A PERSISTING ABERRATION: THE MOVEMENT TO ENFORCE AGREEMENTS TO MEDIATE

Are mediation clauses in commercial contracts legally enforceable? The orthodox stance of commonwealth courts is that they are not. This is largely due to an erroneous conflation of mediation clauses with agreements to agree. With recent first instance decisions such as *Cable & Wireless plc v IBM United Kingdom Ltd*[1] and the subsequent case of *Hyundai Engineering and Construction Co Ltd v Vigour Ltd*[2] the tide may have turned in favour of the enforceability of mediation clauses. This article discusses the issue in light of recent case law. It will proffer that it is now inevitable mediation clauses will be accepted as legally enforceable. It will explore practical methods of enforcing mediation clauses.

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I. Mediation – A commercial dispute resolution tool

1 In the last decade, mediation has become an important means of resolving commercial disputes.[3] The commercial world has come to appreciate mediation's cost savings, and mediation's utility in mending and preserving commercial relationships. Both compare favourably against the aftermath of the adversarial litigation process. Once viewed as being suitable only for quasi-personal disputes because of its non-adjudicatory nature,[4] mediation has become an accepted mainstream

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1 [2003] BLR 89 (QBD) ("*Cable & Wireless*").

2 [2004] HKCU 440 (HC) ("*Hyundai*").

3 See David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press, 2006) and Laurence Boulle and Teh Hwee Hwee, Mediation: Principles, Process, Practice (Butterworths Asia, 2000) for a more detailed exposition on the practice of mediation in general.

4 Unlike arbitration and litigation where disputing parties are bound by the decision of a neutral third party who decides the dispute, mediation only acts as a facilitative tool to help the parties reach an agreed settlement. A settlement cannot be imposed, but must be agreed to by the disputing parties.

form of resolving commercial disputes. Mediation's acceptance is reflected in the legislation of several jurisdictions, including the United Kingdom[5] and Canada[6], which establish mandatory mediation for varying types of suits. In commercial practice, many contracts now incorporate mediation clauses as part of their dispute resolution mechanism. A common manifestation of this is the tiered dispute resolution clause that provides distinct stages for resolving disputes. Tiered dispute resolution clauses commonly involve three separate and sequential processes: negotiation, mediation and arbitration. Such clauses may also be worded such that only upon the failure of a prior process may a subsequent process commence.[7] For example, it may be provided that a dispute can only be arbitrated if mediation fails to achieve a settlement.

2 Appeal courts have not kept pace with the commercial world's acceptance of mediation. Contrary to a plain reading of the contractual term, appeal courts have generally maintained that agreements to mediate are not legally enforceable. A long line of authority to this effect became entrenched and this position is still the orthodoxy in many common law jurisdictions. Given this disconnect between the needs of the commercial world and the orthodox position taken by the appeal courts, it is unsurprising there has been a persistent guerrilla campaign by first instance courts to subvert the orthodoxy. This article charts the latest skirmish in this struggle.

II. The orthodoxy

3 The orthodox position of English courts is not to recognise mediation clauses as enforceable. Three theoretical bases for this consistent objection to enforceability can be identified in case law: (a) agreements to mediate are void as agreements to agree; (b) the requirement of good faith is fatal because it is not possible to ascertain whether a party mediated in good faith;[8] and (c) the uncertainty of such agreements because of the lack of procedural specification.[9] Of these

5 The English Civil Procedure Rules ("CPR"), introduced in April 1999, provides for court-ordered mediation. Rule 1.4(2)(*e*) of the CPR states that the courts must actively manage cases and this includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". Rule 1.3 of the CPR places a duty on disputing parties to assist the court in achieving this objective.

6 Rule 24.1 of the Rules of Civil Procedure establishes mandatory mediation for civil, non-family, case managed actions. Rule 75.1 establishes the same in matters relating to trusts, estates and substitute decisions.

7 This requirement is most obviously seen in clauses containing the preceding words "it shall be a precondition to arbitration that".

8 Mediation clauses often specify that parties will attempt mediation in good faith.

9 See *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89 (QBD) at 94 *per* Coleman J.

three bases, only the first is an existential objection. The others may be addressed by careful drafting.[10]

4 The case of *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*[11] stands for the existential objection to recognition of an agreement to negotiate as an enforceable contract.[12] This is due to such an agreement being void at common law for being an agreement to agree.[13] The holding in *Courtney* has been subsequently approved and followed by the House of Lords in the case *Walford v Miles*.[14] Although the two cases were concerned with agreements to negotiate, courts have exhibited a tendency to equate agreements to negotiate with agreements to mediate due to their common non-determinative nature.[15] This is an erroneous conflation of the two. It is this tendency that led the English High Court in *Paul Smith v H & S International Holding Inc*[16] to suggest that an agreement to submit a dispute to mediation[17] did not create enforceable

10 For instance, excluding the words "good faith" from the mediation clause and specifying the procedure of the mediation.

11 [1975] 1 WLR 297 (CA) ("*Courtney*").

12 [1975] 1 WLR 297 at 301–302 (CA) *per* Lord Denning MR:

> If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force ... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.

Courtney was followed by the Court of Appeal in *Mallozzi v Carapelli SpA* [1976] 1 Lloyd's Rep 407 and an array of first instance courts thereafter. See, *eg*, *Albion Sugar Co Ltd v Williams Tankers Ltd* [1977] 2 Lloyd's Rep 457 and *Star Steamship Society v Beogradska Plovidba* [1988] 2 Lloyd's Rep 583.

13 It has been trite law that an agreement to agree is void for uncertainty. See *May & Butcher v The King* [1934] 2 KB 17 (HL) *per* Lord Buckmaster:

> It has long been a well-recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all.

14 [1992] 2 AC 128 ("*Walford*").

