

Advantages and Pitfalls of Multi-Tier Dispute Resolution Clauses

Henry Peter
GASI/ACC Conference
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OVERVIEW

- Definition
- Purpose
- Toolbox
- Examples:
 - Negotiation
 - Management escalation
 - Mediation
 - Dispute adjudication board
 - Arb-Med-Arb
- Advantages
- Pitfalls
- Conclusion

DEFINITION

- Multi-tier dispute resolution clauses provide for a dispute resolution mechanism using, **in sequence**, different dispute resolution methods
- The clause describes an **escalation process** where each tier, or step, is designed to handle the dispute if it has not been resolved by the previous step
- **Synonyms:** "escalation clauses", "step clauses", "ADR-first clauses", "pre-arbitral procedure clauses"
- They typically include, **if needed, a final decision** by a court or an arbitral tribunal

PURPOSE

- Enable parties to chose the dispute resolution mechanism that accords with the **specific needs** of their relationship
- Resolve disputes in a **less adversarial manner:**
 - Does not damage the relationship
 - Particularly important in ongoing (long-term) contracts
- **Resolve disputes more efficiently** in terms of
 - Time
 - Costs

TOOLBOX

Amicable resolution/negotiation

Management escalation

Mediation/conciliation

Expert determination/dispute adjudication boards (DAB)

Arbitration/litigation

EXAMPLES

NEGOTIATION FIRST

"11. Dispute Resolution and Arbitration

*11.1 In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned in 9.2, 9.3, Clauses 10.1(d) and/or 10.1(e) above, the Parties shall **first seek to resolve the dispute or claim by friendly discussion**. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. **If no solution** can be arrived at in between the Parties for a continuous period of **4 (four) weeks** then the non-defaulting party can invoke the arbitration clause and refer the disputes to **arbitration**."*

Source: Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd [2014] EWHC 2014 (Comm)

EXAMPLES

MANAGEMENT ESCALATION

*"All Disputes arising out of or in connection with this Agreement shall **firstly be subject to the Parties conducting consultation meetings, by the senior executives** of each Party, in good faith whereby each Party will use **best efforts** and without prejudice to resolve the dispute in a reasonable time frame, not to exceed 30 (thirty) days. In the event that the consultation meetings are not successful within the said time frame, the dispute(s) shall be finally settled in **arbitration** under the Rules of Arbitration of the International Chamber of Commerce (ICC), by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Geneva (Switzerland). The language of the arbitration shall be English."*

Source: own practice

EXAMPLES

MEDIATION FIRST

11. Mediation
If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation. [...]

12. Arbitration
In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules. [...]"

Source: Sulamerica CIA Nacional De Seguros S.A. and others v. Enesa Engenharia S.A. and others [2012] EWCA Civ 638

EXAMPLES

DISPUTE ADJUDICATION BOARD (DAB)

"20.4 - Obtaining **Dispute Adjudication Board's Decision**

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, [...] either Party may refer the dispute in writing to the DAB for its decision [...]. If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. [...]

20.5 - **Amicable Settlement**

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 - **Arbitration**

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. [...]"

Source: FIDIC Red, Yellow and Silver Books (1999 editions), Clause 20

EXAMPLES

ARB-MED-ARB

*"1. Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by **arbitration** in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution ('SCAI') in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.*

*2. Following the constitution and receipt of the case file, the arbitral tribunal shall **stay the arbitration** proceedings and invite the Secretariat of the Arbitration Court to **initiate mediation** in accordance with the Swiss Rules of Commercial Mediation of SCAI in force with the date on which the Notice of Arbitration was submitted. However, the arbitral tribunal may proceed with the arbitration if the Respondent does not submit an Answer to the Notice of Arbitration within the deadlines granted.*

