

Advantages and Pitfalls of Multi-Tier Dispute Resolution Clauses ¹

Prof. Henry Peter

Overview of Bundle

I.	Examples of Multi-Tier Dispute Resolution Clauses	2
	A. Toolbox for Multi-Tier Clauses	2
	B. Amicable Resolution/Negotiation	2
	1. Negotiation, then Arbitration (Tailor-Made Clause)	2
	2. Negotiation, then Arbitration (Tailor-Made Clause)	2
	3. Dispute Adjudication Board, then Amicable Settlement, then Arbitration (Standard Clause) (see below, E.1)	3
	C. Management Escalation	3
	1. Management Escalation, then Arbitration (Tailor-Made Clause)	3
	2. Management Escalation, then Arbitration (Tailor-Made Clause)	3
	3. Management Escalation, then Mediation, then Litigation (Tailor-Made Clause)	4
	D. Mediation/Conciliation	4
	1. Mediation, then Arbitration (Standard Clause)	4
	2. Mediation, then Arbitration (Standard Clause)	4
	3. Mediation, then Arbitration (Standard Clause)	5
	4. Mediation, then Arbitration (Tailor-Made Clause).....	5
	5. Arbitration, then Mediation, then Arbitration (Standard Clause).....	6
	6. Arbitration, then Mediation, then Arbitration (Standard Clause).....	6
	7. Mediation, with Possible Parallel Arbitration (Standard Clause)	7
	E. Expert Determination/Dispute Adjudication Boards (DAB).....	7
	1. Dispute Review Board, then Arbitration (Standard Clause)	7
	2. Dispute Adjudication Board, then Possible Amicable Settlement, then Arbitration (Standard Clause)	8
	3. Dispute Adjudication Board, then Arbitration (Standard Clause)	8
	4. Expert Determination, then Arbitration (Tailor-Made Clause)	9
II.	Papers	10

¹ Document prepared in collaboration with Dr. Stefanie Pfisterer (from the law firm Homburger, Zurich) in view of the ASA 2017 General Meeting Conference held in Bern on 15 September 2017.

I. Examples of Multi-Tier Dispute Resolution Clauses

A. Toolbox for Multi-Tier Clauses

Amicable resolution/negotiation

Management escalation

Mediation/conciliation

Expert determination/dispute adjudication boards (DAB)

Arbitration/litigation

B. Amicable Resolution/Negotiation

1. Negotiation, then Arbitration (Tailor-Made Clause)

"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)

2. Negotiation, then Arbitration (Tailor-Made Clause)

"3.2. If any dispute arises in connection with this Agreement, the Parties shall attempt to settle it by negotiation. To this end they shall use their respective reasonable endeavors to consult and negotiate with one another in good faith and, in recognizing their mutual interests, attempt to reach a just and equitable settlement.

3.3 Subject to clause 3.2, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination or the legal relationships established

by this Agreement, shall be referred and finally resolved by arbitration under the rules of the London Court of International Arbitration in force as at the date of this Agreement, which rules are deemed to be incorporated by reference to this clause."

Source: [own practice]

3. Dispute Adjudication Board, then Amicable Settlement, then Arbitration (Standard Clause) (see below, E.1)

C. Management Escalation

1. Management Escalation, then Arbitration (Tailor-Made Clause)

"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]

2. Management Escalation, then Arbitration (Tailor-Made Clause)

"Any controversy that may arise among the parties with respect to the legal relation arising out of this Agreement shall be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement within fourteen (14) calendar days after submission. If an amicable solution cannot be reached by negotiation, the dispute shall be finally settled by arbitration by a panel of one (1) arbitrator, which shall be appointed by both parties. In the event the parties fail to appoint the arbitrator within the following fifteen (15) days as of the initiation of the arbitration, such arbitrator shall be designated by the International Chamber of Commerce, Paris, who conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. The site of the arbitration shall be Mexico City, and the language to be used in the arbitration shall be the English Language. The award of the arbitrator shall be final and binding upon both parties, and neither party shall seek recourse to a court of law or other authorities to appeal for revision of such award or any other ruling of the arbitrators. The cost of the arbitration shall be borne by both parties in equal amounts."

Source: ICC Case No. 9977, in: DYALÁ JIMÉNEZ FIGUERES, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, ICC Bulletin 2003, p. 84

3. Management Escalation, then Mediation, then Litigation (Tailor-Made Clause)

"33.1 In the event of any dispute arising between the Parties in connection with this Agreement, senior representatives of the parties will, within 10 business days of a written notice from either Party to the other, meet in good faith and attempt to resolve the dispute without recourse to legal proceedings.

*33.2 If the dispute is not resolved as a result of such meeting, either Party may, at such meeting (or within 10 business days of its conclusion) propose to the other in writing that structured negotiations be entered into with the assistance of a neutral adviser or mediator ('Neutral Adviser').
[...]*

33.6 If the Parties accept the Neutral Adviser's recommendations or otherwise reach agreement on the resolution of the dispute, such agreement will be recorded in writing and, once it is signed by their duly authorized representatives, will be binding on the parties.

[...]

33.8 If the Parties fail to reach agreement in the structured negotiations within 45 business days of the Neutral Adviser being appointed then any dispute between them may be referred to the Court unless within a further period of 25 business days the parties agree to arbitration in accordance with the procedure set out below."

Source: Halifax Financial Services Ltd. v. Intuitive Systems Ltd., cited in: DIDEM KAYALI, Enforceability of Multi-Tiered Dispute Resolution Clauses, Journal of International Arbitration, 2010, p. 559

D. Mediation/Conciliation

1. Mediation, then Arbitration (Standard Clause)

"In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

Source: ICC standard clause, option "Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required"

2. Mediation, then Arbitration (Standard Clause)

"Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers' Arbitration Institution in force on the date when the request for mediation was submitted in accordance with these Rules.