15 *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303 at 310 *per* McKinnon J:

> [A] distinction could properly be drawn between procedures which are determinative and those which are not. Determinative procedures included arbitration clauses, binding expert valuations, and third-party certifications. In each case, the parties had agreed that certain issues would be finally and conclusively resolved by a third party and the courts, therefore, refused to resolve those same disputes themselves. Non-determinative procedures included negotiation, mediation, expert appraisal and non-binding rulings from a mediator.

16 [1991] 2 Lloyd's Rep 127 ("*Paul Smith*").

17 The exact wording used in *Paul Smith* was "conciliation", but there is little doubt that conciliation is a semantic twin of mediation.

legal obligations[18], while incorrectly citing *Courtney* as authority for this principle.

5 The courts have also generally held that the only way to ascertain whether parties have complied with an agreement to mediate is through the determination of whether parties acted in "good faith".[19] It was deemed that "good faith" is an amorphous concept that is ultimately unascertainable by the courts and accordingly, agreements to mediate are not enforceable due to this uncertainty.[20]

6 Lastly, some agreements to mediate have been held to be too uncertain to enforce on the basis of their drafting. This is often due to a lack of provision on practical matters concerning the mediation process; for example, *inter alia*, the procedure to be adhered to in the appointment of mediators and the length of the mediation.[21]

III. The insurgency

7 In spite of the entrenched orthodox position on mediation clauses, it has become evident that the commercial acceptance of mediation as a mainstream form of ADR (alternative dispute resolution) cannot long be reconciled with the courts' continued refusal to enforce agreements to mediate. The incongruity of the two stances creates a tension. It is the first instance courts that are closest to this tension. It is therefore not surprising that it is these courts which have led the struggle for change. Collectively, a series of first instance court decisions from across the Commonwealth have challenged and substantially eroded the three conceptual bases of the orthodox position.

A. An agreement to be subject to a process

8 The first orthodox basis for rejecting the enforceability of agreements to mediate is that such agreements are agreements to agree,

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18 *Paul Smith v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 131 *per* Steyn J.

19 *Walford v Miles* [1992] 2 AC 128 at 138 *per* Lord Ackner:

> How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined in "good faith".

20 *Walford v Miles* [1992] 2 AC 128 at 138 *per* Lord Ackner:

> 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 ... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies.

21 *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89 (QBD) at 94 *per* Colman J.

which are void for uncertainty. In *Hooper Bailie Associated Ltd v Natcon Group Ltd*,[22] the Supreme Court of New South Wales gave effect to an agreement to mediate after examining English, Australian and United States authorities. Giles J (as he then was) succinctly debunked the view of agreements to mediate as agreements to agree:[23]

> Conciliation or mediation is essentially consensual, and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent cannot be enforced ... The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution ... *What is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come.* [emphasis added]

9 It is submitted that this is an astute view that gives due recognition of the value of mediation as a process. Although it is true that mediation is a non-adjudicatory process and it is not certain the disputing parties would come to an agreement, an agreement to mediate is an agreement to undergo a process, not an agreement to achieve a result. This characterisation of mediation agreements is conceptually correct. In light of the prevalence of mediation in commercial contracts, it is also the more commercially helpful characterisation. The benefits of adopting such a position have been acknowledged in the English Court of Appeal in *Dunnett v Railtrack plc*[24] and further reinforced in the important judgment of Colman J in *Cable & Wireless plc v IBM United Kingdom Ltd*[25]. The English Court of Appeal in *Dunnett* opined that even in situations where parties were initially unwilling to contemplate ADR, skilled mediators have nonetheless been able to achieve satisfactory results and a conciliatory atmosphere that were well beyond the powers of the courts.[26] In *Cable & Wireless*, it was held that for the courts to decline enforcement of contractual references to ADR on grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the new English CPR and the judgment in *Dunnett*.[27]

10 As a further practical safeguard, agreements to mediate may clearly indicate that they are an agreement for the parties to undergo

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22 [1992] 28 NSWLR 194.

23 [1992] 28 NSWLR 194 at 206.

24 [2002] 1 WLR 2434 at 2436 ("*Dunnett*").

25 *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89 (QBD).

26 *Dunnett v Railtrack plc* [2002] 1 WLR 2434 at 2436 *per* Brooke LJ:

> Skilled mediators are now able to achieve results satisfactorily to both parties in many cases which are quite beyond the power of lawyers and courts to achieve ... A mediator may be able to provide solutions which are beyond the powers of the court to provide.

27 *Dunnett v Railtrack plc* [2002] 1 WLR 2434 at [28] *per* Colman J.

mediation in an attempt to settle their dispute and that a guaranteed settlement by the disputing parties in mediation is not required.

B. The ascertainability of good faith

11 It used to be the stand of the courts that the good faith element in agreements to mediate was fatal to their enforceability, as courts could not tell if the element was satisfied.[28] This was successfully challenged by Einstein J in the Supreme Court of New South Wales in *Aiton Australia Pty Ltd v Transfield Pty Ltd*.[29] There, the judge held that while there may be vagueness about a "good faith" obligation, a similar vagueness exists in many enforceable commercial contracts.[30] The court hence cannot be too ready in striking down a contractual clause as void if it is possible to attribute a meaning to an apparently vague term that corresponds with the parties' intentions.[31] It was also ruled that an obligation to *act* in good faith was distinct from an obligation to *negotiate* in good faith to achieve a satisfactory outcome.[32] The good faith obligation in the former instance

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28 This is an argument put forth by both the English courts in *Walford v Miles* [1992] 2 AC 128, and by Australian courts, notably in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 41 where Handley JA pointed out that:

> Negotiations are conducted at the discretion of the parties. They may withdraw or continue; accept, counter offer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or slow as they think fit ... these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding.