*3. **If the dispute has not been fully settled by mediation within 60 days** from the initiation of the mediation by the Secretariat of the Arbitration Court, the **arbitration proceedings shall resume**. Any settlement reached in the course of the mediation, whether full or partial, shall be referred to the arbitral tribunal and may be converted into a consent award. [...]"*

Source: SCAI Arb-Med-Arb Clause (draft)

ADVANTAGES

- Preserves the relationship
- Efficiency
- Flexibility:
 - Steps can be combined freely (type and number of layers)
 - Sequence can be played on
- Standardized clauses/systems can be used if desired
- Each step can be optional... or mandatory

PITFALLS

- If a certain sequence of procedures is compulsory → it **must be followed**
- **If not, consequences?**
 - The answer **depends on:**
 - i. the law applicable to the merits and
 - ii. the seat of the arbitration → law applicable to the proceedings ("*lex arbitri*")
 - **Who decides:** Arbitral tribunal or state courts?

PITFALLS

➤ Possible consequences/risks:

1. Arbitral tribunal **declines jurisdiction**
 - Claimant "looses"
 - New arbitral tribunal should be appointed when process completed
 - Statute of limitation not interrupted?
2. Arbitral tribunal finds **claim inadmissible** "for the time being"
 - No finding on jurisdiction... but proceedings closed
 - Same issues as when jurisdiction declined
 - Approach adopted by German Courts (BGH 9.8.2016)
3. Arbitral tribunal **stays proceedings**
 - Time limit is set by tribunal to perform pre-arbitral tier
 - Approach adopted by Swiss Supreme Court (16.3.2016)

CONCLUSION/TAKE-AWAY

- If *"as in-house counsel we are not so much interested in arbitration than in solving conflicts"*...
- ... then, for several reasons, multi-tier clauses are **advisable**
- But be very careful/**comply with the process**/be aware of the risks which can be substantial



Thank you for your attention.

Henry Peter

Prof. Dr. iur., LL.M., Attorney-at-law, Partner

Kellerhals Carrard
Via Luigi Canonica 5
P.O. Box 6280
CH-6901 Lugano

henry.peter@kellerhals-carrard.ch

Basilea

Hirschgässlein 11
Casella postale 257
CH-4010 Basilea
Tel. +41 58 200 30 00
Fax +41 58 200 30 11

Berna

Effingerstrasse 1
Casella postale
CH-3001 Berna
Tel. +41 58 200 35 00
Fax +41 58 200 35 11

Losanna

Place Saint-François 1
Casella postale 7191
CH-1002 Losanna
Tel. +41 58 200 33 00
FAX +41 58 200 33 11

Sion

Rue du Scex 4
Casella postale 317
CH-1951 Sion
Tel. +41 58 200 34 00
Fax +41 58 200 24 11

Zurigo

Rämistrasse 5
Casella postale
CH-8024 Zurigo
Tel. +41 58 200 39 00
Fax +41 58 200 39 11

www.kellerhals-carrard.ch

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Prof. Dr. iur., LL.M., Attorney-at-law, Partner

Kellerhals Carrard
Via Luigi Canonica 5
P.O. Box 6280
CH-6901 Lugano

henry.peter@kellerhals-carrard.ch

Basilea

Hirschgässlein 11
Casella postale 257
CH-4010 Basilea
Tel. +41 58 200 30 00
Fax +41 58 200 30 11

Berna

Effingerstrasse 1
Casella postale
CH-3001 Berna
Tel. +41 58 200 35 00
Fax +41 58 200 35 11

Losanna

Place Saint-François 1
Casella postale 7191
CH-1002 Losanna
Tel. +41 58 200 33 00
FAX +41 58 200 33 11

Sion

Rue du Scex 4
Casella postale 317
CH-1951 Sion
Tel. +41 58 200 34 00
Fax +41 58 200 24 11

Zurigo

Rämistrasse 5
Casella postale
CH-8024 Zurigo
Tel. +41 58 200 39 00
Fax +41 58 200 39 11

www.kellerhals-carrard.ch