

## Tiered dispute resolution clauses

What are the wider implications of recent cases, including *Kajima Construction v Children's Ark Partnership*, and how will market practice change?

James Leabeater KC

27 November 2024

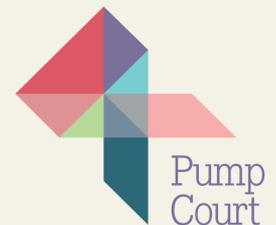
# Wah v Grant Thornton [2013] 1 Lloyd's Rep 11



(c) Hong Kong Tourism Board 2010

# Wah v Grant Thornton [2013] 1 Lloyd's Rep 11

“Until the earlier of (i) such date as the Panel shall determine that it cannot resolve the dispute or difference, or (ii) the date one (1) month after the request for conciliation of the dispute or difference has been referred to it, no party may commence any arbitration procedures in accordance with this Agreement.”



## *Sierra Leone v SL Mining Ltd* [2022] 2 Lloyd's Rep 458

“It was common ground ...that there is a distinction (seemingly first drawn out judicially in an English court by Butcher J in *Obrascon Huarte v Qatar Foundation* [2020] EWHC 1643 (Comm), *PAO Tatneft v Ukraine* [2018] 2 Lloyd's Rep 403 and *Republic of Korea v Dayyani* [2020] 1 Lloyd's Rep 212)

- between a challenge that a claim was not admissible before arbitrators (admissibility)
- and a challenge that the arbitrators had no jurisdiction to hear a claim (jurisdiction).

Only the latter challenge is available to a party under section 67”



# Royal Alexandra Hospital for Sick Children in Brighton



(c) 2024 Google



## Kajima v Children's Ark Partnership Ltd

- Project Agreement between NHS Trust and Children's Ark Partnership provides for Liaison Committee with 3 members from each of the Trust and CAP
- Construction Agreement: CAP (employer) and Kajima (contractor)

"....all Disputes shall first be referred to the Liaison Committee for resolution. Any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree."

"All Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule, shall be referred to the High Court of Justice in England by either party for resolution."



## Kajima v Children's Ark Partnership Ltd [2022] EWHC 1595 (TCC) (Joanna Smith J)

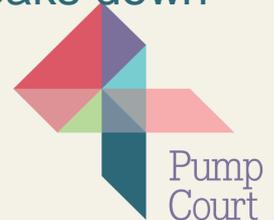
- Reference to Liaison Committee was a condition precedent
- Provision insufficiently certain to be enforceable
- Appropriate remedy would have been stay not strike out
- *IMS SA v Capital Oil* [2016] EWHC 1956 (Comm) #27-34
  - CPR Part 11 has two distinct types of challenge
  - No jurisdiction (eg no *in personam* jurisdiction) = strike out
  - Court should decline to exercise jurisdiction (eg FNC) = stay; failure to follow disp resln provisions is in this category

## Kajima v Children's Ark Partnership Ltd [2022] EWHC 1595 (TCC) (Joanna Smith J)

### ■ *Channel Tunnel v Balfour Beatty Ltd* [1993] AC 334

- initial reference of disputes to a panel of experts thereafter arbitration. Per Lord Mustill:

"...presence of the clause does not deprive the court of jurisdiction over a dispute arising under the contract. If an action is brought to enforce the contract, and either the defendant does not apply for a stay, or the court decides in its discretion not to grant one, the action proceeds in exactly the same way as if the arbitration clause did not exist. Moreover even if the court does choose to grant a stay, the court retains its jurisdiction over the dispute. If all goes well this jurisdiction will never be exercised, but if the arbitration breaks down the court is entitled to resume seizing of the dispute and carry it forward to judgment."



## Kajima v Children's Ark Partnership Ltd [2023] EWCA Civ 292; [2023] B.L.R. 271

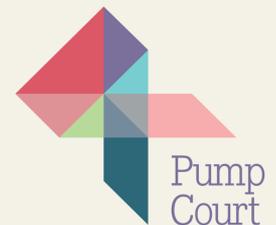
- Coulson, Popplewell and Holroyde LJJ
- Coulson LJ, with whom Holroyde LJ agreed:
  - Liaison Cttee procedure in which K had no right to participate nor could result in a decision binding on K was flawed and pointless and insufficiently certain to be binding.
  - Dismissed the appeal against the judge's decision that only a stay would be appropriate, although he was not sure it was correct to describe the stay as the "default" position

# Kajima v Children's Ark Partnership Ltd [2023] EWCA Civ 292; [2023] B.L.R. 271

## ■ Popplewell LJ:

- Would have found the Liaison Cttee procedure could work if merely required process to start
- Did not think stay was default position; and he would have favoured the claim being struck out if the procedure had been enforceable:

“To do otherwise would be to allow CAP to rely on its breach of contract to deprive Kajima of a limitation defence”



# Lancashire Schools v Lendlease [2024] EWHC 37 (TCC)

“68 ....Either party may (within ninety (90) calendar days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to clause 68.8) give notice to the other party of its intention to refer the dispute to the courts of England and Wales for final determination...

86...Subject to clause 68 (Dispute Resolution), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.”



## Current State of the Law

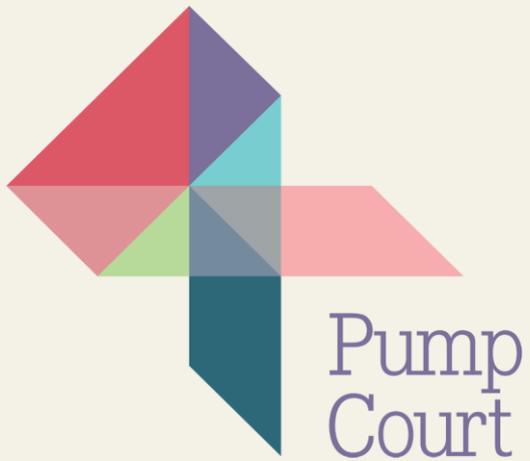
“Machinery providing for alternative dispute resolution will be upheld where: (a) the process is sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed; (b) the administrative processes for selecting a party to resolve the dispute and to pay that person are defined; and (c) the process or at least a model of the process is set out. **Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of the agreement.**”

*Lewison on the Interpretation of Contracts*, 8th Ed,  
chapter 18, section 19



## Considerations

- Tendency to find ADR clauses unenforceable is unfortunate and unnecessary
- How likely is it that parties would think ADR must be fulfilled prior to issue/service of a claim form/arbitration notice for limitation purposes?
- Better to have “default rule” of stay?
- How will market practice change?



**Thank you**

James Leabeater KC

[jleabeater@4pumpcourt.com](mailto:jleabeater@4pumpcourt.com)