29 [1999] NSWSC 996 ("*Aiton*").

30 See *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 67 *per* Ormiston J.

> [T]he courts should strive to give effect to the expressed agreements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out.

31 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 at [89], citing the observation of Barwick CJ in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436:

> But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides on its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it ... so long as the language used by the parties, to use Lord Wright's words in *Scammell (G) and Nephew Ltd v Ouston* [1941] AC 251 is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless.

32 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 at [104]:

> [I]n my opinion, there is significant difference between an obligation to 'act' in good faith, compliance with which obligation may, in certain circumstances, be capable of being assessed by reference to some appropriate legal and/or factual

(*cont'd on the next page*)

only serves to compel one to participate in a negotiating process, which may or may not achieve a satisfactory outcome in the end. The concept is therefore determinable, having acquired substance from the particular events that have taken place and to which it is to be applied. As such, the standard must be fact-intensive and is best determined on a case-by-case basis using the broad discretion of the trial court.[33]

12 The judgment of *Aiton* also dealt with an alternative objection to the good faith element in mediation that had been propounded in another Supreme Court of New South Wales decision, *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*.[34] In *Elizabeth Bay*, Giles J emphasised the tension between negotiation, where parties are expected to have regard to self-interest, and the maintenance of good faith. It was this tension that he felt gave the requirement of good faith its forbidding vagueness. Einstein J in *Aiton* disagreed with this view, stating that good faith does not mandate each party having to submit to concession after concession.[35] Instead, since all that good faith requires is that the parties subject themselves to the process of mediation, the concept does not clash with individual interests of the parties during the process.

13 It is suggested Einstein J's characterisation of the nature of "good faith" in the context of an agreement to mediate is a sensible one. Certainly the law has no trouble enforcing an obligation to act in good faith in other commercial agreements[36] and there is no reason why agreements to mediate should be treated differently. At present, courts in England, the United States and several other common law jurisdictions have had little reservation in accepting good faith as a determinable element in other commercial situations despite the concept's amorphousness. There is no reason that a requirement of good faith should negate enforceability of a mediation clause.[37]

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standard, on the one hand, and on the other hand, an alleged obligation to 'negotiate' in good faith to achieve an outcome 'satisfactory' to both parties, which, in my opinion, as I have said, is no more than an agreement to agree giving rise to no legally binding obligation.

33 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 at [129].

34 (1995) 36 NSWLR 709 at 716 ("*Elizabeth Bay*").

35 *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 at [83]: "[G]ood faith is not co-extensive with selflessness." See also C McPheeters, "Leading Horses to Water: May Courts which have the Power to Order Attendance at Mediation also Require Good-Faith Negotiation?" (1992) 2 Journal of Dispute Resolution 377 at 391.

36 Examples include insurance contracts which are based on the principle of *uberrimae fidei* or utmost good faith.

37 For a more extensive analysis of the "good faith problem", see J Lee, "Mediation Clauses at the Crossroads" [2001] SJLS 81 at 97–100.

C. Uncertainty for lack of stipulation

14 Agreements to mediate have sometimes been held to be unenforceable because the mediation clause was uncertain as to the logistics of the mediation process. This defect can be easily cured by reference to rules of an established mediation institution, such as the Singapore Mediation Centre, the Hong Kong International Arbitration Centre or similar organisations. In the recent landmark case of *Cable & Wireless*,[38] Colman J in the Queen's Bench Division enforced an agreement to mediate after determining it sufficiently certain to be enforced in law. In coming to such a decision, the learned judge had regard to the fact that parties had chosen to bind their mediation with detailed procedure provided for by the Centre for Dispute Resolution.

15 It bears noting that Colman J also raised the possibility, albeit in *obiter dicta*, that a mediation clause could be enforceable even if no set procedure was provided for:[39]

> 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 ...

16 This proposition is certainly worth considering. It is well established that with arbitration clauses, the law endeavours to give effect to that which the parties have agreed, in spite of a lack of stipulation.[40] The same bridging exercise should be done for mediation clauses that the contracting parties intended to be binding. This is especially since the court in *Cable & Wireless* stated that an agreement to mediate is analogous to an agreement to arbitrate and is a "freestanding agreement ancillary to the main contract" capable of being legally enforced.[41] A mere lapse in drafting that does not affect the substance of the agreement should not render the entire mediation agreement void.

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38 *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89 (QBD). For further commentary on this case, see J Lee, "ADR Clauses and Enforcement: *Cable & Wireless plc v IBM United Kingdom Ltd*" [2003] LMCLQ 164 and Lye Kah Cheong, "Agreements to Mediate: The Impact of *Cable & Wireless plc v IBM United Kingdom Ltd*" (2004) 16 SAcLJ 530.

39 *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89 (QBD) at 96.

40 Examples of this can be found in *Paul Smith v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 where the court reconciled two conflicting jurisdiction clauses and *Lovelock EJR Ltd v Exportles* [1968] 1 Lloyd's Rep 163, where inconsistencies and uncertainties in an arbitration clause were exposed. The court partially severed the offending parts and saved the rest that carried into effect the real intention of the parties.

41 *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89 (QBD) at 96.

D. Clinging to the orthodoxy

17 Whilst cases such as *Cable & Wireless* and *Dunnett* successfully eroded the bases for deeming mediation clauses unenforceable, the more conservative courts still cling to the orthodox position. Significantly, this has only been possible by refusing to engage with the legal logic of cases like *Cable & Wireless* head-on. Instead, there is an inclination to distinguish the analyses on differences in factual matrix[42] or to ignore the alternative arguments completely. However, the logic of *Cable & Wireless* could not be smothered for long. The torch was picked up by another first instance court, halfway across the world in the Far East.

