

**Multi-Tiered Dispute  
Resolution Clauses**

IBA Litigation Committee  
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## Forward



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Multi-tiered dispute resolution clauses call for contracting parties to engage in negotiation, mediation, or some other form or combination of alternative dispute resolution prior to commencing litigation or arbitration. Parties agree to such clauses for a variety of reasons, the most common of which is to facilitate resolution of routine disputes quickly and efficiently with a minimum of disruption to the parties' relationship and the underlying transaction. Such clauses are especially useful in construction contracts and in other transactions where the parties need to work together over an extended period of time.

Although multi-tiered dispute resolution clauses can serve a useful purpose, that is not universally the case. For example, they can cause needless delay in time-sensitive situations or where negotiation or mediation is futile. It is not unheard of for parties to use them opportunistically as a dilatory tactic.

The courts in a substantial number of jurisdictions have traditionally been reluctant or unwilling to enforce multi-tiered dispute resolution clauses. In the last few years, however, courts in a number of well publicized cases have shown a willingness to enforce them. The purpose of this compendium is to briefly summarize the current state of the law in a number of jurisdictions throughout the world.

## Albania

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

The use of multi-tiered dispute resolution clauses is not common in Albania. Although they are slowly becoming present in contractual relationships, there is still little consciousness of the benefits this type of clause may provide to parties to a contract.

In Albania the most common clauses related to alternative dispute resolution are those contained in arbitration agreements. The Albanian courts, in the few cases they have been reviewed in relation to arbitration agreements, have always stressed the importance of the free will of the parties to refer to arbitration procedures. On the other hand, since 2011, Albania has adopted legislation on mediation (Law no. 10385/2011 "On the mediation in disputes resolution") which provides the rules and regulations for the basic principles and procedures of the mediation process. This represents another option that may be used in addition or as an alternative to arbitration clauses. However, because this is a new discipline in Albania, in practice the parties to contracts still need to become familiar with such an alternative.

However, although typically in commercial contracts in Albania the disputes are referred to the Albanian courts, it is common to find within the same clause referring to the courts' jurisdiction, a provision providing for the parties to initially make an effort to solve the dispute amicably. Usually such provisions are seen as simple declarations and do not provide for any concrete step or term. Therefore, as far as we are aware, it is not common for a party to claim in front of the Albanian courts for the enforcement of that part of the clause. On the other hand, the courts have not been oriented so far to deal with that part of the clause, largely because they assume that, if the parties have come to the point in which they are facing the court, they are less willing to make the efforts for an amicable resolution of the dispute. In most cases the initial attempt, as

moderated as it is foreseen in the clause, is assumed to have been exhausted with the initial contact and communications the parties might have had. Moreover, the Albanian Civil Procedural Code (ACPC) does foresee the possibility for the Court to attempt, either during the preparatory hearing or during the trial, to conciliate the parties therein (article 158/b of the ACPC). Therefore, with the first preparatory hearing, there will always be a request from the court addressed to the parties, asking if there is any possibility for them to find some common points and reach an agreement. This might also be one of the reasons why usually the Albanian courts do not consider a declarative clause requiring the parties to try and find an amicable solution as a necessary step prior to proceedings as something similar will happen as part of the preparatory procedures in front of the courts.

However, notwithstanding the lack of consistent position of the courts regarding the enforcement of this type of clauses, it is possible to make an estimation of the legal alternatives that the current Albanian legislation may offer in relation to the enforcement of the contractual provisions which represent an agreement to negotiate. As there are no doubts about the enforcement of valid arbitration and mediation clauses, it is necessary to make a deeper legal analysis on the enforcement of the provisions providing for agreements to negotiate or agreements to agree.

It is not possible to identify in the relevant Albanian legislation any specific provision which would help address more narrowly the characteristics of an agreement to negotiate. However, considering the core elements required to be present in an agreement in order to be considered as a "legal action" (a concept in the Albanian legislation similar to the "negotio juridico" in the Italian Civil Code), there should be a clear expression of the will of the parties to create a binding relationship between them (as required by article 79 of the Albanian Civil Code (ACC)). The concept of agreement to negotiate in Albania has not been elaborated either by the doctrine or by the courts, but it appears not to comply with what article 79 ACC requires. Therefore it is difficult to argue that an agreement to negotiate or agreement to agree contained in a tiered clause would be considered valid, as a substantive matter of law, as far as the intention of the parties to enter in a binding legal action or conduct is not expressed clearly enough. However, as we already mentioned, there is no consolidated position of the courts and doctrine on the matter.

From a procedural perspective, the same considerations as above would apply. Considering that, as a matter of jurisdiction, the Albanian courts have always chosen to affirm the intent of the parties, it would be plausible to expect the courts to adopt the same interpretation if the intent of the parties is clear enough from the wording of the clause. However this will depend on a case by case basis.

In conclusion, the Albanian Civil Code does require a contractual clause to show the clear intention of the parties to establish a binding commitment between each other, and in the absence of a position of the courts and doctrine on the matter, it may be possible to argue that the clauses providing for an agreement to negotiate may not satisfy this requirement. However, it will very much depend on how the clause is drafted and structured in order to establish whether it is of binding effect. The more the clause is detailed and structured the more the courts may identify therein a clear expression of the parties' intent and will to be bound by that clause.



## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As previously stated, any clause drafted in a way that indicates the intention of the parties to be bound by the commitment therein would play a significant role in the enforceability of that clause. In this regard, the use of mandatory language, the provision of deadlines, communications, notifications in relation to the procedures foreseen therein, would help the court to identify the intent of the parties in being bound by the agreement to negotiate.

## **3. If your courts have enforced such clauses, how have they done so?**

We are not aware of any case law regarding the enforcement of clauses containing an agreement to negotiate. However as stated above, if the intention of the parties to be bound is clearly recognizable from the wording of the clause and from the terms and conditions set therein, it would be expected that the court will uphold the intention of the parties as expressed in the contract and require them to comply.

## **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

As already mentioned above, to our knowledge there have not been any cases before the Albanian courts in relation to enforcement of multi-tiered dispute resolution clauses. However, we suggest a clause that might be considered valid and enforceable by the Albanian courts.

1. *In case of disputes rising out in relation to any issue regarding the interpretation, performance, breach, termination or validity of this contract, the parties shall make any effort to negotiate and find a solution to the issues therein, within 20 days from the request of either party to the other party.*
2. *In case after the expiry of this term no settlement has been reached, the parties shall meet at the level of Managers within the following 10 days after expiry of the first term, to find a solution.*
3. *In case after the expiry of the second term the parties have not reached a settlement to the issues therein, either party, within 10 days from the expiry of such term, may demand the mediation of the Albanian Center for Mediation in accordance with the Albanian legislation on mediation.*
4. *If an agreement has not been reached within 60 days from the day the issue has been submitted to the Albanian Center for Mediation, either party may submit the case to the Albanian Center for Arbitration in Tirana in accordance with the Albanian Center Rules of Arbitration.*
5. *Each of the steps foreseen in this provision is a condition precedent to proceed with the following step, unless the terms have expired.*

## Argentina

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

From our experience, in Argentina, multi-tiered dispute resolution clauses are frequently used in order to solve disputes in an effective and rapid manner without having the immediate need to resort to litigation or arbitration.

There is a tendency in Argentina to encourage parties to attempt to resolve their disputes amicably. According to Argentine legislation (Law No. 26.589 and Decree No. 1467/2011), in some provinces, including the City of Buenos Aires, pre-trial mediation is mandatory; this means that before attempting to file a lawsuit before the courts, parties must comply with a mandatory mediation procedure in order to try to solve their disputes amicably.

As a result of this, there is not currently abundant case law from Argentinean tribunals relating to challenges to the enforcement of multi-tiered dispute resolution clauses.

Nonetheless, challenges to these types of clauses may arise when they are ill-drafted, revealing vagueness and uncertainty in its wording. In those cases, courts might interpret the real intention of the parties when drafting the clause, either making an interpretation pro-enforcement or directly declaring them non-binding for the parties.

### 2. What drafting might increase the chances of enforcement in your jurisdiction?

There are certain guidelines that might be followed in order to avoid challenges to multi-tiered dispute resolution clauses in Argentina:

- Firstly, it is recommended that the clause include expressly and precisely the different stages that parties wish to undertake before litigation or arbitration. In other words, it is fundamental to establish a straightforward and clear procedure that allows the distinguishing of the different stages, their durations, and the steps to be followed. Moreover, the chances of enforcement are likely to improve if the drafting clearly provides that each of the stages is a condition precedent to arbitration or litigation.
- Including mandatory terms in the clause is of great importance to ensure its enforcement. In contrast to discretionary terms, the usage of mandatory language provides certainty as regards whether the previous stages agreed by the parties before arbitration or litigation are compulsory. Consequently, it is recommended to use such wording.
- Establishing deadlines and time limits for each of the stages is also likely to increase the prospects of the enforceability of these types of clauses. Incorporating such terms will facilitate the determination of whether each stage has been complied with or whether the period has already expired and the parties are able to continue with the next stage.
- Another element that could be included in the clause is a requirement to formally notify the other party once one of the stages has begun and has expired or has already been complied with. This formal notification could avoid a new conflict between the parties in relation to whether or not the previous stages have been met.
- In order to avoid a future conflict, parties may also include in the clause the consequences for a party of a failure to comply with one of the previous stages.
- Parties might agree to incorporate mediation as a prior stage to arbitration in multi-tiered dispute resolution clauses. That would not be necessary in cases where litigation is the last stage because parties will necessarily have to resort to mandatory mediation according to Argentinean Law, whether or not they include it in the clause.
  - In cases where parties eventually provide for arbitration and agree to incorporate mediation as a previous stage, it is advisable, in order to enhance its enforceability, to specify the institution or center that will be in charge of holding the mediation. It is also convenient for the parties to expressly choose the mediation rules from the same institution or center.
- Specifying the number of negotiation sessions that parties must undertake, or specifying the identity of negotiation participants, are not frequently used provisions of multi-tiered dispute resolution clauses in Argentina. Indeed, specifying the identity of negotiation participants could occasionally represent a risk for the parties as regards the enforceability of the clause if, for instance, the participant is then unable to attend negotiations for some reason.

### **3. If your courts have enforced such clauses, how have they done so?**

The Buenos Aires Commercial Court of Appeals has indeed enforced multi-tiered dispute resolution clauses.

In 2006, the Commercial Court enforced a multi-tier clause providing that, if the parties could not resolve the dispute through negotiation, then the dispute would be resolved through arbitration. In that case, the claimant filed a lawsuit before the Commercial Court in order to determine the dispute that arose between the parties through litigation, alleging that the dispute was not capable of being arbitrated since it was not within the scope of the arbitral clause. However, the Commercial Court decided that it did not have jurisdiction to hear the case since the parties had expressly agreed to solve their disputes through the arbitration specified in the jurisdiction clause, and such voluntary and unequivocal consent expressed in the multi-tier clause had to be respected. The arbitral tribunal was the competent authority to determine the matter.

Although the wording of the clause as regards the negotiation stage –from our point of view– might be considered vague, as it lacks elements such as mandatory language, specificity and delimitation of time limits (“*Any controversy or claim... if not solved through the negotiation of the Parties...*”) the Court safeguarded the autonomy of the parties and enforced the multi-tiered dispute resolution clause [Buenos Aires Commercial Court Of Appeals, Chamber “E”, “*Vaccari, Julio Eduardo and other v. Compagnie Generale de Particip. Indu. et Financiere SAS and others*”, 28/08/2006].

In another case, in 2010, the Buenos Aires Commercial Court of Appeals enforced a multi-tiered dispute resolution clause that provided for three different stages in the event a dispute arose: negotiation, mediation and arbitration. The Commercial Court again decided that it did not have jurisdiction to hear the case since the parties had expressly consented to a clause providing that an arbitral tribunal would determine their disputes. The Court emphasized that ignoring such an unequivocal decision would contravene the principle that contracts should be interpreted and exercised according to the parties’ intent. Therefore, the Court interpreted that what parties understood was that they would resolve their disputes through arbitration and not through litigation [Buenos Aires Commercial Court Of Appeals, Chamber “C”, “*Cemaedu S.A. and other v. Envases EP S.A. and other about ordinary*”, 19/10/2010].

In 2005, the Buenos Aires Civil Court of Appeals decided a case where the interpretation of a multi-tiered dispute resolution clause was at stake. In that case, the jurisdiction clause stated that if there was a notorious and serious imbalance in the prices of certain properties, then the parties had a 30-day period to reach an “*equitable solution*” for both of them. In the event that the parties did not reach a resolution, then, in the same period of time, the parties had to fix their claims in “*due form*” in order to file a claim before the arbitral tribunal.

A dispute arose, the parties could not reach an “*equitable solution*” and they did not fix their claims in the period of 30 days. Therefore, the claimant filed a lawsuit before the judicial courts and the defendant challenged the jurisdiction of the judicial courts invoking the dispute resolution clause. While the claimant considered that the option to go to arbitration had been extinguished since the defendant did not exercise the option in the period of 30 days, the defendant considered that the 30-day period was established in order to fix the amount of the dispute, but that the lack of agreement had to be resolved through arbitration and not by judicial courts.

The Civil Court held that the 30-day period in which the parties had to fix their claims was an unavoidable requirement, and the fact that they had not done it in that period and neither had they done it afterwards, proved a tacit withdrawal from the arbitral jurisdiction, and therefore the extinction of the multi-tiered dispute resolution clause [*Buenos Aires Civil Court Of Appeals, Chamber "F", "Zavalía Myriam v. Scarinci, Jorge J.A. about execution of agreement", 13/10/2005*].

From the few cases where the Buenos Aires Courts of Appeal have had to enforce a multi-tiered dispute resolution clause, it could be said that they have not taken a consistent line of thought in relation to multi-tiered dispute resolution clauses. While in some cases the courts have enforced such clauses, in some others they applied a strict criterion even where the clause was extinguished due to non-compliance with one of the previous stages of the clause.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

*All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination ("Dispute"), must be attempted to be solved through negotiation by the parties within [\_\_] calendar days after either party notifies the other in writing of the existence of the Dispute.*

*Any Dispute not resolved in the term abovementioned, shall be finally settled by arbitration under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules.*

*The party that initiates the Dispute must submit a request for arbitration according to the said Rules, and must simultaneously appoint an arbitrator. The other party to the Dispute must appoint an arbitrator simultaneously with the submission of the response to the request for arbitration. The two appointed arbitrators must attempt to reach an agreement on the appointment of the third arbitrator who shall act as presiding arbitrator. In case the two appointed arbitrators fail to reach an agreement within 30 calendar days from the date of appointment of the second arbitrator or, if one of the parties fails to appoint an arbitrator as herein established, the arbitrator will be appointed according to procedure contained in the said Rules. To that effect, the appointing authority will be [indicate the appointing authority].*

*The place of arbitration shall be [...]. The language of arbitration shall be [...], and the arbitration will be [indicate whether the arbitration will be at law or amiable compositeur].*

*The arbitration award ("the Award") shall be final and binding upon the parties, and it could not be subject to any kind of appeal or revision. Each of the parties waives its right to appeal the Award before any tribunal. Any party to the Dispute*

*may request the recognition and enforcement of the Award to any competent tribunal, if the other party does not comply with it.*

## Australia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Under Australian law, a contract can only be binding if its terms are sufficiently certain. If a contract is not certain, it will be void. *Upper Hunter County District Council v Australian Chilling & Freezing Co* (1968) 118 CLR 429; Cheshire and Fifoot's Law of Contract; 9th edition; [6.1]. Certainty is a particularly relevant issue with multi-tiered dispute resolution clauses as they often deal with nebulous concepts such as negotiating in good faith. What can be enforced by the courts is not co-operation and consent, but participation in a process from which co-operation and consent might come. *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 206.

It was only in the 1990s that the law on enforceability of multi-tiered dispute resolution clauses in Australia became clear. Prior to that, cases addressing the question did not 'speak clearly or with one voice'. *Id.*, at 204. Giles J observed in *Hooper Bailie* that opponents of the enforceability of conciliation or mediation clauses contended that it was futile to seek to enforce something that required co-operation and consent; and that there can be no loss to the other party if, for want of co-operation and consent, the consensual process would have led to no result. Proponents of enforceability, however, contended that this approach misunderstood the objectives of alternative means of dispute resolution and that exposure to procedures designed to promote compromise might do just that. *Id.*, at 206.

Shortly before the House of Lords held in *Walford v Miles* [1992] 2 AC 128 that an agreement to negotiate in good faith was unenforceable in the UK (although see comments in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) at 694 onwards per Leggatt J.), the New South Wales Court of Appeal decided *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1. Kirby P (as he then was), with Waddell AJA agreeing, found that, in Australia, an agreement to negotiate in good faith could be enforceable in some cases, depending on the terms and construction of the clause. *Id.*, at [26]-[27]. A representation to negotiate in good faith implies that the representor will genuinely enter into negotiations, but it does not include a representation that a party will act otherwise than in its own interests, or a representation that a party will successfully conclude the negotiations, or that they will not

consider or pursue alternative arrangements. *State Bank of New South Wales v Chia* (2000) 50 NSWLR 588 [427] per Einstein J.

Kirby P stated that the proper approach to be taken in a particular case would depend upon the construction of the particular contract. His honour explained that in many contracts, the promise to negotiate is intended to be a binding legal obligation to which the parties should be held, for example, where a third party has been given the power to settle ambiguities. Sometimes, the court may be able to flesh out a provision which would otherwise be unacceptably vague by reference to a readily ascertainable external standard. However, in many cases, the promise to negotiate in good faith may occur in the context of an 'arrangement' which by its nature, purpose, context or other provisions makes the promise is too uncertain to be enforceable. *Id.*, at [26-27].

Handley JA, in dissent, held there was 'no identifiable criteria by which the content of the obligation to negotiate in good faith can be determined'. However, it is the majority view of Kirby P and Waddell AJA that has prevailed. *See e.g. Carter and Harland 4th edition* at [271].

There is a distinction between an agreement to conciliate or mediate and an agreement to agree, and between an agreement to negotiate in good faith and an agreement to mediate or conciliate. Giles J observed in *Hooper Bailie* that the difficulty may not be that good faith is incapable of certain meaning but that there is a necessary tension between negotiation, where a party may be expected to have regard to self-interest rather than the interests of the other party, and the maintenance of good faith. *Id.*, at 209.

This may be why the question of certainty has proved the most difficult hurdle for multi-tiered dispute resolution clauses to overcome. Uncertainty with respect to the process to be followed in the event of a dispute will be fatal to the enforceability of a clause. However, the trend of recent authority is in favour of construing dispute resolution clauses in a way that will enable them to work as the parties appear to have intended, and being slow to declare the provisions void for uncertainty. *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, [39].

In *Hooper Bailie* the parties had commenced an arbitration but then agreed to participate in a conciliation process. Part way through that process, the defendant broke away and resumed the arbitration. Giles J stayed the arbitration until the conclusion of the conciliation process. In that case, the parties' agreement to attempt conciliation was sufficiently certain to be given legal recognition. Moreover, the defendant had given no explanation for its wish to resume arbitration rather than continue the process of conciliation to its conclusion.

In the more recent case of *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, a dispute resolution clause was found to be unenforceable due to uncertainty. There were two reasons for this. The first was that once the operation of the provision was triggered, the parties were required to do one of two things, either meet to resolve the dispute, or agree on methods of doing so. *Id.*, at [42]. No process was prescribed to determine which option was to be pursued. The second reason was that no method of resolving the dispute was specified, so further agreement would be needed before the process could proceed. *Id.*, at [44].



In *WTE Co-Generation v RCR Energy Pty Ltd*, Vickery J stated that it was a well accepted construction technique for a court to strive to give commercial effect to an imperfectly drafted clause, but the clause must set out a process or model to be employed rather than leaving that to further agreement. It was not for the court to substitute its own dispute resolution mechanism where parties have failed to agree upon it in their contract. To do so would involve the court in contractual drafting rather than contractual construction *Id.*, at [46].

The requirement for certainty does not, however, mean that the process described in the clause must be overly structured. Einstein J noted in *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 that 'if specificity beyond essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself'. *Id.*, at [62].

As already noted, the approach taken by courts in enforcing dispute resolution clauses in Australia is consistent with the approach taken by courts to allegations of contractual uncertainty generally, that is, to 'endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement'. *Robertson v Unique Lifestyle Investments Pty Ltd* [2007] VSCA 29, [38]; *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, [26]. Dispute resolution clauses should be construed robustly to give commercial effect. *WTE*, *supra*, at [39].

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Certainty is of the utmost importance. It is prudent to:

1. avoid clauses which state that the parties should agree on the means of dispute resolution once a dispute has eventuated;
2. avoid agreements to negotiate or discuss and instead, agree to a specific means of dispute resolution;
3. provide for an order in which the tiers of dispute resolution are to be attempted, for example, try x *then* y, not x *or* y;
4. ensure that particular stages of the clause are expressed as requirements to be fulfilled before either party can commence proceedings;
5. be as clear as possible about the process that should be followed, for example, who should be involved, how experts should be paid and where the alternative dispute resolution should be conducted;
6. use mandatory language;
7. clearly express the administrative processes for selecting a mediator/arbitrator/conciliator;
8. provide a mechanism for a third party to finalise a choice of mediator/arbitrator/conciliator in the event that parties have a dispute about it;
9. specify consequences for failure to undertake prior stages where possible; and

10. provide time limits for each step in the process so that it is not open-ended.

### **3. If your courts have enforced such clauses, how have they done so?**

The means of enforcement will vary depending on how the clause has been breached. The most common situation is that one of the parties has commenced either litigation or arbitration prematurely, omitting one or more steps required by the multi-tiered dispute resolution clause. In those circumstances, the clause would usually be enforced by means of a stay of any litigation or arbitration that is on foot. A stay of this nature will not be made unless it is in accordance with fairness. *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, [166].

The general rule is that equity will not order specific performance of a dispute resolution clause, because supervision of performance pursuant to the clause would be untenable. *Id.*, at 26. If a party proceeds with litigation in the face of an enforceable agreement to do otherwise, it may amount to an abuse of process. *Id.*, at 28. Ordering a stay is not a means of enforcing co-operation but enforcing participation in a process from which consent might come. *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, [39]. It is an order which is very close to an order for specific performance, but the courts have been at pains to point out that it is distinct. Cheshire and Fifoot's *Law of Contract*; 9th edition; [6.17]. The party contesting the stay application bears the practical burden of persuading the court that it should not be held to an apparent agreement to endeavour to settle its dispute with the other party by the agreed dispute resolution process. *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, 715.

In *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* 28 NSWLR 194, the plaintiff successfully applied for an order to stay arbitration proceedings until conciliation proceedings were complete. This was on the basis of an agreement between the parties that they would attempt to resolve issues at conciliation before arbitration. The defendant had promised to participate in the conciliation and the conduct required of it was sufficiently certain for its promise to be given legal recognition.

An order to stay litigation while alternative dispute resolution is exhausted is discretionary and the court will exercise its discretion against making such an order where it would be futile. Cheshire and Fifoot's *Law of Contract*; 9th edition; [6.17]. For example, in *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, Einstein J acknowledged that a stay of proceedings could be used to enforce a multi-tiered dispute resolution clause. *Id.*, at [26]-[31], [43]. However, the application for an order staying the proceedings in that case was unsuccessful. This was because strict compliance with a dispute resolution procedure by the party invoking the process was an essential precondition to being entitled to relief by way of enforcing the other party to comply with the procedure. Where both parties have agreed that something should be done which cannot be done unless both concur in doing it, the party seeking to enforce that agreement must do all that is necessary on their part to achieve out the agreed objective. *Id.*, at 172.

