties' abilities to reconcile their self-interests within an amicable dispute resolution mechanism. Again, it is not that in any given situation, the court is not able to conclude what an obligation of good faith demands of the parties. As *Toshin* demonstrates, the court is precisely capable of making such determinations.[107] What is uncertain is the unfolding of the procedure based on the indeterminate possibilities that may emerge even when parties are acting completely in good faith.

40 Alan Berg argues from a slightly different angle that an undertaking to negotiate in good faith is enforceable without more as it imposes on parties, *inter alia*, the obligation not to withdraw from the negotiations (a) without first giving a reason and a reasonable opportunity for the other party to respond; or (b) giving as the cause something which the withdrawing party knows is extremely unreasonable.[108] With respect, the secondary obligations derived from an obligation to negotiate in good faith do not promote certainty in the negotiation procedure. The fallacy is immediately exposed when one considers the multitude of potential responses which may be expected from the other party who is given a "reasonable opportunity to respond" to the withdrawing party's intimation to withdraw from negotiations. The reasonableness of responses is invariably subjective from the perspective of the parties. Not only will this suggestion not reduce certainty; the myriad of potential responses will engender even greater uncertainty!

41 Put another way, it is only where there is sufficient clarity and certainty about the ADR procedure that there is a minimum objective criteria and framework against which the parties' obligations to act in good faith may be measured against. The parties would thus know the minimum that has to be done to satisfy their obligations under the clause; from the court's perspective, it would be able to effectively police the parties' obligations. The minimum cannot be that they are to negotiate in good faith *simpliciter*. Even *Cable & Wireless*, the zenith of the pro-enforcement approach towards ADR clauses in England, rejected this low threshold. For the reasons abovementioned, *Toshin*, it bears emphasis, should not be construed as standing for the proposition

107 Ian Brown, "The Contract to Negotiate: A Thing in Writ in Water?" [1992] JBL 353 at 359.

108 Alan Berg, "Promises to Negotiate in Good Faith" (2003) 119 LQR 357 at 363.

that a bare agreement to *resolve disputes* by negotiation is, without more, sufficiently certain to be enforceable.

B. Legislation

42 Good faith therefore may not be the most appropriate solution to enhance the efficacy of ADR agreements. Nevertheless, a neater and more permanent solution is not unreachable. In this regard, we suggest that legislation is a powerful tool. Inspiration can be drawn from arbitration, where the Model Law on Arbitration and the New York Convention have enabled rapid development of established principles governing the enforceability of arbitration agreements. The same national and international efforts to promote the enforcement of non-arbitration ADR agreements are, however, lacking. The Model Law on Conciliation is a step in the right direction, but it is far from achieving for ADR agreements what the international conventions have achieved for international commercial arbitration. The Model Law on Arbitration and the New York Convention are the basis for many national arbitration legislations which, in turn, are key to the enforceability of arbitration agreements.

43 Taking the appointment process as an example, the application of the Model Law on Arbitration by itself excludes the possibility that an arbitration agreement will be unenforceable for failing to provide an appointment mechanism. Articles 10 and 11 of the Model Law on Arbitration set out *default* procedures which are to apply in the absence of express choice. Articles 12 and 13 go on to provide the bases upon which parties may challenge the appointment of the arbitrators. In short, the Model Law on Arbitration provides a *default* appointment process for all arbitration agreements. Once the Model Law on Arbitration applies and governs the arbitration agreement, any objections on uncertainty as to the appointment procedure evaporate. Moreover, it is not difficult to determine if the Model Law on Arbitration applies. In Singapore, for instance, s 3 of the International Arbitration Act ("IAA")[109] provides that the Model Law on Arbitration has the force of law. A Singapore-seated arbitration which meets the criteria in s 5 of the IAA will be subject to the IAA and the Model Law on Arbitration. Therefore, in theory, an arbitration agreement which only provides that "parties agree to resolve any dispute by arbitration in Singapore under the IAA" cannot be deemed to be unenforceable on the sole ground that the arbitration agreement fails to provide for an appointment procedure.

44 In addition to an appointment procedure, the Model Law on Arbitration also provides for important aspects of the arbitration,

109 Cap 143A, 2002 Rev Ed.

including the commencement of arbitration proceedings (Art 21), rules relating to the conduct of proceedings (Art 19), the power of the arbitral tribunal to order interim measures (Art 17), rules applicable to the substance of the dispute (Art 28), and the termination procedure (Art 32). In a nutshell, because of the comprehensive default procedures prescribed under the Model Law on Arbitration, a bare agreement to resolve disputes by arbitration in Singapore under the IAA is enforceable. There is no ADR equivalent of the Model Law on Arbitration in Singapore.

45 There is also some doubt as to the court's jurisdiction to stay a matter when the parties before it have yet to comply with a mandatory obligation to submit an ADR mechanism. In the case of *Cable & Wireless*, Colman J noted that the jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy and a procedure tool provided for under r 26.4 of the English Civil Procedure Rules.[110] This appears to be an eminently sensible finding for the inherent powers of the court must surely include the power to regulate the parties who may submit to its jurisdiction. Nevertheless, as Colman J noted in the very same paragraph, the decision to stay is ultimately subject to the court's discretion. It would conduce to greater certainty if the ambit of such discretion were clearly delineated in statute.

46 If there is a serious State policy towards the promotion of consensual amicable dispute resolution settlement – a policy which desirability is without question as the Court of Appeal has astutely observed in *Toshin* – the status quo is certainly an opportune moment for the relevant State machinery and ultimately, Parliament, to consider the enactment of the Model Law on Conciliation or its equivalent.

V. Conclusion

47 As the English Court of Appeal cautioned in *Sulamérica*,[111] each case must ultimately be considered on its own terms. Given the increasing level of complexity and sophistication inherent in such ADR mechanisms, parties (and their legal advisors) ought to pay very careful attention to ensure that ADR clauses are felicitously drafted and ultimately enforceable. The implications of submitting to such ADR mechanisms must also be considered. While the benefits of ADR are much feted, it is worth noting that if the parties are ultimately unable to

110 Civil Procedure Rules (65th Update) (31 July 2013); see also *Cable & Wireless v IBM UK Ltd* [2002] CLC 1319 at 1327H.

111 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [35].

come to an amicable resolution of the dispute, compulsory submission to ADR processes before the inevitable show-down in court or in arbitration will have the effect of increasing time and costs.