

Enforceability of Pre-Arbitration Negotiation and Mediation Clauses: A Comparative Analysis of the Strict English Approach and the Flexible French and Swiss Approaches

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1. Round 1

1.1. Reviewer 1

Reviewer:

The second paragraph of the Introduction states that English law treats sufficiently clear clauses as prerequisites to “the arbitral tribunal’s jurisdiction.” This proposition requires substantial qualification in light of developments concerning the distinction between jurisdiction and admissibility. The article should examine whether English courts consistently regard non-compliance with negotiation or mediation requirements as depriving a tribunal of substantive jurisdiction, or whether more recent authorities characterize such objections as concerning the admissibility or prematurity of the claim. Without this clarification, the comparative framework may rest on an overstatement of the English position and may inaccurately imply that every enforceable pre-arbitration clause limits arbitral jurisdiction in the strict sense.

The Introduction promises a “comparative analytical method,” but the manuscript does not explain how the jurisdictions, cases, statutes, or doctrinal materials were selected. A distinct methodological paragraph should be added after the statement of the research question. It should identify the basis for selecting England, France, and Switzerland; the period covered by the case-law review; the hierarchy of authorities examined; the treatment of arbitral awards that are not publicly available; and the criteria used to classify each system as reflecting “textual rigidity,” “arbitration-oriented liberalism,” or “pragmatic balance.” These methodological details are essential to ensure that the comparative conclusions are reproducible rather than impressionistic.

In Section 2.1, the paragraph describing *Walford v Miles* should be revised to distinguish an agreement to negotiate in good faith in the context of contract formation from a procedural negotiation clause embedded in an existing and otherwise binding contract. The current formulation risks treating *Walford v Miles* as a direct authority on all multi-tiered dispute resolution clauses, whereas its factual and doctrinal context was different. The authors should explain why, and to what extent, the

reasoning concerning uncertainty applies to post-dispute negotiation obligations and should discuss the later judicial tendency to enforce defined contractual procedures despite the continued rejection of open-ended agreements to negotiate.

The paragraph in Section 2.2 stating that English courts require evidence that the parties “genuinely attempted, in good faith, to resolve the dispute” needs authority and doctrinal refinement. English courts may enforce objectively defined procedural steps without recognizing a freestanding obligation of good faith. The manuscript should therefore separate compliance with objective contractual requirements, such as issuing a notice, referring the dispute to designated executives, or observing a waiting period, from the more controversial question of whether the parties must demonstrate substantive good-faith engagement. The authors should identify the legal source of any good-faith requirement and avoid importing civil-law terminology into English doctrine without justification.

The discussion of *Cable & Wireless plc v IBM United Kingdom Ltd* in Section 2.3 should be checked carefully against the judgment. The manuscript attributes the decision to the Court of Appeal and presents three criteria as a direct judicial formulation. The authors should verify the court, procedural posture, exact nature of the clause, remedy granted, and wording used by Colman J. Any language presented in quotation marks must either reproduce the judgment accurately with a precise paragraph reference or be reformulated as a paraphrase. At present, the passage may give readers the impression that the cited three-part test appears verbatim in the judgment, which requires documentary confirmation.

The treatment of *Société Sofidif v Société Dilma* in Section 3.3 should be verified against the official decision, including the parties’ names, date, chamber, procedural context, and exact holding. The sentence asserting that “the mediation clause is recommendatory by default” appears unusually categorical and should not be placed in quotation marks unless it is an exact translation of the judgment. The authors should provide the official citation and paragraph or decision reference and explain whether the Court of Cassation addressed jurisdiction, admissibility, or another procedural consequence. This is especially important because French terminology concerning *fin de non-recevoir* cannot be translated accurately as lack of arbitral jurisdiction.

The discussion of *Société Uni-Kod v Société Ouralkali* also requires documentary verification. The manuscript states that a clause becomes mandatory only if the parties expressly provide that non-compliance deprives the tribunal of jurisdiction. This may impose a stricter drafting requirement than French case law actually demands. The authors should determine whether the decision concerned the clause’s scope, the identity of the claims covered, the completion of a conciliation process, or the procedural sanction for non-compliance. They should then reformulate the legal test based on the court’s actual reasoning rather than using the case to support a generalized presumption.

