

THE ENFORCEMENT OF MULTI-TIERED DISPUTE RESOLUTION CLAUSES: CONTEMPORARY JUDICIAL OPINION

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ABSTRACT

Multi-tiered dispute resolution clauses have come to be recognised as a commonly accepted method of dispute resolution clauses in commercial contracts - they often find place in construction contracts. The article discusses the conceptual nature of the multi-tiered clauses and explains the benefits of these clauses, as well as a few concerns related thereto. The article also refers to the UNCITRAL Model Law on Commercial Conciliation on the enforceability of the ADR tiers in the multi-tiered dispute resolution clause, and the statutory regime governing enforceability of the multi-tiered clauses in a few jurisdictions. It further discusses the implications of non-compliance of each of these tiers, especially with reference to the judicial opinion, in common law and civil law systems, with regard to the enforceability of these tiers – importantly, it addresses the question if and when these clauses are to be seen as condition precedent to an arbitration/litigation. The article concludes by setting out the common pitfalls to be avoided and the pointers to be considered when drafting an enforceable multi-tiered dispute resolution clause.

Keywords: multi-tiered dispute resolution clause, ADR process, condition precedent, arbitration, enforceability

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PENGUATKUASAAN KLAUSA PENYELESAIAN PERTELINGKAHAN PELBAGAI PERINGKAT: PENDAPAT PENGHAKIMAN KONTEMPORARI

ABSTRAK

Klausa-klausa penyelesaian pertikaian alternatif pelbagai peringkat sudah dikenali sebagai tatacara yang diterima umum bagi klausa-klausa dalam kontrak komersil – ianya terutamanya wujud dalam kontrak-kontrak pembinaan. Makalah ini membincangkan ciri konsep klausa-klausa pelbagai peringkat dan menerangkan faedah klausa tersebut dan beberapa kebimbangan yang berkaitan dengannya. Makalah juga merujuk kepada Model Undang-Undang Tentang Pendamaian Komercil UNCITRAL berkenaan penguatkuasaan klausa-klausa penyelesaian pertikaian pelbagai peringkat dan rejim statutori yang mentadbir penguatkuasaan klausa-klausa pelbagai peringkat di beberapa bidanguasa. Ia seterusnya membincangkan implikasi ketidakpatuhan setiap peringkat itu, terutamanya dengan merujuk pendapat kehakiman dalam sistem undang-undang am ('common-law') dan undang-undang sivil berkenaan penguatkuasaan peringkat-peringkat tersebut – yang pentingnya, ianya menuju persoalan apabila dan bilamana klausa-klausa itu akan dikira sebagai syarat duluan kepada timbang tara dan tindakan undang-undang. Makalah disimpulkan dengan mengenalpasti perangkap yang perlu di elak dan perkara yang harus dipertimbangkan apabila menggubal klausa penyelesaian pertikaian pelbagai peringkat yang boleh dikuatkuasa.

Kata Kunci: klausa penyelesaian pertikaian pelbagai peringkat, proses penyelesaian pertikaian alternatif, syarat duluan, timbang tara, penguatkuasaan

INTRODUCTION

Diversity within the methodology of the dispute-resolution clauses has been the *sine qua non* in contemporary transnational contracts. Focused upon the continued and sustained commercial relations, parties have been frequently resorting to a variety of dispute resolution mechanisms often in a tiered manner and not in alternative. Known as the multi-tiered dispute resolution clauses and sometimes as water-fall clauses, these clauses contain a collection of a variety of ADR processes like negotiation and mediation before resorting to either arbitration or litigation. Other current terminology for such clauses includes escalation, multi-step and ADR-first clauses. The presence of these clauses is owed to the fact that parties agree to escalate the resolution to the next stage only after a certain methodology(s) of settlement has been tried and exhausted without successful resolution. Multi-tiered dispute resolution clauses (hereinafter referred to as ‘MTDRCs’) feature some initial procedures like conciliation or facilitation, early neutral evaluation of the dispute which are known as non-binding, non-adjudicative procedures.¹ International Arbitration being cost-intensive parties often prefer to have these multi-tiered clauses so that they could resort to relatively cost-effective procedures. An added advantage of such clauses is that various stages of the dispute resolution may require highly customized dispute resolution methodology(s) thus creating reason for a multi-tiered arbitration clause and hence an assured expertise involved in handling the dispute resolution. Such clauses have increasingly been finding place² especially in long-term and complex construction and engineering contracts, especially because such agreements are premised on a constant cooperation among the parties throughout the tenure of the contract.

While the importance of these clauses cannot be gainsaid, extra care and caution needs to be exercised in their drafting – any laxity in

¹ D. Jason File, “United States: Multi-Step Dispute Resolution Clauses”, *IBA Legal Practice Division - Mediation Committee Newsletter*, July 2007, 33.

² *International Arbitration: Corporate Attitudes and Practices*, 5, reported 43% of the respondents utilized a combination of ADR methods and arbitration. 44% preferred to choose international arbitration in a combination with ADR mechanisms in a multi-tier or escalation dispute resolution process. accessed on January 21, 2015. http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf.

the drafting with regard to clarity could lead to uncertainty and possible unenforceability. There has been a divided opinion amongst the scholars, courts and arbitral tribunals on the enforceability of such consensual and non-determinate methods of dispute resolution.³ One opinion subscribes to the thought that the non-determinate nature of the clauses present difficulties for enforceability, while the other opinion is founded upon the principle of parties' choice of such clauses being accorded primacy and hence binding and enforceable.⁴

There have been other concerns, especially with regard to the proper forum to be approached for enforcement of a certain procedure in a specific tier – the arbitral tribunal or the courts. It is perceived that courts, either at the seat of the arbitration or in possible enforcement jurisdictions, retain an inherent jurisdiction to choose to stay the proceedings until any conditions precedent in the multi-tier clauses have been complied with.⁵

A common thread in the discussion on the MTDRCs has been the nature of enforceability of these clauses,

- Are these methods conditions precedent to the ensuing arbitration?
- Which is the appropriate forum to address this question – the arbitral tribunal or the court?⁶

Scheme of the Article

This article discusses the diversity within the MTDRCs and the contemporary judicial statements on the enforceability of various tiers in such clauses. It is structured with a conceptual understanding of these clauses followed by the commonly adopted tiers within the dispute resolution clause. Further the article discusses the methodology of drafting the tiered clauses - some of the concerns about MTDRCs would be flagged in this section. The scheme of the article also focuses upon the concerns that have arisen within the jurisprudence of the MTDRCs. There is a discussion on the

³ Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration*, 27, No. 6, (2010) 551-52.

⁴ Alexander Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement" *Arbitration* 72, No.4, (2006) 329-338.

⁵ Doug Jones, "Dealing with Multi-Tier Dispute Resolution Process", *Arbitration*, 75, no.2 (2009) 190.

⁶ Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 329.

enforceability of these clauses through a conceptual statement utilizing resources from the UNCITRAL Model Law on International Commercial Conciliation followed by a statement on the statutory provisions regarding enforceability of pre-arbitral or litigation processes in a few jurisdictions. The next section is a discussion on the enforceability through the judicial opinion chronicled from a select common law and the civil law jurisdictions. The article concludes with a statement on significant pointers that are taken note of in the drafting of the multi-tiered dispute resolution clauses.

The article adopts the doctrinal research method and the case critique approach to discuss the enforceability of MTDRCs.