A further ground on which the clause failed was that the mediation agreement did not address the question of how the payment of the mediator's costs was to be dealt with. The mediation part of

the clause was not severable from the rest of the clause, so the entire clause was unenforceable. *Id.*, at 174. The case was decided in 1999. Whether the same outcome would be reached today is open to question.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

An interesting example arose in *United Group Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177. The court discussed the enforceability of the following dispute resolution clause:

*[35.11] Negotiation*

*If:*

- a) a notice of appeal is given in accordance with Clause 35.9; or*
- b) the dispute or difference for which the notice under Clause 35.1 has been given does not relate to a Direction of the Principal's Representative under one of the Clauses referred to in Attachment A,*

*the dispute or difference is to be referred to a senior executive of each of the Principal and the Contractor who must:*



- c) meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference; and*
- d) if they cannot resolve the dispute or difference within fourteen days after the giving of the notice... the matter at issue will be referred to the Australia Dispute Centre for mediation.*

The parties agreed that clause 35.11(d) was uncertain because the Australian Dispute Centre did not exist but that it could be severed from the remainder of the clause.

The appellant asserted that sub clause 35.11(c) was also uncertain. The respondent denied it.

The central question in the case, then, was whether clause 35.11(c) was uncertain and therefore unenforceable. The court found that the clause was certain. Allsop P observed that the phrase 'genuine and good faith' is a phrase concerning 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. The phrase requires honesty and genuineness, fidelity to the bargain and to the process of negotiation for the designated process. *Id.*, at [71]. These are not empty obligations but reflect the duty, if the matter were to be litigated, to exercise a degree of co-operation to isolate issues for trial that are genuinely in dispute and to resolve them as speedily and efficiently as possible. *Id.*, at [79]. The effect of this is merely that parties are constrained by the bargain into which they have willingly entered. *Id.*, at [73].

## Austria

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## Introduction

Under Austrian law, the question as to whether or not multi-tiered dispute resolution clauses constitute enforceable parts of a contract has not been finally decided. “Multi-tiered dispute resolution clauses” are generally defined as clauses by which the parties agree to resolve their potential controversies by using a sequence of different alternative dispute resolution (ADR) processes with the intention that court (or arbitral) proceedings will only be commenced in case of the failure of these processes (*Kayali*, *Journal of International Arbitration* 2010, 551). Regarding the enforcement of such clauses which provide for not just one but a whole series of ADR techniques we find neither statutory nor case law.

However, the Austrian Supreme Court (Oberster Gerichtshof, OGH) has faced issues involving the enforceability of conciliation clauses (“*Schlichtungsklauseln*”) and determined the critical requirements regarding their validity and enforcement. Case law and legal literature define a conciliation clause as a clause by which the parties agree to submit their dispute to a procedure in which a third person (or a board, an institution, a mediator etc.) assists the parties to reach an agreement which ends the dispute between them. Court (or arbitral) proceedings are not excluded by such agreements but shall only be commenced in case of the failure of conciliation. Conciliation clauses are strictly distinguished from arbitration clauses. An arbitrator has a judicial role, imposes a decision on the parties and decides instead of the state courts. A conciliation body rather assists them to resolve the dispute themselves and does not definitely exclude the jurisdiction of state courts (OGH 9 ObA 134/88; 8 ObA 2128/96s; 1 Ob 300/00z; 4 Ob 203/12z; *Hausmaninger* in *Fasching/Konecny*2 § 581 No 159 f; *Rechberger/Melis* in *Rechberger*, ZPO, 4<sup>th</sup> ed. § 581 No 13). Because of this fundamental difference, conciliation clauses are deemed to interfere less with the jurisdiction of state courts and are therefore

permitted even for those legal disputes which cannot be subject to arbitration, for example disputes arising from employment contracts (OGH 8 ObA 2128/96s; 8 ObA 28/08p; 9 ObA 31/04f; *Kuderna*, RdA 1978, 3; *Gatternig*, RdW 2009/232, 282; *Hausmaninger in Fasching/Konecny*2 § 581 No 160).

The critical requirements for validity and enforceability of conciliation clauses which have been determined by case law apply equally to so-called expert clauses (“*Schiedsgutachtervereinbarungen*”). An expert clause is defined as a clause by which the parties choose an expert (or a board of experts) who shall help them to put certain facts beyond dispute. Like a conciliator, the expert is not supposed to impose a decision on the parties but only to assist them to find an agreement themselves (OGH 1 Ob 504/85; 3 Ob 507/91; 1 Ob 300/00z).

Moreover, in certain fields of law, there are statutory rules which provide for conciliation proceedings (“*Schlichtungsverfahren*”). Sometimes, they even oblige the parties to submit their dispute to conciliation before seizing a court and provide for the enforcement of this obligation.

Most of the statutory conciliation proceedings refer to disputes between colleagues of certain professions. Examples are § 87 of the Law on Chartered Accountants (WTBG), § 94 of the Law on the Medical Profession (ÄrzteG), § 11 of the Law on the Chamber of Veterinary Surgeons (TierärztekammerG) and § 54 of the Law on the Chamber of Dental Surgeons (ZahnärztekammerG). Collective agreements and guidelines of professional associations of the Austrian Chamber of Commerce may provide for conciliation proceedings as well. The purpose of these conciliation proceedings is to resolve conflicts between colleagues without being noticed by the public where they could cause adverse effects for the profession.

Apart from the law governing professions, further examples of statutory conciliation proceedings are Article III of the Law on the Amendment of the Civil Law 2004 (ZivRÄG 2004) for disputes between neighbors, § 8 Law on Civil Associations 2002 (VerG 2002) for disputes arising from civil associations, § 19 Para 2 of the Order on Lawyers (RAO) for disputes between lawyers and their clients about the fees and § 58a Law on the Medical Profession (ÄrzteG) as well as § 53 Law on the Chamber of Dental Surgeons ZahnärztekammerG) for disputes between doctors and patients.

Most of the case law regarding the enforcement of conciliation proceedings does not refer to individual conciliation clauses but to statutory conciliation of certain professions and to conciliation proceedings of civil associations which are regulated by § 8 of the Law of Civil Associations 2002 (VerG 2002) and the association’s statutes. § 8 obliges civil associations to submit any disputes arising from the association to an internal board of conciliation and to establish in their statutes the necessary conditions for these conciliation proceedings. The few cases regarding individual conciliation clauses refer to employment contracts and to expert clauses.

### **1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?**

The case law has determined certain requirements which must be satisfied by conciliation clauses in order to be considered valid and enforceable. Generally, there are no specific

requirements regarding formal validity. As conciliation clauses are not subject to the formal requirements of arbitration clauses, it is not necessary that they are in written form. They can also take the form of oral or implied agreements (*Gatternig*, RdW 2009/232, 282 [282]).

Assuming that conciliation clauses must fulfill the general prerequisites for the existence and material validity of a contract (OGH 7 Ob 657/78 (regarding an expert clause); *Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 94 ff; *Gatternig*, RdW 2009/232, 282 [282 f]), the Supreme Court has, however, developed various requirements regarding the material validity of a conciliation clause.

Conciliation clauses have been considered invalid by case law (1) because of the lack of certainty and (2) because they offended public policy and morality (in the sense of § 879 of the Austrian Civil Code). Both criteria shall be explained in more detail:

- (1) According to the Supreme Court, an expert clause (Schiedsgutachtervereinbarung) lacks certainty, and is therefore invalid, if it does not contain any rules regarding the composition of the board of experts (7 Ob 657/78). The same is true for a conciliation clause which does not contain any rule about how the chairperson of a conciliation board shall be elected (4 Ob 42/83).
- (2) An offence against public policy is caused by conciliation clauses which (a) do not guarantee a certain minimum of objectivity or (b) result in an unacceptable disadvantage of delaying the commencement of any binding dispute resolution procedure.
  - (a) The necessary minimum of objectivity is not satisfied if in matters relating to an employment contract the chairperson of the conciliation board is either an employee representative or an employer representative. Such conciliation board lacks objectivity even if the chairperson has no voting rights and the parties are equally represented by the other board members. The Supreme Court argues that because of the lack of formal structures and control the conciliation proceedings may be strongly influenced by a chairperson even if this person has no right to vote [OGH 4 Ob 42/83; same argument regarding an arbitration clause (when arbitration was still permitted for employment contracts) 9 ObA 134/88].

We find similar principles in the case law regarding the conciliation in civil associations. According to the Supreme Court, conciliation proceedings are undue and unacceptable if they contradict the principles of a fair trial in accordance with Article 6 of the European Convention on Human Rights. This is for instance the case if a dispute between an association and one of its members is submitted to a conciliation board for which the president of the association appoints the chairperson who subsequently appoints further board members. This conciliation body lacks equal representation (9 Ob 501/96). In accordance with these case law principles, § 8 of the Law on Civil Associations 2002 (VerG 2002) rules that the appointment of the members of the conciliation board must guarantee their impartiality and their independence and that the parties must be granted the right to be heard (6 Ob 219/04f). The Supreme Court considered these requirements satisfied in a case where every party of the dispute was entitled to appoint two board members who should then appoint a chairperson, although only members of the

association could be appointed as board members. According to the Supreme Court (8 Ob 78/06p) this composition would not infringe the impartiality and independence of a conciliation to an extent that would make conciliation proceedings unacceptable.

- (b) Regarding a dispute which arose from an employment contract, the Supreme Court held that a conciliation clause is invalid in accordance with § 879 Austrian Civil Code, if the employee suffers undue disadvantages because his claim cannot be brought to binding legal proceedings for an unacceptable period (8 ObA 28/08p). In order to determine the acceptable extent of a delay, the court referred to the above mentioned § 8 of the Law on Civil Associations 2002 (VerG 2002). Accordingly, if the dispute has not been settled by conciliation proceedings within six months, the parties are entitled to submit their dispute to state courts. The Supreme Court argued, that although this rule does not directly apply to individual conciliation clauses, it gives a guideline which helps to determine for how long a claim may be excluded from the jurisdiction of state courts without infringing the public policy provision of § 879 Austrian Civil Code.

Other statutory provisions regarding conciliation proceedings limit the period during which the submission of the claim to state courts is excluded to three months, for example § 40 of the Law of Tenancy (MRG) regarding disputes between landlord and tenant, § 94 Para 3 and 4 of the Law on the Medical Profession (ÄrzteG) regarding disputes between physicians and Article III of the Law on the Amendment of Civil Law 2004 (ZivRÄG 2004) regarding certain disputes between neighbors. However, the Supreme Court obviously prefers to use the six months period of § 8 of the Law on Civil Associations as a general guideline for individual conciliation clauses.

Limitation and prescription periods do not turn a temporary preclusion from the state courts to an undue or unacceptable disadvantage because conciliation proceedings suspend these periods (details below).

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

It follows from the above that a conciliation clause must determine the composition of the conciliation body and the appointment of its members. The parties must be represented equally and the proceedings must guarantee a minimum of objectivity and impartiality. The period during which the commencement of ordinary proceedings shall be precluded must not exceed six months.

Furthermore, it must be taken into account that the Supreme Court makes a distinction between obligatory and optional conciliation clauses. Only obligatory conciliation clauses may be enforced. Regarding statutory conciliation proceedings the distinction between obligatory and optional conciliation depends on the wording and the purpose of the provision (OBDK 15 Bkd 112/86, dazu *Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 169). If the conciliation shall be obligatory this should thus be explicitly stated in a conciliation clause.

## **3. If your courts have enforced such clauses, how have they done so?**

### **Statutory conciliation proceedings**

If statutory law obliges the parties to submit their dispute to conciliation proceedings before seizing a court and explicitly rules that a court shall dismiss (“*zurückweisen*”) a premature claim, the Supreme Court (6 Ob 32/05g; 4 Ob 142/89; 4 Ob 553/89) and legal literature (*Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 175; *Mayr* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 24; *Rechberger/Melis* in Rechberger, ZPO13 § 581 No 13) consider a premature claim inadmissible (“*unzulässig*”). The court thus lacks jurisdiction. As an inadmissible claim it must be dismissed ex officio at any time during the proceedings (§ 42 of the Austrian Jurisdictional Standards [Jurisdiktionsnorm, JN]). Examples for statutory provisions which explicitly provide for the dismissal of the claim are Article III Para 1 of the Law on the Amendment of the Civil Law 2004 (ZivRÄG 2004) and § 87 Para 5 of the Law on Chartered Accountants (WTBG).

In contrast, if statutory conciliation proceedings are only optional (such as § 19 of the Order on Lawyers [RAO]), the parties remain entitled to immediately submit their dispute to state courts. If, however, a lawyer first agrees to commence conciliation proceedings and then seizes a court before conciliation proceedings have been completed, he may be subject to disciplinary measures (Supreme Disciplinary Commission OBDK 15 Bkd 112/86; *Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 175). Besides, disciplinary measures may generally be used to enforce mandatory conciliation set out by the law of professions (OGH 2 Ob 421/54; 6 Ob 11/60; 6 Ob 32/05g).

Less clear is the legal situation in the case that a legal provision provides for obligatory conciliation but does not explicitly state that a premature claim must be dismissed. According to traditional case law, a premature claim is inadmissible only if the law explicitly provide for its dismissal (OGH 6 Ob 32/05g; 4 Ob 142/89; 4 Ob 553/89).

The following judgments are particularly illustrative:

In 6 Ob 32/05g the Supreme Court faced a dispute between two physicians. § 94 of the Law on the Medical Profession (ÄrzteG) obliges physicians to present disputes between them to the conciliation board of the Austrian Medical Association before submitting them to state courts. There is no explicit rule regarding the enforcement of this obligation. In this case the claimant did not initiate the conciliation proceedings in accordance with § 94 but immediately seized the state courts. The Supreme Court held that if legal provisions set out an obligation for conciliation but don't explicitly state that a premature claim must be dismissed, such claim cannot be considered inadmissible (*unzulässig*). Only if one of the parties raises the objection that the claim is not actionable in terms of substantive law (*materiellrechtlicher Einwand der mangelnden Klagbarkeit*), the court has to reject (but not to dismiss!) the claim. The difference between a rejection (*Abweisung*) and a dismissal (*Zurückweisung*) is important. Only a dismissal may be made ex officio, a rejection requires an objection which must be submitted by one of the parties before the proceedings of the first instance terminates (§ 482 Abs 1 ZPO). Generally, a claim is rejected for substantive reasons and dismissed for procedural reasons. From this it follows that the infringement of § 94 is not seen as a jurisdictional issue but rather a substantive issue.

Similarly, in earlier decisions regarding the obligatory conciliation proceedings of civil associations (§ 8 of the Law on Civil Associations 2002 [VerG 2002]), the Supreme Court argued that in the absence of explicit rules providing for the dismissal of premature claims, these



claims could only be rejected (*abgewiesen*) if a party raised the objection that it lacked actionability (6 Ob 219/04f; 5 Ob 60/05t; 8 Ob 78/06p; *Rauscher*, Zak 2007/639, 367).

In 2007, the Supreme Court changed the case law. In the context of § 8 of the Law on Civil Associations 2002 the court held that a premature claim may be dismissed (*zurückgewiesen*) because of inadmissibility (*Unzulässigkeit*) even if the dismissal was not explicitly set out in the relevant legal provisions (4 Ob 146/07k). In the meantime, it has become settled case law that a claim which is submitted to the courts in contradiction to § 8 of the Law on Civil Associations 2002, must be dismissed ex officio at any time during the proceedings because of (temporary) inadmissibility (OGH 4 Ob 146/07k; 7 Ob 52/08k; *Mayr*, note to OGH 8 Ob 78/06p, JBI 2007, 324; *Rauscher*, Zak 2007/639, 367). The Supreme Court asserted that the legislator intended to oblige the parties to submit their dispute first to conciliation proceedings in order to lessen the case load of courts. Therefore, the claim should be dismissed ex officio and not only if one of the parties raises an objection (legislative materials 990 BlgNR 21. GP 28; OGH 4 Ob 146/07k; 7 Ob 52/08k; *Mayr*, note to OGH 8 Ob 78/06p, JBI 2007, 324).

In 2012, the Supreme Court applied the same principles to a conciliation clause contained in the guidelines of the Professional Association of Real Estate and Asset Trustees of the Austrian Chamber of Commerce. These guidelines oblige real estate and asset trustees to submit any dispute with colleagues to the conciliation body of the professional association. Referring to the above mentioned case law regarding § 8 of the Law on Civil Associations 2002, the Supreme Court decided that a premature claim shall be dismissed (*zurückgewiesen*) because of inadmissibility (*Unzulässigkeit*). The court asserted that the professional association wanted to have disputes between their members settled by internal conciliation proceedings in order to avoid court proceedings which would make the dispute known in public. This purpose could only be realized efficiently if the attempt to settle the dispute by conciliation is considered a necessary prerequisite of jurisdiction (OGH 4 Ob 203/12z).

It remains to be seen whether these arguments will also be applied to other legal provisions which provide for conciliation proceedings.

### **Individual conciliation clauses**

According to case law and legal literature, individual conciliation clauses do not result in the dismissal (*Zurückweisung*) of a claim which has been submitted to state courts before conciliation proceedings have been commenced or completed. Unlike statutory conciliation they do not make premature claims inadmissible (OGH 9 ObA 88/11y; 8 ObA 2128/96s; *Kuderna*, RdA 1978, 3 [8, 9]; *Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 175; *Gatternig*, RdW 2009/232, 282 [283]) and unlike arbitration clauses they do not cause a lack of substantive jurisdiction (OGH 4 Ob 1/75; 9 ObA 134/88; *Gatternig*, RdW 2009/232, 282 [283]).

The Supreme Court considers an individual conciliation clause a material contractual commitment of substantive rather than of jurisdictional nature. The consequence is that the court has to accept jurisdiction and only if one of the parties raises an objection may reject (not dismiss!) a premature claim (OGH 9 ObA 134/88; 8 ObA 2128/96s; 1 Ob 300/00z; 9 ObA 108/01z; 6 Ob 32/05g; 4 Ob 54/06d; 8 ObA 28/08p; 9 ObA 88/11y; *Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 176; *Rechberger/Melis* in Rechberger, ZPO, 4<sup>th</sup> ed. § 581

No 13; *Kuderna*, RdA 1978, 3 [8, 9]). In accordance with § 482 Para 1 of the Austrian Code on Civil Procedure (ZPO), this objection must be raised during the proceedings of the first instance. The same rule applies to conciliation clauses in collective agreements (OGH 4 Ob 1/75; 9 ObA 108/01z; 4 Ob 54/06d (obiter); *Kuderna*, RdA 1978, 3 [9]) and to expert clauses (OGH 7 Ob 657/78; 6 Ob 574/87; 3 Ob 507/91; 1 Ob 300/00z). The fact that the claim has been submitted to the state courts before the conciliation was commenced and completed makes the claim undue in terms of substantive law (OGH 7 Ob 657/78; 6 Ob 574/87; 3 Ob 507/91; 1 Ob 211/99g, all regarding an expert clause; 1 Ob 300/00z regarding a conciliation clause and an expert clause; *Hausmaninger* in Fasching/Konecny, 2<sup>nd</sup> ed. § 581 No 170; *Rechberger/Melis* in Rechberger, ZPO, 4<sup>th</sup> ed. § 581 No 13).

If a conciliation clause is obligatory, a party may seize the ordinary courts only after having initiated the conciliation mechanism, complied with his obligations necessary for conducting proceedings and participated in a good faith effort to resolve the dispute by way of conciliation. It is not enough to formally initiate the conciliation proceedings and subsequently undermine them. Before commencing court proceedings the claimant is obliged to await the decision of the conciliation body for a due and acceptable period (OGH 9 ObA 88/11y; 8 ObA 28/08p; *Rechberger/Melis* in Rechberger, ZPO, 4<sup>th</sup> ed. § 581 No 13). Referring to § 8 of the Law on Civil Associations 2002 (VerG 2002), the Supreme Court considers a delay unacceptable and undue if it exceeds six months (OGH 8 ObA 28/08p, for details regarding the six months period of this provision see above).

When the Supreme Court changed the case law regarding the procedural effects of § 8 of the Law on Civil Associations 2002 (VerG 2002), the question arose whether individual conciliation clauses may also now be enforced by dismissing premature claims ex officio as inadmissible. The Supreme Court (8 ObA 28/08p) explicitly denied this question and argued that the principles developed in the context of the Law on Civil Associations 2002 could not be applied to individual conciliation clauses because such clauses would amend the claim in substantial not in procedural terms. The parties' attempt to settle the dispute by conciliation is a substantial requirement for the validity of the claim. A legislator obliging the parties to submit their dispute to conciliation, on the contrary, intends to temporarily exclude them from ordinary jurisdiction.

### **Limitation and prescription periods**

Conciliation proceedings generally suspend limitation and prescription periods (*Madl* in Kletecka/Schauer, ABGB-ON1.01 § 1496 No 8; OGH 4 Ob 325/97s; 8 ObA 245/01i; 2 Ob 263/09d). In accordance with general principles which have been developed particularly for settlement negotiations (see *Mader/Janisch* in Schwimann Vol. VI, 3<sup>rd</sup> ed. [2006] Vor §§ 1494-1496 No 3; *Madl* in Kletecka/Schauer, ABGB-ON1.01 § 1496 No 8; OGH 4 Ob 325/97s), conciliation proceedings cause a so called „*Ablaufshemmung*“ (OGH 2 Ob 263/09d; 8 ObA 245/01i). This means that the limitation period does not expire while conciliation proceedings are going on. After the failure of conciliation the claimant is granted an additional period necessary to seize the courts. Furthermore, some statutory provisions stipulate that certain conciliation proceedings cause a so called „*Fortlaufshemmung*“ (see for example § 58a and § 94 Para 3 of the Law on the Medical Profession [ÄrzteG] and § 41 Para 1 of the Law on the Chamber of Dental Surgeons [ZahnärztekammerG]). This means that while conciliation proceedings are going on

the limitation period stops running. In general, both statutory and individual conciliation clauses cause the effect of suspension:

Accordingly, the Supreme Court held with regard to a conciliation clause of an employment contract that an agreement according to which courts may be seized only after conciliation proceedings imply the agreement that the preclusion period (of § 1162d of the Austrian Civil Code [ABGB] and § 34 Employees Act [AngG]) shall be suspended during the conciliation proceedings (OGH 8 ObA 28/08p). The judgement does not explicitly determine the type of suspension (*Ablaufshemmung* or *Fortlaufshemmung*) but in accordance with general principles (OGH 2 Ob 263/09d) it may be assumed that the Supreme Court refers to a suspension which does not allow the limitation period to expire during conciliation proceedings (*Ablaufshemmung*).

A further judgement refers to § 58a of the Law on the Medical Profession (*ÄrzteG*). This provision stipulates that if a patient initiates conciliation proceedings because of a medical negligence, the limitation period for claims for damages (§ 1496 Austrian Civil Code [ABGB]) is suspended for a maximum of 18 months. According to the Supreme Court, this suspension is a *Fortlaufshemmung* (2 Ob 263/09d; 10 Ob 57/06i; 6 Ob 276/07t). Accordingly, while conciliation proceedings are going on the limitation period stops running for a maximum of 18 months. If conciliation proceedings take longer than 18 months, they cause a further suspension in the form of an *Ablaufshemmung* (2 Ob 263/09d). Hence, the limitation period does not end before conciliation proceedings are terminated and in the case of failure the patient has an additional time to submit his claim to state courts.

#### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

In the judgement 9 ObA 88/11y the Supreme Court had to decide upon a conflict which arose from an employment contract. The defendant argued that the claimant had not complied with the conciliation clause of the contract and that the claim thus was not actionable. The Supreme Court considered the conciliation clause valid and thus rejected the claim because of the temporary lack of actionability.

The clause read as follows: "In the event of any dispute arising out of this contract, the parties shall submit the matter to a conciliation court. Both parties shall appoint a member of the conciliation court within 14 days and those two members have to appoint a chairperson within further 14 days. The state courts may be seized only after the conciliation court has handed down a decision."

Although this clause was considered valid by the Supreme Court it is not an ideal clause. In the actual legal dispute decided by the Supreme Court, the claimant had seized a state court without initiating conciliation proceedings. In this case it was clear that he had violated the clause and there were no further questions of interpretation. Less clear would be a case where the claimant seizes a state court during the course of the conciliation proceedings arguing that the other party has not replied to his invitation to conciliate, that the proceedings have been going on for five months without any results etc. Is the claimant in this situation entitled to seize a state court?

