

Search term

"enforceability of multi-tiered"

Document information

Author

Didem Kayali (IAI profile)

Publication

Journal of International Arbitration

Bibliographic reference

Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses', Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6) pp. 551 - 577

Enforceability of Multi-Tiered Dispute Resolution Clauses

Didem Kayali

(*)

Abstract

Multi-tiered dispute resolution clauses comprise different steps which begin with various alternative dispute resolution (ADR) techniques. In these clauses, arbitration is designed as the last step if the dispute cannot be resolved by preliminary ADR efforts. However, problems occur regarding the enforceability of these clauses when one of the parties does not comply with the procedure designed in the contract. This article seeks to define the nature of multi-tiered dispute resolution clauses in the light of the different views of scholars, courts, and arbitral tribunals, to ascertain the drafting problems that hinder their enforceability, and to clarify the essentials for an effective multi-tiered dispute resolution clause. The main finding of the article is that once drafted in an operative way, a multi-tiered dispute resolution clause should be respected and enforced as the choice of the parties.

I Introduction

International commercial arbitration, as an alternative to state courts, has been an attractive dispute resolution system for more than a century as a result of its flexible structure which gives parties the opportunity to formulate the arbitral procedure according to the necessities of their disputes. (1) On the other hand, alternative dispute resolution (ADR), as a complement to arbitration, emerged in the late 1970s in the United States as a concept and has become popular in Europe at the beginning of the 1990s and conceived as a method of resolving disputes through commercial settlements which favour the expectations of the international business community. (2)

Multi-tiered dispute resolution clauses merge ADR and arbitration procedures and provide for a sequence of dispute resolution processes generally composed of negotiation, mediation, expert determination, and finally arbitration. By inserting a multi-tiered dispute resolution clause in their contract, parties agree to resolve their potential controversies by using these escalating steps with an intention that arbitral proceedings will only be commenced in case of the failure of previous ADR techniques. (3) Such clauses enable parties to formulate the best dispute resolution mechanism that accords with the specific needs of their relationship by combining adversarial procedures with ADR proceedings. Consequently, they are being increasingly used in long-term and complex construction and engineering contracts which basically count on the constant cooperation of the parties throughout the duration of the contract. (4)

On the other hand, drafting a multi-tiered dispute resolution clause requires specific care because of various mechanisms within different steps and when drafted without sufficient consideration they bear the risk of being unenforceable because of the lack of certainty. (5) In addition to this risk, the enforceability of negotiation and mediation steps is also controversial in the opinions of scholars, courts, and arbitral tribunals. According to one view, due to the consensual and non-determinative nature of negotiation and mediation, these procedures are not enforceable notwithstanding the agreement of the parties. (6) The opposing view is that, if the parties agree on a multi-tiered dispute resolution system in a binding and clear way, a tribunal should treat a premature request for arbitration as being inadmissible. (7)

The aims of this article are to define the nature of multi-tiered dispute resolution clauses and to determine the critical requirements for an enforceable multi-tiered clause by examining the different views of the scholars, courts, and arbitral tribunals, and ascertaining the drafting problems that hinder their enforceability.

II Concept of Multi-Tiered Dispute Resolution Clauses

A Definition

Multi-tiered dispute resolution clauses are also known as "escalation," "multi-step," or "ADR-first" clauses. By these types of clauses in a contract, parties agree that if a dispute arises between them they will follow a series of separate stages with different procedures such as negotiation, mediation, or conciliation, expert determination and then, if necessary, arbitration. (8) When drafting such clauses the intention of the parties is to escalate to the next step if their dispute is not resolved by the technique described in the former step. (9) Therefore, arbitration would be the last resort which can only be reached if the controversy in question cannot be resolved by the preliminary ADR steps. (10)

These clauses are widely used, especially in international construction contracts. There are various reasons that make these clauses attractive. First of all, arbitration is a costly and time-consuming process and multi-tiered dispute resolution clauses give parties the opportunity to

resolve their disputes by relatively cheap and cost-effective procedures. (11) Besides, they enable parties to protect their further business relationship through ▲ cooperative dispute settlement procedures, which are very important especially for long-term contracts. (12) Furthermore, in complex contracts different types of disputes may arise and multi-step clauses contain procedures appropriate for these different disputes which enable parties to resolve simpler and financially smaller problems by spending less time and money. (13)

Beyond these advantages, multi-tiered clauses also bear some risks. The dispute resolution clauses are generally inserted in the contracts at the last minute without considering their importance and even without much negotiation. As a result, poorly drafted arbitration clauses appear which create their own problems. (14) These problems are multiplied with regard to multi-tiered dispute resolution clauses due to their complex structure and may result in them being ineffective or unenforceable. (15)

B Different steps

As noted above, multi-tiered dispute resolution clauses begin with steps which include different ADR techniques. Although arbitration is a dispute resolution procedure alternative to state courts, it is not included in the scope of ADR methods. (16) Since the role of the arbitrator is also judicial, arbitration is distinguished from ADR methods which do not impose a decision on the parties but rather assist them to resolve the dispute themselves. (17) Therefore, ADR is defined as a method of resolving controversies without recourse to the courts or to arbitration by procedures which are informal. (18)

When drafting a multi-tiered dispute resolution clause, parties can define any of the techniques described below as a distinct step.

1 Negotiation

Negotiation is defined as a process whereby the parties try to settle their disputes by reaching an agreement which is acceptable for both sides without the intervention of a third party and it is considered to be the least disruptive and least expensive method of dispute resolution. (19) On the other hand, in order to be enforceable the contractual provision relating to negotiation should be properly drafted. Once drafted and used properly, negotiation as the first step of a multi-tiered dispute resolution clause enables parties to reach success in resolving their disputes at the first level of the process. In the absence of ▲ a mutually agreed solution, however, negotiation carries the disadvantage of delaying the commencement of any binding dispute resolution procedure. (20)

2 Mediation or Conciliation

The terms “mediation” and “conciliation” are often used interchangeably both in practice and in literature. (21) Mediation or conciliation is a dispute resolution process in which a neutral third person (mediator or conciliator) assists the parties to reach an agreement which ends the dispute between them. (22) A mediator or conciliator is not authorized to settle the dispute by giving a binding decision since the main role of the mediator or conciliator is to encourage the parties to negotiate their own solution to their dispute. (23)

Parties who want to use mediation to resolve their disputes may establish a mediation procedure in their contract or they may agree to use the rules formulated by different institutions such as United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC), American Arbitration Association (AAA), and London Court of International Arbitration (LCIA). (24)

Recognizing the increased use of mediation, in 2002 UNCITRAL published its Model Law on International Commercial Conciliation in order to “assist States in enhancing their legislation governing the use of modern conciliation or mediation techniques and in formulating such legislation where none currently exists” and to “contribute to the development of harmonious international economic relations.” (25) Therefore, parties may also refer to this UNCITRAL Model Law in their contract should they wish to settle their disputes by mediation.