THE CONCEPT

Known variously as escalation, multi-step or ADR-first clauses, MTDRCs allow parties to agree that in the consequence of a dispute between them they would follow a series of stages with different procedures for a determination on the dispute,⁷ and then, if found necessary, move towards arbitration/litigation. Drafting of these clauses is founded upon escalation – moving up on the agreed process only when a particular stage could not yield the desired result.⁸ Typically, the initial tiers are formed of methods founded upon amicable settlement of the dispute; they are drafted to impose a duty upon the parties to negotiate or participate in the mediation or conciliation efforts. They are structured in complete detail – the initial processes required for beginning such exercise, the external support, including institutional that might be required, the timing of such processes, the method of participation in such negotiation or mediation efforts and such. There has also been judicial opinion on the compliance with such detail during the participation in these tiers⁹ as discussed elsewhere in this research. The emphasis on amicable settlement hence put to detail, often describes the nature of participation in the process – who shall participate, the venue of the negotiation, the nature of the duty to participate in the agreed manner,

⁷ Michael Pryles, “Multi-tiered Dispute Resolution Clauses”, *Journal of International Arbitration* 18, no.2 (2001) 159.

⁸ Peter Berger Klaus, “Law and Practice of Escalation Clauses”, *Arbitration International*, 22, no.1 (2006) 1-2.

⁹ Ibid.

etc. Apart from the advantages of cost-effectiveness and the ease on the time, these initial tiers in the clauses also create space for professional and expert handling of the dispute, especially in complex engineering and construction contracts.¹⁰ The value of such expertise cannot be gainsaid in long-term contracts where cooperation between parties is the *sine qua non* of the business relationship.

Despite the above mentioned advantages, a few concerns associated with the MTDRCs remain. Foremost among them is the amount of commitment that goes into the insertion of these clauses. Often it is found that these clauses have been last minute entrants into the dispute resolution clause with little explanation about the nature of these tiers.¹¹ Further such poorly drafted clauses with a complex structure placed in them, could create uncertainty and thus render them ineffective and unenforceable.

The Commonly Adopted Tiers

Alternative Dispute Resolution (hereinafter, ADR) is understood as a collection of methods of resolving controversies without recourse to the courts and/or arbitration, and hence do not impose any duty of a mandatory nature.¹² These are in contra-distinction of arbitration and litigation which are judicial processes leading towards binding obligations; therefore categorised as more formal processes.

Some of the commonly adopted ADR methods that form part of the hierarchy in a multi-tiered dispute resolution clause leading finally to an arbitration process are –

1. Negotiation - a non-binding process involving direct discussions and a possible agreement between the disputing parties, without a third party intervention¹³, negotiation is a practice well accepted in commercial contracts. A well drafted dispute resolution clause detailing the subject-matter that could be referred for a negotiation process and identifying the method of negotiation including composition of the negotiating group could result in a resolution of the

¹⁰ Liana Kartsivadze, “Jurisdiction of Arbitral Tribunal on the grounds of Multi-tiered Dispute Resolution Clause”, Central European University Thesis, 2010 accessed December 25, 2014. www.etd.ceu.hu/2010/kartsivadze_liana.pdf

¹¹ Ibid., 11-12.

¹² Kayali, “Enforceability of Multi-Tiered Dispute Resolution Clauses”, 553.

¹³ Kayali, “Enforceability of Multi-Tiered Dispute Resolution Clauses”, 552.

dispute in the initial stage itself. A poorly drafted clause, on the contrary, could lead to a delay in the commencement of any binding dispute resolution method.¹⁴

2. Mediation - An intervention of an acceptable, neutral, third party with no binding decision-making authority, mediation conceptualizes the idea of a trained professional assisting the parties reach a mutually acceptable settlement of the dispute.¹⁵ Also referred to as conciliation, it is a consensual process originating either in the party agreement or in a court-sponsored programme. The process helps consolidate the trust between the parties and reduces any psychological roadblocks between them. The procedure is initiated with a consent, necessary to ensure that the intervention by the third-party would not be counter-productive and also that the parties retain control over the process all through the mediation.
3. Expert Determination –A third person facilitated process expert determination is similar to arbitration - it results in a binding decision.¹⁶ The difference between the two, however, lies in the level of immunity accorded to the facilitator. While in arbitration the arbitrator enjoys immunity from liability, in an expert determination there is liability imposed on the expert for any instance of negligence on his part. Further, the difference reflects in the manner of enforcement of the binding decision.¹⁷ An arbitral award is enforceable under the New York Convention on Enforcement of Foreign Arbitral Awards, 1958, whereas an expert determination can only be enforced through proceedings in the court, in the absence of voluntary compliance by the parties.
4. Dispute Adjudication Boards - The dispute adjudication boards (DABs) are constituted through a clause in the underwriting contract or through a separate agreement. Often

¹⁴ Dana H. Freyer, “Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A US Perspective”, *Journal of International Arbitration* 15, No.4, (1998), 7.

¹⁵ Martin Hunter, *The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts* (Deventer,Boston: Kluwer Law and Taxation Publishers, 1993) 64.

¹⁶ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (London: Sweet & Maxwell, 2004), 50.

¹⁷ Kayali, “Enforceability of Multi-Tiered Dispute Resolution Clauses”, 554.

parties adopt the model clauses/procedures of the International Federation of Consulting Engineers (FIDIC). The DABs endeavour for resolution of any differences as they arise and they continue their efforts throughout the contractual relationship. The function of these boards is preventive as well as curative. These are increasingly finding place in international construction and engineering contracts. An instance of such dispute boards could be found in the World Bank funded projects where the financed value is in excess of 50mnUSD.¹⁸ Another example of its increasing utility could be seen in the ICC Dispute Board Rules, 2004, where three alternative methods of dispute boards – the Dispute Resolution Board, the Dispute Adjudication Board, and the Combined Dispute Board - have been provided.¹⁹

5. Arbitration – Arbitration is a non-judicial private dispute settlement method²⁰ that provides for a final and binding resolution of the dispute, founded upon an agreement of the parties. Unlike the judicial officers, the arbitrators, appointed as a result of an agreement between the parties, could dispense with legal formalities and apply the procedural rules and the substantive law that best fits the dispute before them

¹⁸ The Dispute Review Board (DRB) procedure to settle all the disputes arising out of International Bank for Reconstruction and Development (IBRD) financed projects was adopted by the World Bank in January, 1995. Under this scheme for contracts estimated to cost more than US\$50 million it is mandatory to refer disputes to a three member Dispute Review Board. However, for contracts estimated to cost less than US\$50 million the dispute can be referred to either DRB, or a single Dispute Review Expert or to the Engineer working in quasi-judicial capacity. The DRB procedure has subsequently been adopted by Asian Development Bank (ADB) and European Bank for Reconstruction and Development (EBRD). For more details see *Standard Bidding Documents – Procurement of Works*, The World Bank, January 1995, accessed December 25, 2014 http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/@invest/documents/legaldocument/wcms_asist_4559.pdf .

¹⁹ The International Chamber of Commerce (ICC) Dispute Board Rules have been in force since 1st September 2004. The Rules provide for three types of dispute resolution boards – Dispute Review Board (DRB) (Article 4), Dispute Adjudication Board (DAB) (Article 5) and Combined Dispute Board (CDB) (Article 5). Dispute Board Rules, International Chamber of Commerce (ICC) accessed December 25, 2014 <http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/> .

²⁰ Walter Mattli, “Private Justice in a Global Economy: from Litigation to Arbitration”, *International Organization*, 55, no.4, (Autumn, 2001), 920.

within the framework of the arbitration agreement. The binding nature of the process has been reinforced through international conventions, national arbitration laws and the institutional arbitral rules.

DRAFTING MULTI-TIERED CLAUSES

Some common features to be noted in the drafting of MTDRCs include:²¹

- Order of the steps to be followed;
- The agreed rules and limitations on each step;
- Imposing time limits for every step and the trigger for the time limits; and
- The notification of the completion of the step

A negotiation tier has been common place in the MTDRCs. In the survey conducted by the Pace Law School and the International Association for Contract & Commercial Management (IACCM) it was reported that 75% of the participants in the survey included a mandatory negotiation in their dispute resolution clauses.²² One of the contributing factors for the success of a negotiation provision was the realisation by the parties that the continuance of their business relationship outweighed their need to get their way on a particular issue. More than a half of the respondents averred that two-thirds of their disputes or issues were resolved during the negotiation phase. An enhanced working relationship with minimal formalities as well as being cost-effective were reported as the major reasons for parties having mandatory negotiation processes in their dispute resolution clauses.²³

²¹ *Drafting Step Clauses: An Empirical look at their Practicality and Legality*, Pace Law School Institute of International Commercial Law and IACCM research – accessed from the electronic library of the Pace Law School, accessed December 25, 2014, <http://www.cisg.law.pace.edu/cisg/IICL-NE.html>.