Regarding these questions and in consideration of the case law above, the clause could be complemented as follows:

#### *Conciliation Clause*

1. *In the event of any dispute arising out of or in connection with the present contract, the parties are obliged to submit the matter to a conciliation board of three members before seizing a state court. The conciliators shall help the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.*
2. *The party initiating conciliation shall send to the other party a written invitation to conciliate, briefly identifying the subject of the dispute. The other party shall reply within thirty days. Conciliation proceedings commence when the other party accepts the invitation to conciliate.*
3. *Each party shall appoint one conciliator within fourteen days after the conciliation proceedings have commenced in accordance with paragraph 2. Within fourteen days after their appointment the two conciliators shall appoint a chairperson.*
4. *Judicial proceedings at state courts may only be commenced in case of the failure of conciliation. Conciliation proceedings shall be considered failed*
  - a. *if after the invitation to conciliate the invited party rejects the invitation;*
  - b. *if the party initiating conciliation does not receive a reply within thirty days from the date on which the invitation has been received;*
  - c. *if the conciliation board or both parties declare that further efforts of conciliation are no longer justified;*
  - d. *if no settlement agreement has been reached within a period of six month from the day when the invitation to conciliate of the initiating party was received by the other party.*

## Belarus

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

The Belarusian legislation generally enacts mandatory observance of the pre-trial dispute resolution procedure in economic disputes. According to the Belarusian statutory rules applicable to litigation, the pre-trial dispute resolution is carried out by sending a notice of claim by one party to another one. The reply to the claim shall be forwarded to the claimant within one month. Consequently, the claimant is entitled to apply to the court in the case of:

1. no reply to the claim upon expiration of the month term; or
2. a negative reply to the claim.

In practice, this procedure, although being mandatory, is rather a formality: the parties are not strictly bound by the grounds of the mentioned claim or reply thereto in further resolution of the dispute; both the claim and the reply may be formal documents executed only for the purpose of confirming before the court the observance of the pre-trial procedure. Moreover, the court does not directly force the parties to resolve their dispute within the out of court procedure.

Although such common procedure is directly envisaged in the legislation (hereinafter the **Statutory Procedure**), the parties are also entitled to either:

1. agree on another term for reply to the claim within the Statutory Procedure, or
2. exclude application of any pre-trial dispute resolution procedure at all (inter alia, the Statutory Procedure), or alternatively

3. stipulate another form of dispute settlement (e.g. negotiations, mediation procedure, complex of amicable measures, inter alia described in multi-tiered clauses, etc.) (hereinafter the “Alternative Pre-Trial Procedure”).

Therefore, considering the general rule on application of the Statutory Procedure, courts when accepting a claim normally check observance of any pre-trial procedure (unless there is direct exclusion thereof) and, in case of doubt, usually enforce the Statutory Procedure unless otherwise directly agreed by the parties.

In this regard the responses below will concern the Alternative Pre-Trial Procedure (negotiations, mediation, etc.) and will include recommendations to encourage enforceability of such alternative procedures.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Although the legislation does not provide for specific requirements to the scope and structure of a dispute resolution clause, we recommend direct indication of the dispute resolution procedure as a pre-trial one (it will make the procedure mandatory for the parties) and putting clear descriptions of all reasonable measures and actions to be taken for the dispute settlement, together with their exact time limits and consequences. It increases the chances of defeating a challenge by the court on the grounds of non-observance of the pre-trial procedure before all required reasonable pre-trial measures are taken. Please also refer to Section 4 hereof.

- A. *Does the clause expressly provide that prior stages are “conditions precedent” to litigation or arbitration?*

As mentioned in Section 1 above, it is the general rule that the pre-trial procedure is a condition precedent to litigation, and therefore there is no need to directly stipulate it in the clause for the Alternative Pre-Trial Procedure – mentioning that it is a “pre-trial” procedure would be enough.

There are two permanent arbitration courts in Belarus: International Arbitration Court of Belarusian Chamber of Commerce and International Arbitration Court “House of Arbitrators at the Union of Lawyers.” According to the arbitration procedure applied in those courts the pre-trial procedure is not compulsory. However, if the particular agreement provides for the pre-trial procedure, according to the rules of the mentioned courts – non-observance of the pre-trial procedure is generally an obstruction for arbitration. Therefore it is recommended that parties stipulate in the clause that observance of the Alternative Pre-Trial Procedure is a condition precedent for arbitration.

- B. *Does the clause use mandatory language (e.g., “shall” or “must” negotiate or mediate) as opposed to discretionary language (“may” or “should”)?*

If the parties agree to have, or not to have, the pre-trial procedure we recommend inclusion of the respective mandatory language into the agreement. Discretionary language most likely will be interpreted by the court as an alternative procedure to the Statutory Procedure, i.e. the court may

not enforce the Alternative Pre-Trial Procedure in cases where there is evidence of observance of the Statutory Procedure.

C. *Does the clause specify deadlines and time limits for each of the prior stages?*

As mentioned above, if a clause stipulating the Alternative Pre-Trial Procedure is not specific enough, the court may not enforce it if there is evidence of observance of the Statutory Procedure.

We note that terms of certain dispute settlement procedures may be legally limited, e.g. the term of mediation procedure is limited to six months.

D. *Does the clause specify the number of negotiation sessions?*

Although the number of negotiation sessions is outside of mandatory regulation and the parties are free to determine any number of sessions they want, we recommend clearly determining a reasonable number of negotiations sessions within the Alternative Pre-Trial Procedure. Therewith, the court most likely will not meticulously investigate and afterwards defeat the appropriate claim if, in case of multi-tiered dispute resolution clause or the clause stipulating complex negotiations procedure, not all tiers of dispute settlement are passed according to the agreed clause.

E. *Does the clause specify the identity of negotiation participants? E.G., project engineers, company officers, etc.*

There are no specific rules regulating the identity of the participants of negotiation; therefore the parties are free to select any participants they want. Therewith, on the one hand it may be specified in detail which participant should represent the company. However, on the other hand, where negotiations are conducted with the participation of representatives other than those stipulated in the agreement, the court will be unlikely to enforce such clause due to this reason only. Therefore, we recommend reference to those representative(s) whose participation will be reasonable indeed and complying with the level of the parties' representation sufficient for taking certain decisions within and as per results of the negotiations (CEO, deputy directors, other persons having respective authorities (PoA, etc.)).

F. *Does the clause specify mediation pursuant to specific rules?*

The parties are free to stipulate to a mediation procedure which in Belarus is referred to as an out-of-court dispute resolution procedure. There are legally approved mediation rules in Belarus which the parties may refer to. Within the process of mediation the parties may change the order of mediation which, however, should correspond to Belarusian mandatory legislation on mediation. If the party does not fulfill voluntarily its obligations within the mediation procedure, another party is entitled to apply to the court for compulsory enforcement of the mediation agreement.

H. *Does the clause specify mediation using a particular dispute resolution institution?*

Mediation in Belarus is a type of negotiation with the involvement of a mediator, who is a natural person having a special certificate and meeting other legislative requirements for being a mediator.

There are also several companies rendering services for the mediation process, *inter alia* ensuring material (provision of the place for conducting negotiations, etc.), informational, legal and other assistance to the parties involved into the mediation.

Although the parties may agree on any mediator and/or servicing company they want, reflection in the agreement of a particular mediator and/or servicing company, we believe, will influence neither positively nor negatively enforcement of the dispute-resolution clause by the court. However on the other hand, by choosing in advance the mediator and/or servicing company, the parties would definitely accelerate starting the mediation process in the future.

I. *Does the clause specify consequences for failure to undertake the prior stages?*

Consequences for failure to undertake pre-trial dispute resolution procedures are stipulated in Section 3 below.

According to the legislation and available law enforcement practice we are not aware of any other consequences for failure to undertake the Statutory Procedure or any other pre-trial dispute resolution procedures.

### **3. If your courts have enforced such clauses, how have they done so?**

#### **Litigation**

If the parties fail to undertake the mandatory pre-trial procedure (or no written evidence thereof exists) the court:

- on the stage of claim acceptance – will suspend consideration of a claim and provide the applicant with a reasonable term (not more than 15 business days) for provision to the court of the evidence of performance of the pre-trial procedure. If the applicant fails to do so the court will return the claim without consideration on the merits of the case. Upon rectification of deficiencies connected with non-observance of pre-trial procedure the claim may be filed with the court again;
- After the claim is accepted but before the judgement is announced – will leave the claim without consideration having comparatively the same effect as for return of the claim (i.e. once the shortcomings of the claim are eliminated it may be submitted again).



## Arbitration

If the pre-trial procedure is a compulsory stage but the evidence thereof is not provided to the Belarusian permanent arbitration courts, they usually propose to rectify such defects within the established term. Depending on the residency of the parties involved, category of the case and amount of the claim the terms for deficiencies' rectification may vary:

- at the International Arbitration Court of Belarusian Chamber of Commerce: from 10 days to 6 months;
- at the International Arbitration Court "House of Arbitrators at the Union of Lawyers": the term is 1 month.

If the deficiencies are not rectified within the mentioned terms the arbitration courts will return the claim (suit) without any consideration of the merits of the case.

#### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

There are several options:


1. No pre-trial dispute resolution clause at all. In this case the Statutory Procedure shall be applied in litigation. In case of arbitration the Statutory Procedure is not applied thereto and therefore there is no obstruction for arbitration.
2. Making a reference similar to "the pre-trial dispute resolution procedure applicable under the law". In this case the Statutory Procedure shall be also applied to litigation. As for arbitration, we assume, such wording will be insufficient for enforcement since there is no particular pre-trial dispute resolution procedure stipulated by the law especially for arbitration.
3. In case of the parties' agreement on applying the Alternative Pre-Trial Procedure we recommend clearly describing all reasonable measures and actions to be taken for the dispute resolution, their exact timing limits and clear logical consequences if the settlement comes to deadlock or any party avoids or refuses to resolve the dispute in an amicable way.

The following is an example of such a clause:

*The Parties agree that in case of any claims, disputes, controversies and disagreements arisen from or in connection with the validity, application, interpretation, performance, or enforcement of the terms of this Agreement, including but not limited to breach, termination, or enforcement thereof, the Parties shall first endeavor in good faith to resolve them in an amicable manner by means of negotiations between the authorized representatives of the Parties. The Party intending to initiate such negotiations shall send to the other Party a written request to conduct negotiations stating the proposed date, place and*

*agenda of the meeting. Upon receipt of the request the other Party shall provide its response thereto within [...] term with either approval to conduct negotiations on the date, place and agenda of the meeting suggested, or proposal of another date, place and (or) agenda thereof. The negotiations shall be conducted if both Parties expressed their consent to the same date, place and agenda of the meeting. In case the Parties do not agree on the same date, place and agenda of the meeting within [...], the negotiations shall be recognized as failed. As per results of each session of negotiations the Minutes of the meeting shall be executed by the Parties which shall indicate the date, place and agenda of the meeting, names of the Parties' representatives taken part in the meeting, description of the Parties' positions expressed with regard to the discussed issues, decision(s) taken (not taken) as per results of the negotiations, signatures of the Parties' representatives. The decision is deemed to be taken if it is endorsed by both Parties. Unless otherwise is directly agreed by the Parties, in the event that within [...] term starting from the date of initially sending the request on negotiations the Parties have not reached the decision(s) acceptable for both Parties or the negotiations have been recognized as failed, then the interested Party shall be entitled to submit any such claim, dispute, controversy or disagreement, which has to be (was) on the agenda of the negotiations but has not been resolved, for the consideration of the court deemed competent in accordance with this Agreement[applicable law].*

## Belgium

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

The legality of multi-tiered dispute resolution clauses is governed by the principle of the freedom of contract. Contract parties are free to enter into multi-tiered dispute resolution clauses except in certain specific circumstances where (part of) such clauses would be invalid. For example, public entities can exceptionally enter into mediation clauses where permitted by law (K. Andries, *Het bemiddelingsbeding, geldigheid, effect, inhoud en afdwingbaarheid*, De Boeck & Larcier, *Brussel*, 2007, p. 6). Another example is a multi-tiered dispute resolution clause in a company's by-laws; the validity of such a clause is disputable as it could limit a shareholder's right to claim the exclusion of another shareholder (A.-L. VERBEKE en N. VERSLYPE, "Bemiddelingsbeding in vennootschapsakten", in F. BUYSSSENS, K. GEENS, H. LAGA, B. TILLEMANN, A.-L. VERBEKE (eds.), *Liber Amicorum Prof. Dr. Luc Weyts*, Larcier, 2011, 861, nr. 29).

Apart from such validity issues in specific situations, the major obstacle to enforcing multi-tiered dispute resolution clauses under Belgian law lies in the fact that there is no clearly prescribed sanction in the event of a breach.

Firstly, the law does not allow a court (or arbitrator) to declare itself without competence in the event of the breach of an agreement to negotiate or to mediate.

Furthermore, as current Belgian (case) law stands, the grounds for the inadmissibility of a claim require a legal basis (Liège 5 February 1999, *J.T.* 1999, 292; Ghent 29 January 2004, *Juristenkrant* 2004 (summary); A. Kohl, obs. under Brussels Labour Court, 29 July 1974, *J.T.T.* 1974, 276). As there is no legal provision prescribing the inadmissibility of a court action in violation of a commitment to negotiate or mediate, the courts cannot declare such actions inadmissible.

Nevertheless, Article 1725 of the Belgian Judicial Code gives the court the power to suspend the court proceedings, at the request of one party at the start of these proceedings (*in limine litis*), in the event that the court is asked to hear a dispute subject to a mediation clause. It is clear that this does not ensure that the parties actually make an effort to reach a mediated solution. Moreover, the court proceedings would resume as soon as one party informs the court and the other party that the mediation has come to an end.

The law does not provide for a similar sanction in the event of the violation of a commitment to negotiate or any type of ADR method (other than mediation) agreed upon between the parties. A party confronted with the violation of a multi-tiered dispute resolution clause could ask the court to order the agreement's specific performance (e.g. to negotiate) and to impose a penalty (*dwangsom/astreinte*) upon the party breaching the agreement. The court could, however, find it difficult to make a party cooperate in a meaningful way.

Claiming damages as a result of a breach of a multi-tiered dispute resolution clause seems rather theoretical as the claimant would face practical difficulties. The claimant would, for example, have to demonstrate actual additional costs and the nexus with the breach.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Given the lack of case law in this respect, the general advice is to carefully draft multi-tiered dispute resolution clauses to ensure that they are workable in practice.

In this respect, it seems impossible to provide for a contractual indemnity in the event of a breach of a multi-tiered dispute resolution clause. Such a clause would go against Article 1023 of the Belgian Judicial Code, under which any clause increasing the claim, in the event of its recovery before the courts, would be considered to be non-existent.

## **3. If your courts have enforced such clauses, how have they done so?**

If the Belgian courts have enforced multi-tiered dispute resolution clauses, such decisions have not appeared in the public domain.

However the courts have established the existence of an agreement to mediate between the parties. In that situation, the courts have ordered the parties to mediate and appointed a mediator. Such decisions are formally based on Article 1734 of the Belgian Judicial Code. Under that Article, the court can order, at any stage of the proceedings, the parties to mediate if the parties so agree. However, such decisions are not based on a multi-tiered dispute resolution clause, but merely on the will of the parties as expressed before the court.

## **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Given the lack of (publicly) available precedents, it is impossible to provide a tested clause.

## Brazil

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Brazilian law has a deep-rooted tradition of favoring judicial litigation over alternative dispute resolution. This is because the Brazilian Constitution ensures the right to litigate in view of the principle of impossibility of waving the jurisdictional control (article 5º, XXXV, of the Brazilian Constitution). This represents a major challenge to the implementation of multi-tiered dispute resolution clauses, since the aforementioned principle ensures the right to bring to the Court any question or violation of rights, despite any contractual provision establishing the obligation to undertake prior steps.

In view of the current saturation of the Brazilian courts, measures such as mediation and arbitration stand out with the promise of granting them a much-needed relief. However, it was only in 2015 that Brazil finally consolidated the growing trend of applying alternative dispute resolution methods. Three new and very important laws related to this trend have been recently enacted:

- (a) Law no. 13.129/2015, which modified and improved Brazil's Arbitration Law (Law no. 9.307/1996), which was enacted on May 26, 2015 and came into force on July 26, 2015;
- (b) Brazil's first Mediation Law (Law no. 13.140/2015), which was enacted on June 26, 2015 and will come into force on December 23, 2015; and
- (c) Brazil's new Civil Procedure Code (Law no. 13.105/2015), which will come into force on March 16, 2016, and clearly states the relevance of alternative dispute resolution.

Unfortunately, there are no relevant precedents from Brazilian courts related to the enforceability of multi-tiered dispute resolution clauses. Nevertheless, we believe that article 23 of Mediation Law could set the courts' direction regarding the enforceability of such clauses. The aforementioned provision establishes that "if, in the context of a contractual provision of a mediation clause, the parties agree to not initiate the arbitration process or judicial proceeding during a certain period or even until the implementation of a certain condition, the arbitrator or judge will suspend the course of the arbitration or the lawsuit for the previously agreed period or until said condition is implemented".

Such provision creates the possibility of suspending the judicial proceeding or the arbitration during a limited period laid down in the contract or until the execution of a specific condition set in a multi-tiered dispute resolution clause. Such provision may be considered an exception to the principle of impossibility of waiving the jurisdictional control. However, such provision is not applicable in case the party needs to obtain a preliminary injunction or a provisional order in order to prevent the perishing of a right.

Since the Mediation Law is not applicable yet, it is too soon to predict Brazilian courts' views on this matter. Nevertheless, article 23 could be considered the basis of the enforceability of multi-tiered dispute resolution clauses in Brazil.

Problems resulting from the drafting of a dispute resolution clause may also represent a challenge to its enforceability in Brazil, such as: (a) not establishing a clear time limit on the period of the pre-arbitration steps; (b) the unclear definition on whether the pre-arbitration steps are mandatory or not; and (c) the lack of provisions defining procedures and rules to be followed prior to the commencement of an arbitration or a lawsuit.

Finally, it is worth mentioning that, according to Brazilian Arbitration Law, if the parties agreed not to initiate arbitration during a certain period and a party decides to infringe such contractual provision, the arbitration award shall be considered valid and lawful.

## **2. In your jurisdiction, what drafting might increase the chances of enforcement?**

The use of multi-tiered dispute resolution clauses is still rare in Brazil. In addition, Brazilian courts have yet to create precedents related to the enforceability of such clauses. Nevertheless, considering article 23 of Mediation Law, which has not come into force yet, such clause may be considered enforceable if its terms are sufficiently clear and definite, and especially with regard to the period the parties have to wait before initiating arbitration or filing a lawsuit.

Thus, in view of the provisions of Brazilian Mediation Law, we believe that the chances of enforceability of multi-tiered dispute resolution clauses tend to increase if the following conditions are met:

- (a) The clause shall state clearly that there are previous and mandatory steps that must precede the commencement of arbitration or a lawsuit;
- (b) Establish a certain period of time or a deadline during which the parties shall try to negotiate or carry out a mediation in order to resolve the dispute;
- (c) If the parties intend to establish multiple steps before arbitration or lawsuit, it is recommended to set a deadline for each step;
- (d) If arbitration or a lawsuit shall not commence until a specific condition is set, such condition must be described as clearly and definitely as possible;
- (e) Specification of procedures and rules of the pre-arbitration proceedings;

- (f) Specification of rules for the selection of the mediator or conciliator – including special qualities depending on the nature of the dispute;
- (g) Specification of the consequences for the parties' failure to comply with the clause;
- (h) Specification of the rules for sharing the costs and expenses originated by the mediation or other pre-arbitration proceeding.


**3. If your courts have enforced such clauses, how have they done so? *For example, the courts of some jurisdictions have enforced such clauses by:***

As previously stated, there are no relevant precedents from Brazilian courts related to multi-tiered dispute resolution clauses.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

As previously stated, there are no relevant precedents from Brazilian courts related to multi-tiered dispute resolution clauses. However, in view of Brazilian Mediation Law, it is highly recommended that the guidelines described in item 2 above are followed, in order to increase the chances of enforceability of such clause before Brazilian Courts or Arbitration Chambers.

## Bulgaria

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Our research of Bulgarian case-law and legal doctrine didn't identify particular issues or concerns in respect of the application of multi-tiered dispute resolution clauses.

Based on general law of obligations and dispute resolution rules, we consider that the following issues should be taken into consideration:

1) *Whether the clause could adversely affect the dispute resolution clause –*

In principle, under Bulgarian law the parties may agree to submit their disputes to arbitration and exclude the jurisdiction of state courts but may not waive their procedural rights to file claims. This brings two potential risks in respect to the multi-tiered dispute resolution clauses:

- The Bulgarian courts or arbitral tribunals may consider that a multi-tier clause could not constitute a clear and valid agreement of the parties to submit their dispute to arbitration and exclude the jurisdiction of state courts;
- The possibility to preclude the right of a party to file a claim before an arbitral tribunal or a court if specific conditions precedent under any tier of the multi-tier clause has not been satisfied (e.g. if a complaint is not delivered to the other party within a defined period of time) could be considered as a waiver of the procedural right to file a claim which would be null and void under Bulgarian law.

2) *Whether the obligations under such clause could be effectively enforced*

Under Bulgarian law non-specific obligations such as the obligations to negotiate are difficult to enforce. In certain cases, where the non-performance of a party can be clearly identified (e.g. failure of a party to respond to a complaint within a defined period) and the consequences of such non-performance are clearly stated (e.g. a recourse to arbitration) the obligation could be potentially enforced.



## 2. What drafting might increase the chances of enforcement in your jurisdiction?

- A. *Does the clause expressly provide that prior stages are “conditions precedent” to litigation or arbitration?*

Such language could increase the chances of enforcement only to the extent that the "conditions precedent" clause is valid under Bulgarian law. If recourse to courts/arbitration is subject to conditions precedent, the non-fulfilment of the conditions precedent should not preclude the party's right to file a claim before an arbitral tribunal or a state court as this would qualify as invalid waiver of the procedural right to file a claim. Thus, it should be ensured that non-fulfilment of the conditions precedent for litigation would trigger the application of an arbitration clause and the non-fulfilment of the conditions precedent for arbitration would result in state court's jurisdiction over the dispute.

- B. *Does the clause use mandatory language (e.g., “shall” or “must” negotiate or mediate) as opposed to discretionary language (“may” or “should”)?*

The use of mandatory language could improve the chances of enforcement if the mandatory language clearly defines (i) what performance is due and (ii) when this performance is due so that any failure to perform is easily identified and the consequences of such failure are applied.

- C. *Does the clause specify deadlines and time limits for each of the prior stages?*

Specification of deadlines and time limits will help to identify any failure to perform of any party and will improve the enforceability of the clause.

- D. *Does the clause specify the number of negotiation sessions?*

Specifying the number of sessions would result in more specific obligations of the parties so that any failure to perform could be easily identified. This could improve the enforceability of the clause.

- E. *Does the clause specify the identity of negotiation participants? E.G., project engineers, company officers, etc.*

Specifying the identity of participants could result in more specific obligations of the parties so that any failure to perform could be easily identified. This could improve the enforceability of the clause. However, it should be considered what level of detail is necessary – specifying persons by name could impede the enforceability of the multi-tiered dispute resolution clause if the person is not available to the negotiation for various reasons.

- F. *Does the clause specify mediation pursuant to specific rules?*

Mediation clauses usually used in Bulgaria include specific mention of (i) the mediation institution and (ii) the rules applicable to the mediation. Such wording would limit the possible

vagueness of the clause and would allow a court/tribunal to better assess what has been the agreement between the parties.

G. *Does the clause specify mediation using a particular dispute resolution institution?*

As noted above, mediation clauses usually used in Bulgaria include specific mention of (i) the mediation institution and (ii) the rules applicable to the mediation. Such wording would limit the possible vagueness of the clause and would allow a court/tribunal to better assess what has been agreed between the parties.

H. *Does the clause specify consequences for failure to undertake the prior stages?*

It is essential that the consequences resulting from the failure to undertake the prior stages be specified, e.g. if no response from a party is received within a defined time period the other party would be entitled to file a claim before the arbitral. This is necessary because the clear and unequivocal will of the parties to submit the dispute before the arbitral tribunal or the respective state court is required for the enforceability of the multi-tier clause.