3 Expert Determination

Expert determination is another ADR method by which a third person is chosen by the parties to decide an issue between them. (26) Like arbitration, expert determination is a dispute resolution system that results in a binding decision. However, there are two fundamental differences between expert determination and arbitration. First, an arbitrator is immune from liability for negligence in performing his duties while an expert may be liable for negligence. (27) Second, an arbitral award is directly enforceable under the Convention ▲ on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) whereas an expert decision can only be enforced by proceedings in the court if the parties do not abide by it voluntarily. (28)

As a special form of expert determination, dispute boards are created to operate throughout the contractual relationship both to prevent disputes between the parties and to settle them when they occur. (29) They are increasingly being used in international construction and engineering contracts by the parties (30) and are being adopted in projects funded by the World Bank if the financed contract is in excess of U.S.\$50 million. (31) In 1996, the International Federation of Consulting Engineers (FIDIC) published a Supplement which introduced the concept of the “Dispute Adjudication Board.” (32) Furthermore, in 2004, the ICC

published its Dispute Board Rules which can be used in different types of contracts in different industries and which provide for three alternative types of dispute board. (32)

4 Arbitration

Arbitration is a private dispute settlement procedure alternative to the national court system which finally and in a binding fashion resolves the disputes between the parties according to the agreement of the parties related to the procedural and substantive issues. (33) Although arbitration is a dispute resolution system based on the parties' agreement, it has its binding effect due to the legal regime consisting of international conventions, national arbitration laws and institutional arbitration rules which improve the enforceability of both arbitration agreements and arbitral awards. Besides the New York Convention, which compels Member States to recognize and enforce both international arbitration agreements and awards, most of the countries have their own arbitration laws that provide for the enforcement of international arbitration agreements and awards. (34)

III Models and Examples

Today it is not uncommon to find dispute resolution clauses, in particular in large construction projects, which provide for more than one procedure to settle disputes between the parties.

P 555 ▲

(35) On the other hand, standard multi-tiered dispute resolution clauses ▲▼ formulated by international arbitration institutions are few and used very infrequently by practitioners. (36)

A Model clauses

1 ICC ADR Rules

The ICC formulated four alternative ADR clauses which can be used by the parties as dispute resolution clauses in their contract, which are as follows:

Optional ADR The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.

Obligation to consider ADR In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules.

Obligation to submit dispute to ADR with an automatic expiration mechanism In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.

Obligation to submit dispute to ADR, followed by ICC arbitration as required In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such 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.

The first clause entitles parties to settle their disputes according to the ICC ADR Rules at any time. The second clause obliges the parties to “discuss” and “consider” ICC ADR Rules before submitting their dispute to arbitration. The third and fourth clauses clearly set an obligation for the parties to submit their disputes to ICC ADR Rules. Therefore, if an arbitral tribunal is faced with either of these clauses it should determine whether the obligation to submit the dispute to ICC ADR Rules was satisfied before the request for arbitration was submitted. (37)

2 Centre for Effective Dispute Resolution (CEDR) Model ADR Contract Clauses

CEDR formulated two different multi-tiered dispute resolution clauses in its drafting guide to key ADR clauses which was updated in February 2007. Model 1 contains a two-step process (mediation-arbitration), whereas Model 2 introduces a three-step process (negotiation-
mediation-arbitration). ▲▼

P 556 ▲

Model 1

If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure ... No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.

Model 2

If any dispute arises in connection with this agreement, directors or other senior representatives of the parties with authority to settle the dispute will, within [...] days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.

If the dispute is not resolved at that meeting, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure ...

[The draftsman has the choice to add Version 1, referring to court proceedings in parallel, or Version 2, no court proceedings until the mediation is completed.]

Version 1: The commencement of a mediation will not prevent the parties commencing or continuing court proceedings/an arbitration.

Version 2: No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.

3 World Intellectual Property Organization (WIPO) Recommended Contract Clauses

The following clauses are recommended by the WIPO.

Mediation followed, in the absence of a settlement, by [expedited] arbitration Any dispute, controversy or claim arising under, out of or relating to this contract ... shall be submitted to mediation in accordance with the WIPO Mediation Rules ... 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 ...

P 557

Mediation followed, in the absence of a settlement, by expert determination Any dispute or difference between the parties arising under, out of or relating to this contract and any subsequent amendments of this contract shall be submitted to mediation in accordance with the WIPO Mediation Rules ... If, and to the extent that, any such dispute or difference 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 Expert Determination by either party, be referred to expert determination in accordance with the WIPO Expert Determination Rules ... The determination made by the expert shall [not] be binding upon the parties ...

Expert determination, binding unless followed by [expedited] arbitration Any dispute or difference between the parties arising under, out of or relating to this contract and any subsequent amendments of this contract shall be referred to expert determination in accordance with the WIPO Expert Determination Rules ... The determination made by the expert shall be binding upon the parties, unless within [30] days of the communication of the determination, the matter referred to expert determination is, upon the filing of a Request for Arbitration by either party, referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules ...

4 LCIA Recommended Clause

The LCIA has not published any rules for ADR other than for mediation. Due to the flexibility of the other ADR procedures they do not regulate these processes but recommend clauses on an ad hoc basis. Therefore, the only recommended multi-tiered dispute resolution clause comprises of two steps (mediation-arbitration) and is formulated as:

In the event of a dispute arising out of or relating to this contract ... the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause. If the dispute is not settled by mediation within [...] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

5 AAA Recommended Clauses

For strategic or long-term commercial contracts, the AAA provides for two different model clauses in its Drafting Guide:

INTL 5

In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

INTL 6

In the event of any controversy or claim arising out of or relating to this contract, the parties hereto agree first to try and settle the dispute by mediation administered by the International Centre for Dispute Resolution under its rules before resorting to arbitration, litigation, or some

other dispute resolution technique.

B Practical examples

The main construction contract in the Channel Tunnel project provided for a two-tiered dispute resolution clause (clause 67) as follows: (38)

P 558

- (1) If a dispute or difference shall arise between the employer and the contractor during the progress of the work ... such dispute or difference shall ... in the first place be referred in writing to and be settled by a Panel of three persons (acting ▲▼ as independent experts but not as arbitrators) who shall ... within a period of 90 days ... state their decisions in writing ...
- (2) The contractor shall in every case continue to proceed with the works with all due diligence and the contractor and the employer shall both give effect forthwith to every such decision of the Panel (provided that such decision shall have been made unanimously) and unless and until the same shall be revised by arbitration as hereinafter provided ...
- (3) ... if: (i) either the employers or the contractor be dissatisfied with any unanimous decision of the Panel given under Clause 67(1), or (ii) the panel shall fail to give a unanimous decision for a period of 90 days ... then either the employer or the contractor may within 90 days after receiving notice of such decision ... notify the other party in writing that the dispute or difference is to be referred to arbitration ...
- (4) All disputes or differences in respect of which a notice has been given under Clause 67(3) ... shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

The dispute resolution clause (clause 33) in the contract between Halifax Financial Services Ltd. and Intuitive Systems Ltd. comprised three steps: (39)

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 authorised 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.

In a long-term, cross-border energy supply agreement, the following three-tiered dispute resolution procedure was formulated: (40)

P 559

- (1) Any dispute arising out of or in connection with this contract shall be settled in good faith through mutual discussions between the parties.▲▼
- (2) In the event that the parties are unable to resolve a dispute in accordance with Section 1 above, then either party, in accordance with this Section 2, may refer the dispute to an expert for consideration of the dispute ...
- (3) Any dispute arising out of or in connection with this Agreement and not resolved following the procedures described in Sections 1 and 2 above shall, except as hereinafter provided, be settled by arbitration in accordance with the Rules of procedure for Arbitration Proceedings.

In another agreement which had been the subject of examination in ICC Case No. 9977, the dispute resolution clause provided for a two-step process. (41)

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.

IV Nature of Multi-Tiered Dispute Resolution Clauses

A Conflicting opinions

As noted already, multi-tiered dispute resolution clauses are used very often, especially in

complex contracts in different forms and with different steps. In spite of the prevalence of these clauses in international practice, the differences between the opinions of the courts, arbitral tribunals, and scholars regarding the nature of these clauses still exist. In the centre of the discussions lies the enforceability of the negotiation and mediation steps.