²² *Ibid.*, 6.

²³ *Ibid.*, 7.

Along with an increasing preference for the MTDRCs,²⁴ there has been a tendency to litigate over the question of compelling parties to comply with the tiers – often a result of improper drafting and straying from the designated process. It has been argued that, due to the consensual and non-determinative nature of negotiation and mediation, the management of these procedures is completely contingent upon the voluntary participation of the parties.²⁵ Non-participation of one of the parties could lead to these processes falling apart, thus rendering them incapable of getting a judicial enforcement.²⁶

Summarising the explanations representing the arguments for and against enforcement of the ADR tiers in the step clauses, Carter stated that the rationale for pro-enforcement is that ADR procedures in the tiered dispute resolution clause hold significant value for a cooperative dispute resolution process.²⁷ On the other hand, the rationale for non-enforceability rests on the opinion that it is futile to compel a reluctant party to negotiate the disagreement or to participate in a mediation process since both the processes involve cooperation and consent of the parties.²⁸

Jolles opined that upon agreement to a multi-tiered dispute resolution clause, parties expect that a tribunal faced with the dispute would ensure the exhaustion of the initial steps before it could be seized of the matter.²⁹ Expert determination being a determinative procedure, agreements to submit disputes to experts before initiating arbitration are enforceable in courts, though there is not much literature discussing this method and enforceability.

²⁴ Ibid.,4. The Pace Law School IACCM Survey reported that 82% of the respondents preferred a multi-step dispute resolution clause to a single step dispute resolution clause. Further it reported that 45% of the respondents preferred incorporating multiple steps into their ADR clauses for reasons of efficiency on the timelines; 37% of respondents averred to the fact that even if an earlier tier could not result in a successful resolution of the dispute, it could still bring the key concerns to the fore and thus facilitate the resolution at later stages.

²⁵ Pryles, “Multi-tiered Dispute Resolution Clauses”, 161.

²⁶ Pryles, “Multi-tiered Dispute Resolution Clauses”, 162.

²⁷ James H. Carter, “Issues Arising from Integrated Dispute Resolution Clauses”, in *New Horizons in International Commercial Arbitration and Beyond*, 2005, A. J. van den Berg ed. (Kluwer Law International, 2005), 446.

²⁸ Ibid., 456.

²⁹ Jolles, “Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement”, 336.

CONCERNS REGARDING MTRCS

Not discounting the advantages that such clauses attach to the contract and the business relationship, there is a significant risk flowing from these clauses. It could block parties from enforcing their rights, and thus could be termed as essentially ‘pathological’.³⁰

A few difficulties or concerns with the escalation clauses are articulated as follows –

1. Being a step clause, it premises on the fact that escalation happens only when the immediately preceding tier has been complied with. There is no way for one party to move on to the next tier if the other party has failed to comply with the preceding tier.
2. There might be significant difficulty in comprehending when one tier ended and the other has begun, especially if parties have different thoughts in this regard
3. It is a possibility that during the mediation proceedings sensitive business information may be disclosed,³¹ and it may be difficult for either party to prevent the other from utilising it later in the absence of any determinative process
4. Another concern is that parties may not voluntarily comply with mediation since any agreement that resulted from that process is not directly enforceable.

Is it then necessary that all the tiers need be mandatorily fulfilled or can a party(s) omit the earlier tier(s)? What are consequences of not complying with the tiers voluntarily? Can parties omit some or all of the tiers if they find them non-productive to the dispute resolution?

³⁰ Kartsivadze, Jurisdiction of Arbitral Tribunal on the grounds of Multi-tiered Dispute Resolution Clause”,8.

³¹ Nathalie Voser, Enforcement of Multi-tier Dispute Resolution Clauses by National Courts and Arbitral Tribunals – the Civil Law Approach, cited in Wian Erlank, Enforcement of Multi-tiered Dispute Resolution Clauses (working paper), accessed December 25, 2014< <http://ssrn.com/abstract=1491027> >.

ENFORCEABILITY OF ADR TIERS IN MTDRCS'

The discussion on the utility of MTDRCs has concerned itself with the mandatory value and enforceability of the non-adjudicatory part of these clauses – the tiers providing for negotiation and/or mediation. The UNCITRAL Model Law on International Commercial Conciliation³² is a significant instrument within the international regime on the enforceability of the ADR tiers in dispute resolution clauses. There have been attempts by signatories to enact legislations based on or influenced by the Model Law.³³ United States and Canada have enacted Uniform Legislations based upon the Model Law principles. This section of the article discusses the Model Law in the context of enforceability of agreements to conciliate within a tiered dispute resolution clause. It also discusses the statutory provisions within a few legal regimes that provide for enforceability of the ADR obligations within the multi-tiered dispute resolution clauses.

UNCITRAL Model Law on International Commercial Conciliation

Article 13 of the UNCITRAL Model Law favours the enforceability of agreements to conciliate by providing that where parties have undertaken not to initiate arbitral or judicial proceedings during a specified period of time or until a specified event has occurred, such an undertaking shall be given effect to by the arbitral tribunal or by the court. The drafters were not in favour of having a general rule that prohibited parties from recourse to litigation pending a conciliation procedure as they perceived that such an overarching rule could be counter-productive for conciliation as a methodology, in the sense that it would dissuade parties from contracting to conciliate.³⁴ However, the Article's drafting allows an analogy to be derived in the terms that this provision could be construed as supporting enforcement of ADR procedures like negotiation, at least to the extent

³² Adopted by the UNCITRAL on 24th June 2002. accessed on July 21, 2015 http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf .

³³ Till date legislations based on or influenced by the Model Law are in place in 15 States in 27 jurisdictions.

³⁴ Linda C. Reif, "The Use of Conciliation or Mediation for the resolution of International Commercial Disputes", *Can. Bus. L.J.* 45, no.20 (2007) .

of staying arbitral or judicial proceedings until the specified event has occurred.

Legislative Statement on Enforcement of Mediation or Conciliation Agreements

It is pertinent to discuss the statutory regime concerning MTDRCs that exists in a few jurisdictions. It may be noted that the judicial opinion from these jurisdictions are also discussed in the later sections of this article.

English Law

The English Arbitration Act, 1996 is legislation which has made reference to the position of other dispute resolution procedures *vis-à-vis* arbitration.

Section 9 (2): An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.³⁵

An application to enforce an arbitration agreement by staying court proceedings may be brought notwithstanding that the matter is to be referred to arbitration only after exhaustion of any other dispute resolution procedures. Section 9 is a mandatory provision and Kayali opined that the phrase “other dispute resolution procedures” could be interpreted to involve multi-tiered dispute resolution clauses.³⁶ He further stated that where the multi-tier dispute resolution clause is not a nullity or is not considered to be void, inoperative or incapable of being performed, the court would be obliged to stay the proceedings and allow the MTDRC to become operative.³⁷

³⁵ Arbitration Act, 1996 accessed December 25, 2014 <http://www.legislation.gov.uk/ukpga/1996/23/data.pdf>

³⁶ Kayali, “Enforceability of Multi-Tiered Dispute Resolution Clauses”, 561.

³⁷ Ibid, 561.