IV. A persisting aberration – The insurgency spreads East

18 In *Hyundai*, a first instance judgment by Reyes J in the Hong Kong SAR High Court in 2004, it was held that the parties' agreement to mediate was sufficiently certain to be enforced even though there were few provisions regarding the procedure of the proceedings.

A. The backdrop of the dispute

19 The setting for the dispute is as follows. Vigour Ltd ("Vigour"), the defendant in the case, had employed the plaintiff's, Hyundai Engineering and Construction Co Ltd's ("Hyundai's"), services for construction work under various agreements. The agreements included complex ADR clauses that were prevalent in the construction industry and the clauses provided that disputes should be referred initially to the architect for his written decision. The architect's decision was then to be binding unless a party commenced arbitration proceedings.

20 The parties became engaged in a dispute over the architect's assessment of certain requests for extensions of time and liquidated damages and Hyundai eventually issued notices of arbitration to circumvent a time bar. Correspondence then passed between the parties where Vigour indicated that it was prepared to negotiate and resolve the dispute amicably only if Hyundai relinquished its right to arbitrate. Hyundai agreed to Vigour's proposal and the parties signed an unusual further agreement to cement their positions ("the March Agreement"):

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42 In *Parker v Parker* [2003] EWHC 1846 (Ch), *Cable & Wireless* was referred to and distinguished without much discussion as to the reasoning therein. See also *Thames Valley Power Ltd v Total Gas & Power Ltd* [2006] 1 Lloyd's Rep 441 (HC) where *Cable & Wireless* was referred to but its judgment was held not to have militated against the conclusion reached. The case of *Flight Training International v International Fire Training Equipment Limited* [2004] 2 All ER (Comm) 568 (QBD) was an anomaly in approving *Cable & Wireless*, but there was once again little in the way of legal analysis alongside the citation of the case.

> The parties will not continue arbitration and will not bring any arbitration or court action forever and any right to sue each other will not be exercised any more mutually and the parties will start to discuss together to resolve any difference under or in connection with the above contracts and any arguments that may come up now and in the future for *anything about the above contracts that cannot be finalised will be resolved and decided by the managing directors of the ultimate shareholder group of the highest level provided failing an ultimate agreement then both parties shall agree and submit to Third Party Mediation procedure* which shall be conducted and completed as soon as possible and in any case no party will exercise the right to sue against each other. [emphasis added]

21 The agreement was, of course, not to be the end of the problems. Hyundai, perhaps realising its hastiness in agreeing to the terms of the March Agreement, commenced court proceedings asserting that the March Agreement was unenforceable. Vigour cross-claimed that by signing the March Agreement, Hyundai forever gave up the right to arbitrate in return for a chance to negotiate with Vigour.

22 On Vigour's claim, the court held that it would require "far clearer" words than those in the March Agreement before the court could find that substantial rights to sue in respect of any matter have been relinquished. Reyes J then turned to consider Hyundai's arguments that the March Agreement and the corresponding agreement to mediate was void for uncertainty as an agreement to agree due to the lack of provisions toward procedure and timeframe of the proposed proceedings.

B. Enforcing the March Agreement and addressing the orthodoxy

23 In deciding whether the mediation agreement in question was enforceable, Reyes J addressed all three bases of the orthodox position. Dealing with the first basis of the orthodoxy, the court examined older authority in *Courtney*[43] and *Walford*[44] where it had been consistently held that mediation clauses were unenforceable because of their uncertainty as agreements to agree. Reyes J concluded that even accepting this view as correct, there would still be no hard and fast rule that agreements to mediate are *per se* unenforceable.[45] Instead, the court must examine each situation in turn and ask whether it is possible to frame objective criteria

43 *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 (CA).

44 *Walford v Miles* [1992] 2 AC 128.

45 Reyes J referred to the Australian cases of *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205 and *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 in support of the proposition that not every agreement to agree should be automatically held to be unenforceable, instead a nuanced approach should be adopted.

against which a party's reasonable compliance with the particular obligation can be assessed.[46]

24 The learned judge also considered the judgments of *Halifax Financial Services Ltd v Intuitive Systems Ltd*[47] and *Kenon Engineering Ltd v Nippon Kokan Koji Kabushiki Kaisha*[48] both of which were first instance decisions in which the courts declined to stay litigation proceedings for mediation. The court in *Cable & Wireless* had failed to take the earlier decision of *Halifax* into account, and it was therefore timely that the two cases were compared. Reyes J stated that as a matter of principle on the enforcement of agreements to mediate, he preferred the reasoning in *Cable & Wireless* to *Halifax* and *Kenon*. This was as the latter cases showed an exercise in judicial discretion but provided little on the questions of law.

25 On the second basis of the orthodox position, the High Court in *Hyundai* opined that an agreement to mediate in good faith could be enforceable, albeit as *obiter dicta*. In the words of the learned judge, he was "prepared to go one step further than *Cable & Wireless*".[49] Lord Ackner in *Walford* distinguished between an agreement to negotiate in good faith and an agreement to use best endeavours to agree and suggested that the latter is enforceable while the former is not.

26 In his analysis, Reyes J doubted there was any conceptual difficulty in assessing "good faith" – all that is needed is that the court poses the question of whether, applying an objective standard, the parties have acted reasonably in all the circumstances in carrying out a mutually agreed activity.[50] He concluded that if a mediation clause that adheres to set procedure is enforceable, a clause to mediate in "good faith", a standard that is similarly objectively ascertainable, is also enforceable.

27 Finally, on the third orthodox basis, Reyes J held that the March Agreement and the corresponding agreement to mediate were valid even though no specific mediation procedure was laid down in the March Agreement. It was held that the parties came under a duty to act reasonably to ensure that mediation took place in the event that

46 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2004] HKCU 440 (HC) at [98].