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 to the process. (42) If one of the parties is not involved in the mediation procedure, the mediator cannot continue, and similarly without the participation of one of the parties, there will be no negotiation procedure. Therefore, these dispute resolution procedures are not enforceable under judicial supervision. (43) Furthermore, according to this view, it is fruitless to constrain a reluctant party to negotiate the disagreement or to participate in a mediation process because it would be an unsuccessful attempt without the cooperation and consent of both parties. (44)

On the other hand, it has been claimed that if the parties agree on a binding multi-tiered dispute resolution clause, they expect that a tribunal which is faced with the dispute before the initial steps, such as negotiation or mediation, have been exhausted would refuse to solve the dispute. Therefore, if the parties agreed on a binding and clear multi-tiered dispute resolution system, the steps of which are accurately set out without  any doubt regarding the intention of the parties, a tribunal should treat a request for arbitration as inadmissible. (45) The proponents of this view also argue that enforcement of agreements to negotiate or mediate is crucial for ADR because the aim of this dispute resolution system is to provide for the cooperation of the parties instead of opposition, by using procedures designed for compromise. (46)

With respect to expert determination, which is considered as a determinative procedure, there are no in-depth discussions regarding its enforceability and agreements to submit the dispute to experts before arbitration is deemed to be enforceable. (47)

Beyond these discussions, Article 13 of the UNCITRAL Model Law on International Commercial Conciliation favours the enforceability of agreements to conciliate by providing that:

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 13 of the Model Law requires arbitrators and courts to enforce clear agreements of the parties and not to commence arbitration or litigation during a specified period of time or until a specified event has occurred. This Article is construed to comprise enforcing other ADR procedures like negotiation, at least to the extent of staying arbitral or judicial proceedings until the specified event has occurred. (48)

Under section 9(2) of the English Arbitration Act 1996, 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 other dispute resolution procedures have been exhausted. Section 9 is a mandatory provision and the phrase “other dispute resolution procedures” is interpreted to involve multi-tiered dispute resolution clauses which may include negotiation, mediation, or expert determination procedures before any arbitration may be commenced. (49) Therefore, under section 9, a multi-tiered dispute resolution clause which is not considered to be “null and void, inoperative, or incapable of being performed” will oblige the court to stay proceedings.

B Relevant cases

1 *Walford v. Miles*

In *Walford v. Miles* (50) the defendants were the owners of a company and a property and they entered into negotiations with the plaintiffs for the sale of the company and the property. On March 17, 1987, the parties orally agreed that the defendant would terminate negotiations with third parties and would only negotiate with the plaintiffs. Although the defendants ended the negotiations with a third party, on March 27 they decided not to deal with the plaintiffs and they sold the company and the property to a third party.

The plaintiffs brought action for damages relying on the breach of the agreement of March 17, while the defendants argued that the agreement was unenforceable because of uncertainty. The House of Lords held that the agreement of March 17 lacked certainty and was unenforceable as a bare agreement to negotiate. In the course of the proceedings, Lord Ackner stated that an agreement to negotiate, like an agreement to agree, was unenforceable simply because it lacked the necessary certainty. (51)

2 *Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd.*

In *Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd.*, (52) Hooper Bailie subcontracted

construction work to Natcon and the subcontract contained an arbitration agreement. After a dispute arose and an arbitrator was appointed, the parties decided to refer some issues to conciliation and formulated the procedure to be followed. Thereafter conciliation procedures commenced and a number of the issues were addressed. Before they were all dealt with, however, a provisional liquidator who wanted to proceed with arbitration was appointed to Natcon. Hooper Bailie applied to the Supreme Court of New South Wales to restrain Natcon from continuing the arbitration proceedings.

After noting that there was an agreement between the parties to conciliate some issues, Giles, J. said that what was enforced was not cooperation and consent but participation in a process from which cooperation and consent might come. (53) 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. Natcon promised to participate in the conciliation and the conduct required of it was sufficiently certain for its promise to be given legal recognition.

▲
P 562

(54) Finally, Giles, J. ordered a stay of ▲▼ the arbitration proceedings until the conclusion of conciliation between the plaintiff and the first defendant. (55)

3 Channel Tunnel Group v. Balfour Beatty Construction Ltd.

In *Channel Tunnel Group v. Balfour Beatty Construction Ltd.*, (56) the contract between the parties contained a multi-tiered dispute resolution clause (clause 67) which provided for two steps. The first step comprised the binding decision of a panel of three experts on the dispute within ninety days. The second step of dispute resolution provided for arbitration under the Rules of Conciliation and Arbitration of the ICC if either party was dissatisfied with any unanimous decision of the panel or if the panel failed to reach a unanimous decision.

When a dispute arose between the parties related to the price to be paid in respect of work on the cooling system for the Channel Tunnel, the appellants sought an injunction in the English courts to restrain the respondents from suspending work. On the same day, the respondents issued an application to stay all further proceedings in the action pursuant to Arbitration Act 1975, section 1, on the basis that the dispute should not be determined by the English court but by the dispute resolution procedure contained in the contract between the parties.

In this case, Lord Mustill thought that it was appropriate to exercise the discretion in favour of a stay and specified: (57)

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.

4 Elizabeth Bay Developments Pty Ltd. v. Boral Building Services Pty Ltd.

In *Elizabeth Bay Developments Pty Ltd. v. Boral Building Services Pty Ltd.*, (58) Elizabeth Bay entered into a construction management contract and a building contract with Boral, both of which contained two-tiered dispute resolution clauses providing for mediation administered by the Australian Commercial Disputes Centre (ACDC), in the first step, and arbitration administered by and in accordance with the Arbitration Rules of ACDC, in the second.

▲
P 563

After Boral ceased its involvement in the project, Elizabeth Bay treated this ceasing as a repudiation and terminated the contracts. It then commenced proceedings in the Supreme Court of New South Wales claiming damages for breach. Boral invoked the ▲▼ mediation clauses in the contracts and sought a stay of the proceedings pending mediation where Elizabeth Bay declined to participate and asserted that the agreement was not sufficiently certain to be given effect.

According to Giles, J. both the mediation agreement and the mediation guidelines of the ACDC were not completely coherent and the dispute resolution clause did not incorporate the mediation guidelines. He also added that while the ACDC's guidelines required the parties to sign a mediation agreement, it did not directly refer to the ACDC mediation agreement. The obligation to enter into a mediation agreement which was basically coherent with the mediation guidelines was too broad and ambiguous to be enforceable. He further found that clause 11 of the ACDC mediation agreement contained a confirmation by the parties that they had entered into the agreement "with a commitment to attempt in good faith to negotiate toward achieving a settlement of the dispute" which was also unclear. (59) Consequently, after emphasizing that mediation agreements should be recognized and given effect in appropriate cases, Giles, J. held that the mediation agreement in this case was not enforceable.

5 Halifax Financial Services Ltd. v. Intuitive Systems Ltd.

In *Halifax Financial Services Ltd. v. Intuitive Systems Ltd.*, (60) clause 33 of the agreement between the parties provided for a three-tiered dispute resolution clause. The first step provided that within ten days of a written notice from either party, senior representatives of the parties must meet in good faith and attempt to resolve the dispute. According to the second step, if the dispute was not resolved either party may propose to the other that structured negotiations be entered into with the assistance of a neutral adviser or mediator. The final step provided for arbitration by a sole arbitrator if the dispute was not resolved by

other procedures.