Canada

While the Canadian Uniform [International] Commercial Mediation Act, 2005 is an approximation from the UNCITRAL Model Law, 2002, there have been significant modifications on the nature of enforceability of the agreement to conciliation within the multi-tiered dispute resolution clause. Of importance is Section 10 of the legislation. Though modelled upon Article 13 of the MLICC, the Act gave over-riding powers to the arbitral tribunal or the court, as may be in the given case, over the party agreement to mediation. The tribunal or the court could order proceedings before them to continue if they consider it necessary to preserve the rights of any of the parties or is otherwise necessary in the interests of justice.³⁸ The Act however stated that a court registered settlement agreement would be enforceable as if it were a judgment.

France

Article 1134 of the French Civil Code³⁹ has been interpreted to make a legal position for the enforcement of ADR tiers⁴⁰. Cremades commented that ADR agreements created legally binding obligations, and the import of this provision would be that there are two obligations – to initiate negotiations with the other disputing party as agreed upon, and secondly to act in good faith with the aim to settle the dispute.⁴¹

³⁸ Reif, “The Use of Conciliation or Mediation for the resolution of International Commercial Disputes”, 44.

³⁹ Art. 1134 Agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith.

⁴⁰ Liana Kartsivadze, “Jurisdiction of Arbitral Tribunal on the grounds of Multi-tiered Dispute Resolution Clause”, 31.

⁴¹ Bernardo M. Cremades, “Multi-tier Dispute Resolution clauses”, (*CPR Institute for Dispute Resolution*), 13 accessed on January 21, 2016 http://fidic.org/sites/default/files/36%20cremades_2004.pdf .

Spain

In Spain, multi-tier dispute resolution clauses are enforceable and such clauses need to portend a definitive obligation towards the pre-arbitral processes.⁴² For example, a clause that provided for arbitration after a specific length of time has elapsed, would not be enforceable until that period had expired. Cremades states that a definitive obligation to appoint a representative for the purposes of negotiating or an obligation to designate a mediator as a pre-condition to arbitration, would have the consequence of the arbitration not being initiated until the pre-arbitral phase has been exhausted.⁴³

United States

The United States courts have resorted to contract law principles to enforce multi-tier dispute resolution clauses under the general rule that was aptly summarised by Kathleen Scanlon.⁴⁴

When a party contracts to use mediation prior to the commencement of arbitration (or litigation) the contractual agreement cannot be bypassed without a valid defense, eg. waiver or estoppel.

⁴² Article 1,125. Obligations for whose performance a certain day has been set shall only be enforceable upon arrival of such date. Certain day shall be deemed to mean a date, which must necessarily arrive, even though it is uncertain when it will do so. If the uncertainty consists on whether the day will arrive or not, the obligation is conditional, and shall be governed by the rules of the preceding section;

Article 1,127. Whenever a forward term is designated in obligations, it shall be presumed to have been established for the benefit of both creditor and debtor, unless it should result from the provisions of such obligations or from other circumstances that it has been set in favour of one or the other.
http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6402 (accessed on 12/12/2015).

⁴³ Bernardo M. Cremades, “Multi-tier Dispute Resolution clauses”, 14.

⁴⁴ Kathleen Scanlon, “Enforcement of Multi-tiered Dispute Resolution Clauses – United States”, *Arbitration and ADR Newsletter of the IBA*, 6, no.2, (October, 2001), 24.

Further a binding obligation to mediation⁴⁵ was inferred from the application of Section 3 of the Federal Arbitration Act⁴⁶, which requires the stay of the proceedings in a court if there is a valid arbitration agreement, hinting at such procedure with certainty.⁴⁷

JUDICIAL OPINION

England

English courts have largely been averse to recognising agreements to negotiate; these were seen as agreements to agree to terms not finalized.⁴⁸ On multi-tiered dispute resolution clauses English law seems to have adopted an approach of differentiating between determinative and non-determinative procedures. An arbitral tribunal applying English law would decline jurisdiction till such time that initial tiers have been fulfilled where a contractual provision expressly states that determinate procedures are a condition precedent to arbitration. However as far as non-determinative procedures are concerned, such tiers are non-enforceable and as such not seen as constituting a condition precedent to arbitration.⁴⁹

⁴⁵ *Cecala v. Moore*, 982 F.Supp. 609 (N.D. Ill. 1997).

⁴⁶ Section 3 FAA - If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

⁴⁷ Peter Tochtermann, "Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution", accessed April 20, 2016 <http://www.unidroit.org/english/publications/review/articles/2008-3-tochtermann-e.pdf>.

⁴⁸ Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 333.

⁴⁹ Philip Naughton QC, Country report for England in *Enforcement of Multi-tiered Dispute Resolution Clauses*, IBA Newsletter of Committee D (Arbitration and ADR) Volume 6 No. 2 October 2001, cited in Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 333, note 23.

In *Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd*⁵⁰ it was decided that agreement to negotiate is vague and uncertain and hence unenforceable. Similar approach was adopted by the court in *Walford v Miles*⁵¹ where the plaintiffs alleged that the defendants did not initiate the negotiations that they agreed to have with the plaintiffs in the matter concerning the sale of a property. Delivering the judgment on the plaintiffs' suit for damages for the breach of agreement, the House of Lords held that the agreement lacked certainty and was unenforceable as a bare agreement to negotiate. Lord Ackner opined that an agreement to negotiate, like an agreement to agree, was unenforceable simply because it lacked the necessary certainty.

Lord Mustil's opinion in the *Channel Tunnel* case⁵² reflected the changing state of mind of the judiciary towards the ADR procedures in the multi-tier dispute resolution clauses. The dispute resolution clause in the instant case contained a two-tier procedure involving an expert determination within ninety days of submission of the dispute to the three-member expert panel and an arbitration procedure. The ICC-administered arbitration was to ensue if either party was dissatisfied with the unanimous decision of the panel or if the panel failed to reach a unanimous decision. The appellants sought an injunction from the Court to restrain the respondents from suspending work when a dispute arose between them. The respondents filed a cross application requesting for further stay on all proceedings on the basis that the dispute ought not to be determined by the Court but by the dispute resolution procedure contained in the contract between the parties. Lord Mustil exercising his discretion in favour of a stay stated:

Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go.⁵³

⁵⁰ [1975] 1 WLR 297.

⁵¹ [1992] 2 A.C.334.

⁵² *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*, [1993] AC 334.

⁵³ *Ibid*, 353.

Channel Tunnel decision thus marked an important statement from the Court in favour of initiating proceedings before the agreed dispute resolution mechanisms and staying further judicial proceedings till such mechanisms have been initiated and exhausted without a satisfactory result.

In the *Cable & Wireless* case⁵⁴ the contract provided for a tiered dispute resolution clause, the dispute to be referred to escalating levels of management. After a failed resolution of the dispute the parties could turn on the ADR procedure as recommended by the Centre for Dispute Resolution. Upon non-resolution of the dispute through ADR procedure, the parties could then apply to the court. On an application by IBM for a stay of the judicial proceedings so that ADR methods could be pursued, the Court held that the dispute resolution clause in the instant case had identified the procedures to be followed with much clarity and in a detailed manner, and as such it was more certain than a mere agreement to negotiate.

In *Holloway v Chancery Mead Limited*⁵⁵ the Court identified three requirements that could make an ADR agreement enforceable:

- The process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed.
- The administrative processes for selecting a party to resolve the dispute and pay that person should also be defined.
- The process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.

In *Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others*⁵⁶ a dispute had arisen between Thornton and minority partners in a partnership that had previously been part of Grant Thornton's international network. The judge considered a clause that provided for:

- The CEO to facilitate an 'amicable conciliation' process,
- If that was not successful, for a panel of three board members to facilitate another round of conciliation,
- If that was not successful, either party could commence arbitration.

⁵⁴ *Cable & Wireless Plc v IBM* [2002] EWHC 2059 .

⁵⁵ [2007] EWHC 2495 TCC.

⁵⁶ [2012] EWHC 3198 (Ch).