47 [1999] 1 All ER (Comm) 303 ("*Halifax*").

48 HCA No 3492/2002 ("*Kenon*").

49 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2004] HKCU 440 (HC) at [94].

50 Although the earlier Australian case of *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWC 996 was not referred to, Reyes J's *dicta* appears to be an affirmation of Einstein J's judgment in *Aiton* where he held that a requirement to mediate in "good faith" was not detrimental to the enforceability of the mediation clause as good faith is objectively ascertainable.

negotiations broke down.[51] The failure to identify a procedure or a time frame was not fatal to the enforceability of the obligation.[52]

V. The orthodoxy strikes back

28 Despite Reyes J's enthusiasm in advancing the enforceability of the mediation clause within the March Agreement, his reasoning with regard to enforceability and the effect of the requirement of good faith were both roundly rejected by the Hong Kong Court of Appeal.[53] However, the weight of the Court of Appeal's criticism of the trial judgment was greatly diminished since it merely reiterated principles espoused in older cases and neglected to discuss recent case law developments.

A. On the enforceability of the March Agreement

29 In discussing the enforceability of the March Agreement, Rogers VP found difficulty with the fact that the agreement provided for the resolution of differences by "managing directors of the ultimate shareholder group of the highest level" and in default, submission to a "Third Party Mediation procedure".[54] The court held that the March Agreement was no more than an agreement to agree due to the uncertainty of those words.[55] The shareholding of the plaintiff company appeared to be fairly evenly divided and it was evident that there was no ultimate shareholder group of any higher level.[56] The court also held that the latter requirement to submit to a "Third Party Mediation procedure" did not add anything to further the certainty of the agreement since there was no precision in defining specific steps to be taken in the process.[57]

30 In deciding that the agreement was an agreement to agree, the court referred once again to the principles enunciated in *Courtney* and *Walford* without considering the logic explained in the judgment in *Cable & Wireless*, which the first instance judgment was primarily based on. All that was said in this respect was that the March Agreement was in contrast to the situation in *Cable & Wireless*, where there were specific details laid down for a formalised alternative dispute resolution

51 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2004] HKCU 440 (HC) at [100].
52 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2004] HKCU 440 (HC) at [100].
53 *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKCU 258 (CA).
54 [2005] HKCU 258 at [24].
55 [2005] HKCU 258 at [24].
56 [2005] HKCU 258 at [21].
57 [2005] HKCU 258 at [29].

procedure.[58] The Court of Appeal therefore seemingly approved of the principles of law espoused in *Cable & Wireless* and impliedly agreed that mediation clauses were indeed enforceable if sufficiently precise in drafting. The only disagreement lay in the facts of the two cases.

B. The requirement of "good faith"

31 The Court of Appeal also dealt with Reyes J's *dicta* in which he expressed difficulty reconciling the difference between an agreement to mediate in good faith and an agreement to mediate according to set procedure. The court referred to *Walford*, stating that the case stood for the proposition that a court is not in a position to determine the good faith or otherwise of negotiations because a party is entitled to negotiate in any way it feels fit. The trial judgment was disapproved due to the court's adoption of this proposition.

32 In so deciding, the court did not directly deal with the underlying controversy as to whether "good faith" is determinable. Notable cases such as *Aiton*, wherein good faith was held to be an objective standard, were decided years after *Walford*. By choosing the easier route of finding that the trial judge misinterpreted Lord Ackner, the court sidestepped the problem without resolving it. The reason for such avoidance may be that the March Agreement did not express a requirement of good faith and there was little need to explore the issue further. Whether inserting an obligation of good faith into a mediation clause renders the clause unenforceable was thus left as a question still open for debate.

VI. Taking stock-end of the existential objection

33 Although the High Court ruling in *Hyundai* was reversed on appeal, the principles espoused within and its affirmation of the judgment in *Cable & Wireless* are certain to have reverberations. The March Agreement was *per se* not a strong candidate for enforceability – even to a layperson, it seemed to contain little precision. Whilst it provided a useful opportunity to discuss the logic of *Cable & Wireless*, it was surprising that Reyes J held it was enforceable. One may infer this as a manifestation of the trend that courts worldwide are increasingly inclined towards the enforceability of mediation clauses. This view gains further momentum with the words of Rogers VP in the Court of Appeal decision of *Hyundai* where he opined that "mediation is likely to be a matter which is increasingly encouraged in court procedure".[59]

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58 [2005] HKCU 258 at [29].

59 [2005] HKCU 258 at [29]. The United Kingdom too has seen an increase in interest with regard to commercial ADR, so much so that the court in *Hurst v Leeming*

(*cont'd on the next page*)

34 The importance of the Court of Appeal's decision in *Hyundai* lies in the very restricted reason adopted by that court to hold the March Agreement unenforceable. That court did not repeat the existential objection that mediation agreements were unenforceable *per se*. Instead, it relied on the "good faith" objection, and the clause's lack of precision on procedure. This raises the possibility that mediation clauses are now enforceable, provided the clause is properly drafted.

35 Even on the restricted objections based on good faith and precision of procedure, the Court of Appeal dealt little with the substance of the trial court's holding, preferring to rely without discussion on older judgments that have since been doubted.

36 It is proffered that the intellectual battle over the enforceability of mediation clauses is all but over. The weakness of the orthodox position has been exposed by *Hyundai*. If the best defence the orthodoxy can hope to muster is the reasoning enunciated by the Court of Appeal in *Hyundai*, then the orthodoxy can survive only by a refusal to engage with the logic of the challenges posed to it.