After the plaintiff claimed that the defendant repudiated the agreement in February 1998, the parties held various discussions from February to June 1998 without mentioning clause 33 or the notices required thereunder. Later on, in June, the plaintiff's solicitors sent the defendant a letter before action and a draft statement of claim. On July 20, the defendant intended to give a notice according to clause 33(1) requiring the parties' senior representatives to meet. When an action was commenced the defendant applied to the court for an order to stay plaintiff's action, asserting that clause 33 was a condition precedent to legal proceedings. The defendant's application was dismissed and the defendant lost the appeal as well.

While resolving the appeal in favour of the plaintiff, McKinnon, J. stated that there was no express condition making compliance with the dispute resolution clause a condition precedent to legal proceedings. He further found that clause 33 was not an arbitration agreement on which a statutory power to stay proceedings could be based. Additionally, ▲▼ regarding the discretionary power of the court he held that this power could not be extended to the dispute resolution mechanisms of negotiation, mediation, or expert appraisal as they were not determinative or final mechanisms but merely good faith clauses which were not enforceable under English law. Finally, considering that forced negotiations between the parties would be futile and their only real effect would be to add to expense and delay, he did not grant a stay. (61)

6 Aiton Australia Pty Ltd. v. Transfield Pty Ltd.

In *Aiton Australia Pty Ltd. v. Transfield Pty Ltd.*, (62) the Supreme Court of New South Wales dealt with a very long three-tiered dispute resolution clause (clause 28) which comprised negotiation, mediation, and finally expert determination or litigation.

Aiton entered into three contracts with Transfield regarding the construction of a co-generation project in South Australia. When Aiton instituted an action against Transfield for damages arising out of some execution problems, Transfield sought a stay of judicial proceedings relying on the dispute resolution clause in the contracts.

After the review of the evidence, Einstein, J. found that the procedure outlined in clause 28 had not been complied with and noted that there was no legislative basis for enforcing dispute resolution clauses other than those which provided for arbitration. However, he stated two requirements for an agreement to conciliate or mediate to be enforceable: it should be expressed as a condition precedent to litigation or arbitration and it should be sufficiently certain. Finally, he held that the mediation clause was unenforceable because of uncertainty. Regarding the negotiation stage prior to mediation, Einstein, J. held that the negotiation clause was also unenforceable because it was not separable from the mediation clause.

7 Cable & Wireless plc v. IBM United Kingdom Ltd.

In *Cable & Wireless plc v. IBM United Kingdom Ltd.*, (63) the agreement between IBM and Cable & Wireless provided for a three-tiered dispute resolution clause commencing with negotiation between senior executives, then moving onto the ADR procedure recommended by the Centre for Dispute Resolution, and finally litigation.

A dispute arose regarding the benchmarking process which was designed in the agreement. The first step of the dispute resolution clause, namely negotiation, failed to resolve the dispute and the ADR procedure recommended by the Centre of Dispute Resolution was mediation. However, Cable & Wireless refused to refer the dispute to mediation and issued proceedings. IBM sought to enforce the ADR provision and argued for a stay of court proceedings pending mediation. After stating that the reference to ADR was similar to an arbitration agreement and as a separate agreement it was capable ▲▼ of being enforced by a stay of proceedings, Colman, J. upheld the enforceability of the clause and adjourned the proceedings.

In reaching this decision, he stated that the parties' intention to have the issue decided by the courts if the ADR procedure failed was clear and there was no basis to say that the parties did not mutually intend that ADR would be binding. Therefore, Cable & Wireless was in breach of the dispute resolution clause having declined to participate in any ADR exercise. (64)

He also observed that the reference to ADR was more than an attempt to negotiate in good faith because the parties had prescribed a particular procedure by which such attempt should be made. He underlined that some references to ADR in a contract might still be enforceable despite the lack of an identifiable procedure and added that in such a situation the court would consider whether the reference was expressed in unconditional and mandatory terms which allowed a finding of a sufficiently certain and definable duty of participation. (65)

8 United Group Rail Services Ltd. v. Rail Corp. New South Wales

In *United Group Rail Services Ltd. v. Rail Corp. New South Wales*, (66) various disputes arose in relation to the General Conditions of Contract in two agreements between the parties which had identical dispute resolution provisions. Both provisions provided that following receipt of a written notice of a dispute, the matter would be referred either to an expert adjudicator or to an arbitral tribunal. Where disputes were to be referred to arbitration, two preliminary steps were to be followed. First, the parties had fourteen days to nominate "senior representatives" who would "meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference." Second, if the dispute could not be resolved by

negotiation, the parties were obliged to refer the matter to the “Australian Dispute Centre” for mediation. Only if the parties could not resolve the dispute by mediation within forty-two days would the matter be referred to arbitration. (67)

Although the wording of the contracts indicated that the steps before arbitration were intended to be mandatory, both parties accepted that the reference to mediation was unenforceable because the “Australian Dispute Centre” did not exist. United also argued that the obligation to conduct “genuine and good faith negotiations” lacked certainty and was therefore unenforceable. (68)

[▲]
P 566 After reviewing the history of the authorities, Allsop, P. specified some essential propositions founded on accepted authority and principle: (69) ▲▼

First, an agreement to agree is incomplete, lacking essential terms (that is not a question of uncertainty or vagueness, but the absence of essential terms).

Secondly, the task of the Court is to give effect to business contracts where there is a meaning capable of being ascribed to a word or phrase or term or contract, ambiguity not being vagueness.

Thirdly, good faith is not a concept foreign to the common law, the law merchant or businessmen and women. It has been an underlying concept in the law merchant for centuries.

In addition to these propositions, he said that the phrase “genuine and good faith” concerned an “obligation to behave in a particular way in the conduct of an essentially self-interested commercial activity: the negotiation of a resolution of a commercial dispute.” (70) In this context, he interpreted the phrase to mean “an honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain.” (71)

Finally, Allsop, P. decided that the businesspeople in the case described the kind of negotiations they wanted to undertake by choosing the words “genuine” and “good faith,” which should be enforced. (72)

9 ICC Cases

In ICC Case No. 4230, there was a two-tiered dispute resolution clause and the respondent argued that the claimant had not respected the conciliation requirement prior to arbitration. Following the respondent's jurisdictional objection, the tribunal found that it had jurisdiction due to the wording of the clause (“all disputes related to the present contract may be settled amicably”) which was not expressly obligatory. (73)

In ICC Case No. 6276, there was a three-tiered dispute resolution clause which provided for amicable settlement, engineer's decision, and arbitration. The tribunal first tried to ascertain whether the claimant had satisfied the amicable settlement stage and found the efforts of the claimant regarding this stage to be sufficient. After the failed attempts at amicable settlement, however, the claimant submitted the dispute directly to arbitration instead of to an engineer. The tribunal stated that the parties had voluntarily agreed upon the procedure before the engineer and they also mutually determined strict modalities of substance and form in great detail and therefore the pre-arbitral process was strictly binding on the parties. After this determination the tribunal held that the claimant had not complied with the pre-arbitral phase established in the dispute resolution clause and the request for arbitration was premature. (74)

[▲]
P 567 In ICC Case No. 8462, there was a two-tiered dispute resolution clause which provided for arbitration if after thirty days no settlement could be reached by negotiation. The respondent challenged the tribunal's jurisdiction on the basis that it had no opportunity to find an amicable solution because of the failure of the claimant to notify the ▲▼ respondent about the exact issues to be arbitrated. The tribunal held that the claimant had made sufficient efforts to comply with the negotiation obligation and therefore it had jurisdiction. (75)

In ICC Case No. 9977, there was a two-tiered dispute resolution clause which provided for submission of any controversy to senior management representatives of the parties at the first stage, and if an amicable solution could not be reached by negotiation, submission to arbitration at the second stage. The parties held several settlement meetings. However, the respondent argued that no senior management representative was involved in the negotiation process, but only a legal representative of the claimant. The arbitrator considered the respondent's argument objecting to the characteristics of the claimant's representative to be a post-factual argument that should have been raised in the course of negotiations and therefore dismissed the challenge. (76)