Although there was some discussion between the parties, the CEO withdrew from the process and neither was a panel created. On commencement of arbitration by Grant Thornton, the other party applied to the court for ordering commencement of ADR procedures envisaged in the dispute resolution clause. The judge considered that the clause was not certain enough to act as a condition precedent to the commencement of arbitration. The decision of *Hildyard, J.* in the *Grant Thornton* case holds sufficient guidance on the enforceability of ADR tiers in dispute resolution clauses -

The test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect.⁵⁷

It could be deduced from the above statement of the learned judge that for an ADR clause to be a binding condition precedent a few conditions need necessarily be addressed. They are

- (a) a sufficiently certain and unequivocal commitment to commence a process;
- (b) from which may be discerned the steps that each party would be required to undertake to put the dispute resolution process in place; and which is
- (c) it is sufficiently clearly defined to enable the court to determine objectively (i) the minimum standard required of the parties to the dispute in terms of their participation in it and (ii) when or how the processes would be exhausted or properly terminable without breach.

An interesting trend towards recognising the enforceability of ADR processes as condition precedent to arbitration could be seen in the recent decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd.*⁵⁸ The Court was called to decide whether an agreement to negotiate as a condition precedent in an arbitration agreement is enforceable; and, whether there were friendly discussions between the parties in good faith seeking to resolve PMEPL's claim for US\$45mn. The decision of the court was in

⁵⁷ Ibid., § 59.

⁵⁸ [2014] EWHC 2104 (Comm).

favour of enforcing the ADR clause. The Court held that the arbitrators have jurisdiction to decide the dispute between ETA and PMEPL because the condition precedent to arbitration, although enforceable, was satisfied. Hence, ETA's application under Section 67 of the Arbitration Act 1996 that the arbitral tribunal lacks jurisdiction to hear and determine the claim was dismissed. The reasoning of the Court was that enforcement of such an agreement, complete in all respects; otherwise not uncertain; and the obligation to seek to resolve the dispute through friendly discussions having a fair and objective identifiable standard, when found as part of a dispute resolution clause, is in the public interest - first, because commercial businessmen expect the court to enforce obligations which they have freely undertaken; and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration. Regarding the second issue, the Court upon a factual reading of the case chronology found that the requirements of notice of the agreed friendly discussions were fulfilled as parties had a notice of the termination of the contract and had continued to discuss the issues on their own.

Thus it could be stated that *Emirates Trading Agency* decision marked an important shift in the English jurisprudence on the enforceability of ADR procedures as conditions precedent to arbitration in a Multi-tiered dispute resolution clause. The decision also brought the English law on the subject in line with much of the jurisprudence in other jurisdictions like Australia and Singapore.

Canada

Canadian courts have been in favour of enforcing ADR within the MTDRCs provided the parties had expressly contracted that these tiers ought to be treated as condition precedent. The courts also required these clauses to be succinctly detailed in the manner of conduct of these tiers as well as the time limits for their completion.

The Supreme Court of Nova Scotia in *Canada (Minister of Transport) v. Marineserve.MG Inc.*,⁵⁹ favoured the claim of the defendants to enforce the contracted tiered dispute resolution clause. The parties had agreed upon a three-tiered dispute resolution clause that specified the following stages for dispute resolution -

⁵⁹ [2002] N.S.J. No. 256 (in chambers).

- (i) good faith negotiations between senior individuals of each party with decision-making authority;
- (ii) mediation, if within ten days of the meeting the parties had failed to resolve the dispute; and
- (iii) ultimately, arbitration, if the mediation process was unsuccessful.

The plaintiff commenced court proceedings, while the defendants sought to enforce the dispute resolution process. The court found for the defendants and required the dispute resolution clause to be satisfied in full, including the negotiation stage. The court further opined that the parties should "follow the path of their own choosing."⁶⁰

Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.,⁶¹ is another significant decision in favour of enforcement of ADR tiers within the MTDRCs. The Quebec Superior Court while dismissing the plaintiff's action ordered submission of the dispute to the multi-step dispute resolution clause (parties to use best efforts to resolve the dispute, followed by the appointment of a Conciliator followed by the ability of either party to refer the matter to arbitration if the dispute still remained unresolved). The Court held that to allow one party to immediately bring a dispute before the court and deprive the counterparty of its rights under the dispute resolution clause would be to deny the intention of the parties as set out in the agreement.⁶²

In *Toronto Truck Centre Ltd. v. Volvo Trucks Canada Inc.*,⁶³ the Ontario Court of Justice was called upon to write in an injunction to compel a contracting party to participate in the dispute resolution process that include a mediation tier. The court while enforcing the dispute resolution process stated:

dispute resolution clauses are increasingly common in commercial contracts. They serve both the public interest in resolution of disputes and the interest of the parties in finding constructive, timely and cost effective solutions to their difficulties. Since such provisions are consensual, their terms may vary greatly. The

⁶⁰ Ibid. para 30.

⁶¹ [2001] Q.J. No. 2470.

⁶² Ibid., para 34.

⁶³ [1998] O.J. No. 2965.

process in issue here is clearly intended to achieve a final and binding resolution of this termination dispute.⁶⁴

France

Judicial opinion, as could be perceived from the decisions discussed below, seems to echo the point that French courts would enforce an obligation to negotiate, where certainty could be derived from the dispute resolution clause about the mandatory nature of the pre-arbitration process.

In *Poiré v. Tripier*⁶⁵ the Cour de Cassation held that the claims of a party who failed to comply with an amicable dispute resolution clause set as a mandatory condition precedent to initiating proceedings before a judge were inadmissible.

In *Medissimo v. Logica*,⁶⁶ a pharmaceutical company entered into a contract with an IT company to outsource the maintenance of a software program. The pharmaceutical company, Medissimo, initiated proceedings against Logica for breach of performance in the contract. It was contended that the requirement of compliance with amicable dispute settlement clause was not complied with and therefore the claim for arbitration was inadmissible. The Cour de Cassation held that a mere mutual agreement to attempt to resolve a dispute without any particular conditions as to its implementation is not a mandatory condition precedent and thus does not render the claims inadmissible if disregarded. However, a contractual clause establishing a mandatory conciliation procedure is lawful and binding upon the parties until the end of the conciliation procedure. The court explained that the inadmissibility of the claims would therefore be dependent upon the wording of the multi-tiered clause in relation to the following questions:

- (a) Is the amicable dispute resolution clause mandatory?
- (b) Is the amicable dispute resolution clause a condition precedent to the right to refer a claim to litigation or arbitration?
- (c) Is the amicable dispute resolution clause procedure sufficiently detailed?

Only in situations where all the above requirements were fulfilled, could the clause be considered to be enforceable.

⁶⁴ Ibid, para 38.

⁶⁵ Cass. ch. mixte, 14 February 2003, *Poiré v. Tripier*, JurisData n° 2003-017812.

⁶⁶ Cass. com. *Medissimo v. Logica*, 29 April 2014, n° 12-27.004.

Spain

Under the Spanish law, MTDRCs are valid and binding for the parties for the following reasons –

- (i) they are not contrary to applicable law and do not harm third parties in accordance with the provisions of article 6.4 of the Spanish Civil Code ('SCC');
- (ii) they are covered by the principle of contract freedom (article 1255 SCC); and
- (iii) the parties are required under Spanish law to comply with the agreed provisions (article 1090 SCC).

In addition, article 1258 SCC states that agreements are concluded by mere consent, and are thereafter binding upon the parties.

In a few cases, reflective of an increasing phenomenon of MTDRCs in international contracts, Spanish courts have favoured enforcement of obligations contracted by parties in good faith. The juristic opinion could be summarised in the following words. The purpose of the multi-tier clause is clear: to require the aggrieved party to inform the other party of the existence of a controversy, providing an opportunity for the situation to be resolved outside arbitration, thereby avoiding the financial costs and delays involved in the arbitration process.⁶⁷ Failing this, the clause may also serve to provide the respondent with an opportunity to prepare its defense better if a negotiated solution cannot be reached.⁶⁸ In short, these clauses allow the parties to reflect on the facts that gave rise to the dispute and explore the possibilities of reaching an amicable resolution.