37 Accepting that mediation clauses will increasingly come to be accepted by the appeal courts as enforceable, the question of how to enforce them arises. The nature of a mediation agreement means that in many instances, damages will be an unsuitable remedy. Yet, to paraphrase Lord Simmons, a right without a remedy is but a pious aspiration.[60] The remainder of this article discusses remedies for a breach of an obligation to mediate.

VII. Methods of enforcement

38 A breach of a mediation clause is in theory similar to the breach of any other contract. Damages are the primary remedy. Similar to any other contractual breach, there will be, depending on the case involved, a discretion of the court to: (a) award contractual damages, (b) order

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[2003] 1 Lloyd's Rep 379 described ADR as being at the "heart of today's civil justice system".

60 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407:

> [I]f a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration.

In a similar vein, note M Shirley, "Breach of an ADR Clause – A Wrong Without Remedy?" [1991] Australasian Dispute Resolution Journal 117 and L Katz, "Enforcing an ADR Clause – Are Good Intentions All You Have?" (1988) 26 American Business Law Journal 575.

specific performance; or (c) order an injunction. The mechanisms of the three categories of remedy will be discussed below.

A. Damages

39 The first category is that of damages – the primary remedy at common law for a breach of contract. The recent case of *Sunrock Aircraft Corporation v Scandinavian Airlines System Denmark-Norway-Sweden*[61] is authority for the proposition that damages can be awarded for the failure to comply with the terms of an ADR clause. Contractual damages fall into three distinct categories. Firstly, it might be based on the expectation measure, where the injured party is put in the position she would have been in had the contractual obligation in question have been performed. Secondly, it might be based on the reliance measure, where the injured party, who relied on the contract and incurred a detriment through a change of position, would be restored to the position she would have been should the contract not been made. Thirdly, it might in exceptional circumstances be based on restitution, where the party in breach hands over the unjust gains she acquired as a result of the breach to the injured party. It can be readily appreciated there are grave problems with quantifying damages for the breach of a mediation clause because of the uncertainty as to whether mediation would have resulted in settlement, much less the terms of that settlement.

(1) The expectation measure

40 Applying the expectation measure of damages, a victim of a breach of a mediation agreement should be placed in the same position as if the mediation process had been carried out. The problem with the breach of a mediation clause is uncertainty both as to whether a settlement would have been achieved, as well as to quantum of the settlement sum.

41 With regard to uncertainty over whether a settlement would have been achieved, the law allows for a claim for a loss of a chance.[62] In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd*,[63] it was held that two questions were to be asked before the court can decide whether to allow a claim for a loss of a chance. Firstly, whether the breach

61 [2007] EWCA Civ 882 ("*Sunrock*"). The English Court of Appeal in this case considered the measure of damages for breach of an expert determination clause in an aviation sale and leaseback agreement. It was ruled that the damages to be awarded is what an expert determining the matter in accordance with established law would award.

62 *Chaplin v Hicks* [1911] 2 KB 786. See generally Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 8-024.

63 [2005] 1 SLR 661 (CA).

caused the plaintiff to lose a chance to acquire an asset or benefit and secondly, whether the chance was substantial as opposed to being merely speculative. Judging from statistics of mediation settlement[64] and the high success rate even in the face of initially unwilling parties, it is not too adventurous to assume that the questions posed can be answered in the affirmative in most cases involving breach of a mediation clause.

42 A more serious problem is the uncertainty over what the settlement would have been had the mediation been held. The law on loss of chance is no assistance on this. Neither are cases like *Sunrock*.[65] In those cases, the amount was known, or capable of being known. The terms of a settlement reached in mediation are solely in the hands of the parties. There is no credible objective way of determining what it might have been. Reference to the average sums settled in cases at mediation institutions may be of limited value since what one set of parties may agree upon differs vastly from what another set of parties may agree, and would also be dependent on the amount in dispute. It might be that in most circumstances, bar the anomalous case where there is a reasonable yardstick for measuring the result of mediation, damages with reference to the expectation measure are an inadequate remedy, because there can be no satisfactory proof of the quantum of loss.

(2) The reliance measure

43 A second measure of damages that may be employed, in cases where expectation loss cannot be accurately estimated or is too speculative, is the reliance measure[66]. Reliance loss refers to the expenses incurred in preparing to perform or in part performance of the contract, which has in the circumstances been rendered useless by the breach. Applying this measure, a plaintiff is restored to a position as if she had not acted in the belief that the mediation obligation would be performed.[67] This may comprise costs wasted in proceedings brought in breach of the mediation clause[68] or other losses suffered by the plaintiff

64 See Michael Hwang SC, Loong Seng Onn and Yeo Chuan Tat, "ADR in East Asia" in *ADR in Business: Practice and Issues across Countries and Cultures* (J C Goldsmith, Arnold Ingen-Housz and Gerald H Pointon eds) (Kluwer Law International, 2006) at p 153. As at 31 December 2005, more than 1,300 disputes were referred to the Singapore Mediation Centre. About 75% of these cases were successfully settled, with more than 90% settled within one working day.

65 *Sunrock Aircraft Corporation v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882.

66 See *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377 and *Anglia Television v Reed* [1971] 3 WLR 394 ("*Anglia*").

67 The underlying principle is *restitutio in integrum* – the law does not put the plaintiff in a better position than if the contract had been fully performed.

68 See *Union Discount v Zoller* [2002] 1 WLR 1517.

arising out of a change of position in anticipation of the clause being observed[69].

(3) Restitutionary measure

44 A final measure of damages is one that derives from equitable principles, that is, the party in breach should not be unjustly enriched by his own wrongdoing. This discretionary remedy may be granted in the exceptional case where the usual rules of quantification are insufficient.[70] An example is where the loss to the victim of the breach of a mediation clause cannot be clearly determined or does not exist. It may then be useful for the court to have regard to the unjust enrichment of the party in breach. Where the party in breach has obtained a benefit accruing directly as a result of the breach, she should be made to account to the victim for that amount.