In ICC Case No. 9984, there were two contracts both of which contained two-tiered dispute resolution clauses which comprised amicable negotiation and arbitration. According to the clauses, before resorting to arbitration, the parties must have attempted to settle their dispute amicably and only if this attempt had failed and one of the parties informed the other in writing could the dispute be submitted to arbitration. The respondent argued that the request for arbitration was inadmissible because the claimant did not inform it in writing of the failure of the amicable settlement. Relying on the claimant's letter inviting the respondent to amicable settlement and indicating that if no solution was reached by May 4, 1998 the claimant would resort to arbitration, the arbitral tribunal held that by May 4, 1998 the claimant was entitled to file a request for arbitration without breaching the obligation to attempt to reach an amicable settlement. (77)

In ICC Case No. 10256, there was a three-tiered dispute resolution clause which provided for mutual discussions by the parties acting in good faith, mediation, and finally arbitration. The respondent argued that mediation was a condition precedent for arbitration and that the claimant was not entitled to initiate arbitration until there was mediation. However, the arbitral tribunal found it clear that the reference to mediation was not mandatory due to the wording of the clause which stated “either party ... may refer the dispute to an expert for consideration of the dispute.” (78)

C Overview of the opinions and relevant cases

As we have seen, problems occur regarding the enforceability of multi-tiered dispute resolution clauses when one of the parties does not comply with the procedure designed in the contract between the parties, and the resolution of the dispute basically depends on the drafting of the negotiation and mediation mechanisms and the interpretation of these techniques.

P 568

Scholars who argue that negotiation or mediation procedures are not enforceable fundamentally rely on the consensual or non-determinative nature of these techniques. Admittedly, the parties' willingness to participate in a negotiation or mediation process to resolve their controversies is the most crucial determinant of the process's success. However, these arguments ignore the fact that the procedure to be followed in case of a dispute is determined by the agreement of the parties within the framework of party autonomy, which is one of the fundamental principles of both contract law and international commercial arbitration. Therefore, if a multi-tiered dispute resolution clause reflects the parties' intention and describes the procedure to be followed clearly, each step of this clause should be enforced regardless of their consensual features. As stated in *Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd.* by Giles, J., what is enforced in these procedures is not cooperation and consent but participation in a process from which cooperation and consent may come. (79)

In this respect it is also important to note the importance of ADR as a means of dispute resolution which is increasingly used by the international business community. As already noted, ADR is defined as a method of resolving controversies without recourse to the courts or to arbitration. It is asserted that ADR has emerged out of practice and the main reason for its growing popularity in the business world is because it is a way of avoiding lengthy, complex, and costly litigation or arbitration procedures. (80) It is also argued that the real issue in a commercial dispute is not generally resolved in an adequate manner by the courts or arbitral tribunals, which makes the ADR more attractive. (81) Indeed, any solution reached by a court or arbitral tribunal may miss preserving the dynamics of the contract. In modern commercial relationships, the major concern of the parties is to maintain the contractual relationship and disputes may be regarded as being successfully resolved when both of the parties gain something for their respective benefits. (82) Therefore, enforcing clear ADR clauses which include negotiation or mediation techniques signifies that both the choice of the parties and the needs of the international business community are considered.

With respect to the above-mentioned cases, the following general issues can be drawn out.

(i) In a properly drafted multi-tiered dispute resolution clause, exhaustion of the ADR steps prior to arbitration is a procedural requirement in order to refer the dispute to arbitration and therefore fulfilment of this requirement concerns the admissibility of the claim. Consequently, if one of the parties directly refers the dispute to arbitration by disregarding the previous dispute resolution procedures, upon the objection of the other party, the courts may stay the arbitration proceedings in favour of an ADR step which had not been exhausted, and under the same circumstances, the arbitral tribunals may reject the arbitration request. If the last step of a multi-tiered dispute resolution clause is litigation rather than arbitration, the courts may stay court proceedings in favour of the disregarded ADR steps.

P 569

(ii) Court decisions, whether or not they gave effect to ADR clauses, show that in order to be enforceable, these clauses should be drafted in a binding and “sufficiently certain” manner. Although it is possible to define an ADR clause as binding by considering the wording of the clause, whether an ADR clause will be sufficiently certain depends on the interpretation of the courts. When compared to negotiation, mediation in a multi-tiered dispute resolution clause is considered to be more enforceable as long as it is drafted properly. Especially after the decision in *Cable & Wireless v. IBM*, which likened the reference to ADR to an arbitration agreement and acknowledged it as a free-standing agreement, it could be argued that mediation has been finally appreciated as a valuable dispute resolution procedure.

(iii) Except in the decision in *United Group Rail Services Ltd. v. Rail Corp. New South Wales*, the courts seem reluctant to recognize negotiation as a separate dispute settlement procedure. The main rationale for this reluctance is that agreements to negotiate are too uncertain to be enforceable as they do not create binding obligations. According to this argument, when there is an agreement to negotiate “in good faith” the level of uncertainty increases as it is impossible to determine the parties' state of mind.

First of all, it could be argued that when the parties wish to negotiate their differences when they occur and draft a clear and binding multi-tiered clause commencing with negotiation, the will of the parties should be respected within the scope of party autonomy.

It should be underlined that the only difference between negotiation and mediation as

dispute settlement procedures is that in mediation there is a third person who assists the parties to reach an agreement, while in negotiation the parties try to reach a solution on their own. As in mediation, parties may reach a binding agreement at the end of a negotiation process. Therefore, to treat the negotiation and mediation stages in a dispute resolution clause differently from the point of view of enforceability would be pointless.

Furthermore, good faith in the ADR context implies a duty on parties to conduct negotiations in a proper and constructive way. (83) Therefore, this duty involves an obligation to commence negotiations and have some minimum participation in them; to adopt an open mind in the sense of a willingness to consider options proposed by the other party for the resolution of the dispute; and a willingness to give consideration to putting forward options, and not to withdraw from the negotiations without first giving a reason and a reasonable opportunity for the other party to respond. (84) Consequently, it might be argued that all these obligations of a negotiating party make clear that negotiating in good faith is not related to a state of mind, but the behavior of the parties during the negotiation process, which allows the courts to follow the process.

P 570

These arguments regarding the negotiation stage of a multi-tiered dispute resolution clause were confirmed by the decision in *United Group Rail Services Ltd. v. Rail Corp. New South Wales* and it was held that clauses requiring parties to negotiate in good faith are, in most circumstances, valid and enforceable.

(iv) When an ICC arbitral tribunal is faced with an allegation that the claimant has submitted the request for arbitration without having completed the necessary steps prior to arbitration, it first considers whether the parties were under an obligation to submit their disputes to ADR before arbitration and, in the affirmative, it looks at the facts to determine if this obligation has been fulfilled. When the wording of the clause makes the use of ADR obligatory, tribunals have decided that this makes the provision binding upon the parties. (85) When compared to court decisions, it could be argued that ICC tribunals have interpreted multi-tiered dispute resolution clauses, particularly the negotiation steps, more liberally. Indeed, the tribunals have never dealt with the concerns regarding the enforceability of negotiation and mediation procedures; instead, they have considered these processes as obligations of the parties prior to arbitration, if the wording was express. Moreover, they enforced such clauses even if the clause did not state clearly how and by when the parties had to comply with their obligation to negotiate.