United States

There has not been a concurring opinion in the United States on the enforceability of the ADR tiers in the dispute resolution clauses. The

⁶⁷ Judgment of March 16, 1989, rendered by the Spanish Constitutional Court (RTC 1989/60), in which the Spanish Constitutional Court analysed the purpose of the requirement to exhaust administrative remedies, which is somewhat analogous to the negotiation clause.

⁶⁸ Judgment of June 9, 1988, Spanish Supreme Court [Tribunal Supremo] (RJ 1988/5259), a decision that also refers to the exhaustion of administrative remedies.

Court of 9th Circuit has described the California law on this issue as unsettled.⁶⁹ This opinion could be attributed to the fact that difficulty arises in explaining the difference between an ‘agreement to agree’ and a ‘contract to negotiate’ as found in the tiers in a multi-tier dispute resolution clause.

Notwithstanding the absence of clarity in the law on enforcement of the ADR tiers, judicial opinion on enforcement has hinged upon the definiteness of the contractual terms⁷⁰ – on a case-by-case method. Some of the indicia identified by the courts to determine the definiteness of the parties’ opinion with regard to the ADR tiers are –

- a limited duration of negotiation or mediation⁷¹
- a specified number of negotiation sessions⁷²
- specified negotiation participants⁷³
- mediation pursuant to specified rules or under the auspices of a particular dispute resolution institution⁷⁴

In a few instances courts have insisted upon enforcement of the ADR tiers holding that they were unable to infer that such procedures were futile in the resolution of the dispute.⁷⁵ It further clarified that in spite of the fact that one party to a dispute was uncertain of the procedure and considered it being futile, there could exist a possibility of the procedure itself resulting in a favourable advisory to the resistant party, hence, the procedure itself if indicating definiteness to it, ought to be pursued.⁷⁶

Another important derivation from the judicial opinion on the MTDRCs has been an emphasis on the clarity within the clause on the issue of the fulfillment of the ADR tiers being mandatory

⁶⁹ *Vestar Development II LLC v General Dynamics Corp.* 249 F3d958, 961 9th Cir 2001; D. Jason File, “United States: Multi-Step Dispute Resolution Clauses” 36.

⁷⁰ *Mocca Lounge, Inc v Misak* 94 AD 2d 761,763 (2d Dep’t 1983); *Fluor Enters Inc v Solutia Inc*, 147 F Supp 2d 648, 651 (SD Tex. 2001).

⁷¹ Fluor Enters Inc,

⁷² *White v Kampner* 641 A.2d 1381, 1382 (Conn.1994).

⁷³ *Fluor Enters Inc.* (2001) 147 F Supp 2d 648, 651 (SD Tex. 2001).

⁷⁴ *HIM Portland LLC v DeVito Builders Inc*, 317 F 3d 41, 42 (1st Cir. 2003).

⁷⁵ see for example, *US v Bankers Ins. Co* 245 F 3d 315, 323 (4th Cir, 2001).

⁷⁶ *Ibid.*

precondition before the escalation.⁷⁷ Where such clarity in the clause emphasising upon the mandatory nature of these tiers is absent, courts viewed them with diminished enforceability – largely founded upon the provisions and time limits surrounding these tiers.⁷⁸

Australia

In *Hooper Bailie Associated Ltd. v Natcon Group Pty Ltd.*,⁷⁹ the Australian Court noted that there was an agreement between the parties to conciliate on some issues. *Giles, J.*, observed that an agreement to conciliate or mediate is not to be likened to an agreement to agree nor is it an agreement to negotiate in good faith. If the terms of the conciliation agreement were sufficiently certain the Court could require the parties to participate in the process. Since *Natcon* promised to participate in the conciliation and the conduct required of it was sufficiently certain for its promise to be given legal recognition, the Learned Judge ordered a stay of the arbitration proceedings until the conclusion of the conciliation between the plaintiffs and the defendant.

*Elizabeth Bay Developments Pty. Ltd. v Boral Building Services Pty Ltd.*⁸⁰ is another important judgment that held the ADR clauses enforceable. The facts of the case revealed that there was a two-tiered dispute resolution clause providing for Australian Commercial Disputes Centre (ACDC) administered mediation followed by arbitration according to the Arbitration Rules of ACDC in the second tier. In a dispute between the parties evolving from *Boral's* non-involvement in the project, *Elizabeth Bay* treated it as repudiation of the contract and commenced judicial proceedings for damages for breach of contract. Referring to the commitment of the parties within the mediation agreement to attempt in good faith to negotiate towards achieving a settlement of the dispute, *Giles, J.* held that mediation agreements should be recognized and given effect in appropriate cases. However, in the instant case he found that the clause was

⁷⁷ In *DeValk Lincoln Mercury Inc v Ford Motor Co.* 811 F 2d 326, 336 (7th Cir 1987) the court held that since the mediation clause stated that it was a condition precedent to any litigation, it would be construed that the clause required strict compliance with its requirements before the parties could litigate.

⁷⁸ *Fluors Enters Inc.* (2001) refer note ...

⁷⁹ (1992) 28 NSWLR 194.

⁸⁰ (1995) 36 NSWLR 709.

unclear as also the fact that the dispute resolution clause did not incorporate the mediation guidelines of the ACDC. He held that the mediation agreement in this case was not enforceable.

A decision favouring enforceability of ADR clauses could be derived from the judgment in *United Group Rail Services v Rail Corporation New South Wales*.⁸¹ The agreement contained a dispute resolution clause which provided that the parties should "meet and undertake genuine and good faith negotiation with a view to resolving the dispute"; failing such resolution the dispute could be arbitrated. The Court held that while an agreement to agree was unenforceable, it does not follow that an agreement to undertake negotiations in good faith to settle a dispute arising under a contract was unenforceable. It further observed that the public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, wherever possible, real and enforceable content be given to clauses. This would make parties conducive to the resolution of disputes without expensive litigation, arbitral or curial. It further explained:

Good faith connotes both honesty and the observance of reasonable commercial standards of fair dealing. Where a party clearly fails to honour such standards of conduct, judges and commercial arbitrators will have no particular difficulty in recognising and identifying such failures.⁸²

Germany

German courts have demonstrated a commitment towards enforceability of ADR procedures as condition precedent to arbitration/litigation. A Federal Supreme Court decision of 1998⁸³ held that a clause, under which the parties had agreed to attempt to resolve disputes arising out of a contract by settlement negotiations before commencing Court proceedings, was valid under German law and that in general, any claim brought against one of the parties by the other before the Courts would be inadmissible if the settlement negotiations had not been commenced and completed. It further

⁸¹ (2009) 127 Con LR 202.

⁸² *Ibid.*, t § 53.

⁸³ *Bundesgerichtshof* decision of 25 November 1998.<<http://www.unilex.info/case.cfm?pid=1&do=case&id=356&step=abstract> > cited in Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 332.

explained that if the parties agreed on a mandatory settlement clause, both parties were obliged to cooperate in carrying out the settlement negotiations. An application to the Court prior to the completion of an agreed settlement procedure is inadmissible.

A similar opinion was expressed earlier in the *Landestieraztekammer* case⁸⁴ where the Court held that pre-litigation conciliation clauses are valid and must be respected by the parties and the Courts.