(4) The failure of damages

45 On any basis of assessment, damages will often be an unsatisfactory remedy for the breach of a contractual obligation to mediate. The value of mediation lies in the process, not in the result.[71] If no mediation has been held, it is speculative to postulate what result it might have achieved. The speculative nature of the supposed result most likely means only nominal damages will be awarded.[72]

46 It follows that if a breach of a mediation clause were to be compensated only with damages, then mediation clauses would realistically be unenforceable, because there would be no effective remedy for its breach. A remedy other than damages must be found.[73]

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69 *Anglia Television v Reed* [1971] 3 WLR 394 where an actor signed a contract with a TV station and subsequently breached the contract. Profits that the TV station would have garnered had the contract been performed were dependent on box-office takings, which rendered expectation loss too speculative. The court thus allowed the recovery of losses accrued in expectation of the contract being performed.

70 *Attorney-General v Blake* [2001] 1 AC 268 (HL).

71 One interesting view that has been advanced is that the true value of mediation lies not only in the possibility that it may settle the dispute, but "the intangible benefit to the parties in the satisfaction and empowerment resulting from the process itself". See J Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] Sing JLS 229 at 243. For similar sentiments see L Katz, "Enforcing an ADR Clause – Are Good Intentions all You Have?" (1988) 26 American Business Law Journal 575 at 586.

72 An interesting suggestion is to address this by drafting liquidated damages for a breach of a mediation clause. See J Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] Sing JLS 229 at 242.

73 The inadequacy of damages as a remedy for breach of a mediation clause has been noted by other writers. See J Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] Sing JLS 229 at 243. See also David Spencer, "Remedies: A Bar to the Enforceability of Dispute Resolution Clauses" (2002) 13:2 Australasian Dispute

(*cont'd on the next page*)

B. Specific performance and injunction

47 It is trite law that where damages are inadequate to remedy a breach of contract, the court may exercise its discretionary powers of specific performance.[74] Injunctions are a subset of specific performance. Breaches of mediation agreements usually take the form of one party starting arbitration or litigation proceedings without undergoing mediation as contractually required. What follows discusses remedies in that context.

(1) Where a matter has been litigated in breach

48 If a matter has been brought to litigation in breach of an obligation to mediate, an obvious remedy is for the court to order a stay of proceedings pending mediation. Only after mediation is resorted to and the parties fail to reach a settlement should the litigation process then continue. A similar position is adopted by the UNCITRAL Model Law on International Commercial Arbitration[75] for a suit brought in breach of an arbitration clause. There is no reason why the courts should adopt a different attitude towards actions brought in breach of a mediation agreement.

49 Some thought should be given to whether a better remedy would be for the court to dismiss a suit brought in breach of a mediation agreement, rather than to stay the suit. An argument may be made that whereas a stay of the suit is an appropriate remedy for suits brought in breach of an agreement to arbitrate, a stay is an inadequate remedy for suits brought in breach of an agreement to mediate. This is because of the effect on a time-bar defence.

50 If a suit is brought in breach of an agreement to arbitrate in order to preserve a time bar, whether the suit is stayed or dismissed bears little consequence on the outcome of the time-bar defence. The arbitral tribunal will decide on the time-bar defence. If the defence is successful, the claim is dismissed and there will be an arbitration award to that effect. The fact that the claimant started a court suit before the time bar, and that suit was stayed, will not affect the respondent's ability to take advantage of the time-bar defence in the arbitration.

Resolution Journal 85 at 92 which suggests that the reliance measure of damages may be used, although clauses should be drafted with requisite certainty in order for courts to accurately assess the quantum.

74 *Beswick v Beswick* [1967] 3 WLR 932. Specific performance will be ordered where damages or other legal remedies are inadequate.

75 Article 8(1) states:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

51 It is different for a suit brought in breach of a mediation clause. If the court stays (rather than dismisses) a suit brought in breach of a mediation agreement, the stay does have the effect of preserving time bar for the plaintiff. If the mediation fails, and the suit resumes, the plaintiff would have succeeded in preserving time bar by filing the suit in breach of the mediation agreement. So there is an argument that vindication of the right to mediate requires a dismissal of the suit, not just a stay.

52 In spite of this, policy considerations regarding the right to court access[76] render a dismissal of a suit unlikely. As such, a stay of the court proceedings, although not a panacea, is the best approximate remedy to be given where there is a breach of a mediation obligation.[77] Significantly, the same policy considerations do not apply to an arbitration brought in breach of a mediation agreement. This is discussed below.

53 The UNCITRAL Model Law on International Commercial Conciliation requires a mandatory reference to arbitration of suits brought in breach of an agreement to arbitrate.[78] Singaporean legislation requires a stay of the suit in similar circumstances.[79] There is at present no similar requirement in our domestic legislation in respect of agreements to mediate. It is submitted that taking due cognizance of the trend in the enforceability of mediation clauses, efforts should be taken to incorporate this requirement into domestic law.

54 In the interim, recourse may be had to the remedy explained in the Singapore Court of Appeal in *Star-Trans Far East Pte Ltd v Norske-Tech Ltd.*[80] There the Court of Appeal affirmed that the courts retain a jurisdiction to order a stay of court proceedings in favour of arbitration where such cases are not statutorily provided for. The grounds for invoking the courts' jurisdiction in this regard are where the proceedings are frivolous, vexatious and oppressive, or an abuse of the process of the court. Until statutory intervention, this may provide a similar basis for staying suits brought in breach of mediation clauses.

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76 See, as an illustration, *Golder v United Kingdom* (1975) Series A, No 18 (ECHR) which held that the right to fair trial protected by Art 6 of the European Convention on Human Rights "secures to everyone the right to have any claim related to his civil rights and obligations brought before a court or tribunal".