### **3. If your courts have enforced such clauses, how have they done so?**

There is no case-law or legal doctrine in this respect.

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

We did not identify any case law or legal doctrine in this respect.

## Canada

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

If a Multi-Tiered Dispute Resolution Clause (“MTDR”) clause contains an agreement to negotiate (or an agreement to negotiate in good faith) it may be characterized as a mere “agreement to agree”. Canadian courts have historically found such agreements to be unenforceable (*Molson Canada 2005 v. Miller Brewing Co.* 2013 ONSC 2758 [*Molson*] at para 93, citing *Walford v Miles*, [1992] 2 A.C. 128) and thus a party would likely find it difficult to obtain a remedy based on the opposite party’s intransigence or refusal to engage in a meaningful exchange even in the face of such an agreement to negotiate.

An MTDR clause which contained an agreement to refer a matter to mediation would likely be accorded more respect by the courts although for the same reasons as above, the courts would be unlikely to police a party’s conduct during a mediation and a party would likely find it difficult to obtain a remedy based on the opposite party’s conduct at the mediation.

Where an MTDR clause requires the parties to go through the motions of negotiation or mediation as a precondition to proceedings or the invocation of self-help remedies such as contract termination, courts can reasonably be expected to enjoin conduct or stay proceedings undertaken without at least purporting to fulfil such conditions.

### 2. What drafting might increase the chances of enforcement in your jurisdiction?

The following practice tips could increase the likelihood that a MTDR clause will be enforced by a Canadian court:

- Expressly provide that negotiation and/or mediation are conditions precedent to arbitration or litigation.
- Include as much detail as possible with respect to the expected conduct of the parties.
- Include clear time periods for each step in the dispute resolution process.

- Specify the level of management to be involved at each step and whether they have the authority to resolve or “pass up” the dispute.

Disputes regarding whether there has been compliance with an MTDR clause are likely to be reduced if the clause avoids terms such as “good faith”, “best efforts” and “meaningful negotiations”.

### **3. If your courts have enforced such clauses, how have they done so?**

Described below are three cases in which an MTDR clause has been enforced by a Canadian court.

In the Nova Scotia Supreme Court decision of *Canada (Minister of Transport) v. Marineserve.MG Inc.*, [2002] N.S.J. No. 256 (in chambers) the parties had agreed upon a three-tiered dispute resolution clause which required: (i) good faith negotiations between senior individuals of each party with decision-making authority; (ii) mediation, if within ten days of the meeting the parties had failed to resolve the dispute; and (iii) ultimately, arbitration, if the mediation process was unsuccessful. The plaintiff commenced court proceedings, while the defendants sought to enforce the dispute resolution process. The court found for the defendants and required the dispute resolution clause to be satisfied in full, including the negotiation stage. In this regard, the court noted that the parties should “follow the path of their own choosing.” *Ibid.* at para 30.

In *Toronto Truck Centre Ltd. v. Volvo Trucks Canada Inc.*, [1998] O.J. No. 2965 a dealer of heavy equipment sought a mandatory injunction to compel the counterparty to the agreement (the manufacturer) to submit to the dispute resolution process contained in the Dealer Sales and Service Agreement entered into between the parties. The dealer brought the motion after receiving from the manufacturer a notice of termination of the agreement in circumstances where the manufacturer had refused to participate in the dispute resolution process. The Ontario Court of Justice (General Division) enforced the dispute resolution process and required the parties to mediate the dispute. In upholding the dispute resolution clause, the court held (par 38):

*I observe that dispute resolution clauses are increasingly common in commercial contracts. They serve both the public interest in resolution of disputes and the interest of the parties in finding constructive, timely and cost effective solutions to their difficulties. Since such provisions are consensual, their terms may vary greatly. The process in issue here is clearly intended to achieve a final and binding resolution of this termination dispute.*

In *Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.*, [2001] Q.J. No. 2470. the Quebec Superior Court dismissed the plaintiff’s action and required the parties to submit to a multi-step dispute resolution clause (parties to use best efforts to resolve the dispute, followed by the appointment of a Conciliator followed by the ability of either party to refer the matter to arbitration if the dispute still remained unresolved). The Court held that to allow one party to immediately bring a dispute before the court and deprive the counterparty of its rights under the dispute resolution clause would be to deny the intention of the parties as set out in the agreement. *Ibid.* at para 34.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

- A. From *Canada (Minister of Transport) v. Marineserve.MG Inc.*, [2002] N.S.J. No. 256 (in chambers).

*Section 13.01 Negotiation and Mediation*

*In the event of a dispute between the parties arising out of this Agreement, the parties agree to use the following procedure prior to pursuing any other legal remedy:*

- (a) promptly following the onset of the dispute, a meeting shall be held between the parties, attended by senior individuals with decision-making authority, to attempt, in good faith, to negotiate a resolution; and*
- (b) if within ten (10) days after this meeting the parties have failed to resolve the dispute, they agree to submit the dispute to mediation and to equally bear the costs of that mediation:*
  - i. the parties will jointly select a mediator. If after then (10) days, the parties are unable to agree upon the choice of mediator, then a mediator will be chose by the President of the Nova Scotia Barristers' Society; and*
  - ii. the parties agree to participate, in good faith, in the mediation process for a period of two (2) days or less.*

*Section 13.02 Arbitration*

*If the parties do not resolve all of the issues in dispute through mediation, then within ten (10) days from the date of the mediator's report, the parties agree to submit any claim or dispute arising out of or in connection with this Agreement, other than any claim or dispute pertaining to a question of public law, to binding arbitration pursuant to the federal Commercial Arbitration Act. The party requesting such arbitration shall do so by notice to the other party. The costs of the arbitration and fees of the arbitrator(s) shall be borne equally by the parties. The arbitration shall take place in Digby, Nova Scotia before a single arbitrator to be chosen by the parties. If the parties cannot agree on the choice of arbitrator within ten (10) days of the notice to submit to arbitration, then the parties shall each choose an arbitrator who in turn will select a third.*

*The parties may determine the procedure to be followed by the arbitrator(s) in conducting the proceedings, or may request the arbitrator(s) to do so. The arbitrator(s) shall issue a written award within thirty (30) days of completion of the hearing. The award shall be in such form that it may be entered for judgment in any court having jurisdiction.*

- B. From *Toronto Truck Centre Ltd. v. Volvo Trucks Canada Inc.*, [1998] O.J. No. 2965 at para 2.

## *Addendum #7 Dispute Resolution Process*

1. *Both Company and Dealer recognize that from time to time a serious dispute over interpretation or application of this Agreement may arise between the parties (a "Dispute"), and that to resolve such Dispute through the more timely and cost-efficient procedures of this Dispute Resolution Process (the "Process") than traditional judicial or administrative remedies is in the Dealer's and the Company's mutual interest.*
2. *Under this Process, both parties shall have the opportunity to resolve a Dispute through the following two step process:*
  - (a) *Company management and/or general counsel review that is non-binding; and*
  - (b) *if necessary, and at Dealer's option, binding mediation through a mutually-agreed upon neutral party.*
3. *The purpose and design of this Process is to achieve fair and just results without modifying the terms of this Agreement. The process utilizes the expertise of representatives together from Company and its dealers, while maintaining and enhancing a positive business relationship. The intent of the Process is to produce a resolution within seventy-five (75) calendar days from the date of the impasse that precipitates the Dispute.*
4. *The Dealer and the Company therefore agree that any Dispute, whether for damages, stay of action, termination of this Agreement, settlement of accounts, or otherwise shall be settled by the Process as described herein. It is further agreed between both parties that such a settlement shall prevail as a final remedy over any other available actions, implied or expressed under terms of either this Agreement or any local, provincial or federal statute.*
5. *Management and General Counsel Review*
  - (a) *Review Request. If Dealer feels aggrieved by any decision or action of Company it may request in writing a review of how such a decision or action was inconsistent in Dealer's opinion with its rights under this Agreement by delivering a notice to that effect to Company (Attention: Director, Dealer Operations) within 15 days from the date of impasse that caused the Dispute. Such notice shall contain a reasonable amount of detail and explanation to permit Company to properly review the matter under dispute. The Company shall acknowledge in writing having received Dealer's request within seven (7) days of such receipt. Continuous action by Company resulting solely from the Dispute may be halted by Company at its discretion.*

- (b) *Review Decision.* Company shall review Dealer's request and other relevant information it believes appropriate and render a decision in writing to Dealer within fifteen (15) days after the date of Company's acknowledgment.
- (c) *Response.* Dealer shall give written notice to Company within seven (7) days after receiving Company's decision as to Dealer's acceptance or rejection of Company's decision. In the latter case, Dealer may advance its interest by engaging mediation as a preferred course of resolution by delivering a notice of appeal of Company's decision (an "Appeal") to one of the independent pre-authorized mediation services (a "Mediator") set out in the Mediation Service Addendum within seven (7) days of Dealer's receipt of Company's decision.
- (d) *No Fault.* Failure by either party to respond as defined in this section, or in any way to insist on performance by the other party of any of its obligations in any one instance shall not be deemed a waiver of Company's or Dealer's right to insist upon performance of that or any other obligation in the future.

6. *Mediation.*

- (a) *Notice of Appeal.* Upon Dealer's timely submission of the Appeal as prescribed above with Mediator, a copy of the Appeal and all accompanying material in support of Dealer's position shall be provided to Company by Mediator within seven (7) days after the Appeal was received by the Mediator. As the responding party, Company shall have a maximum of seven (7) days from the date of receiving Dealer's position to submit its written position to Mediator and at the same time transmit a complete and legible copy of same to Dealer.
- (b) *Proceedings.* Within ten (10) days from receiving the Appeal, Mediator shall be responsible for obtaining any additional information from either party, which in Mediator's opinion is deemed essential to fair and appropriate analysis of the Dispute's issue(s), and for arranging, with each party's consent (or failing such consent within (5) days, at the Mediator's sole discretion), the forum for the Dispute's disposition. Such a forum may be conducted by phone, electronic communication, or by an actual meeting. The selected forum shall be as necessary to facilitate settlement to the equal convenience of both parties under the Mediator's direction.
- (c) *Negotiations.* Mediator shall not be authorized to impose a decision on the parties. Its primary task is to impartially and effectively bridge the positions taken by Dealer and Company in order to reach an accord within six (6) days after the onset of actual mediation or no later than twenty-four (24) days after the Appeal was received from Dealer. The Controlling Individual(s) in all cases shall personally represent Dealer. Company shall appoint one management employee to represent

*Company's position with the authority to negotiate a final settlement with Dealer.*

- (d) *Settlement. Any settlement shall resolve all components and/or issues constituting the dispute and shall be binding on Company and Dealer. Under Mediator's supervision, such a settlement shall be confirmed in writing and include each party's acknowledging signature. If necessary, any agreed upon follow-up and/or ensuing action(s) expected of either party emanating from this settlement shall be executed in good faith as a condition to the settlement's binding effect on Company and Dealer.*
- (e) *Allocation of Expenses. Company and Dealer will each be accountable for costs they incur for their direct or indirect involvement with the mediation activity. Both Company and Dealer agree to split all other expenses associated with the Mediator, including its fee, and, if any, travel, meals, lodging, communication services, and forum accommodations.*

C. *From Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc., [2001] Q.J. No. 2470 at para 6 (emphasis in original).*

### *13. Disputes*

*13.1 The Parties will use their best efforts to resolve any disputes.*

*13.2 Any disputes will first be submitted in writing to the Co-ordinating Team for discussion and resolution. The Co-ordinating Team will discuss the dispute in good faith.*

*13.3 If, in the opinion of any Party, the Co-ordinating Team is unable to resolve a dispute, either Party may demand the nomination of a Conciliator.*

*13.4 Upon demand of either Party to name a Conciliator, the Co-ordinating Team will choose a Conciliator with skills relevant to the issue in dispute. If the Co-ordinating Team fails to agree on the Conciliator no later than two weeks after a demand for conciliation. The parties will provide the Conciliator with free and open access to information relevant to the dispute. The Conciliator will provide a report with recommendations to be presented to the Co-ordinating Team for resolution. The Conciliator's fees will be borne equally by the Parties unless, upon recommendation of the Conciliator, it is agreed otherwise.*

*13.5 If the matter remains in dispute after presentation of the Conciliator's report to the Co-ordinating Team or three months after a notice of dispute submitted to the Co-ordinating Team in accordance with Section 13.2, (whichever is first) either party may submit to dispute to final and binding arbitration in accordance with the Code of Civil Procedure of the Province of Quebec before one or three arbitrators chosen in accordance with those rubs. The arbitration will take place in English in Montreal.*



## China

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### I. Cases

Chinese law does not have clear provisions on the enforceability of multi-tiered dispute resolution clauses (“MTDRC”). Chinese courts usually have a conservative attitude generally and will not support a vague or unspecific MTDRC unless clear conditions are specified. There are few relevant cases discussing the question.

In the *Runhe* case (2008), the losing party in an arbitration applied to the court for non-enforcement of the arbitral award rendered by the South China International Economic and Trade Arbitration Commission. It claimed that the MTDRC had not been well observed which provided that “.....*all disputes shall be subject to friendly negotiation firstly, if negotiation fails, then each party may commence arbitration.*” After several rounds of review, the Supreme Court ruled against the party. The Court reasoned that, though the parties had agreed to resolve disputes through negotiation, they had not explicitly agreed on a negotiation schedule, and there was ambiguity on how the negotiation should be actually conducted. The MTDRC was not mandatory and enforceable. The Court further held that even the standard of conducting a “friendly negotiation” was hard to define, and the act of applying for arbitration by one party should be interpreted as the failure of a “negotiation.” Therefore, the arbitral tribunal had the right to directly accept the arbitration application since the MTDRC was not enforceable.

On the other hand, the two arbitral awards (SCC 076/2002 and 111/2003) by the Arbitration Institute of the Stockholm Chamber of Commerce had a quite different fate. In those arbitration proceedings, Pepsi Cola was the claimant against its Chinese joint venture partner under the joint venture agreement and the licensing agreement and Pepsi obtained two successful awards against the Chinese parties. It then applied to a Chinese court for recognition and enforcement of the awards. The Supreme Court finally refused to recognize and enforce the awards on the ground that there were inconsistencies between the arbitration proceedings and the arbitration agreement. The arbitration agreements provided that “.....*disputes shall be firstly solved by negotiation; .....negotiation shall be presided by local government; .....a negotiation period of 90 days is necessary.*” However, the parties did not conduct negotiation by appointing the local government and waiting for 90 days before they filed arbitration as specified by the arbitration agreements. The Court held that the act of applying for arbitration had violated the MTDRC and

gave the respondent a valid ground to set aside the awards under the New York Convention. The Court reasoned that the arbitral tribunal should not accept the arbitration applications before a negotiation as specified by the arbitration agreements was conducted.

## **II. Drafting**

In light of the cases above, only an express, definitive and accurate MTDRC may be considered enforceable by a Chinese court. When drafting an MTDRC, it is strongly advised that the parties should add definite and specific conditions in order to increase enforceability of the MTDRC. For example, parties may consider using mandatory wording such as “shall” or “must” instead of “may” or “should,” providing specific conditions for the negotiation, putting a deadline on the negotiation, and identifying a third party who will host or chair the negotiation.

## Croatia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Although multi-tiered dispute resolution clauses are used in practice, there is no publicly available case law dealing directly with the enforcement of such clauses. We are not aware of any court decision by which a court (i) found that the prior stages would constitute "conditions precedent" to initiating litigation, refusing to proceed with litigation either by way of rejecting the claim or by staying the proceedings, or (ii) held that the prior steps are irrelevant for initiating litigation continuing the proceedings notwithstanding the fact that the prior steps agreed to in the clause were not undertaken.

There is apparently an award, not publicly available, rendered in arbitration administered by the Permanent Arbitration Court of the Croatian Chamber of Commerce in which the tribunal rejected the claim because the claimant failed to comply with the old FIDIC contract rules and obtain an expert opinion about the issue in dispute prior to initiating arbitration. The tribunal held that obtaining an expert opinion in fact constituted an agreement to engage in mediation. Since this obligation was not honoured, the tribunal rejected the claim on the basis of the Article 18 of the Croatian Mediation Act, which provides that any claim filed in breach of the parties' obligation to initiate mediation will be rejected.

As already mentioned, this award is not publicly available and it has very limited effect on the creation of trends in the legal assessment of multi-tiered dispute resolution clauses. Therefore, we believe it should not have material importance for creation of case law related to the issue of enforcement of multi-tiered dispute resolution clauses.

### 2. What drafting might increase the chances of enforcement in your jurisdiction?

The issue of enforceability of multi-tiered jurisdiction clauses has not been tested and reviewed by Croatian courts. As a consequence, there is no direct guidance what the drafters of such clauses should be particularly aware of. However, we believe that any language that increases the level of certainty of the parties' obligations under the dispute resolution mechanism would certainly increase the chances of enforcement of multi-tiered dispute resolution clauses.

It is important to note that the Republic of Croatia has a Mediation Act in place, which governs the mediation process. Being a regulated process, reference to mediation may imply certain features or restrictions that may affect the parties' right of recourse to courts or arbitration. The most important is that a claim to a court or an arbitral tribunal will be rejected if the claim has been filed in breach of the claimant's obligation to refer the dispute to mediation prior to filing a statement of claim.

In that respect, we would recommend, to the greatest extent possible:

- determining the consequences for not undertaking the steps preceding the filing of the claim with a court or an arbitral tribunal,
- specifying deadlines and time limits for undertaking each prior step, explicitly stating whether the parties refer the dispute to mediation or any other alternative dispute resolution tool prior to initiating litigation or arbitration, because such reference may be relevant for triggering the application of the Croatian Mediation Act,
- specifying specific mediation rules or institution administering mediation, if agreed so by the parties.

### **3. If your courts have enforced such clauses, how have they done so?**

As already explained, Croatian courts have not dealt with the enforcement of multi-tiered dispute resolution clauses.

However, Croatian law contains certain provisions that may be important for the assessment of potential conduct of Croatian courts if and when enforcement of multi-tiered dispute resolution clauses becomes a matter under their review.

The Croatian Civil Procedure Act provides, as a condition precedent to initiating a law suit against the Republic of Croatia, that the claimant is required to file a request for out-of-court settlement of the dispute with the State Attorney's Office. If the claimant fails to do so, the court will reject the claim.

The Croatian Mediation Act contains a similar provision, providing that the court will reject the claim if the claimant, prior to filing a statement of claim, fails to initiate a mediation procedure that the parties agreed upon.

As a consequence, if a statement of claim is filed with the court without undertaking the prior steps agreed upon between the parties, we believe the courts will be likely to dismiss the litigation and award the costs against the claimant.

## Cyprus

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### Introduction

The use of multi-tiered dispute resolution clauses is becoming increasingly common in commercial agreements and, even though there haven't yet been any decisions by the Cypriot courts on this issue, the effect, if any, which should be given by the courts in Cyprus to such clauses, is becoming an issue of great debate.

Litigation is the predominant method for resolving disputes in Cyprus, both domestic and international. In the last couple of decades the Courts of Cyprus have been used as a "battlefield" for a significant number of large and complex international commercial disputes. The main reason is that Cypriot companies have been extensively used as holding companies for investments in a number of jurisdictions (most notably the Russian Federation and Ukraine). The involvement of Cypriot companies in disputes that arise in relation to such investments or activities brings a lot of claims under the jurisdiction of the Cypriot Courts.

The involvement of Cypriot Courts is also important in cases where interlocutory relief, such as freezing orders or orders for disclosure of information, is sought in aid of foreign court proceedings or in aid of international arbitration proceedings, where Cypriot entities are involved.

Cyprus is a common law jurisdiction, the legal system being a remnant of the island's British colonial history. In addition to the Constitution and the Laws enacted by the Cyprus Parliament, Article 29 of the Courts of Justice Law of 1960 (Law no.14/1960) incorporates the English common law as well as the principles of equity into the Cypriot legal system.

Regarding the use of ADR in Cyprus, unfortunately it cannot be said that it is extensive. However the Courts in Cyprus favor amicable resolution of disputes, in order to reduce their heavy workload and generally encourage the parties to exhaust settlement possibilities, before a case is scheduled for hearing. In 2012 a law covering mediation in civil and commercial matters, based on EU Directive 2008/52/EC, was passed and it remains to be seen to what extent it will affect dispute resolution in Cyprus.

## **1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?**

Cypriot Courts have not yet dealt with multi-tiered dispute resolution clauses. For those who are familiar with the nature of international commercial disputes which are the subject matter of cases regularly filed in the Courts of Cyprus, the absence of case law on this point is somewhat strange.

The above questions are therefore addressed with reference to the principles of the Contract Law of Cyprus.

A party choosing to commence litigation without having sought the resolution of the dispute by friendly discussions where a clause to that effect is included in the agreement in question, faces the risk of an application by the defendant for stay of proceedings or of the defendant raising a ground of defense that the case was filed prematurely.

We can start this analysis by saying that a mere agreement to negotiate will not be enforceable under Cypriot law. Section 29 of the Contract Law, Cap. 149, provides that agreements, the meaning of which are not certain, or capable of being certain, are void. This provision aims to incorporate in the Contract Law the common law rule that to be enforceable an agreement must be certain.

In *Saab v. The Holy Monastery of Ayios Neophytos* (1982)<sup>1</sup> CLR 499, the Supreme Court of Cyprus cited with approval the following test for determining whether the terms of the contract are sufficiently certain to render the agreement enforceable, as suggested by the English Court of Appeal in *Brown v. Gould* (1971)<sup>2</sup> All E.R. 283: “*Whether someone, genuinely seeking to discover its meaning, is able to do so*” and held that: “*The effect of case-law is that, so long as the essential terms of the agreement are ascertainable by a reading of the contract as a whole, effect will be given to the agreement of the parties.*”

Therefore, one seeking to enforce a mere agreement to negotiate a settlement will undoubtedly face an uphill struggle in court.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

When a multi-tiered dispute resolution clause is examined by a Court, the question of enforcement will most probably turn on whether the agreement is complete and whether it has sufficient certainty to be enforceable. It is therefore important that the parties do more than simply agree to attempt in good faith to negotiate a settlement.

The parties should go much further than that and agree on a particular procedure. Using the word “shall” would indicate that the obligation is mandatory. Furthermore, identifying specific rules and/or a mediation/ADR institution and setting out time limits for each stage, would assist in establishing that the agreement is not too uncertain to be binding.

Generally it is important to have in place the criteria which would enable the court to reach a decision as to whether the parties have complied with or are in breach of such a provision.

**3. If your courts have enforced such clauses, how have they done so?**

To date there is no decision by a Cypriot court dealing directly with this issue. However a court deciding to enforce such a clause would possibly order a stay of proceedings until the parties have completed the agreed resolution procedure.


It is debatable whether a court would dismiss litigation in case of breach of a dispute resolution clause. In such a case the court would have to consider on the one hand the effect of Article 28 of the Contracts Law, Cap. 149, which provides that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the Courts, or which limits the time within which he may thus enforce his rights, is void to that extent (agreements to refer a dispute to arbitration are excluded) and Article 30 of the Constitution of the Republic of Cyprus which safeguards access to the courts of the Republic of Cyprus and on the other hand the argument that the purpose of such a clause is not to restrict access to the court but to set out the rights and obligations of the parties and that the clause is a choice made by the parties under the freedom of contract which is protected, under Article 26 of the Constitution.

It is important to note that when a dispute arises, the aggrieved party may rush to commence litigation in order to obtain interlocutory relief. For instance a freezing injunction may be necessary to prevent the alienation or dissipation of assets and the aggrieved party may find itself in a position that it cannot afford to wait and exhaust the agreed ADR procedure before commencing a legal action in order to protect its rights. There is no Cypriot case law on this point but it would be interesting to see whether a court would grant a freezing order in such a case and then order a stay of proceedings in order for the agreed ADR procedure to take place, leaving the freezing order in force during the period of stay.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

To date there is no decision by a Cypriot court dealing directly with this issue.

## Czech Republic

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Multi-tiered dispute resolution clauses are not subject to any specific regulation, with the exception which is the regulation of mediation. Other clauses that lay down the obligation of parties to negotiate in good faith may be deemed unenforceable if they do not specify to the full extent the manner under which the parties to such an agreement shall act.