Singapore

In Singapore, multi-tiered dispute resolution clauses have found favour with the courts for enforceability. An important decision ruling in favour of enforceability of ADR processes as condition precedents is the judgment in *HSBC Institutional Trust Services (Singapore) Ltd. (Trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd.*⁸⁵ In this case the Court was presented with questions regarding the validity and the enforceability of a contractual clause directing parties to “endeavour in good faith to agree”. The court was further called upon to state whether legal consequences flowed from the breach of such clauses. Drawing a distinction between pre-contract negotiations and the negotiations envisaged by the parties in the ‘rent review mechanism’, which was the dispute in the instant case, the Judge refused to be guided by the opinion of Lord Ackner in *Walford v Miles*.⁸⁶ The Court opined that in the instant case parties were not in a strictly adversarial position and had shared common interest in the commitment to negotiate a new rent review mechanism; they were not free to walk away from the system. Drawing instructive guidance from the Australian decision in the *Aiton* case⁸⁷ the Court held that if as part of the wider existing contractual framework there is a provision obliging the parties to negotiate certain modalities in good faith, such negotiations need not necessarily be adversarial but call for a consensual approach to resolve the matters as part of the performance of the broader existing agreement. It further opined that it is a part of the wider

⁸⁴ 1984 decision cited in Jolles, “Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement”, 332, note 19.

⁸⁵ [2012] SGCA 48.

⁸⁶ [1992] 2 A.C.334.

⁸⁷ [1999] 153 F.L.R. 236.

contractual duty to cooperate to implement the contract. In the words of the judgment:

[T]here is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld. First, such an agreement is valid because it is not contrary to public policy. Parties are free to contract unless prohibited by law. Indeed, we think that such “negotiate in good faith” clauses are in the public interest as they promote the consensual disposition of any potential disputes.

The Court reinforced its opinion in favour of enforceability of good faith clauses by holding that such clauses need be enforced because non-participation by a party could still leave an option for dispute resolution through other processes. The Court referred to the decision in *Petro-Deep Societa Armamento Navi Appoggio Spa v Petroleo Brasileiro SA (“Petromec”)*⁸⁸ where the English Court of Appeal held that the decision in *Walford*⁸⁹ did not have the effect of invalidating an express term of a contract which employed the language of good faith. One of the issues in *Petromec* concerned the enforceability of a clause in the contract between the parties (viz, clause 12.4 of the Supervision Agreement) which provided that “Brasoil agrees to negotiate in good faith with *Petromec* the extra costs referred to in clauses 12.1 and 12.2 of the contract”. It further opined:

negotiate in good faith agreements do serve a useful commercial purpose in seeking to promote consensus and conciliation in lieu of adversarial dispute resolution. These are values that our legal system should promote.⁹⁰

Another significant judicial statement on the issue of enforceability of ADR tiers in the dispute resolution clause is the decision in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Another*.⁹¹ In an instructive opinion in the instant case the Court of Appeal opined that it would have upheld the multi-tier clause that imposed conditions precedent to approaching

⁸⁸ [2006] 1 Lloyd’s Rep 12.

⁸⁹ [1992] 2 A.C.334.

⁹⁰ *Petromec* [2006] 1 Lloyd’s Rep 121 at § 45.

⁹¹ [2012] SGHC 226.

the tribunal's jurisdiction. It further stated that in the instant case the multi-tiered dispute resolution mechanism (which required parties to attempt to resolve the dispute) had not been complied with. The mechanism in question contemplated that a dispute would be escalated up hierarchies of the respective parties with representatives of increasing seniority to meet to attempt resolution. In other words, there was to be an escalation of a dispute by way of progressively higher ranks of the Respondent's management meeting with their designated counterparts from the other side in an endeavour to reach a resolution. Allowing the appeal the court held that given that the preconditions for arbitration set out in clause 37.2 had not been complied with, the agreement to arbitrate in clause 37.3 (even if it were applicable to the Appellant) could not be invoked. The Court was of the view that the dispute resolution mechanism (clause 37.2 of the cooperation agreement) was certain and hence enforceable:⁹² it is also a condition precedent to the commencement of any arbitration. The judgment thus served as a reminder that multi-tiered dispute resolution clauses required that the requirements of the tiers need to be complied with before any escalation of any tier could be pursued.

Switzerland

There were few cases that discussed the nature of the multi-tiered dispute resolution clauses – whether the obligation was substantive or procedural – and both of them reached different conclusions.

In a case⁹³ arising out of a construction contract, the contractual clause providing for an initial stage of conciliation came up for decision. The Cassation Court of Canton of Zurich ruled that conciliation agreement is agreement of substantive nature and its breach cannot have any relevant consequences to court's jurisdiction and should be addressed as any breach arising out of the substantive law.

⁹² Ibid., § 54, 62.

⁹³ Cassation Court of the Canton of Zurich on March 15, 1999, published in ZR 99 (2000) No.29, discussed in Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 329-330.

In another case⁹⁴ the multi-tier dispute resolution clause included a conciliation process before arbitration of the dispute. The respondent refused to participate in the composition of the arbitral tribunal because the claimant refused the request for conciliation as agreed, leading the respondent to claim that the requirement for arbitration not being fulfilled. The court held “it was not its function to determine whether the requirements for arbitration had been met... [as] the issues regarding jurisdiction were to be decided by the arbitrators and not by the courts”⁹⁵ Importantly, this dictum of the courts influenced scholarly opinion on the subject to infer that the court’s view that the issue of conciliation agreement was of procedural nature, since it was acknowledged that it could have an effect on arbitral tribunal’s jurisdiction.⁹⁶

In *A. SA v. B. SA*⁹⁷ the question before the Swiss Federal Supreme Court was whether a party was obliged to refer disputes to a Dispute Adjudication Board (DAB) as a condition precedent to arbitration under the general conditions of the International Federation of Consulting Engineers (FIDIC). The tribunal opined that, despite an incomplete DAB procedure, it had jurisdiction. The Swiss Court applied Swiss general rules on the interpretation of contracts to the arbitration agreement and found that the reference to the DAB was a mandatory step. However, in the circumstances (where there was no standing DAB and significant time had passed with no DAB having been put in place) it concluded that the tribunal’s decision to accept

⁹⁴ Decision by Zurich Court of Appeals of September 11, 2001, published ZR 101 (2002) No. 21, discussed in Jolles, “Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement”, 330.

⁹⁵ Ibid.

⁹⁶ Liana Kartsivadze, *Jurisdiction of Arbitral Tribunal on the grounds of Multi-tiered Dispute Resolution Clause*”, 36; similar opinion formed the obiter in another case before the Court of Appeals of the Canton of Thurgau (Decision of April 23, 2001 by Court of Appeals, Canton of Thurgau; reported in ASA Bulletin 2003,418–420); the obiter stated that court would have to ‘unquestionably’ take into consideration an undertaking by the parties to submit their disputes to a pre-litigation process; court, upon objection, has to reject the claim as inadmissible for failure to meet a procedural requirement. (Jolles, “Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement”, 331.

⁹⁷ 4A_124/2014, <http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements> .

jurisdiction was correct.⁹⁸ The Swiss Court found that, whilst completing the DAB dispute resolution procedure was mandatory before arbitration, the language of the clause permitted some exceptions – one being where, given the procedural behaviour of a party, the principle of good faith prevents that party from objecting to the jurisdiction on the basis of the absence of a DAB decision.⁹⁹

India

The enforcement of multi-tiered dispute resolution clauses is closely connected to the nature of arbitral agreement. In India this has often attracted the role of domestic courts, especially while constituting arbitral tribunal under Section 11¹⁰⁰ of the Arbitration and Conciliation Act, 1996. In the context of this research paper, it is pertinent to decipher whether the judge while making such appointment would check for the fulfillment of the pre-arbitral requirements. This question was addressed in the case of *Sunil Manchanda v. Ansal Housing and Construction Ltd*¹⁰¹ where the dispute resolution clause involved a pre-arbitration step of mutual discussions between the parties. It required the parties to initiate the process within 15 days of the arising of the dispute following which conciliation proceedings had to follow. The clause further required that upon failure of the conciliation proceedings, the matter had to be presented before sole arbitrator. In a request for appointment of an arbitrator the court was asked to deliberate upon the nature of its appointing power under Section 11 of the Act, whether its judicial power resulting in an adjudicatory order or a mere appointing power. The court held, applying the Supreme Court ruling in the *Konkan*

⁹⁸ Craig Tevendale, Hannah Ambrose & Vanessa Naish, Multi-Tier Dispute Resolution Clauses and Arbitration, *The Turkish Commercial Law Review* 01 no.1 February 2015, 37.