77 *Contra*, however, the interesting argument that a mediation clause may be drafted to achieve the effect of a *Scott v Avery* ((1856) 5 HL Cas 811) clause. There the party refusing to mediate would have no substantive rights to assert until the mediation was completed. Such an argument was made, albeit unsuccessfully, by counsel for the defendant in *Halifax Financial Services v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303. For an analysis of this argument see J Lee, "Mediation Clauses at the Crossroads" [2001] Sing JLS 81 at 83–84.

78 Article 8(1) of the UNCITRAL Model Law.

79 International Arbitration Act (Cap 143A, 2002 Rev Ed), s 6(2).

80 [1996] 2 SLR 409.

(2) Where a matter has been arbitrated in breach

55 If a party has started arbitration in breach of an agreement to first mediate the dispute, there are two options available to the arbitration tribunal. First, the tribunal may order a stay of the arbitration proceedings pending mediation. In many cases, this would be the conceptually correct remedy. Arbitration clauses are usually drafted in wide terms. One popular form of words is that the parties agree to refer "all disputes arising out of or in connection with this agreement" to arbitration. If so, a dispute over the existence of an obligation to mediate would fall within the matters the parties have agreed to arbitrate. The tribunal would have the jurisdiction to issue a stay of the arbitration pending the result of the mediation.

56 Whilst conceptually correct in most cases, this remedy is open to the abuse of starting an arbitration process in breach of a mediation obligation as a means of avoiding a contractual time bar.

57 A second option becomes available to the tribunal if the obligation to mediate is drafted as a precondition to the agreement to arbitrate. In this situation, the tribunal would be obligated to hold an arbitration process commenced in breach of the agreement to mediate void *ab initio*. This flows from the nature of the jurisdiction of an arbitration tribunal. In arbitration, the basis of the tribunal's jurisdiction is the agreement of the parties to arbitrate. If there is no agreement, there is no jurisdiction. If mediation is a precondition to the agreement to arbitrate, an arbitration started prior to mediation is void, since there is not yet an agreement to arbitrate.[81]

(3) Unresponsive and unwilling party

58 In a situation where the party in breach is generally unresponsive and refuses to participate in a mediation proceeding, specific performance is available as a remedy. It is anticipated many courts will have reservations about exercising its discretion to order a party to attend mediation against its will. There are two main reasons for these reservations.

59 First, what good would such an order do? A coerced mediation is surely an exercise in futility.[82] This precise concern was raised by counsel

81 See *Smith v Martin* [1925] 1 KB 745.

82 This is better known as the "Futility Argument", see M Shirley, "Breach of an ADR Clause – A Wrong Without Remedy?" [1991] Australasian Dispute Resolution Journal 117 at 118; see also in J Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] Sing JLS 229 at 239–241.

in *Dunnett*.[83] Counsel's argument on this point is recounted in the judgment of Brooke LJ:[84]

> Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.

60 It is suggested the view of Brooke LJ is correct. The value of mediation is in the process. Success in settlement is possible even if parties begin the process with what they thought were entrenched positions. In *Dunnett*, the English Court of Appeal recognised mediation as a process which changes mindsets, rather than a process that requires a particular mindset from the parties in order to work.[85]

61 Second, there is the perceived difficulty in supervising compliance with such an order for specific performance.[86] When can it be said that a party has complied with an order to mediate? Would mere physical attendance at the mediation proceeding be enough?

62 A good example of these concerns is the judgment of Lord Ackner in *Walford*.[87] In the context of an agreement to negotiate, Lord Ackner opined:

> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty ... This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations?

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83 *Dunnett v Railtrack plc* [2002] 1 WLR 2434.

84 *Dunnett v Railtrack plc* [2002] 1 WLR 2434 at 2436–7.

85 For support for this proposition in the Commonwealth, see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 (Sup Ct). Giles J noted of agreements to mediate that "what is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come".

86 See *Co-operative Insurance Society v Argyll Stores* [1997] 2 WLR 898. Specific performance will not be ordered if the performance is too difficult to supervise.

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

> 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 ... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies.

63 With due respect to the learned judge, it is suggested that this overstates the problem. It may be correct that an obligation to mediate implies the obligation to mediate in good faith. However, it is not difficult for a court to determine if a party has mediated in good faith. As discussed in a section above, Einstein J in *Aiton* suggested a sensible way of dealing with this point,[88] as had Reyes J in *Hyundai*.[89]

64 It is suggested the appropriate response of the court in the face of a party unwilling to mediate is to compel that party to attend the mediation. Such an order would gain the benefit of allowing a chance for the mediation to work. This would be what the parties had bargained for. Last, it is not an unduly harsh remedy, since it would still take both parties to agree to any settlement. There would be no compulsion of a result.

VIII. Conclusion

65 The logic explained in the recent first instance decisions discussed above has rendered untenable the orthodox position against the legal enforceability of mediation clauses. If authority follows logic, it is inevitable that the appeal courts will ultimately recognise the enforceability of mediation clauses in commercial contracts. What remains to be done is to frame suitable methods for the enforcement of mediation clauses.

66 Conceptually, contractual damages are the primary remedy for the breach of an obligation to mediate. However, it is anticipated that in a majority of cases, damages will not be an adequate remedy. It is suggested the more appropriate remedy will be the equitable remedies of specific performance and injunction. For litigation proceedings brought in breach, the court should order a stay of such suits pending mediation. In the context of arbitrations begun in breach of a mediation clause expressed as a precondition to arbitration, the appropriate remedy for the tribunal to give is to void the arbitration proceedings brought in breach.

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88 For more on this topic, see paras 11–13 of the main text above.

89 For more on this topic, see paras 23–27 of the main text above.