In addition to these general considerations, some case specific comments might be made as follows:

(i) The judgment of the House of Lords in *Walford v. Miles* regarding the enforceability of agreements to negotiate has been much criticized. It was argued that the distinction drawn between an agreement to negotiate a contract, which was unenforceable, and an agreement to use best endeavors to agree the terms of a contract, which was enforceable, was not convincing since a best endeavors negotiation is still a negotiation. (86) In addition, it was also argued that the misconception of *Walford v. Miles* is the assumption that adversarial or competitive negotiation is the only type of negotiation. (87) However, another type is problem-solving negotiation which is also very helpful to ADR practice. (88) When parties undertake to negotiate in good faith, they recognize both types of negotiation and by the expression "good faith" they choose the problem-solving one. If businessmen clearly undertake to negotiate, the denial of this undertaking by the court is commercially unfair. (89)

Beyond these criticisms, regarding the effect of this judgment on the negotiation mechanism in a multi-tiered dispute resolution clause, it could be argued that such a step should be considered outside this judgment, since the agreement to negotiate in this case is aimed at reaching an agreement, while a negotiation step in a dispute resolution clause aims to settle the dispute between the parties arising out of an existing agreement. Although at the end of the dispute settlement negotiations parties may come to an agreement, at the beginning of the process parties undertake, not to reach an agreement but to negotiate their differences only. Therefore, the negotiation stage in a multi-tiered dispute resolution clause should be enforced if the parties' intention is clear.

P 571

(ii) The decision of the Supreme Court of New South Wales in *Elizabeth Bay Developments* can be considered in its two respects. First, by following his own judgment in *Hooper Bailie*, Giles, J. recognized mediation as a valuable means of resolving of disputes and acknowledged the enforceability of mediation agreements if they are sufficiently certain. Second, he ignored the parties' explicit reference to mediation administered by the ACDC on the basis of the vagueness of some expressions in the standard documents of this institution regarding mediation. It might be argued that, while accepting mediation as an important method of dispute resolution, disregarding the parties' express intention to have their disputes resolved by mediation within a defined framework is contradictory, on the one hand, and is the refusal of party autonomy, on the other.

(iii) The decision of McKinnon, J. in *Halifax Financial Services Ltd.* was also criticized in several respects. First of all, it was argued that although the word "shall" was not contained in the dispute resolution clause, considering each of the steps in the clause as unenforceable is regrettable. The finding that there was no arbitration agreement was inconsistent with the Arbitration Act 1996, particularly since section 9 guarantees all private dispute resolution

mechanisms in addition to arbitration. Furthermore, distinguishing negotiation and mediation as non-determinative or non-final mechanisms was a weak conclusion since the parties could reach a binding solution at the end of these procedures. (90)

V Drafting Enforceable Multi-Tiered Dispute Resolution Clauses

A Classic drafting problems

In the light of the afore-mentioned cases, it could be argued that proper wording of a multi-tiered dispute resolution clause is crucial for the clause to be enforceable. Therefore, when drafting such a clause the parties should be more attentive than when drafting a regular arbitration clause. However, as noted before, parties generally insert dispute resolution clauses in their contracts at the last minute without considering their importance, as if no disputes will arise. This general attitude towards the dispute resolution clauses creates significant problems for multi-tiered clauses at the enforcement stage. On the other hand, considering the related cases and the general acknowledgement of the expert determination as a determinative and enforceable procedure like arbitration, it might be argued that the drafting problems that result in the unenforceability of a multi-tiered dispute resolution clause are mostly related to the negotiation and mediation steps.

^{P 572} The first problem with regard to the drafting of a multi-tiered clause is the usage of non-mandatory words such as “may,” instead of obligatory ones like “shall.” When a multi-tiered dispute resolution clause provides that parties may refer to negotiation, mediation, or expert determination prior to arbitration, this reference to ADR techniques does not impose upon parties an obligation to comply and parties may directly commence arbitration proceedings. If the intention of the parties is not to grant each side only the choice of having the dispute resolved by initial ADR proceedings, but to make ADR procedures a precondition to arbitration, then the words which will give such effect to the clause should be chosen.

The second problem derives from the ambiguity in the escalation process despite the mandatory wording of the clause. It is very important to formulate the transition from one step to another, and in particular from an ADR procedure to arbitration, in a very certain and clear way. The clause should specify the point of failure for each step and include criteria for determining whether the obligatory ADR proceedings prior to arbitration have failed. (91) Therefore, only stating that if the parties cannot settle their disputes with negotiation or mediation they should move to arbitration will not be certain and clear enough to be enforceable; indeed, the indicators for commencement and termination of each procedure should be specified clearly to draft a functioning multi-tiered dispute resolution clause.

Another problem with respect to ambiguity occurs when each of the steps is not defined in a detailed manner in order to provide for an undoubted and seamless operation of each step. In other words, besides the transition from one step to another the procedure that will be followed within the scope of each step should be drafted clearly. (92) Therefore, it will not suffice to determine the requirements to escalate through the steps, but all other practical matters should be considered and inserted into the clause in an appropriate way.

As mentioned before, multi-tiered dispute resolution clauses enable parties to adopt a sequence of dispute resolution procedures which is created for the special needs of their relationship. On the other hand, benefiting from a multi-tiered clause mostly depends on certain and clear drafting of the clause which allows arbitral tribunals or courts to understand the intention of the parties concerning the resolution of their differences. Therefore, considering the importance of drafting, the parties should entrust drafting the clause to a specialist. (93)

B Essentials for a functioning multi-tiered dispute resolution clause

^{P 573} Multi-tiered dispute resolution clauses generally consist of negotiation, mediation, expert determination, and arbitration. Considering the main drafting problems which have resulted in the unenforceability of the multi-tiered clauses in various court and arbitration proceedings, it could be argued that special attention should be given to the formulation of the negotiation and mediation processes. Although in *Cable & Wireless v. IBM* Colman, J. held that some contractual references to negotiation or mediation, which did not include identifiable procedure, might still be enforceable, (94) adoption of a conservative approach while drafting a multi-tiered dispute resolution clause is highly recommended. (95)

As a general requirement for the enforceability of the ADR steps that precede arbitration, each ADR step should be formulized as a prerequisite for the next step and finally for the commencement of arbitration. (96) In other words, exhaustion of the procedure designed within a step should be mandatory in order to move on to the procedure in the following step. Drafters can ensure this effect by using appropriate words. Thus, instead of using words which make ADR steps optional, words which oblige the parties to follow a specific ADR procedure should be used. Therefore, drafting an ADR step by using certain expressions such as “Any controversy arising out of this Agreement shall be submitted to senior management representatives of the parties ... If an amicable solution cannot be reached by negotiation ...” (97) will be much more effective when compared to an ADR step drafted using non-mandatory expressions such as “all disputes related to the present contract may be settled amicably.” (98)

Further, each ADR step should involve clear mechanisms regarding the termination of the procedure designed in that step. (99) In other words, the ending of the procedure in the former step and consequently commencing of the procedure in the following one should be clearly determinable from the wording of the clause. Therefore, formulating the transition from one step to another is crucial for the clause to be enforceable. In order to ensure the safe transition of the dispute between the steps, drafters could use an objective criterion such as the lapse of time and draft a clause which states that if the senior management representatives of the parties cannot reach an amicable settlement by negotiation within fourteen days, the dispute shall be submitted to mediation. (100) In spite of such a certain time limit in the clause, parties can always extend it by agreement if the negotiations take longer than expected. (101) Parties may also draft a clause which requires moving to the next step if one of the parties informs the other in writing that the negotiations have failed. (102)

In addition to the certainty concerning the transition between the steps, both negotiation and mediation stages should also be sufficiently certain with regard to the conduct of these proceedings. As decided in relevant cases, the expression “good faith” in an ADR step of a multi-tiered clause may lead to the unenforceability of the procedure defined in that step because of uncertainty. Therefore, it might be argued that, in particular, phrases such as “meet in good faith and attempt to resolve the dispute” (103) or “attempt in good faith to resolve the dispute or claim through an ADR procedure” (104) should be avoided when drafting a multi-tiered dispute resolution clause.