In answering this first question, both types of agreements on pre-arbitration or pre-litigation clauses will be analysed.

#### 1.1. Mediation

##### a) Introduction

Mediation has had its own statutory framework since 2012 when Act No. 202/2012 Coll., on Mediation (the "**Mediation Act**") was enacted. Mediation is based on several principles (including voluntariness, confidentiality and informality) and each such principle is strongly reflected in the regulation of the mediation proceedings. Other principles are reflected in the person of the mediator, who has to have some personal and other qualities. These include the neutrality and impartiality of a mediator, principles which shall guarantee the strength of his/her position and ensure greater trust and openness between interested parties.

Despite the wide range of flexibility of the parties, not all disputes may be settled through mediation. Relations which require that the consent of a state court (or other authority) be established, modified or terminated are excluded from the mediation proceedings.

The parties may agree to resolve their disputes via mediation by adopting a mediation clause ("**mediation clause**"). Mediation proceedings established hereon are primarily regulated by the conclusion of a written agreement between the parties regarding their dispute. The Mediation Act stipulates compulsory legal requirements for such a mediation agreement, which must contain at least: identification of the parties; the name and address of a place of business of a mediator; a definition of the conflict; the mediator's fee for performing mediation or a method for its determination (or an arrangement that the mediation shall be performed free of charge); and the



period of time during which mediation proceedings are to take place (or the fact that such mediation is to take place for an indefinite period).

However, a mediation agreement should not be mistaken for a mediation clause. Whilst a mediation agreement regulates and commences the proceedings itself, a mediation clause serves only for parties to undertake to settle their future disputes in an amicable way.

The following is a typical mediation clause used in the Czech Republic:

*"All disputes, controversies or claims arising under, out of or in relation to this contract shall be first submitted to mediation and an attempt made for such to be settled in an amicable manner. Only in case of failure of such mediation effort may the parties exercise their respective rights to bring the disputes, controversies or claims before the court or any other relevant authority."*

#### b) Consequences of a concluded mediation agreement

The question is whether parties that entered into a mediation agreement may still bring their dispute before state courts directly or if they are obliged first to submit their dispute to a mediator and try to settle their dispute. In the light of a decision of US courts, this issue is at stake; however, continental law is more conservative and even though there is no relevant case law, we must not qualify the mediation clause as a type of "arbitration clause".

In this respect, the Mediation Act explicitly states that the initiation of mediation does not affect the right of parties to the conflict to demand protection of their rights and legitimate interests via legal proceedings. In connection with the right to end the mediation at any time during the mediation, such proceedings cannot prevent any of the parties from raising an action before a relevant state court.

Despite the fact that a concluded mediation agreement does not establish a reason to interrupt or prevent commencement of litigation or arbitration, which means that such agreement has no procedural consequences, breach of such obligation to try to settle matters without any trial may lead to an action for damages for breach of agreement in general. Therefore, a mediation agreement has its substantive consequences and any party that did not breach the contract and which could have reasonably expected initiation of mediation proceedings to settle a dispute may demand any damages arising from such breach of the mediation agreement by the other party.

#### c) Relation to pending litigation

In case of pending proceedings before a state court, there is no statutory obligation to interrupt such proceedings and refer the parties to a mediator. Nevertheless, there can be an initiative to commence mediation. The initiative may arise from two grounds: (i) based on a request of parties to the proceedings; or (ii) based on the court's decision that it will be beneficial and appropriate to refer parties to meet a chosen mediator for at least a first session.

- (i) Parties may end the litigation by concluding a settlement of their dispute. In such a case, the respective court must approve the settlement based on its examination of solely the settlement's compliance with the legislation. Similarly, such

settlement may be concluded between parties prior to commencement of the proceedings before the court. Subsequently, parties are entitled to apply to the relevant court for approval of such settlement under the same conditions as in the previous situation.

- (ii) The other possibility is that the court itself will refer parties to a chosen mediator to meet him/her for a first session of up to 3 hours. In the meantime, the proceedings may be stayed for up to 3 months at most. Such a mediation session is not obligatory and parties do not have to follow such instruction. However, disobedience of the court decision by a party may mean that the court will not grant such a party some or all of the costs of the proceedings.

d) Relation to arbitration

In a situation when mediation should precede arbitration, such arrangement between parties is binding for the arbitrator as long as it is contained in the arbitration clause. In any other case, any influence must be refused (see below).

Arbitrators are generally bound by the arbitration agreement even in proceedings before institutional arbitration courts. Moreover, the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (as one of two arbitration courts established by law) stipulates in Article 6 of its Rules that parties may agree on the procedure and the arbitrators are bound to conduct the proceedings following such an agreement unless it is made after commencement of the proceedings.

If an arrangement for mediation is not included in the arbitration clause but parties wish to stay the proceedings in order to try to settle their dispute before a mediator, the arbitrator should proceed analogously to state courts as the same regulation applies to arbitration proceedings (without a possibility to accept a judicial settlement, which remains the prerogative of the state courts).

e) Outcome of mediation

The aim of mediation is not to obtain a binding decision that must be followed by the parties. It should lead to an amicable settlement of a dispute with intervention and assistance of a mediator as a third independent party.

However, parties have the opportunity, as mentioned above, to apply to the competent court for approval of their settlement and thereby have it become a judicial settlement. In such case, this judicial settlement has the effect of a final judgment and may be enforced against the will of the other party.

## 1.2. Other settlement clauses

### a) Introduction

As regards other settlement clauses ("**settlement clause**") that lead to the obligation of the parties to settle a dispute in an amicable manner prior to commencement of the proceedings, the parties are free to agree on any content which they consider sufficient for their possible future negotiation.

In order to establish a valid and enforceable obligation pursuant to sec. 1725 of Act No. 89/2012 Coll., the Civil Code (the "**Civil Code**"), such an agreement between the parties must, however, meet all the requirements set forth by the general civil laws in the Czech Republic, namely by the Civil Code.

Thus, despite the wide range of flexibility of the parties, it must be specifically agreed what obligations the parties have to observe and also in which time frame.

The following is a typical settlement clause used in the Czech Republic:

*"All disputes, controversies or claims arising under, out of or in relation to this contract shall be settled by the parties in an amicable manner. Only in case of failure of the parties to reach an agreement within 30 days and upon the request of either party to negotiate is any party entitled to bring such claim before the competent court."*

### b) Consequences of a concluded settlement agreement

Also in case of a settlement clause, it must be made clear whether the parties that entered into such an agreement to find an amicable settlement may still bring their dispute before state courts or if they are obliged to try to settle their relationship out of court.

From the general perspective, before commencing the proceedings the court shall check whether there is any obstacle for such proceedings. The core regulation Act No. 99/1963 Coll, the Czech Civil Procedure Code ("CPC") establishes only a few provisions which lead to rejecting of the jurisdiction of civil court. It is in particular litigation or *res iudicata* case and furthermore an existence of the arbitration clause if the respondent objects to the jurisdiction of the general court. The settlement clause is not included into those obstacles and consequently, similarly to a mediation clause, the settlement clause will not hinder the competent court stopping or staying proceedings.

Despite the fact that a concluded agreement does not establish a reason to interrupt or prevent commencement of litigation or arbitration, which means that such agreement has no procedural consequences, breach of such obligation to try to settle matters without any trial may lead to an action for damages for breach of agreement in general.

c) Relation to arbitration

In a situation when a settlement negotiation should precede arbitration, such an arrangement between the parties is binding for the arbitrator as long as it is contained in the arbitration clause. Arbitrators are generally bound by the arbitration agreement even in proceedings before institutional arbitration courts.

d) Outcome of negotiation

The parties have the opportunity to apply to the competent court for approval of their settlement and turn it into a judicial settlement. In such a case, this judicial settlement has the effect of a final judgment and may be enforced against the will of the other party.

### 1.3 Med-Arb clauses

As regards the connection of mediation and arbitration, a specific issue must be pointed out ("**Med-Arb**"). Generally, the Med-Arb may occur in two different ways. The two types of the Med-Arb differ in whether a participating mediator transforms into an arbitrator in contrast to the second type where the mediator and arbitrator are two different persons.

a) Med-Arb with different persons as mediator and arbitrator

Med-Arb where different persons participate as mediator and arbitrator face no problems except those which are connected with separated mediation and arbitration proceedings as described above. All legal requirements governing both proceedings shall apply at the respective stages.

b) Med-Arb with the same person as mediator and arbitrator

When one person participates in the proceedings as both mediator and arbitrator concurrently there are several complications.

First, the legal requirements for the position of mediator and arbitrator must be met. This can result in violation of impartiality and neutrality of the arbitrator. It is obvious that the mediator accesses confidential information, personal attitudes and opinions and other information that no arbitrator would obtain during the proceedings. The question is whether the person acting as arbitrator is able to stay impartial despite all the information he/she gained during the mediation. Moreover, arbitration is subject to the contradictory principle, which means that all facts used by the arbitrator for his/her decision must be known to both parties, and in turn the arbitrator must be able to express their opinions on each of such facts. However, it is questionable whether the arbitrator who acted as mediator in the prior stage is able to exclude information obtained within the mediation when making a decision. It is not only that the other party does not have such information but the arbitrator is bound by confidentiality provisions and therefore prohibited from sharing such information with the counterparty as doing so would provide it with the opportunity to comment on it. Therefore, the arbitrator is allowed to use any confidential information obtained during the mediation when making a decision only if the party of such

information communicates them to the counterparty by itself. Otherwise, though the arbitrator knows of such information his/her decision cannot be influenced by it.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As mentioned in the first part, the alternative dispute resolution methods, with the exception of mediation, do not have any special legal regulation under Czech law. Therefore, rules and conclusions laid down in the answer to the first question must be applied on this issue.

A mixed clause will be a mixture of a mediation or settlement clause and arbitration or litigation clauses.

- The issue of wording used for the clauses must be considered from the point of view of arbitration and standard litigation before the general court:
  - As the arbitrators are in general bound by the arbitration agreement, it is advisable to use imperative wording to express the multi-tiered nature of such proceedings with a fixed continuity of stages. In such a case, the Med-Arb clause will be binding as a whole and the breach thereof may lead to a failure in the proceedings that entails the invalidity of the arbitral award under Czech law.
    - The best approach for establishing a binding nature of the mediation or settlement proceeding before the commencement of the arbitration is to insert into the clause phrases such as "obligatory mediation/negotiation prior to commencement of the arbitration proceedings" or "mediation/negotiation as a condition precedent".
    - In each case, the clause must contain imperative words such as "must" or "shall", as only imperative agreements establish a duty of either party that is enforceable upon the parties. Should the parties use only discretionary language, such wording may lead to refusal of the binding nature of the clause. On the other hand, a one-sided clause is in general possible, but its enforceability may be refused in case of a "good morals" test, ie, in case of a check to ensure that the clause does not lead to unfounded aggravation of the position of the party that is deemed weaker.
  - The combination of the mediation/settlement clause and the jurisdiction of courts is different in litigation cases in which the clause will be deemed an agreement of substantive law; and if not fulfilled, such a breach will be considered a breach of legal duty, but the respective breach will not entail the failure of active legitimacy in proceedings that the court must check *ex officio*.

- As to the time limitation of the mediation/settlement proceedings, it is advisable to stipulate a certain time limit for the proceedings.
  - The failure to do so may lead to cancellation of the Med-Arb clause as an unlimited obligation and may lead to impossibility of the decision-making in the subsequent arbitration proceedings.
    - The certain time is not an obligatory requirement of the mediation clause; however, it makes clear that the mediation is only a temporary proceeding within the settlement proceedings and that if it does not lead to any settlement of a dispute it shall turn into arbitration as a final resolution of a dispute. Moreover, stipulation of a time limit is obligatory under the mediation agreement, which is necessary to commence the proceedings. Therefore, some time limit for mediation must be stipulated at some point. If the time period for mediation proceedings is stipulated under the clause, it is not necessary to determine any obligatory number of negotiation sessions or even any consequences to undertake a prior stage (meaning mediation).
    - In case of a settlement clause, it is advisable to use the particular time limit for the respective proceedings as only in such a case may the other party breach its duty to negotiate. The same applies to the possible number of sessions.
  - The combination of the mediation/settlement clause and the jurisdiction of courts is different in litigation cases in which the clause will be deemed an agreement of substantive law; and if not fulfilled, such a breach will be considered a breach of legal duty, but the respective breach will not entail the failure of active legitimacy in proceedings which the court must check *ex officio*.
- The proper identification of the participant is the fundamental part of any agreement within the private law relationships.
  - The exact identity of the participants of the mediation must be included in the agreement that commences the mediation proceedings, and it is also an inevitable element both of arbitration and mediation clauses, ie, also of the Med-Arb clause. However, it is not necessary to specify the particular persons who will act on behalf of the participants as it is deductible from general law who may act for or on behalf of a natural person or legal entity. The same applies for settlement clauses.
  - Also, in the case of the mediation/settlement clause and the jurisdiction of courts, the parties must be properly defined so that no issue arises as to who the parties are. The identification does not need to meet the

requirement for identification of any person on business documents as prescribed by sec. 584 of the Civil Code (ie, name, address, ID and registration details), but it must not lead to confusion as to the identity of the parties.

- There is no obligation as to whether any particular institution must be chosen for mediation, and the same applies to mediation rules. Mediation itself is free of any such regulation. However, in case of failure to identify the mediator or the rules thereof, there is a risk that either party will object to the chosen institution, claiming that it was under pressure to agree on it.

### **3. If your courts have enforced such clauses, how have they done so?**

As to the outcome when the parties agree on multi-tiered clauses and do not undertake the prescribed prior stage, the situation arisen must be divided into cases of arbitration and litigation.

- In a situation when mediation should precede arbitration, such arrangement between parties is binding for the arbitrator as long as it is contained in the arbitration clause. Arbitrators are generally bound by the arbitration agreement even in proceedings before institutional arbitration courts. If such arrangement for mediation is not included in the arbitration clause but parties wish to stay the proceedings in order to try to settle their dispute before a mediator, the arbitrator should proceed analogously to state courts as the same regulation applies to arbitration proceedings similarly (without possibility to accept a judicial settlement, which remains the perview of the state courts). The breach thereof may lead to a failure in the proceedings that entails the invalidity of the arbitral award under Czech law.
- In case of litigation that should be subsequent to the mediation or amicable solution, the binding nature for the court must be refused. The Mediation Act explicitly states that the initiation of mediation does not affect the right of parties to the conflict to demand protection of their rights and legitimate interests via legal proceedings. In connection with the right to end the mediation at any time during the mediation, such proceedings cannot prevent any of the parties from raising an action before the relevant state court. The same applies to a contractual obligation to negotiate.
- Breach of an obligation to try to settle matters without any trial may lead to an action for damages for breach of agreement in general. Therefore, a mediation clause or obligation to negotiate has its substantive consequences, and any party that did not breach the contract and which could have reasonably expected initiation of mediation proceedings to settle a dispute may demand any damages arising from such breach of the mediation clause by the other party.

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

- As regards the Med-Arb clause, based on the above description of pros and cons, the following wording should be recommended:


*All disputes, controversies or claims arising under, out of or in relation to this contract shall be first submitted to mediation and tried to be settled in an amicable manner. The mediation shall be deemed as condition precedent to any other procedure of dispute resolution, especially arbitration. If the mediation does not lead to any resolution within 3 months after the commencement then it shall turn into arbitration. The parties may agree on the extension of such obligatory period. Only in case of failure of the mediation shall all disputes, controversies or claims arising out of or in relation to this contract be finally decided with the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic according to its Rules by three arbitrators in accordance with the Rules of that Arbitration Court.*

- As regards the Settlement-Arb clause, based on the above description of pros and cons the following wording should be recommended:

*All disputes, controversies or claims arising under, out of or in relation to this contract shall be first settled in an amicable manner. If not settled within 3 months after the call of one party delivered to the other party, either party shall be free to deliver the matter to the arbitration court for a decision. The parties may agree on the extension of such obligatory period. Only in case of failure of the negotiation, shall all disputes, controversies or claims arising out of or in relation to this contract be finally decided with the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic according to its Rules by three arbitrators in accordance with the Rules of that Arbitration Court.*



## Denmark

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Jurisprudence from Danish courts on multi-tiered dispute resolution clauses is extremely scarce, and the courts thus have yet to determine the requirements of enforceability on such clauses.

However, Danish courts would most likely not enforce clauses on negotiation and mediation unless they have specific content regarding procedure, deadlines etc.

In the few rulings published, the courts have allowed parties to initiate litigation, despite the agreements being subject to multi-tiered dispute resolution clauses that imposed obligations for the parties to mediate before entering into litigation.

In one decision from the Maritime and Commercial Court of Copenhagen (SH2015.H-0041-10), the court refused to dismiss the case regardless of the existence of a well-defined mediation process. The alternative, which was a stay of the proceedings, was not argued before the court.

The court emphasized that the plaintiff's interest in suspending the statute of limitation through legal action was superior to upholding the mediation clause.

However, this reasoning might no longer be valid, since the law on the statute of limitation in Denmark has been changed, so that commencing a mediation process as well will suspend the limitation period.

The court also emphasized that the parties had entered into mediation after litigation had been initiated, and that this process had proven unsuccessful.

The decision could be interpreted in such a way that had it not been for the issue of statute of limitation, or the fact that a mediation process had in fact been initiated, the court would have dismissed the case due to the lack of compliance with the well-defined mediation process outlined.

In another ruling (The Danish Arbitration Court for Building and Construction's ruling of 20 June 2002, case C 7113), an arbitral tribunal found that a provision whereby a dispute regarding

an architect's fee should be decided by a disputes board set up by the Association of Architects did not preclude an arbitration.

The reason for this decision was that the dispute was considered to relate to the interpretation of the parties' contract. The scope of the multi-tiered dispute resolution clause was thus considered outside the scope of the actual dispute, and did therefore not affect whether the party was allowed to initiate arbitration, notwithstanding the clause.

**2. What drafting might increase the chances of enforcement in your jurisdiction? For example, in a number of jurisdictions the decision to enforce or not has come down to considerations such as the following:**

A. *Does the clause expressly provide that prior stages are "conditions precedent" to litigation or arbitration?*

To the extent that a clause specifically stated this, it would presumably be enforceable, however, a clause could also be enforceable in the absence of such wording.

B. *Does the clause use mandatory language (e.g., "shall" or "must" negotiate or mediate) as opposed to discretionary language ("may" or "should")?*

There is no doubt that the use of mandatory language will increase the likelihood of a multi-tier clause being enforced.

C. *Does the clause specify deadlines and time limits for each of the prior stages?*

It is essential for the enforcement of multi-tier resolution clauses that there are time limits on the initiation of each step as well as a deadline for each step to be completed.

D. *Does the clause specify the number of negotiation sessions?*

In itself, this would not be of material importance.

E. *Does the clause specify the identity of negotiation participants? E.G., project engineers, company officers, etc.*

There is no doubt that specifying the identity of the negotiation participants (the level within the organization) is relevant for the likelihood of a negotiation clause to be enforced.

F. *Does the clause specify mediation pursuant to specific rules?*

That is not essential, however, it is essential that there are rules for appointing a mediator and a deadline.

*G. Does the clause specify mediation using a particular dispute resolution institution?*

Not relevant.

*H. Does the clause specify consequences for failure to undertake the prior stages?*

That would of course be relevant with respect to enforcement.

Generally, it should be acknowledged that there are, as mentioned, very limited decisions on multi-tier clauses and their enforceability.

The comments above are based on the general approach of the Danish Courts to enforce contractual provisions.

However, as a general point, including well-defined information in the clause such as time, negotiating team etc. should be expected to increase the enforceability of the clause, as it is more easily tested by the courts whether the parties have complied with the conditions in accordance with the clause.

### **3. If your courts have enforced such clauses, how have they done so?**

No court judgments have been published yet, in which the courts have enforced a multi-tiered dispute resolution clause, however, it is likely that proceedings could be dismissed in case of a breach of a well-defined multi-tier clause.


In situations where none of the parties have complied with a less well-defined clause, the likely remedy could be awarding costs against the reluctant party.

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

There has not yet been published court judgments in which the courts have enforced a multi-tiered dispute resolution clause.

However, there is a non-published decision by an arbitral tribunal whereby a case was dismissed for lack of compliance with a Dispute Board-procedure.

## England

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

There are two key challenges a party may face when attempting to enforce a multi-tiered dispute resolution clause in the English courts.

First, the clause must be drafted such that its terms are sufficiently certain to be enforced. In English law, if the terms of a contract are uncertain or incomplete then it will not be binding. In practical terms, such clauses will need to set out the dispute resolution process in detail and avoid any gaps or ambiguity in the process outlined.

Second, if the relevant clause introduces (explicitly or impliedly) an obligation for a party to act in good faith then there is a degree of uncertainty as to whether it will be enforceable. Recent case law suggests that such obligations will be enforceable but the position remains uncertain.

#### Contractual certainty

The general rule in English law is that an agreement to negotiate is not enforceable. This rule derives from the principle that a contract must have sufficiently certain terms for it to be enforced.

In *Walford v Miles*, [1992] 2 AC 128 the sellers of a company had reached an oral agreement to negotiate with one potential purchaser exclusively and to terminate any negotiations with any other competing purchaser. The problem was that the agreement did not specify when this arrangement was to end nor was there any contractual mechanism whereby one party could conclude negotiations. For this reason, the Court held that the clause was void due to lack of contractual certainty.

Ambiguity or missing detail has resulted in the unenforceability of dispute resolution clauses in other cases. The precise criteria that is applied to assess such clauses has varied over time. The most stringent formulation is set out in a 2012 decision *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors*, [2012] EWHC 3198 (Ch). In *Wah*, the court held that for any positive obligation (for example, a requirement to attempt mediation prior to arbitration or bringing legal proceedings) to be enforceable it must:

- a) be a sufficiently certain and unequivocal commitment to commence a process;
- b) set out, with sufficient clarity, what steps each party is required to take to put the process in place;
- c) set out a sufficiently clear defined process to enable the Court to determine objectively:
  - i. what, under that process, is the minimum required of the parties to the dispute in terms of their participation in it; and
  - ii. when or how the process will be exhausted or properly terminable without breach.

Similarly, negative obligations (e.g. the preventing of the issuing of legal proceedings until a given event or step, such as a mediation) must be sufficiently defined and its happening objectively ascertainable so as to enable the Court to determine whether and when the event or step has occurred.

The threshold level of certainty required for a dispute resolution process to be enforceable is relatively high. In *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia*, [2012] EWCA Civ 638 the Court criticised a dispute resolution clause which required the parties to mediate prior to issuing legal proceedings as it did not set out a procedure to appoint a mediator. In *Wah*, despite the relevant clause setting out a detailed procedure, Hildyard J was able to identify various ambiguities and omissions in the proposed dispute resolution process and ultimately decided the relevant clause was unenforceable. Particular deficiencies were:

- a) the process did not state who was to be involved in it and what (if anything) they were required to do;
- b) vague terms were not explained (for example requiring parties to "*attempt to resolve the dispute*"); and
- c) it was unclear whether the decision maker had to reach a conclusion and/or take a particular step, or whether it could simply conclude that it would take no steps.

The stringent approach in *Wah* is to be contrasted with *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*, [2014] EWHC 2104 (Comm) where a multi-tiered dispute resolution clause was found to be enforceable which required the parties to seek to resolve the dispute by "friendly discussions", failing which either party could refer the dispute to arbitration.

The judgment in *Wah* also sits uneasily next to the comments of Coleman J in *Cable & Wireless Plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm):

*"... the English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references."*

It remains difficult to reconcile the approaches in these cases, particularly *Wah and Emirates*. There is a tension between the Court's desire to see clauses drafted clearly and without ambiguity and its desire to give effect to the parties' intention that disputes be governed by the terms of a particular clause. There remains a significant degree of uncertainty as to how strictly the courts will approach this issue in future cases.

### Good faith

In *Walford*, a prospective purchaser, in order to repair the defect in the agreement, asked the Court to imply a term that either party could conclude negotiations if they had a "*proper reason*" for doing so. The Court expressed concern that implying such a term would effectively impose an obligation on the parties to act in "*good faith*".