⁹⁹ *Ibid*, 38.

¹⁰⁰ Section 11 concerns with the constitution of the tribunal, and the role of the courts with regard to the appointment of the arbitrators. (4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

¹⁰¹ (2004) 3 Arb LR 100 (Del).

*Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*¹⁰², that it was “not obliged to examine the question as to whether the procedure prescribed in the arbitration agreement has, in fact, been followed before the invocation of the arbitration and seeking appointment of the arbitrator...”¹⁰³

In *Tulip Hotels Pvt. Ltd. v. Trade Wings Ltd*¹⁰⁴ the court while upholding the enforceability of the MTDRCs opined that when the parties agree for a specific procedure and mode for settlement of their dispute by way of arbitration and also prescribes certain pre-condition to be complied with for referring the matter to arbitration, the parties are required to comply with those pre-conditions and only then refer the matter to the arbitration.

In *Centrotrade Minerals v. Hindustan Copper Limited*¹⁰⁵ the validity of a two-tier arbitration clause that envisaged an initial arbitration by the Indian Council of Arbitration and then an ICC-administered arbitration seated in London had to be referred to a larger bench of the Supreme Court, as a two-judge bench could not agree upon their validity. While one judge was of the opinion that the scheme of the 1996 Arbitration and Conciliation Act did not include an appeal to another board or an arbitral tribunal, the other judge held that there was nothing in the 1996 Act against the existence of an arbitral appellate forum.

In *Nirman Sindia v. Indal Electromelts Ltd.*¹⁰⁶ the question before the Court was the termination of the contract, which provided initial referral of the dispute to the engineer. In case the parties were dissatisfied they could go before the adjudicator, and then for arbitration. Since one of the parties went ahead and approached the Court for the appointment of the arbitrator, the question of the enforceability of pre-arbitral mechanism came into question. The Kerala High Court held:

When the parties to a contract agree to any special mode for resolution of the disputes arising out of the agreement and they are bound to comply with the mode prescribed under the agreement.

¹⁰² (2000) 8 SCC 159.

¹⁰³ Sunil Manchanda v. Ansal Housing and Construction Ltd. (2004) 3 Arb LR 100 (Del) para 9.

¹⁰⁴ MANU/MH/1748/2008.

¹⁰⁵ (2006) 11 SCC 245.

¹⁰⁶ AIR 1999 Ker 440.

Without resorting to the first step provided for the resolution of the dispute in the agreement they cannot jump to the second step or to the final step to settle the disputes between the parties.¹⁰⁷

In *Sushil Kumar Sharma v. Union of India*¹⁰⁸, the Supreme Court observed discussing the enforceability of the pre-arbitration processes held that where the contracting parties agreed that the dispute resolution clause is mandatory with regard to the steps preceding arbitration that procedure ought to be followed. Without having followed the steps, the arbitral tribunal did not have jurisdiction to entertain the dispute.

FORUM FOR DECISION ON THE FULFILLMENT OF PRE-ARBITRATION REQUIREMENTS

The appropriate forum for deciding upon compliance with the pre-arbitration requirements is a question that needs to be addressed through the lens of the doctrine of *Kompetenz-Kompetenz*.¹⁰⁹ According to the doctrine all disputes regarding the compliance with the pre-arbitration requirements ought to be raised and decided before the arbitrators. The Zurich Court of Appeals in a 2001 decision¹¹⁰ held that since the dispute is arising out of, or in connection with, the arbitration agreement, it is appropriate that the issue is decided by the arbitrators. Since there is an arbitration clause, the duty to order specific performance of a mediation obligation is to be rendered by the tribunal, not by the courts. Since such an order is a final decision on a contractual obligation, and not an order for any preliminary measures, it could stand in conflict with the arbitration clause if such an order is made by a court.

The jurisdiction of the tribunal to decide upon the compliance with pre-arbitration processes within the MTDRCs is reinforced within the UNCITRAL Model Law on Commercial Conciliation, 2002.¹¹¹ In Article 13 of the UNCITRAL Model Law it was stated that where

¹⁰⁷ AIR 1999 Ker 440, 442, para 6.

¹⁰⁸ (2005) 6 SCC 281.

¹⁰⁹ Doug Jones, "Dealing with Multi-Tier Dispute Resolution Process", 190.

¹¹⁰ Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 335.

¹¹¹ Adopted by the UNCITRAL on 24th June 2002. accessed on July 21, 2015.

parties have agreed to conciliate and have expressly undertaken not to initiate during the specified time period or until a specified event had occurred any action before the arbitral or judicial proceedings, such an undertaking shall be given effect to by the arbitral tribunal or the court. The words of Article 13 suggest that the tribunal has jurisdiction and should make use of its authority to enforce the pre-arbitral steps.

Is non-compliance of pre-arbitral requirements a procedural issue or a matter of substantive law? In most of the cases that formed part of this research paper, the issue was addressed as a procedural matter largely because the tribunal or the judicial institution seized of the matter and addressed it on factual reasons rather than the validity of the clause. Jolles is of the view that it is in line with the intention of the parties who would want the tribunal not to review the case and order the initial steps to be complied with by the parties.¹¹² Attributing the substantive law character to the pre-arbitral steps, would in the event of non-compliance, bring in claims for breach of contract and damages, a result likely to be unsatisfactory to the parties, as the party claiming the damages would be unable to establish the quantum of damage, and hence at no specific gain from the decision.

In multi-tier clauses the timing of request for arbitration also has a significant importance in the context of admissibility of such requests. A tribunal should consider a request inadmissible if the parties had agreed in an unequivocal manner to first engage in all ADR tiers for dispute resolution. The language of the clause must intend that such agreement is not merely permissive or a non-mandatory provision.¹¹³ The tribunal should declare request for arbitration as inadmissible if such ADR process are limited and specific in time and are definite in the process. Upon such declaration of inadmissibility, the tribunal should close its proceedings as such an inadmissibility order would end the mandate of the tribunal, leading for the tribunal to be reconstituted if the pre-arbitral steps were unsuccessful and parties move to the arbitration. But such an inference could lead to difficulties like reconstituting the tribunal and further questions regarding the choice of arbitrators and the eligibility of the previous arbitrators. Other important concerns with closed

¹¹² Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 336.

¹¹³ Ibid.

proceedings would include suspension or interruption of limitation periods, which could lead to further litigation. Therefore a stay of the proceedings could be a preferable solution.¹¹⁴

CONCLUSION

As global commerce witnesses an increasing preference for MTDRCs owing to the adaptable nature of such processes to a diverse range of disputes, absence of clarity on their enforceability persists in a few jurisdictions. Another concern that is organic to the MTDRCs is that as they become progressively more complex, the risks of unenforceability compound.¹¹⁵ The drafting of the multi-tiered dispute resolution clause thus assumes utmost importance if it were to be enforced. While there are templates available with the dispute resolution centres and these can be customised for every requirement, a few pointers need be taken care of to ensure that the clause passes the muster of certainty and is high on the definiteness of its process.

A review of the foregoing case law discussion presents the following pointers that could help further the enforceability of the dispute resolution clause:

- i. Identifying the procedures with utmost clarity;
- ii. Allocation of time limits for each procedural step so that the transition between the tiers could be easily determined. It would help to indicate the mechanism for determining the time-period between the tiers;
- iii. Identifying the procedural rules governing each tier could also be of significant help in monitoring the dispute resolution sequence;
- iv. Alternatives and methods to handle the roadblocks likely to occur during the processes could be identified and positioned within the dispute resolution clause.

¹¹⁴ *Ibid.*, 337.

¹¹⁵ Doug Jones, “Dealing with Multi-Tier Dispute Resolution Process”, 198.