With regard to the negotiation step, beyond the issues regarding certainty and clarity mentioned above, it could also be added that other practical matters, such as who will negotiate in the name of the parties, and where and how the negotiations will take place, should be defined and in case of settlement at the end of the negotiation process, the binding nature of the agreement should be expressed in the clause.

Mediation, because of the involvement of a third party, needs a more detailed structure when compared to negotiation. Therefore, in addition to the issues which are essential for a functioning negotiation process, mediation should also include the procedure for the appointment of the mediator and the determination of the remuneration of the mediator. (105) Needless to say, the process to be followed in mediation should also be drafted in a more detailed manner in comparison with negotiation. It has been argued that referring to the mediation rules of an organization can avoid the problem of lack of certainty concerning practical matters in a mediation clause. (106) Indeed, when the parties choose to adopt the rules of an organization they will not have to deal with drafting each detail, such as the commencement, conduct, and termination of the proceedings, selection of the mediator, and fees and costs. Such reference will also help them avoid omitting a critical requirement which may lead to the unenforceability of the clause.

Although the problems resulting in the unenforceability of a multi-tiered dispute resolution clause generally derive from poorly drafted negotiation or mediation mechanisms, an expert determination step also requires specific care in order to secure the enforceability of the clause. This is mainly because expert determination is frequently used as a separate and complete ADR remedy distinct from arbitration and consequently it is important to be clear as to its role and its relationship with arbitration if it is provided as a step prior to arbitration in a multi-tiered dispute resolution clause. (107) Therefore, if the parties want to move to arbitration after the binding decision of the expert, they should formulate the transition between these two procedures by defining a criterion such as dissatisfaction by the decision of the expert, as in the dispute resolution clause in the Channel Tunnel project. (108) Similarly, according to clause 20 of the FIDIC Conditions of Contract for Construction, disputes shall be adjudicated by a dispute adjudication board (DAB), and in case of dissatisfaction with the DAB's decision either party, after giving notice, may commence arbitration on or after the fifty-sixth day after the day of notice. In the absence of such a criterion, parties will be bound by the decision of the expert and arbitration will be meaningless.

As noted already, the formulation of each step and their relationship with each other in a multi-tiered dispute resolution clause is very important in order to ensure the enforceability of the clause. Therefore, a dispute resolution clause, which contains more than one procedure for the resolution of possible disputes, should be drafted with necessary care to give effect to each of these procedures. To this end, the parties' intention with regard to observing the sequence of procedures without disregard to any of the steps should be expressed in a clear and binding way. In addition, the whole process established by the clause should be sufficiently certain, with every detail of the expected conduct of the parties for each step specified, and also the transition between the steps, without reliance on any further agreement of the parties. It could be argued that once drafted with the critical elements mentioned above in mind, a multi-tiered dispute resolution clause should be respected and enforced as the choice of the parties.

VI Conclusion

Multi-tiered dispute resolution clauses provide for a sequence of separate dispute resolution procedures through which the dispute will escalate if not resolved by the proceeding in the former step. However, problems occur with regard to the enforceability of multi-tiered dispute resolution clauses when one of the parties does not follow the path described in the contract

between the parties, and the resolution of the issue concerning enforceability of the clause is fundamentally contingent on effective drafting of the negotiation and mediation steps and the interpretation of these techniques. Indeed, in spite of an agreement which contains a multi-tiered clause, one of the parties may ignore the former steps and directly submit the dispute to arbitration. In such a case, enforceability of the steps prior to arbitration will depend on the wording of the clause and the approach of the courts or arbitral tribunal to the issue.

Although mediation seems to be acknowledged as a valuable means of dispute resolution, courts are still reluctant to recognize negotiation as an enforceable dispute settlement procedure. However, when the parties agree on a multi-tiered dispute resolution clause within the framework of party autonomy, they expect that each of the steps of this clause would be enforceable as a dispute settlement procedure. Enforcement of an ADR step means obliging the parties to participate in a process at the end of which they may reach a compromise, rather than compelling them to reach a compromise. Furthermore, to enforce an ADR clause also signifies considering the needs of the international business community which increasingly uses different ADR techniques to resolve commercial disputes, in particular with the aim of maintaining the contractual relationship.

On the other hand, in order to be enforceable, a multi-tiered dispute resolution clause needs to be drafted properly. Therefore, the intention of the parties with regard to the escalation of their disputes from one step to the next should be expressed in a clear and binding way. Further, the operation of each step and transition from one step to the other should be sufficiently certain in order not to require any further agreement of the parties.

P 576

A multi-tiered dispute resolution clause, by combining different ADR techniques with arbitration, gives parties the opportunity to formulate the most suitable way of resolving their disputes in accordance with the special needs of their relationship. While it enables parties to resolve simpler and financially smaller problems by spending less time and money, it also allows them to preserve their future relationship by providing less confrontational ADR procedures. Accordingly, multi-tiered dispute resolution clauses are being increasingly used, especially in long-term and complex international commercial contracts. Therefore, it could be argued that once drafted in an operative way, a multi-tiered dispute resolution clause should be respected and enforced as the choice of the parties.

P 577

References

- *1) Chief of Division at Prime Ministry Undersecretariat of Treasury, Ankara, Turkey; Ph.D. Candidate (in Private International Law) at University of Ankara Institute of Social Sciences; LL.M. (Queen Mary, University of London); LL.B. (University of Ankara). I wish to thank Prof. Loukas Mistelis and Dr. Stavros Brekoulakis for their valuable contributions and encouragement.
- 1) Klaus Peter Berger, *Integration of Mediation Elements into Arbitration; "Hybrid" Procedures and "Intuitive" Mediation by International Arbitrators*, 19 Arb. Int'l 387 (2003).
- 2) Carita Wallgren, *ADR and Business*, in *ADR In Business* 3-7 (G.H. Pointon & A. Ingen-Housz eds., 2006).
- 3) James H. Carter, *Issues Arising from Integrated Dispute Resolution Clauses*, in *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12, 446 (A.J. van den Berg ed., 2005).
- 4) Klaus Peter Berger, *Law and Practice of Escalation Clauses*, 22 Arb. Int'l 1 (2006).
- 5) *Id.*
- 6) Carter, *supra* note 3, at 456.
- 7) Alexander Jolles, *Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement*, 72 Arbitration 329, 336 (No. 4, 2006).
- 8) Michael Pryles, *Multi-Tiered Dispute Resolution Clauses*, 18 J. Int'l Arb. 159 (2001).
- 9) Carter, *supra* note 3, at 446.
- 10) Berger, *supra* note 4, at 1.
- 11) Pryles, *supra* note 8, at 159.
- 12) Berger, *supra* note 4, at 2.
- 13) Carter, *supra* note 3, at 447.
- 14) Julian D.M. Lew, Loukas A. Mistelis, & Stefan M. Kröll, *Comparative International Commercial Arbitration* 165-66 (2003).
- 15) Pryles, *supra* note 8, at 160.
- 16) Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 43 (2004).
- 17) Eileen Carroll & Giles Dixon, *Alternative Dispute Resolution Developments in London*, 7 Int'l Const. L. Rev. 437 (1990).
- 18) Redfern & Hunter, *supra* note 16, at 43.
- 19) Nael G. Bunni, *The FIDIC Forms of Contract* 441 (2005).
- 20) Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A US Perspective*, 15 J. Int'l Arb. 7, 9 (No. 4, 1998).