"Good faith" is a limited concept in English law and its application is evolving. There is no duty of good faith in pre-contract negotiations. The term has been implied into particular types of contract but it remains context dependent. In broad terms good faith imposes a duty on the parties to act fairly and honestly (for example in *Yam Seng PTE Ltd v International Trade Corporation Ltd*, [2013] EWHC 111 (QB)).

In the Court's view, acting in good faith was not compatible with the position of a negotiating party. In the words of Lord Ackner, a duty to negotiate in good faith is "*inherently repugnant to the adversarial position of the parties when involved in negotiations*" and "*unworkable in practice*". The Court thought that in a negotiation each party must be entitled to pursue his or her own interest and that might include withdrawing from negotiations (or threatening to do so) in order to elicit an offer on improved terms. The Court, being unable to reconcile good faith with a party's unfettered ability to advance its own interests in a negotiation, refused to imply the term suggested by the purchaser. As a result the agreement remained too uncertain to be enforced.

The position taken in *Walford*, where a requirement for opposing parties to negotiate in "*good faith*" effectively neutralised the relevant clause, has not been rigidly adhered to in subsequent case law. In both *Cable & Wireless* and *Emirates*, the Court held that clauses imposing a requirement for parties to act in good faith were enforceable. In *Emirates*, Teare J was critical of *Walford* stating that it arguably frustrates the expectation that when commercial parties have entered into obligations they reasonably expect the courts to uphold those obligations.

Both the *Cable & Wireless* and *Emirates* decisions were arrived at in subordinate courts to the House of Lords (now the Supreme Court) which decided *Walford*, and as a result neither decision is able to displace it. In order to reach their conclusions, the judges in *Cable & Wireless* and *Emirates* had to cite facts that distinguished the cases from *Walford*.

Neither *Cable* nor *Emirates* articulates very clearly what factual points will allow a party to distinguish *Walford* and overcome the good faith hurdle. However, there are a number of possibilities:

- a) In *Emirates*, Teare J sought to resolve the incompatibility of good faith with negotiation by stating that parties can agree to place constraints on their conduct

during a negotiation. This explanation is not entirely satisfactory as it is unclear why, if this were so, it was not possible to imply the good faith constraint into the contract in *Walford* and therefore it is unclear on what basis *Emirates* distinguishes itself.

- b) Both *Cable & Wireless* and *Emirates* were cases involving a dispute resolution clause within a larger contract whereas in *Walford* the relevant clause was the sole clause in the contract. Teare J, draws this distinction in *Emirates* observing enforcing obligations in dispute resolution clauses which are designed to avoid the expense of litigation or arbitration is consistent with public policy. Coleman J, in *Cable & Wireless*, states that courts should not accentuate uncertainty with "*in the field of dispute resolution references*".

However in *Wah*, which pre-dated *Emirates*, obiter comments are made which appear to be at odds with both possible exceptions:

*"... good faith is too open-ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve and when it can objectively be determined to be properly concluded. That appears to be so even if the provision for agreement is one of many provisions in an otherwise binding legal contract"*

The polar opposite approaches taken in *Wah* and *Emirates* in relation to good faith has introduced a considerable uncertainty into English law. Absent a clear articulation of principles from the Supreme Court there remains some uncertainty as to how courts will interpret such a provision in the future.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

There are two competing factors that must be considered when drafting multi-tiered dispute resolution clauses: the general desirability of simple and straightforward clauses balanced against the need for it to contain sufficient detail so as to make the dispute resolution process sufficiently certain to be enforced.

*Prior stages are "conditions precedent"*

Although it does no harm to state explicitly whether a particular dispute resolution stage is a condition precedent to another, the Court will look to substance over form. The key requirement to ensuring a stage is a valid condition precedent to a subsequent one is to ensure the relevant prior stage is drafted with sufficient particularity and clarity such that it is clear when the condition precedent stage has been satisfied.

*Mandatory language*

It is highly advisable to use mandatory language (e.g. "shall" or "must") as opposed to qualified or discretionary language (e.g. "may" or "should") when drafting dispute resolution clauses. Use

of qualified language may lead a court to conclude that a process is not sufficiently certain. Although there is no authority to suggest that the use of qualified language will always make a clause too uncertain to be enforced, in *Cable & Wireless*, when considering the enforceability of such a clause, the use of mandatory wording was an "important consideration" in the Court's decision to hold that it was enforceable. *Wah* also requires that a positive obligation must be "*sufficiently certain and unequivocal commitment to commence a process*" (emphasis added).

#### Detail of the process

English case law makes it very clear that the dispute resolution procedure outlined in a multi-tiered dispute resolution clause must be set out clearly. In *Sulamerica*, the Court of Appeal considered that to be valid a clause must "*define the parties' rights and obligations with sufficient certainty to enable it to be enforced*".

However, given the inconsistencies in the approach of the Court, it is logical to ensure any clauses drafted do meet the requirements of the more stringent test in *Wah*. In particular, the inclusion of strict time limits is advisable to ensure that a specified process is always terminable.

Given the risk of drafting a clause containing any ambiguity or omissions, it is often advantageous to incorporate a specific set of dispute resolution service provider rules into a multi-tiered dispute resolution clause. For example in *Cable & Wireless*, the clause stated that both parties would "*resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution ('CEDR')*". In that case the CEDR rules set out the dispute resolution process in detail and clarified, for example:

- a) the functions of the mediator, including his power to chair and determine the procedure for the mediation, his attendance at meetings and his assistance in drawing up any settlement agreement;
- b) the duties of the participants, in particular that of providing to CEDR at least two weeks before the mediation a case summary and all documents referred to in it; and
- c) the entitlement of each party to send in confidence to the mediator documents or information which it wished the mediator to have but did not wish to disclose to the other party.

#### Good faith

Given the uncertainty around the enforceability of good faith obligations, as described previously, it is advisable not to include explicit references to "good faith" or phrases from which it might be implied (e.g. "friendly negotiations" or "proper reason").

A further practical problem with good faith obligations, even if held to be enforceable, is the difficulty in proving what behaviour would and would not constitute acting in good faith. Teare J



considered this issue in *Emirates*: he stated that in some cases establishing a breach of such obligations would indeed be difficult but that in other circumstances it would be possible to identify such conduct. This view is in contrast to the Court's view in *Walford* which did not believe a court could ever police such an agreement.

In any case, from a practical perspective, negotiations are often conducted on a without prejudice basis, which means that parties will not generally be able to rely on accounts of such discussions to evidence a breach of good faith.

### Severability

Agreements will commonly contain a severance clause so that if a section is held to be unenforceable the agreement may remain enforceable by severing the relevant clause from the rest of the agreement.

However, there is reason to doubt whether such clauses will be effective to save the enforceable parts of multi-tiered dispute resolution clauses if one of the stages of such a clause is not enforceable (i.e. if any part of the clauses is defective, then the entire clause will be unenforceable). In *Wah*, Hildyard J made the following comment:

*"The court should not just extrapolate from a clause the parts which were sufficiently certain, and treat them as being the enforceable parts of the clause. As confirmed by Sulamerica, the court must be satisfied that each part of the relevant clause which was intended to be operative can be given certain legal content and effect."*

However, the lack of severability is not necessarily fatal. The court may still imply a term into the relevant clause to in order to 'fix' it.

### **3. If your courts have enforced such clauses, how have they done so?**

There have been only a limited number of reported cases where the courts have taken steps to enforce a multi-tiered dispute resolution clause.

In two of those cases *Cable & Wireless* and *Mann v Mann*, [2014] EWHC 537 (Fam) the Court opted to stay the proceedings on the basis that the agreed dispute resolution step had not been completed. In *Cable & Wireless*, the stay was for an unspecified period until after the parties had referred all their outstanding disputes to ADR. The Court stated that in the event that this was unsuccessful, the parties could lift the stay and resume the proceedings. In *Mann*, the proceedings were stayed for a fixed 8 week period to allow the ADR step to be completed, failing which the stay was to automatically be lifted.

In *Holloway & Anor v Chancery Mead Ltd*, [2007] EWHC 2495 (TCC) the Court was prepared to give a declaration that the claimants were entitled to engage a particular ADR step and refer their dispute to arbitration.

In *Emirates*, although the Court held that a particular ADR step was a condition precedent to arbitration, it thought that the step had already been taken so took no further action. The applicant had been seeking an order from the Court (pursuant to section 67 of the Arbitration Act 1996) that the assembled arbitral tribunal lacked the jurisdiction to hear the dispute.



There have been no reported judgments in English case law where a court has awarded damages to a party to compensate them for another party's breach of a dispute resolution clause. However, in obiter (non-binding) comments made in *Emirates*, the Court suggested that such damages could be assessed on the basis of loss of a chance.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The following clause is the CEDR international core mediation clause:

*"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 and the mediation will start, unless otherwise agreed by the parties, within 28 days of one party issuing a request to mediate to the other. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR. The mediation will take place in [named city/country; city/country of either/none of the parties] and the language of the mediation will be [English]. The Mediation Agreement referred to in the Model Procedure shall be governed by, and construed and take effect in accordance with the substantive law of [England and Wales]. If the dispute is not settled by mediation within [14] days of commencement of the mediation or within such further period as the parties may agree in writing, the dispute shall be referred to and finally resolved by arbitration. CEDR shall be the appointing body and administer the arbitration. CEDR shall apply the UNCITRAL rules in force at the time arbitration is initiated. In any arbitration commenced pursuant to this clause, the number of arbitrators shall be [1-3] and the seat or legal place of arbitration shall be [London, England]."*

## Estonia

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There is no court practice in Estonia in enforcement of multi-tiered dispute resolution clauses. Any such limitation clause collides with a constitutional right to recourse to court. §15 of the Constitution of the Republic of Estonia. As a result, our Civil Procedure Code (CPC) provides that the court has an obligation to conduct proceedings in a civil matter if a person files a claim with the court for the protection of the person's alleged right or interest protected by law (§ 3 of the Civil Procedure Code). In the cases prescribed by law, pre-trial proceedings shall be conducted before a person may have recourse to court and failure to do so renders action inadmissible (§ 371 paragraph 1 (3) of the Civil Procedure Code). However, this concerns only mandatory procedure or conciliation provided by law for prior extra-judicial adjudication of such matter (e.g. public procurement disputes). As a conclusion, an agreement on a multi-tiered dispute resolution in commercial contracts to settle a dispute first by “friendly discussion” is not a ground for refusal to accept action in the court.

This may be different if the parties have simultaneously agreed on arbitration. An agreement on arbitration is a voluntary waiver of one's constitutional right to have recourse to the court. The Supreme Court has found that by entering into an arbitration agreement, a person voluntarily waives to a substantial extent the guarantees applicable upon adjudication of a case in judicial proceedings (Constitutional judgement dated 2 July 2013 (case No 3-4-1-25-13). Available online: <http://www.riigikohus.ee/?id=1449>). Thus, the regulation stipulated in law (CPC) no longer applies and it may be that the arbitration court considers failure to comply with pre-trial “friendly discussion” procedure as a ground to refuse to accept the action. As said earlier, we are not aware of any such arbitration court practice. Moreover, arbitration is confidential and it depends on the rules of arbitration.

**1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?**

We are not aware that the Estonian courts have explicitly considered multi-tiered dispute resolution clauses. The Supreme Court has confirmed in a number of cases that the courts may refuse to accept an action only in cases where the parties have failed to follow mandatory pre-trial proceedings provided by law. As a result, an agreement on the basis of the law of obligation on a multi-tiered dispute resolution to settle a dispute first by “friendly discussion” is not a ground for the court to refuse to accept the action.

It can be that the breach of the agreed pre-trial procedure may lead to claim of damages. Depending on the circumstances it may be considered acting in bad faith and as a result, may lead to an obligation to reimburse the opponent’s consequential damages.

**2. What drafting might increase the chances of enforcement in your jurisdiction?**

A multi-tiered dispute resolution clause is not a ground to refuse to accept an action in court regardless of its wording. Moreover, if the wording of the clause is “too strong”, the question arises whether it contradicts the mandatory rules of the law since it deprives the parties of the opportunity to protect their rights in the court. Such clause may be declared void by the court.

As to arbitration, the case may be different since the parties have voluntarily waived their right to have recourse to the court. In this case, the wording of the multi-tiered dispute resolution clause should at least explicitly declare that it is a pre-condition for arbitration and include a conciliation procedure (terms for conciliation). However, we are not aware of any such arbitration court practice.

Other than that, Estonian law does not consider “agreements to agree” to be enforceable and a clause requiring the parties to engage in friendly discussions is no more than an agreement to negotiate.




**3. If your courts have enforced such clauses, how have they done so?**

We are not aware of any such court practice.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

We are not aware of one.

## Finland

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### Current Legal Status of Finland Regarding Multi-Tiered Dispute Resolution Clauses

In certain types of commercial agreements it has become quite customary in the Finnish business practice to adopt multi-tiered dispute resolution (**MDR**) clauses. Even though the adoption of MDR clauses has increased in certain types of agreements, their enforcement or interpretation is not widely discussed in the Finnish legal praxis or legal literature. In addition, Finnish legislation does not provide any specific statutory support to courts or arbitral tribunals to interpret or enforce MDR clauses.

MDR clauses adopted by Finnish entities are drafted in a variety of ways. Some are construed with a high degree of precision stipulating the exact procedure and length of the first tiers while others are drafted on a general level encouraging the parties to negotiate amicably before initiating legal proceedings.

Probably the most common type of MDR clause in commercial agreements in Finland includes an obligation to endeavour to negotiate in order to resolve disputes amicably before initiating legal proceedings. However, it seems that this somewhat vague obligation to first pursue settlement through amicable, but otherwise undefined, negotiations is usually agreed for the purpose of emphasising good relations between the contracting parties. We are not aware of any such clause being enforced so that the failure to undertake *amicable negotiations* would have constituted a bar for judicial proceedings.

Another commonly used type of MDR clause in Finland is agreeing on obtaining an expert determination before initiating legal proceedings in court or in arbitration. For instance, in share purchase agreements it is common to agree on the use of an independent auditor as a first tier in resolving issues arising from post-closing adjustments of the purchase price. Additionally, in construction agreements or other technical projects it is quite common in Finland to agree on the use of an external specialist or a joint committee in determining whether, for instance, the performance of a party duly conforms to agreed standards. These kinds of MDR clauses are usually drafted in a specific way determining the exact procedure to be fulfilled as a condition precedent before establishing the right to initiate judicial proceedings.

However, it seems that, apart from the aforementioned types of MDR clauses, Finnish companies are generally still somewhat reluctant to adopt MDR clauses in their agreements due to the risk of creating additional procedural problems rather than solving them. Additionally, the companies usually fear that the exhausting of the first tiers of an MDR clause would only result in additional costs, delay or an undesirable impediment for judicial proceedings.

In the event of an MDR clause being included in an agreement to which Finnish law is applied, the answer to the question as regards its enforcement and the effects thereof may be dependent on whether the final tier of the MDR clause refers the parties to resolve their dispute i) in litigation or ii) in arbitration. Thus, the enforceability of an MDR clause in these two different final dispute resolution mechanisms must be discussed separately.

### **Enforcement of MDR Clauses in Litigation**

As regards litigation as the final tier of the MDR clause, Finnish legal praxis includes one precedent concerning the enforcement of a contractual provision that limited the parties' right to initiate court proceedings before exhausting the agreed alternative means of dispute resolution.

In case KKO 1995:81 issued by the Supreme Court of Finland in 1995, the parties (a developer and a contractor) had agreed to apply the General Conditions for Building Contracts (General Conditions) to their construction agreement. According to a stipulation in the General Conditions, if the developer terminates the agreement due to the contractor's breach and completes the construction work himself, the accounts of the parties shall be settled in a final settlement procedure. More specifically, the settling of the accounts means that the parties' financial relations are settled by balancing, for instance, the difference between advance payments and actual costs.

In the case decided by the Supreme Court, the developer terminated the construction agreement due to delay of the contractor and sued the contractor for breach of contract claiming damages. The claimant filed its claim before any settlement of the accounts had been performed and did not even argue that the settlement of accounts would have taken place in accordance with the General Conditions. The respondent objected to the claim and argued that it was premature as the settlement of accounts had not been performed as agreed.

The Supreme Court stated that the parties had expressly agreed on applying the General Conditions to their agreement and that the purpose of the settlement clause of the General Conditions was to resolve all claims between the parties in one final settlement proceedings. The Supreme Court continued that in the absence of an express contract clause superseding the provision of the General Conditions, the claimant had no right to unilaterally bypass the parties' agreement and claim that the accounts of the parties should be settled by some other means than the one stipulated in the General Conditions. Thus, the Supreme Court enforced the parties' agreement by dismissing the claim as premature (i.e. inadmissible for the moment).

Even though the aforementioned case did not concern a typical MDR clause *per se*, the precedent established by this ruling indicates that the Finnish courts could give effect to the kinds of contractual provisions that are typical in the first tiers of MDR clauses.

It should be noted that initiating legal proceedings before exhausting the first tiers of a valid MDR clause could be considered as procedural impediment to legal action. This is to say that, pursuant to the Code of Judicial Procedure, the respondent should invoke the claimant's failure to undertake a prior stage of an MDR clause already while submitting its first statement to the court at the risk of forfeiting its right to invoke the defence later during the proceedings. Under Finnish law, the courts do not on their own initiative take into account whether the parties have exhausted the prior stages of an MDR clause.

As regards the obligation to bear legal costs, the general rule of the Finnish Code of Judicial Procedure stipulates that the losing party is usually liable for all reasonable legal costs incurred by the necessary measures of the opposing party. The dismissal of a claim due to its premature nature is considered as losing in the sense of the parties' responsibility to bear legal costs.

As regards the *res judicata* effect of dismissing a claim as premature, under Finnish law the *res judicata* effect of a previous judgment extends only to the legal facts that could have been invoked already during the earlier proceedings. This is to say that, for instance, the ruling in the case KKO 1995:81 would not prevent the parties from initiating new court proceedings in terms of a disputed subject matter of the settlement of the accounts later on.

### **Enforcement of MDR Clauses in Arbitration**

According to our experience, in commercial agreements it is more common to choose arbitral proceedings as the final tier of an MDR clause. In such cases, the starting point regarding the evaluation of the MDR clause's enforceability is slightly different. This is due to the fact that, contrary to the proceedings in court, the jurisdiction of an arbitral tribunal is based on the parties' consensual agreement. One of the most important characteristics of arbitral proceedings under

the Finnish Arbitration Act is party autonomy, according to which the parties have the right to agree on the jurisdiction of the arbitral tribunal as well as on the prerequisites to be fulfilled before the tribunal has the right to examine the matter on its merits.

We are not aware of any legal precedents regarding a situation where a party has failed to undertake a prior stage of an MDR clause and proceeded to arbitration prematurely. However, there are several different alternative outcomes in such an event.

Firstly, pursuant to the Finnish Arbitration Act, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings if the tribunal finds that the continuation of the proceedings has for some reason become impossible. This could be the case if the respondent invokes the claimant's failure to comply with the first stages of an MDR clause and claims that consequently, the tribunal lacks jurisdiction. If the tribunal considers that the claimant's failure to comply with the MDR clause would result in a lack of jurisdiction, it could render the continuation of the proceedings impossible in the sense of the Arbitration Act and thus result in the tribunal issuing an order for the termination of the proceedings.

Another possible outcome could be that the tribunal would accept jurisdiction but dismiss the claim as premature (i.e. inadmissible for the moment) due to the claimant's failure to comply with the condition precedent for initiating arbitral proceedings. This was the case in the aforementioned judgement of the Supreme Court in the dispute regarding the settlement of the accounts in accordance with the General Conditions applicable to the parties' agreement.

The third possible outcome could be that the arbitral tribunal would dismiss the claim as inadmissible due to the lack of need for legal protection, which is generally considered as a procedural requirement under Finnish law. Consequently, in the event of a valid MDR clause being in force between the parties, the tribunal could consider that the claimant would not have sufficient need for legal protection through arbitration due to its possibility as well as obligation to exhaust the first stages of the MDR clause before initiating arbitral proceedings.

The fourth possible outcome could be that the tribunal would decide to stay the proceedings for a certain period of time or until further notice. This could be deemed as an appropriate measure in order for the parties to fulfil the prerequisites of the first tiers of their MDR clause. It should be noted that the Finnish Arbitration Act does not provide any clear statutory support to this kind of procedure. In practice, however, tribunals have interrupted or suspended proceedings, for instance, if the parties have requested a stay of the proceedings in order to negotiate a settlement.

It should be noted that none of the aforementioned alternative rulings issued by the arbitral tribunal would be deemed as final in the sense that they would have *res judicata* effect. Consequently, in all of the aforementioned alternatives the parties would have the right to initiate new arbitral proceedings in terms of the subject matter later on when the condition precedent would have been fulfilled.

In terms of responsibility to bear legal costs in relation to the aforementioned alternative outcomes of the arbitral proceedings, the Finnish Arbitration Act stipulates that unless otherwise agreed by the parties, the arbitral tribunal may, in its *award* or in *any other decision concerning*



*the termination of the arbitral proceedings*, order a party to reimburse, in whole or in part, the legal costs of the other party, in accordance with the provisions of the Code of Judicial Procedure on the compensation for legal costs, where applicable. Should the tribunal decline jurisdiction or dismiss the claim due to the violation of an MDR clause, the claimant would be considered the losing party and generally obligated to bear the legal costs of the respondent.

In relation to the obligation to bear the costs and fees of the tribunal, the Finnish Arbitration Act stipulates that, unless otherwise agreed or provided, the parties shall be jointly and severally liable to compensate the arbitrators for their work and expenses. Furthermore, it is stipulated in the Arbitration Act that, unless otherwise provided in a manner binding on the arbitrators, the arbitral tribunal may in its award fix the compensation due to each arbitrator and order the parties to pay it. Even though the wording of the Arbitration Act refers only to the tribunal's right to fix their compensation in an *award*, in practice it is generally considered that the tribunal has this right to fix their own compensation also when rendering any other decision concerning the termination of the arbitral proceedings.

All of the aforementioned alternative outcomes of arbitral proceedings would probably be deemed as either awards or other decisions concerning the termination of the arbitral proceedings except for the tribunal's decision to stay the proceedings. Consequently, while issuing an order to stay the proceedings, the arbitrators probably could not order the claimant to reimburse the respondent's legal costs or order their own fees and costs to be paid by the parties.

### **Drafting an Enforceable MDR Clause**

The question of how the wording of an MDR clause affects the chances of its enforcement has not been discussed in the Finnish legal literature in detail, nor have the Finnish courts taken any specific stand on the matter. Thus, the enforceability of an MDR clause would probably be decided based on the prevailing principles of the Finnish general contract law.

Under Finnish law the main goal of contractual interpretation is to determine what the parties intended to agree on at the time of concluding the agreement. If the parties' agreement is in writing, the general assumption is that the wording of the clause reflects the mutual intentions of the parties. This is to say that the arbitral tribunal or the court shall interpret and give effect to the MDR clause in accordance with the parties' intentions regarding the effects of their MDR clause *in casu*.

Consequently, the wording of the MDR clause has great significance in terms of the chances of its enforcement. If the MDR clause is of a general nature and stipulates, for instance, that the parties should pursue the settlement of disputes through *amicable negotiations*, it is likely that the intention of the parties' was only to emphasise their good relations rather than actually bar access to judicial proceedings. Thus, we would consider it less likely for an arbitral tribunal or a court to enforce such a clause. Alternatively, due to the ambiguous wording of the clause, an arbitral tribunal or a court could also consider that the intention of the parties was to agree that almost any kind of communication between the parties would be sufficient to fulfil the requirement of negotiating *amicably* or *in good faith*.

Had the parties' intention been to actually bar access to judicial proceedings before conducting certain negotiations, the interpretation of a court or an arbitral tribunal could very well be that the parties would have probably drafted their MDR clause with a higher level of precision, stipulating for instance the specific means or the explicit time period of the required negotiations. A precise and compelling wording regarding the first tier procedure would simply indicate more clearly that the parties intended to agree that a violation of the MDR clause would constitute an enforceable impediment to judicial actions.