Authors revised the manuscript and uploaded the document.

1.2. Reviewer 2

Reviewer:

The paragraph concerning *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* contains several potentially serious inaccuracies. The sentence stating that “the arbitral tribunal concluded that the pre-arbitration condition had not been satisfied” and that the court confirmed a resulting lack of jurisdiction should be verified against the procedural history and holding. The authors should accurately identify the deciding court, the tribunal’s conclusion, the construction of the four-week friendly-discussion requirement, and whether the issue was characterized as jurisdictional or procedural. This case is central to the manuscript’s account of English law, and any misstatement would materially undermine the article’s comparative conclusions.

The treatment of *Wah (aka Alan Tang) v Grant Thornton International Ltd* in the final paragraph of Section 2.3 appears to reverse or oversimplify the significance of the decision. The manuscript describes the clause as an enforceable mediation requirement and states that proceedings were stayed until serious mediation efforts occurred. The authors should re-examine whether the relevant escalation procedure was instead held insufficiently certain or incomplete and whether it provided an enforceable mechanism. The factual description, type of dispute resolution process, institutional structure, and judicial outcome must be corrected and supported by pinpoint references to the judgment.

Section 2.4 lists six criteria for enforceability under English law, but the criteria are presented as settled cumulative requirements without adequate differentiation between necessary and desirable drafting elements. For example, the statement that fixed time limits are “essential” and that the consequences of non-compliance should be specified requires qualification. The authors should classify the criteria into indispensable elements, strong indicators of certainty, and recommended drafting practices. A clause may be enforceable even if it does not expressly state every consequence of breach, provided that its procedural obligations and endpoint are objectively ascertainable. This distinction would make the section doctrinally more precise and practically more useful.

In Section 2.5, the paragraph on *Halsey v Milton Keynes General NHS Trust* should be updated and placed in its proper doctrinal context. The manuscript relies on *Halsey* for the proposition that courts cannot compel mediation, but English civil procedure and judicial attitudes toward compulsory non-court dispute resolution have continued to evolve. Because the article presents itself as an account of contemporary law, the authors should examine later authorities and procedural reforms concerning court-ordered mediation and the compatibility of compulsory participation with the right of access to a court. The relationship between judicial encouragement of mediation and contractual enforcement of multi-tiered clauses should also be explained rather than treated as a single doctrinal development.

The claim in Section 2.7 that the English approach has “generally contributed to greater legal certainty” is plausible but currently asserted rather than demonstrated. The authors should identify the dimensions of legal certainty being evaluated, such as predictability of enforceability, consistency of remedies, certainty concerning tribunal competence, or drafting guidance. They should also confront the contrary possibility that uncertainty over the jurisdiction–admissibility distinction and inconsistent judicial treatment of negotiation clauses may reduce predictability. A more balanced assessment should distinguish *ex ante* drafting certainty from *ex post* procedural uncertainty.

The opening paragraph of Section 3 characterizes French law as presuming that multi-tiered clauses are recommendatory unless the parties express an unequivocal intention to make them mandatory. This broad proposition requires reconsideration. French law has recognized the binding procedural effect of mandatory conciliation clauses in important decisions, often treating non-compliance as a ground of inadmissibility rather than lack of jurisdiction. The authors should avoid constructing the French model solely as the opposite of English law. Instead, they should examine the wording, scope, procedural precision, and sanction attached to the clause and explain how French courts distinguish a mandatory conciliation prerequisite from a merely aspirational amicable-settlement provision.

The paragraph in Section 3.1 invoking the “principle of facilitating access to arbitration” should provide a more precise legal basis. The manuscript currently presents this principle as if it automatically converts ambiguous pre-arbitration obligations into recommendations. The authors should distinguish the principle favoring the validity and effectiveness of arbitration agreements from the interpretation of a separate conciliation or mediation clause. They should also explain whether the relevant French doctrine concerns arbitral jurisdiction, admissibility of claims, or the procedural effectiveness of contractual obligations. Without this separation, the analysis risks extending the pro-arbitration principle beyond its established doctrinal function.

Authors revised the manuscript and uploaded the document.

2. Revised

Editor’s decision: Accepted.

Editor in Chief’s decision: Accepted.