- 21) For example, according to art. 1(3) of the Model Law, conciliation means “a process whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (‘the conciliator’) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.”
- 22) Mordehai Mironi, *From Mediation to Settlement and from Settlement to Final Offer Arbitration: An Analysis of Transnational Business Dispute Mediation*, 73 *Arbitration* 52, 53 (No. 1, 2007).
- 23) David Spencer & Michael Brogan, *Mediation Law and Practice* 9 (2006).
- 24) Freyer, *supra* note 20, at 10.
- 25) Resolution adopted by the U.N. General Assembly on November 19, 2002.
- 26) John Kendall, *Expert Determination* 1 (2001).
- 27) Redfern & Hunter, *supra* note 16, at 50.
- 28) Bunni, *supra* note 19, at 599.
- 29) Kendall, *supra* note 26, at 67.
- 30) Gordon L. Jaynes, *A Dispatch from the Front: Dispute Boards at 2002*, available at <www1.fidic.org/resources/contracts/docs/dispute_boards_feb04.rtf>.
- 31) Bunni, *supra* note 19, at 610.
- 32) Bernardo M. Cremades, *Multi-Tiered Dispute Resolution Clauses*, available at <www1.fidic.org/resources/contracts/cremades_2004.pdf>.
- 33) Lew, Mistelis, & Kröll, *supra* note 14, at 1–3.
- 34) Gary A. Born, *International Commercial Arbitration* 3 (2001).
- 35) Dyala Jimenez-Figueres, *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, 14 *ICC Bull.* 71 (No. 1, 2003).
- 36) Carter, *supra* note 3, at 447.
- 37) Jimenez-Figueres, *supra* note 35, at 73.
- 38) Anthony Connerty, *The Role of ADR in the Resolution of International Disputes*, 12 *Arb. Int'l* 47, 56 (1996).
- 39) Tanya Melnyk, *The Enforceability of Multi-tiered Dispute Resolution Clauses: The English Law Position*, 5 *Int'l Arb. L. Rev.* 113, 116 (No. 4, 2002).
- 40) Berger, *supra* note 4, at 2–3.
- 41) Jimenez-Figueres, *supra* note 35, at 84.
- 42) Pryles, *supra* note 8, at 161.
- 43) *Id.*
- 44) Carter, *supra* note 3, at 456.
- 45) Jolles, *supra* note 7, at 336.
- 46) Carter, *supra* note 3, at 456.
- 47) Melnyk, *supra* note 39, at 114.
- 48) Carter, *supra* note 3, at 457.
- 49) Martin Hunter & Toby Landau, *The English Arbitration Act Text and Notes* 15 (1998); Lord Mustill & Stewart C. Boyd, *Commercial Arbitration* 270 (2001).
- 50) [1992] 2 A.C. 128.
- 51) *Id.* at 139.
- 52) (1992) 28 N.S.W.L.R. 194.
- 53) *Id.* at 206.
- 54) *Id.* at 209.
- 55) *Id.* at 214.
- 56) [1993] A.C. 334.
- 57) *Id.* at 353.
- 58) (1995) 36 N.S.W.L.R. 709.
- 59) *Id.* at 714–16.
- 60) [1999] 1 All E.R. 303.
- 61) *Id.* at 307–11.
- 62) [1999] 153 F.L.R. 236.
- 63) [2002] C.L.C. 1319.
- 64) *Id.* at 1324.
- 65) *Id.* at 1325.
- 66) [2009] N.S.W.C.A. 177.
- 67) Simon Chapman, *Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith*, 27 *J. Int'l Arb.* 89, 91 (2010).
- 68) *Supra* note 66, at 20–21.
- 69) *Id.* at 56–58.
- 70) *Id.* at 71.
- 71) *Id.* at 73.
- 72) *Id.* at 81.
- 73) Peter M. Wolrich, *Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules*, available at <www.cm-p.com/pdf/multi_tiered_clauses.pdf>.
- 74) Jimenez-Figueres, *supra* note 35, at 76–78.
- 75) Jolles, *supra* note 7, at 334.
- 76) Jimenez-Figueres, *supra* note 35, at 84–85.
- 77) *Id.* at 86–87.
- 78) Cremades, *supra* note 32, at 9.
- 79) *Supra* note 52, at 206.

- 80) Jean-François Guillemin, *Reasons for Choosing Alternative Dispute Resolution, in ADR in Business 21* (G.H. Pointon & A. Ingen-Housz eds., 2006).
- 81) Wallgren, *supra* note 2, at 3–4.
- 82) *Id.*
- 83) Henry J. Brown & Arthur L. Marriott, *ADR Principles and Practice* 124 (1999).
- 84) Alan Berg, *Promises to Negotiate in Good Faith*, 119 L.Q. Rev. 357, 363 (2003).
- 85) Jimenez-Figueres, *supra* note 35, at 71–72.
- 86) Patrick Neill, *A Key to Lock-Out Agreements?*, 108 L.Q. Rev. 405, 409–10 (1992).
- 87) Berg, *supra* note 84, at 362.
- 88) Brown & Marriott, *supra* note 83, at 104.
- 89) Berg, *supra* note 84, at 362.
- 90) Olakunle O. Olatawura, *Managing Multi-Layered Dispute Resolution under the Arbitration Act 1996: Smashing Bricks of Intention*, 4 Int'l Arb. L. Rev. 70, 71–72 (No. 2, 2001).
- 91) Berger, *supra* note 4, at 10.
- 92) Sarah Leonard & Kanaga Dharmananda, *Peace Talks Before War: Enforcement of Clauses for Dispute Resolution Before Arbitration*, 23 J. Int'l Arb. 301, 313 (2006).
- 93) Berger, *supra* note 4, at 17.
- 94) *Supra* note 63, at 1325.
- 95) Leonard & Dharmananda, *supra* note 92, at 313.
- 96) *Supra* note 62, at 252.
- 97) Dispute resolution clause in ICC Case No. 9977, *see supra* note 35.
- 98) Dispute resolution clause in ICC Case No. 4230, *see supra* note 73.
- 99) Leonard & Dharmananda, *supra* note 92, at 313.
- 100) Formulation in the dispute resolution clause in ICC Case No. 9977.
- 101) Berger, *supra* note 4, at 10.
- 102) Formulation in the dispute resolution clause in ICC Case No. 9984.
- 103) Dispute resolution clause in *Halifax Financial Services Ltd. v. Intuitive Systems Ltd.*, *supra* note 60.
- 104) Dispute resolution clause in *Cable & Wireless plc v. IBM United Kingdom Ltd.*, *supra* note 63.
- 105) Kah Cheong Lye, *Case Note: Agreements to Mediate: The Impact of Cable & Wireless plc v. IBM United Kingdom Ltd*, 16 Singapore Academy of Law J. 530, 535 (2004).
- 106) *Id.*
- 107) Carter, *supra* note 3, at 455.
- 108) *Supra* note 56.

© 2017 Kluwer Law International BV (All rights reserved).

Kluwer Arbitration Law is made available for personal use only. All content is protected by copyright and other intellectual property laws. No part of this service or the information contained herein may be reproduced or transmitted in any form or by any means, or used for advertising or promotional purposes, general distribution, creating new collective works, or for resale, without prior written permission of the publisher.

If you would like to know more about this service, visit www.kluwarbitration.com or contact our Sales staff at sales@kluwerlaw.com or call +31 (0)172 64 1562.