If a contractual obligation to negotiate amicably is meant only to facilitate the negotiation process of the agreement and not in fact constitute an impediment to judicial proceedings, we would suggest to note in the MDR clause that the dispute may in any event be submitted to litigation or arbitration after a certain final deadline starting from a specific and verifiable occasion.

On the other hand, if an MDR clause is intended to be enforced in Finland, we suggest the following matters to be taken into account when drafting the clause:

- Compelling wording (i.e. *shall* or *must*) would most likely be a prerequisite for the enforcement of an MDR clause. An MDR clause drafted by using discretionary wording (i.e. *should* or *may*) would probably not be enforced in Finland.
- Establishing a specific time frame during which the first tiers are to be exhausted and an exact time from which said time frame is counted would probably increase the chances of the enforcement of an MDR clause.
- The accuracy and unambiguity of the first tier procedure to be exhausted before granting a party the right to initiate judicial proceedings would most definitely be of great importance when the enforcement of an MDR clause is considered in court or in arbitration.

The adoption of the aforementioned matters would support the interpretation that the mutual intention of the parties was in fact to agree that the failure to undertake the specific first tier proceedings would constitute a bar for judicial proceedings in an enforceable way.

## France

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

After some hesitation reflected by conflicting decisions rendered by the various sections of the French Cour de cassation, the Supreme Court in France in civil and commercial law matters, the rule has now been established since 2003 (the “*Poiré v. Tripier*” decision of February 14, 2003: Rev. Arbitrage 2003, page 403; 19 Arbitration International 368 [2003]), that multi-tiered or escalation dispute resolution clauses will be enforced in France provided the prior conciliation or mediation stage is found mandatory and not simply optional (1.1.).

The few court decisions on that same issue that followed *Poiré v. Tripier* have all upheld the same rule, but have narrowed it to a rather restrictive interpretation of the facts or a restrictive reading of the clause at issue (1.2.).

More recent trends have advocated that litigation generally be preceded by attempts to negotiate or settle through conciliation or mediation, culminating very recently into a decree of March 11, 2015 that now requests an ADR approach in all civil and commercial litigation in France (1.3.).

#### 1.1. The *Poiré v. Tripier* 2003 Decision

This 2003 decision was issued by a “Chambre mixte” of the Cour de cassation, i.e. a panel of Supreme Court judges from each of the various sections of the Cour de cassation and chaired by the presiding judge of the court, and accordingly prevailed over the earlier dissenting decisions rendered by separate sections of the court.

Specifically, the 1<sup>st</sup> civil section of the Cour de cassation had earlier resolved that conciliation language in a dispute resolution clause, even spelled out as being mandatory, could not be enforced because there was no remedy in the event of a party’s non compliance (January 23, 2001, “*Clinique du Morvan*”). In contrast, the 2<sup>nd</sup> civil section of the same court had issued a conflicting ruling by finding, in a very similar contractual situation (in both cases these were mandatory conciliation clauses in contracts between doctors and private hospitals), that the action should be denied as it was not admissible when filed without having first complied with the mandatory conciliation clause (July 6, 2000, “*Polyclinique des Fleurs*”: Rev. Arbitrage 2001, page 749).

Legal authors had strongly criticized the position of the 1<sup>st</sup> civil section of the Cour de cassation (Jarrosson, Rev. Arbitrage 2001, page 752), arguing that a contract clause had to be complied with and enforced, and could not be possibly dismissed as being without a remedy. But there remained uncertainty as to the type of remedy that should be applied. Damages were not practical because claimants would in most cases not be in a position to assess, and much less prove the quantum of their losses derived from their opponent's refusal to negotiate or attempt conciliation. Specific performance, such as by awarding a periodical (e.g. daily) fine until the defaulting party complied with the negotiation or conciliation clause, was equally impractical as there could be ceaseless disputes as to whether the defendant's conduct should qualify as satisfactory compliance with the prelude provided in the dispute resolution clause. Finally, a flat inadmissibility decision was also unsatisfactory as it could be held to prejudice the possible resumption of the court proceedings after negotiation or conciliation had, as a hypothetical, been carried out but proved unsuccessful.

The solution reached in 2003 by the Cour de cassation in a plenary session in *Poiré v. Tripier* has been hailed as quite reasonable, as it upheld the decision of the appellate judges who had denied the claim on the merits by finding it not admissible “*at this stage*” of the proceedings (“*en l'état*”), as this had been before a mandatory conciliation had been complied with. In other words, the “*at this stage*” cautionary language in the ruling by the court of appeals did not prejudice the claimant's right to reiterate proceedings in due course if needed, meaning after attempts at negotiation or conciliation had been conducted and failed:

*“a contract clause that established a mandatory conciliation procedure prior to court proceedings, which in itself is lawful, and which when applied stops until its completion the period of limitations from running, constitutes a bar to proceedings which is binding upon the judge if invoked by the parties; by holding that the deed for the transfer of assets provided for conciliation in advance of any court action for disputes arising out of the performance of the contract, the court of appeals has appropriately found that the transferor of the assets should be barred from taking action in court on the merits of the contract before the conciliation procedure had been carried out”.* (free translation from the French)

Accordingly, under the rule set forth by the Cour de cassation in *Poiré v. Tripier*, negotiation or conciliation clauses embedded in a dispute resolution mechanism will indeed be enforced by denying action on the merits before the negotiation or conciliation is carried out, without preventing further court action in due course, the only conditions being (i) that the negotiation or conciliation be expressed as being mandatory and not just optional, and (ii) that the parties invoke that clause, meaning that the judge will not deny the action on the merits *sua sponte* but only if the defendant claims that he had been defrauded of his rights to a conciliation or a negotiation as stated in the contract.

In addition, the ruling in *Poiré v. Tripier* solved another issue, which is the statute of limitations, as the court found that the implementation of the negotiation or conciliation clause stops the period of limitations from running until the end of the negotiation or conciliation procedure. Admittedly, there is some uncertainty as to when an unsuccessful negotiation process should be held to have been completed, for the purposes of the statute of limitations; however, by

mentioning the limitations period the court addressed one of the main objections expressed by opponents of the conciliation phase, which is that by forcing parties into a negotiation or conciliation preamble to litigation, litigation on the merits may be delayed for a time-period which is beyond the plaintiff's control, which entails that the plaintiff incurs the risk of being barred from action if the limitations period stops running only when filing an action on the merits.

## 1.2. The More Recent French Court Decisions

The few French court decisions that followed *Poiré v. Tripier* have all acknowledged the same rule, but often narrowed it to a rather restrictive interpretation or a restrictive reading of the clause at issue.

- (i) Proving the existence of the conciliation clause: the clause must be in writing in the contract:

In a decision of May 6, 2003 ("*Clinique du Golfe v. Le Gall*", *Semaine Juridique*, G, Feb. 11, 2004, II 10021), the Cour de cassation ruled that the clause had to be written in the contract between the parties and could not be inferred from model contracts even if these were commonly used in the trade. That case also dealt with a dispute between a doctor and a private hospital, like the 2000 and 2001 earlier cases by the Cour de cassation discussed above, but while in those earlier matters the conciliation clause was written in the contract at issue, in *Clinique du Golfe* the clause derived from model contracts prepared by Unions and commonly used, but had not been incorporated into the contract even by reference.

The *Clinique du Golfe* decision was criticized as authors commented that these model contracts were commonly used in the medical profession, and particularly that conciliation in advance of litigation was an established usage for doctors and private hospitals, such that they should have been enforced under the general Civil Code rule (section 1135) that provides for contract obligations to be enforced in accordance with the terms of the contract and any additional implication deriving from the law or applicable usages of trade. Accordingly, the *Clinique du Golfe* decision should be read as a narrow interpretation of the *Poiré v. Tripier* rule, because a duty to a prior conciliation operates as an exception from the ordinary situation where, until the issuance of the March 2015 decree mentioned in 1.3 below, judges may be referred to immediately as the dispute arises, and exceptions are applied restrictively.

In contrast, however, a multi-tiered dispute resolution clause in an architect's contract that provided for the prior submission of the dispute to the architects' regional association structure for their opinion, was found enforceable against the purchaser of a property who inherited his seller's rights against the architect by way of subrogation, although that same clause had not been reiterated or even incorporated by reference in the agreement between the buyer and the seller of the property (Cour de cassation, April 28, 2011, comments by M. Billiau, *Semaine Juridique*, G, Sept. 26, 2011, doct. 1030, §8).

- (ii) To be enforceable, the escalation clause must provide for mandatory and not optional conciliation or mediation:

In a decision of February 6, 2007 (“*Placoplâtre v. SA Eiffage TP*”, 1<sup>st</sup> civil section of the Cour de cassation, comments by J. Béguin, *Semaine Juridique*, E&A, Aug. 30, 2007, 2018, §16), the Cour de cassation upheld a court of appeals that had denied the enforcement of an escalation clause which in its view did not provide for a mandatory duty to engage into conciliation. The clause, which derived from a professional standard rule for constructors, provided that “*for the settlement of disputes likely to arise in relation to the performance or the payment of the construction contract, the contracting parties have to consult each other in order to submit their dispute to arbitration or to reject arbitration*”. Applying, as in the few cases mentioned above, a restrictive reading of the language of the clause, the courts found that failing the reference to “conciliation”, a “consultation” which on the face of the clause appeared limited to deciding whether or not to resort to arbitration, could not be equated to a mandatory “conciliation” which would have been aimed at resolving the dispute altogether.

In the same vein, in a more recent decision of January 29, 2014 (“*Knappe Composites v. Art Métal*”, 3<sup>rd</sup> civil section of the Cour de cassation, n°13-10833), the Cour de cassation reached the same ruling for a clause from another professional standard rule for constructors with language nearly identical to the clause in *Placoplâtre*.

However, in a March 28, 2012 decision (“*Hainan Yangpu Xindadao Industrial Co Ltd*”, 1<sup>st</sup> civil section of the Cour de cassation, n°11-10.347,393), the Cour de cassation ruled that the escalation clause should be enforced, although it was confronted with two conflicting French translations (one from the English text, the other from the Chinese version) of a clause that stated, in English, that “*disputes arising out of the performance of the agreement between the parties shall be settled by amicable consultation*”, and “*disputes that could not be so settled shall be submitted to the China International Economic and Trade Arbitration Commission (CIETAC) for mediation or arbitration*” (free translation back into English of the French translation of the English version), and in Chinese, that “*in case of dispute, the parties shall endeavour to reach an amicable solution*” and “*failing so, this dispute must first be referred to CIETAC for settlement*” (free translation into English of the French translation of the Chinese version).

- (iii) Courts also have a narrow interpretation of the scope of the conciliation clause:

Transactions for the sale of real property are ordinarily broken into two stages: first an option agreement, followed by the final deed of transfer. In a decision of October 20, 2009, the court of appeals in Montpellier found that a clause that provided for a mandatory conciliation procedure but only appeared in the option agreement and had not been reiterated or cross referenced into the final deed of transfer would not apply to disputes arising out of that deed of transfer, but only to disputes relating to the option agreement (comments by J. Béguin, *Semaine Juridique*, E&A, Feb. 10, 2011, 1109, §9).

As an illustration of an equally narrow reading of the scope of a conciliation clause, the court of appeals in Douai found in a May 15, 2007 decision (“*Mitsui Sumitomo Insurance Company Europe Limited*”, n°05/04204), that a mandatory conciliation clause in a contract only applied to

disputes bearing on the language of the contract rather than disputes arising out of the performance of the contract.

Finally, the Cour de cassation ruled in a June 12, 2012 decision (“*SAS Eurauchan v. Sté Moyrand Bally*”, *Semaine Juridique*, E&A, Oct. 4, 2012, 1585), that a mandatory conciliation clause in a distribution agreement would not apply to a liability action grounded in tort rather than based on the contract, although the clause stated that it applied to all disputes relating to the termination or expiration of the contract “*for any cause whatsoever*”.

Specifically, the clause read as follows: “*In the event that a dispute should arise as to the validity, the interpretation, the performance or the termination for any cause whatsoever of this agreement, the parties agree to look for an amicable solution. In the event that such dispute should be unable to be resolved amicably, the parties agree to refer their dispute to mediation under the aegis of the Center for Mediation and Arbitration of the Paris Chamber of Commerce and Industry*” (free translation from French). But the action was grounded in tort, on the basis of a statute providing for tort liability in the event of “brutal termination of an established commercial relationship” (section L.442-6 of the French Commercial Code), and accordingly was based on the termination not just of that specific distribution agreement, but of the parties’ overall relationship made of a stream of consecutive distribution agreements. Therefore, using a narrow reading of the scope of the clause, the courts denied enforcement of that same clause in the context of that specific dispute.

### 1.3. The Decree of March 11, 2015

Following a trend in favor of ADR procedures, particularly as expressed in the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on mediation, the French government has just issued a decree on civil procedure that now requests an ADR approach in all civil and commercial litigation in France.

Specifically, decree n° 2015-282 of March 11, 2015 requires under sections 18 and 19 that, save in case of a documented emergency, every summons and complaint filed in civil or commercial matters state the action taken towards an amicable resolution of the dispute. The decree further states that its effective date is April 1, 2015.

Because this statute is extremely recent and unexpected, comments have yet to be published as to its true implications in civil practice. Initial reactions concur in finding that there is no remedy in case the claimant should fail to have taken any action towards amicable settlement of the dispute, or should fail to identify such action on the face of the complaint: in other words, the claim will not be denied or found not admissible at law for that reason. That being so, this might influence the judges towards a more flexible approach to escalation clauses rather than the narrow interpretation standards reviewed under 1.2 above.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Based on the case law reviewed above, we would briefly summarize as follows the issues to be kept in mind when drafting a multi-tiered dispute resolution clause from the perspective of its enforcement by French courts.

- (i) the clause must be spelled out in writing in the contract, as the defendant may not rely on a clause deriving from another contract or a model clause or existing usages of trade;
- (ii) the clause must contain unambiguous mandatory rather than optional or discretionary language;
- (iii) it would help if the clause spelled out that failure to comply with the terms of the clause bars the filing of proceedings on the merits, until full compliance with the same;
- (iv) it would also help to specify a time-limit;
- (v) if the parties have in mind not just open attempts at negotiating but specific conciliation or mediation procedures, the clause should identify specific rules or a particular dispute resolution institution;
- (vi) the purpose of the clause must clearly state that it is geared towards the amicable resolution of the dispute and not just whether or not to refer to arbitration or to courts;
- (vii) the scope of the clause must be as large as possible, and refer, illustratively, to disputes arising out of or in connection with the contract, or its validity, interpretation, performance, termination or non-renewal, and whether claims are based in tort or in contract liability.

### **3. If your courts have enforced such clauses, how have they done so?**

As stated above, this was by dismissing litigation where the parties have failed to undertake the prior stages, but dismissal was specified as being correlated to the status of the dispute, meaning that claimant is free to reinstate proceedings ultimately in due course, and the limitations period will stop running pending compliance with the pre-litigation clause.

Also, dismissal only applies to claims on the merits, and is without prejudice to claims brought in summary proceedings for transitory or provisional relief dictated by emergency situations.



## Guatemala

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

First of all, it is important to note that Guatemala has an Arbitration Act, substantially based on the 1985 Uncitral Model Law on International Commercial Arbitration. Therefore, no express reference is made to “multi-tiered dispute resolution clauses”, as it only defines an “arbitration agreement” and the form that such agreement must comply with. (Decree 67-95 of Congress, articles 4 (1) and 10 (1) ).

Therefore, challenges to enforce a “multi-tiered dispute resolution clause” (simply “the Clause”, or “Clauses”) are principally related to a good drafting of such Clauses. Poor quality drafting can lead, directly, to confrontations on what was agreed upon by the parties.

There is just one case known to this reporter, after due research, related to enforceability of a Clause. It was related to a request of AMPARO by one party. (AMPARO is a type of constitutional procedure in which a party claims a violation of a fundamental right, and requests protection from a Court, known as Court of Amparo, in order to gain protection and termination of such violation of his, her or its rights. Literally, “amparo”, translated to English, means “protection”.) The particulars of such case are described below, through some of the issues covered under this questionnaire.

It is the opinion of the reporter, based on practice both as Arbitrator and Member of the Board of Directors of a local arbitration institution, that parties to contractual arrangements where an arbitration agreement has been included, normally do not contemplate multi-tiered dispute resolution mechanisms. The use of mediation is not favored in local practice. The reasons may be related to insufficient levels of confidence on the mechanism, or its final perceived, non-binding nature. As a matter of fact, the Arbitration Act of Guatemala, though its title, contains two provisions in it, in which “conciliation” is briefly regulated. Article 49 contains a definition of “conciliation”, and article 50 succinctly refers to some characteristics of it, and it states that the result of the conciliation shall be regarded as “hard evidence” in a judicial or arbitral proceeding.

Other alternative dispute resolution mechanisms, such as conciliation or mediation, except for some particular type of cases (in subject-matters related to family law and labor law, prior

conciliation efforts are required before actually filing a law suit), are not even mandatory or requested before actually filing a lawsuit in a local competent court. Therefore, there might be some culturally-based reasons not to favor the multi-tiered dispute resolution systems available or favored in some other jurisdictions. That is not to say that parties cannot, and actually do in rare occasions, include Multi-Tiered Dispute Resolution Clauses in their contractual arrangements.

Some practitioners might see or interpret obligations to “negotiate in good faith” as a prerequisite to initiate arbitration, or even, mediation before arbitration, as a “cool off” period.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

No other recommendation can be better than simple and very clear drafting of the respective Clause.

*For example, in a number of jurisdictions the decision to enforce or not has come down to considerations such as the following:*

- A. *Does the clause expressly provide that prior stages are “conditions precedent” to litigation or arbitration?*

Calling a prior stage to arbitration or litigation as a “condition precedent” (condición suspensiva), might be a good legal technique. But it should be carefully drafted, in order to avoid unnecessary delays in the future. For example, no ambiguity shall be left in topics such as when the condition precedent starts and for what period of time, in order to have certainty of the moment the condition has been met or any prior state, duly exhausted, either by actual use, or by waiver to actually use it during such period of time.

In Guatemala, perhaps the only instance where the use of other means of dispute resolution must be actually exhausted before commencing arbitration, is in investment disputes. In particular, investment disputes arising out of “protected investments” under USA-DR-CAFTA (art. 10.16. 2 and 3). A mandatory “cool off” period of six months is provided. An arbitral tribunal may consider this period as part to the consent to submit the dispute to arbitration, in the sense that if such period has not expired, arbitration proceedings might be rejected through a defense of lack of jurisdiction. Of course, the possibility of an amicable resolution between the parties is clearly favored during such 6-month periods.

- B. *Does the clause use mandatory language (e.g., “shall” or “must” negotiate or mediate) as opposed to discretionary language (“may” or “should”)?*

If parties are really inclined to multi-tiered dispute resolution provisions, they should avoid as much as possible, discretionary language. Mandatory language such as “shall” or “must” is highly recommended.

- C. *Does the clause specify deadlines and time limits for each of the prior stages?*

Not contemplating a specific deadline or a term to exhaust prior stages to litigation or arbitration, is a call for delay or even worse, malicious or bad-faith litigation.

D. *Does the clause specify the number of negotiation sessions?*

Stipulating for a number of negotiation sessions is not common practice in Guatemala, although it would be completely legal to do so. Notwithstanding this, it is not recommended, because if one party simply does not appear in one of the sessions, a new dispute may arise over whether the number of negotiation sessions needs to be actually exhausted, or over whether the non-appearance of one or both (or all) parties shall be regarded as an actual “session”.

E. *Does the clause specify the identity of negotiation participants? E.G., project engineers, company officers, etc.*

This is rarely seen in Guatemala. Dispute resolution provisions in construction agreements or in other sorts of more “technical” contracts, such as power purchase agreements, might include “technical disputes” resolution methods, calling for the direct participation of some company officers, before filing for another dispute resolution method.

F. *Does the clause specify mediation pursuant to specific rules?*

That would normally be the case. In the Guatemalan legal community, there are two well-known and well-established arbitration and conciliation centers. Reference to the conciliation rules of those institutions are expected if any reference is made to conciliation prior to arbitration proceedings.

Notwithstanding the prior statement, practice demonstrates that parties prefer to refer to “negotiation in good faith periods” between them as a prerequisite to initiate arbitration, rather than to conciliation or mediation.

G. *Does the clause specify mediation using a particular dispute resolution institution?*

Please, see response to item F above.

H. *Does the clause specify consequences for failure to undertake the prior stages?*

Again, this depends on drafting techniques and negotiation abilities of the respective clause, but in the cases of actual multi-tiered dispute resolution clauses analyzed in preparing this report, normally there are no reference to consequences for failure to undertake prior stages.

### **3. If your courts have enforced such clauses, how have they done so?**

A. *Dismissing litigation where the parties have failed to undertake the prior stages.*

As stated before, there is just a single case where the subject-matter of the judicial dispute has

been the enforceability of a multi-tiered dispute resolution clause. The case is an “Amparo” action. Case No. 251-2009, Court of Constitutionality.

Parties to this case provided in the clause that, prior to commencing arbitration under the rules of the Arbitration and Conciliation Center of the Chamber of Commerce of Guatemala, a 30 day period for Conciliation should be exhausted. Both arbitration and conciliation should be conducted under the applicable rules of said Center. If after the 30 day period, parties did not reach a resolution of the dispute through conciliation, arbitration was immediately available.

Notwithstanding that one party actually initiated the conciliation procedure, the other party never appeared in any hearing, though duly notified such procedures. Once the 30-day period was completed, the claimant requested a certificate from the Center to declare that the “conciliation period” was exhausted. Once the Center issued such certification, the respondent immediately reacted, filing for a legal recourse that is only available for administrative resolutions issued by governmental authorities. As the Center rejected “in limine” such recourse, for being completely inapplicable, the respondent filed for a constitutional protection (Amparo) against the determination of the Center to issue such documentation.

The case ended up at the Court of Constitutionality (CC), as all “amparo” procedures can be subject to second and final instance at such high court. CC rejected all arguments that constitutional rights were violated by the Center, including due process, right to access to justice, and other internationally recognized human rights, and denied the writ of protection requested, meaning that the arbitral proceedings should be continued.

*B. Staying litigation or arbitration until the parties have completed the prior stages.*

Based on the brief description of the case, and due to the fact that, in essence, the arguments of respondent were considered in bad faith (penalties were imposed on that party for seeking unfounded constitutional protection), all to the contrary of staying arbitration, the claimant was allowed to continue with the arbitration proceedings.

*C. Awarding attorney fees and costs to a party that commenced litigation or arbitration without first undertaking the prior stages.*

Again, based on the only case reported, the attorney fees and costs were imposed on the party trying to evade arbitration by simply not appearing during the conciliation, a step considered as a prerequisite or “condition precedent” to arbitration.

*D. Vacating arbitration awards or reversing court judgments where the parties failed to undertake the prior stages.*

No cases are known that could have led to such judicial determination. The Guatemalan Arbitration Act does not contemplate a direct or express cause for annulling or granting a stay of enforcement of an arbitration award due to a failure to undertake prior stages. But, article 43 (2) (a) (iv) provides, following the text of the Model Law of UNCITRAL, that if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,

or, failing such agreement, was not in accordance with such Law, such cause can be claimed in an annulment proceeding.

This provision of the Arbitration Act may be used for such request to vacate an arbitration award if a multi-tiered dispute resolution clause was originally provided for and the prior stages were not fully satisfied.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The provision subject to judicial review in Case 251-2009, CC, that was found, and remains, enforceable in Guatemala, provides as follows:

*“In the event of any disputes arising out or in connection with the application, interpretation or fulfillment of this Agreement, either during its term or at its termination, such disputes shall be resolved by conciliation. If within a period of 30 days since the commencement of conciliation, the conflict is not resolved, then it shall be finally resolved by arbitration “in equity”, and all of the above, according to the Rules of Conciliation and Arbitration of the Center of Arbitration and Conciliation (CENAC) of the Chamber of Commerce of Guatemala.”*

## Hungary

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

First of all we need to look at the statutory legal provisions governing the regime of multi-tiered dispute resolution procedures preceding litigation in the courts of the state.