The seat of the mediation shall be ... [name of city in Switzerland, unless the parties agree on a city abroad], although the meetings may be held in... [specify place].

The mediation proceedings shall be conducted in... [specify desired language].

If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the mediator(s) has (have) been confirmed or appointed, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.

The number of arbitrators shall be ... ['one', 'three', 'one or three'];

The seat of the arbitration shall be in ... [name of city in Switzerland, unless the parties agree on a city in another country];

The arbitral proceedings shall be conducted in ... [specify desired language].

The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties]."

Source: SCAI standard clause, option "Mediation, followed by arbitration"

3. Mediation, then Arbitration (Standard Clause)

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].] The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction]. (* The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.)."*

Source: WIPO standard clause, option "WIPO Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration Clause"

4. Mediation, then Arbitration (Tailor-Made Clause)

"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

5. Arbitration, then Mediation, then Arbitration (Standard Clause)

"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 on 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.

4. The seat of the arbitration and mediation shall be [name of a city in Switzerland, unless the parties agree on a city in another country].

5. The arbitration and mediation shall be conducted in ... [specify desired language]

6. The number of arbitrators shall be ... ['one', 'three', 'one or three'].

7. [The arbitration proceedings shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties].]"

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

6. Arbitration, then Mediation, then Arbitration (Standard Clause)

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ('SIAC') in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this clause.

*The seat of the arbitration shall be [Singapore].**

*The Tribunal shall consist of _____ ** arbitrator(s).*

The language of the arbitration shall be _____.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ('SIMC'), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace '[Singapore]' with the city and country of choice (e.g., '[City, Country]').

** State an odd number. Either state one, or state three."

Source: SIAC-SIMC Arb-Med-Arb Model Clause ("Arb-Med-Arb Clause")

7. Mediation, with Possible Parallel Arbitration (Standard Clause)

"(x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below.

(y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

Source: ICC standard clause, option "Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required"

E. Expert Determination/Dispute Adjudication Boards (DAB)

1. Dispute Review Board, then Arbitration (Standard Clause)

"The Parties hereby agree to establish a Dispute Review Board ('DRB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The DRB shall have [one/three/X] member[s] appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted—in the first instance—to the DRB in accordance with the Rules. For any given dispute, the DRB shall issue a Recommendation in accordance with the Rules.

If any Party fails to comply with a Recommendation, when required to do so pursuant to the Rules, the other Party may refer the failure itself—without having to refer it to the DRB first—to arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. A Party that has failed to comply with a Recommendation, when required to do so pursuant to the Rules, shall not raise any issue

as to the merits of the Recommendation as a defence to its failure to comply without delay with the Recommendation.

If any Party sends a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation—as provided in the Rules—or if the DRB does not issue the Recommendation within the time limit provided in the Rules, or if the DRB is disbanded pursuant to the Rules prior to issuing the Recommendation, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

Source: ICC standard clause, ICC Dispute Review Board followed by ICC arbitration if required

2. Dispute Adjudication Board, then Possible Amicable Settlement, then Arbitration (Standard Clause)

"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

3. Dispute Adjudication Board, then Arbitration (Standard Clause)

"The Parties hereby agree to establish a Dispute Adjudication Board ('DAB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The DAB shall have [one/three/X] member[s] appointed in this Contract or appointed pursuant to the Rules.

*All disputes arising out of or in connection with the present Contract shall be submitted—in the first instance—to the DAB in accordance with the Rules. For any given dispute, the DAB shall issue a Decision in accordance with the Rules.**

If any Party fails to comply with a Decision, when required to do so pursuant to the Rules, the other Party may refer the failure itself—without having to refer it to the DAB first—to arbitration

under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. A Party that has failed to comply with a Decision, when required to do so pursuant to the Rules, shall not raise any issue as to the merits of the Decision as a defence to its failure to comply without delay with the Decision.

If any Party sends a written notice to the other Party and the DAB expressing its dissatisfaction with a Decision—as provided in the Rules—or if the DAB does not issue the Decision within the time limit provided in the Rules, or if the DAB is disbanded pursuant to the Rules prior to issuing the Decision, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

Source: ICC standard clause, ICC Dispute Adjudication Board followed by ICC arbitration if required

4. Expert Determination, then Arbitration (Tailor-Made Clause)

"3. Determination of Put Option and Call Option Price

3.1 To enable the Call Option Price or the Put Option Price, as the case may be (Option Price), to be ascertained, the Party having exercised the Option (the Exercising Party) shall submit to the Other Shareholder its calculation of the Option Price [...].

3.2 Within thirty (30) Business Days of delivery to the Option Price Calculation, the Other Shareholder shall give a written notice to the Exercising Party of any item or items it wishes to dispute. [...]

3.3 If, in accordance with subclause 3.2, written notice is given to the Exercising Party as to any item or items in dispute: (a) the Exercising Party and the Other Shareholder shall attempt to agree in writing the item or items disputed; (b) if any such item or items are not agreed in writing within thirty (30) Business Days of the delivery to the Other Shareholder of the Option Price Calculation, the item or items in dispute shall be determined by the Independent Accountants as set forth in more detail below; and the Option Price Calculation adjusted to take account of each item in dispute (of which notice is given in accordance with this schedule) as agreed in writing or as determined by the Independent Accountants (as the case may be), shall constitute the final and binding Option Price for the purposes of this Agreement."

Source: [own practice]

II. Papers

DIDEM KAYALI, Enforceability of Multi-Tiered Dispute Resolution Clauses, *Journal of International Arbitration* 2010, p. 551

DYALÁ JIMÉNEZ FIGUERES, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, *ICC Bulletin* 2003, p. 71