The Civil Procedural Act sets out that business entities must make attempts to settle their disputes through amicable discussions before filing the statement of claim to the court of the state (Section 121/A of the Civil Procedural Act). If such efforts are not successful and the claimant files its claim, it must attach to the claim document all correspondences, minutes, etc. that prove that the parties have complied, or the claimant has made attempts to comply, with this statutory requirement. This statutory regime applies irrespective of any provisions of the contract between the parties and its dispute resolution clause; and the parties must make such attempts even if their contract is silent on this particular issue. There are certain types of litigation before the court of the state where this requirement does not apply, and the claimant may file its claim without any efforts to settle the dispute through amicable discussions (such as cases with a value in excess of approximately EUR 1,333,000).

In relation to these statutory legal grounds it needs to be examined what happens if the parties' contract contains a multi-tiered dispute resolution clause, and the claimant fails to adhere to the specific procedural order set out in that clause before filing the statement of claim with the court of the state. General court practice shows a trend where such non-compliance with the multi-tiered dispute resolution clause does not necessarily result in the dismissal of the claim. The court only examines whether the general requirements set out in the Civil Procedural Act (as explained in the preceding paragraph) are fulfilled, and if it finds that the claimant has attempted to settle the dispute then the claim will not be dismissed, even if such attempt did not conform

with the multi-tiered dispute resolution clause. A relevant court decision held that such dismissal would hinder the claimant's constitutional right to seek judicial remedy, and the breach of the multi-tiered dispute resolution clause in itself does not provide sufficient grounds for the dismissal of the claim.

However, in the absence of statutory guidance on this particular issue prevailing over the courts of the state, it is difficult to predict how a court would judge such matters in a specific case. In certain cases the courts examined this topic from the perspective of maturity. The multi-tiered dispute resolution clause required that the parties conduct settlement discussions for a certain period of time, and claims filed before the expiry of that period were dismissed on the procedural grounds of being premature.

As a general observation, multi-tiered dispute resolution clauses are not necessarily enforceable and enforceability of such clauses before the courts of the state will be decided on a case-by-case basis in the light of the specific facts and circumstances.

In arbitration there are no statutory requirements for parties to make attempts to settle their disputes before filing their request for arbitration (as opposed to civil procedures before the court of the state – see explanations above). If the parties' contract contains a multi-tiered dispute resolution clause and the claimant fails to follow the relevant procedure, it will be at the absolute discretion of the arbitration tribunal to decide the matter. General experience shows that arbitration tribunals scrutinize and analyse the arbitration clause and the multi-tiered dispute resolution clause of the parties' contract and the prevailing circumstances in detail; and it is the claimant's compliance or non-compliance with these clauses that will be the decisive factor.

It can therefore be established that while courts of the state predominantly look at the statutory requirement to conduct a pre-litigation settlement procedures (with relatively less focus on the respective provisions of the parties' contract), arbitration tribunals are driven by the specific wording of the multi-tiered dispute resolution clause and the arbitration clause.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Precise and specific imperative wording of multi-tiered dispute resolution clauses definitely increase the chances of enforcement. The focus of analysis of arbitration tribunals is exclusively on the specific provisions of such clauses, and courts of the state take into consideration such wording as well in addition to the statutory requirements (as explained above). The more detailed, strict and meticulous the wording is, the higher the likelihood of enforcement will be.

## **3. If your courts have enforced such clauses, how have they done so?**

A relevant court decision held that a claim, submitted prior to the expiry of the time period set out in the multi-tiered dispute resolution clause, was premature and therefore must be dismissed. This decision was based on grounds of procedural considerations, and not of substance. It has not been established that the claimant breached the multi-tiered dispute resolution clause: it has only been stated that the claim was premature. Nevertheless, this was an individual decision in a specific case and it has no statutory power over judgments of other courts. Such matters will always be decided on a case-by-case basis at the discretion of the court.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

It is not possible to give an example of a clause that has been found to be, and remains, enforceable in the Hungarian jurisdiction. Enforceability of a multi-tiered dispute resolution clause will always be decided on a case-by-case basis at the discretion of the court, and there is no preferred or recommended wording in this respect.



## India

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

At the outset, in India, the concept of following an alternate dispute resolution (ADR) is not very mature as seen in westernized nations. Consequentially, Indian lawyers seldom come across multi-tiered dispute resolution clauses. However, this scenario is changing rapidly, as Indian parties are increasingly entering into more cross border contracts.

Arbitration, in India, is governed by the Arbitration and Conciliation Act, 1996 (the “Act”). Section 8 of the Act makes it obligatory upon the courts to refer parties to arbitration if certain conditions as mentioned therein are fulfilled. Usually, Indian parties would not care to comply with multi-tiered dispute resolution clauses and often they would fail to appoint arbitrators with mutual consent. This situation compels one of the parties to invoke Section 11 of the Act, which sets out the procedure of appointment of arbitrator(s) by the Court. Sub-section (2) of Section 11 of the Act allows the parties to agree on a procedure for appointing the arbitrator(s). As such, it is under these provisions that the parties to the contracts agree to have a multi-tiered dispute resolution clause, the last tier being arbitration.

Typically, the courts intervene in appointing the arbitrator(s) under Section 11(6) of the Act when the procedure of appointment fails among the parties. However, Indian courts follow the mandate specified in Section 11(6), read with Section 11(2) of the Act and honor the procedure (including that of following multi-tiered dispute resolution clause) for appointment of the arbitrator as agreed upon between the parties, save and except where the conduct of the parties illustrate that:

- (i) the procedure as agreed upon is waived;
- (ii) it is impossible to follow the procedure
- (iii) the procedure, *prima facie*, is unlikely to resolve the dispute and the same is eventually going to land before the arbitrator for adjudication.

Hence, under the Act, as a thumb rule, conditions precedent to invocation of arbitration are recognized as enforceable. However, there are exceptions (as aforesaid) and the Indian courts

would, depending on the facts and circumstances of a particular case, take a practical view of the matter rather than being technical or hyper-technical.

To support our views expressed above, we have relied on the following judgements:

- (i) AIR 2007 SC 2069 - Municipal Corporation, Jabalpur & Ors. Vs. Rajesh Construction Co.
- (ii) Bombay High Court – Arbitration Application No.4 of 2007 Tulip Hotels Pvt. Ltd. Vs. Trade Wings Ltd.
- (iii) (2009) 4 SCC 357 - S.K. Jain Vs. State of Haryana
- (iv) AIR 2012 SC 2854 - AL Jazeera Steel Products Company SAOG Vs. MID India Power and Steel Ltd.
- (v) AIR 2014 SC 3723 - Swiss Timing Ltd. Vs. Organising Committee, Common Wealth Games, 2010
- (vi) Delhi High Court – I.A. No.10776 of 2014 in C.S. (O.S.) 1678 of 2014 [Delhi Airport Metro Express Pvt. Ltd. Vs. CAF India Pvt. Ltd.]

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

The drafting of a multi-tiered dispute resolution clause is definitely a critical factor in determining the enforceability of such clauses. However, to increase the chances of enforcement please include the following points in the multi-tiered dispute resolution clause:

- (i) To use assertive and mandatory terms / words like “shall” and “condition precedent”;
- (ii) To use clear and unambiguous language, leaving no scope for creative interpretation and/or debate; and
- (iii) To clarify and mention the method, stages and procedure for the multi-tiered dispute resolution clause in detail, including, if possible, the names of the mediators / conciliators as well as the applicable rules for the same.

**In a number of jurisdictions, the decision to enforce or not has come down to considerations such as the foregoing. Is this true in your jurisdiction?** On the basis of the above guidelines, we proceed to answer the queries as below:

- A. *Does the clause expressly provide that prior stages are “conditions precedent” to litigation or arbitration?*

Yes, use of the words “condition precedent” would surely help.

- B. *Does the clause use mandatory language (e.g., “shall” or “must” negotiate or mediate) as opposed to discretionary language (“may” or “should”)?*

Yes, use of the words “shall” or “must” negotiate or mediate is recommended.

- C. *Does the clause specify deadlines and time limits for each of the prior stages?*

Considering that India is a tardy jurisdiction, specifying deadlines and time limits for each of the prior stages may, or may not, work in all cases, but providing deadlines is advisable.

- D. *Does the clause specify the number of negotiation sessions?*

The number of negotiation sessions required for settling a dispute would vary, depending on the nature and complexity of the dispute, as also a lot would depend on the mindset of the parties as to whether they really intend and wish to resolve issues or merely wish to drag the matter. Hence, it may not be practical, especially, from an Indian standpoint, to specify the number of negotiation sessions.

- E. *Does the clause specify the identity of negotiation participants? E.G., project engineers, company officers, etc.*

It would be ideal to clearly identify the negotiating participants. This will save time, as parties would refrain from causing delays on the pretext of identifying their respective participants for conducting negotiations.

- F. *Does the clause specify mediation pursuant to specific rules or using a particular dispute resolution institution?*

In India, there is no separate statute for governing mediation. However, there are institutions that act as mediators through their panel members and have their own rules, regulations and procedures. If the parties are inclined to use mediation as a mode of dispute resolution, then it would be ideal if the clause specified the dispute resolution institution. In our experience, mediation is encouraged by the courts mostly in family disputes and matrimonial matters. Having said so, as we all know, the end result of mediation may not necessarily conclude the dispute.

- G. *Does the clause specify consequences for failure to undertake the prior stages?*

Consequences for not following the process can be specified. However, the question of whether a party is liable for such consequences or not needs to be decided through the process of arbitration or court. Hence, specifying consequences with a view to induce parties into following the prior stages may not prove to be as effective.

**3. If your courts have enforced such clauses, how have they done so? For example, the courts of some jurisdictions have enforced such clauses by doing the following.**

A. Dismissing litigation where the parties have failed to undertake the prior stages.

Yes, the courts have dismissed applications for appointment of arbitrator(s) when the respondent has raised a contention that the procedure (prior stages) agreed under the contract for dispute resolution has not been followed.

B. Staying litigation or arbitration until the parties have completed the prior stages.

In India, once a party has participated in the appointment of the arbitrator the party is deemed to have waived its right to contend that prior stages were not complied with. Therefore, such contention can be raised only at the stage when the other party files an application for the appointment of arbitrator(s). Hence, the question of a stay on litigation or arbitration does not arise.

C. Awarding attorney fees and costs to a party that commenced litigation or arbitration without first undertaking the prior stages.

This is very rare in India. To say the least, we have not come across any case wherein the courts in India have awarded/ granted attorney fees and costs against a party that commenced litigation or arbitration without first undertaking the prior stages. Generally, attorney fees are not awarded; however, the possibility of imposition of costs in some matters cannot be ruled out, which too is not given in all cases.

D. Vacating arbitration awards or reversing court judgments where the parties failed to undertake prior stages.

As discussed above, in India, once the parties in dispute participate in the appointment of the arbitrator and/or undergo arbitration process, such parties are deemed to have waived their respective rights to contend that prior stages were not undertaken and therefore the entire arbitration process is bad. Hence, the question of vacating arbitration awards or reversing court judgments where the parties fail to undertake prior stages would not arise.


**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

In the case of Tulip Hotels Pvt. Ltd. Vs. Trade Wings Ltd. (referred above) the clause which was enforced by the Bombay High Court is reproduced below:

*All dispute and differences between the parties hereto in respect of any matters and except those relating to the fundamental matters in respect of which the parties have been given affirmative vote, stated in this Agreement shall first be tried to be resolved through the intervention of a conciliator appointed by the parties to the dispute, who shall initiate through conciliation to resolve the*

*dispute. If, however, the dispute is not resolved within one month after the matter of dispute is referred to the conciliator for conciliation, the same shall be referred for arbitration to panel of arbitrators comprising of arbitrator appointed by each party to the dispute and the arbitrator so appointed may appoint one more arbitrator as a Umpire, however, the total number of arbitrators shall be 3 numbers. The conciliation and arbitration proceeding shall be governed by the Arbitration and Conciliation Act 1996(26 of 1996). The venue of conciliation and arbitration proceeding shall be in the city of Mumbai. The award given by the Umpire shall be final and binding on all the parties to the arbitration.*

## Ireland

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### Introduction

Multi-tiered dispute resolution clauses are commonly used in Ireland, for example in construction contracts. That said, there is very little authority on the enforceability of such clauses. The lack of case law may reflect the parties' general willingness to follow the steps set out in such clauses before moving to arbitration or litigation. Where problems have arisen they have often concerned ambiguous or unclear clauses, rather than issues of principle as to the effect of such clauses in general.

In principle, and provided that the parties' intentions are clear, a multi-tiered dispute resolution clause should be enforceable in Ireland. The Irish Courts consistently encourage parties to explore alternative dispute resolutions measures, such as mediation and arbitration. Irish judgments have reflected this sentiment, for example, in the recent High Court decision *John G Burns v Grange Construction and Roofing Co Ltd* [2013] IEHC 284, Ms Justice Laffoy observed that,

*"it would be infinitely preferable if the dispute between the applicant and the respondent was resolved by some process of alternative dispute resolution, rather than by litigation".*

### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In *Esso Ireland Limited & Anor v Nine One One Retail Limited* [2013] IEHC 514, the Irish High Court considered the enforceability of a contractual commitment to negotiate in good faith. A clause stipulated that,

"In the event of the parties entering into negotiation in relation to a new agreement, both parties shall negotiate in good faith with a view to entering into the Contract".

The defendant claimed that the plaintiff lacked good faith in their negotiations on a contract extension. Mr. Justice McGovern concluded that the clause was insufficiently precise for the Court to enforce it and the Court could not impose its opinion of what the phrase "*good faith*"

meant in the context of commercial discussions where both parties were pursuing their own business interests. There is therefore a risk that a dispute resolution clause requiring "good faith" negotiations would not be enforceable in Ireland. If a party refused to engage in negotiations at all, it might be possible to claim legal redress for breach of contract. Where the party does engage, however, but simply "goes through the motions", the obligation to negotiate in good faith may be insufficiently precise or may simply constitute an agreement to agree.

Irish Courts would consider authorities in comparable jurisdictions, such as the recent decision of the English High Court in *Emirates Trading Agency Llc v Prime Mineral Exports Private Limited*, which considered the enforceability of a commitment to "friendly discussion" prior to commencing arbitration. The plaintiff argued that there was a condition precedent requiring the parties to engage in friendly discussion before moving to arbitration. Emirates challenged the arbitrator's jurisdiction on the basis that the condition precedent had not been fulfilled. It was held that a clause which required the parties to try to resolve a dispute using "friendly discussions" within a limited time period, before referring the dispute to arbitration, was enforceable. While not binding, it is likely that the Irish courts would view this decision as persuasive.

The Irish Law Reform Commission report on Alternative Dispute Resolution: Mediation and Conciliation 2010 notes that parties should be permitted to apply to court to stay proceedings to allow them to resolve disputes through processes such as mediation or conciliation where they are provided for in the underlying contract. The Law Reform Commission report on Alternative Dispute Resolution: Mediation and Conciliation 2010: paragraphs 4.16.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

A multi-tiered clause must be clear and workable to be enforceable. Any agreement regarding dispute resolution procedures should also be documented, either electronically or in hard copy. Depending on the tier in question, the considerations A to G above should be included and would be considered good practice. For example, in the case of negotiation the clause should specify the personnel for the negotiation, the time frame for the meeting and the time frame for a decision and express the step as a condition precedent to escalation. Only once the time frame for a decision had elapsed would the parties be able to progress to the next tier. Conciliation and mediation would also specify a time frame and the applicable rules as conditions precedent.

It is not common for clauses in Ireland to specify the consequences for failure to undertake the prior stages in the multi-tiered clause. In the interest of clarity, however, it may be desirable to include some wording on the consequences of failure to undertake prior dispute resolution steps.

The Irish High Court case of *Clarke Quarries Limited v P.T. McWilliams Limited [2009] IEHC 403*, concerned the right of a party to refer a dispute to adjudication where that same party had previously referred the same dispute to arbitration. The contract provided for any dispute to be determined by arbitration but subject to the provisions of a dispute resolution procedure, which provided for a three stage dispute resolution process: liaison, adjudication and finally arbitration.

Certain disputes arose and on 6 March 2009 the plaintiff referred two matters to arbitration (challenging an adjudicator's decision that the plaintiff had wrongfully terminated the contract and the entitlement of the defendant to suspend or abandon the works). On 9 March 2009 the defendant referred certain matters to arbitration, including the failure of the plaintiff to pay to the defendant all sums properly due under the contract.

On 15 May 2009 the defendant served a notice of adjudication of a dispute concerning the monies due to the defendant as a result of the plaintiff's wrongful termination of the contract.

The plaintiff instituted proceedings and sought an interlocutory injunction restraining the defendant from prosecuting a referral to adjudication on foot of the 15 May 2009 notice of adjudication. The plaintiff asserted that that dispute, concerning the monies due as a result of the plaintiff's wrongful termination, was the same as that referred to arbitration by the defendant on 9 March 2009. It was agreed at the hearing that, as the issue was one of interpretation of the contract, the Court should treat the interlocutory injunction application as the trial of the issue. The issue was whether, in accordance with the terms of the contract, the Defendant was not entitled to pursue the quantum claim on foot of the 15 May 2009 adjudication notice until the pending arbitration was concluded.

While Ms Justice Laffoy was inclined to the view that the contract did envisage a dispute being referred to adjudication as a preliminary step to arbitration, she could find nothing in the contract to preclude, expressly or by implication, a party from referring the same dispute to adjudication prior to the determination of the arbitration. In her view there were no counter indicators within the contract which would prevent the adjudication process from running parallel to the arbitration. She followed the reasoning adopted by Dyson J in the English High Court decision in *Hershal Engineering Limited v Breen Property Limited* [2000] BLR 272. As a matter of construction the Irish court did not consider that there was anything to prevent a party from referring a dispute to adjudication while the same dispute was pending arbitration. In principle the Irish court was happy to follow a step clause in accordance with the parties' intentions provided they were clearly set out in the contract.

The contract required that any dispute "*will, except where otherwise specifically provided in this Contract, be subject to the provisions*" of the dispute resolution process under the contract. Ms Justice Laffoy's judgment noted that, "*the use of the word "will" in that provision would suggest that it is mandatory*". This illustrates the need for clear mandatory language as opposed to discretionary language in order to increase the chances of enforcement.

Taking these points together, parties should be careful to use clear, mandatory language which explicitly sets out the step process which they intend to use in the event of a dispute and expresses each step as a condition precedent to the following step in the procedure.

### **3. If your courts have enforced such clauses, how have they done so?**

The limited Irish case law on multi-tiered dispute resolution clauses suggests that the Irish Courts will tend towards enforcing clause by staying formal dispute resolution proceedings until the prior stages have completed.



A decision of Ms Justice Laffoy, *Health Service Executive v Keogh, trading as Keogh Software [2009] IEHC 419*, involved a dispute resolution clause providing that,

*"The independent expert's decision will be final and binding on all parties to this agreement and shall not be subject to appeal to a court in legal proceedings except in the case of manifest error"*.

Both parties applied to the Irish High Court for interlocutory relief. Ms Justice Laffoy considered that the dispute resolution terms were agreed in order to facilitate a speedy resolution, which would be more likely if she gave effect to the alternative dispute resolution process. On that basis she ordered that the application to the Court should be stayed pending the completion of the expert determination procedure in accordance with the contract.

In the case of *Clarke Quarries Limited v P.T. McWilliams Limited* referred to above, Ms Justice Laffoy ruled that the defendant could pursue a reference to adjudication in parallel to arbitration.

Further the guidance of the Law Reform Commission in its 2010 report is that,

*"if any party to a mediation clause or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may, at any time after proceedings have been commenced, apply to the court to stay the proceedings. The Commission recommends that the court, unless it is satisfied that the mediation clause or conciliation clause is inoperative, is incapable of being performed or is void, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, should make an order staying the proceedings"*.

The Law Reform Commission report on Alternative Dispute Resolution: Mediation and Conciliation 2010: paragraphs 4.19 to 4.20.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The dispute resolution provisions in *Clarke Quarries Limited v P.T. McWilliams Limited* were upheld by Ms Justice Laffoy and can be interpreted from that judgment as reading

*"Clause 26.2*

*Except as expressly provided in any other provision, all disputes will be resolved in accordance with the provisions set out in the Sixth Schedule.*

*Clause 26.3*

*Subject to the provisions of the Disputes Resolution Procedure, if any Dispute arising out of or in connection with this Contract cannot be settled amicably between the Parties within 7 (seven) Working Days after written notice that such a situation exists, then at the election of either Party the matter may be referred to arbitration. Any such arbitration will be governed by the Arbitration Acts 1954 to 1998 as amended from time to time. The language of the arbitration will be English and the seat of the arbitration will be Dublin, Ireland.*

*Sixth Schedule*

*Paragraph 1*

*Any Dispute will, except where otherwise specifically provided in this Contract be subject to the provisions of this Schedule.*

*Paragraph 2*

*The parties are required to use their best endeavours to resolve the dispute through liaison. If the parties fail to achieve resolution within seven working days, then either party may refer the Dispute to an adjudicator in accordance with paragraph 3.*

*Paragraph 3*

*....*

*3.11*

*The Adjudicator is required to provide both parties with his written decision on the dispute within twenty working days of the date the referral notice is received by him.*

*3.12*

*Unless and until the Dispute is finally determined by arbitration, by legal proceedings or by a written agreement between the Parties, the Adjudicator's decision will be binding on both Parties who will forthwith give effect to the decision. If either Party does not comply with the Adjudicator's decision, the other may bring Court proceedings to secure such compliance.*

*.....*

*3.14*

*The Adjudicator will be deemed not to be an arbitrator but will render his decision as an expert. "*

## Introduction

Multi-tiered dispute resolution clauses are commonly used in Ireland, for example in construction contracts. That said, there is very little authority on the enforceability of such clauses. The lack of case law may reflect the parties' general willingness to follow the steps set out in such clauses before moving to arbitration or litigation. Where problems have arisen they have often concerned ambiguous or unclear clauses, rather than issues of principle as to the effect of such clauses in general.

In principle, and provided that the parties' intentions are clear, a multi-tiered dispute resolution clause should be enforceable in Ireland. The Irish Courts consistently encourage parties to explore alternative dispute resolutions measures, such as mediation and arbitration. Irish judgments have reflected this sentiment, for example, in the recent High Court decision *John G Burns v Grange Construction and Roofing Co Ltd* [2013] IEHC 284, Ms Justice Laffoy observed that,

*"it would be infinitely preferable if the dispute between the applicant and the respondent was resolved by some process of alternative dispute resolution, rather than by litigation".*

### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In *Esso Ireland Limited & Anor v Nine One One Retail Limited* [2013] IEHC 514, the Irish High Court considered the enforceability of a contractual commitment to negotiate in good faith. A clause stipulated that,

"In the event of the parties entering into negotiation in relation to a new agreement, both parties shall negotiate in good faith with a view to entering into the Contract".

The defendant claimed that the plaintiff lacked good faith in their negotiations on a contract extension. Mr. Justice McGovern concluded that the clause was insufficiently precise for the Court to enforce it and the Court could not impose its opinion of what the phrase "*good faith*" meant in the context of commercial discussions where both parties were pursuing their own business interests. There is therefore a risk that a dispute resolution clause requiring "*good faith*" negotiations would not be enforceable in Ireland. If a party refused to engage in negotiations at all, it might be possible to claim legal redress for breach of contract. Where the party does engage, however, but simply "*goes through the motions*", the obligation to negotiate in good faith may be insufficiently precise or may simply constitute an agreement to agree.

Irish Courts would consider authorities in comparable jurisdictions, such as the recent decision of the English High Court in *Emirates Trading Agency Llc v Prime Mineral Exports Private Limited*, which considered the enforceability of a commitment to "*friendly discussion*" prior to commencing arbitration. The plaintiff argued that there was a condition precedent requiring the parties to engage in friendly discussion before moving to arbitration. Emirates challenged the arbitrator's jurisdiction on the basis that the condition precedent had not been fulfilled. It was

held that a clause which required the parties to try to resolve a dispute using "*friendly discussions*" within a limited time period, before referring the dispute to arbitration, was enforceable. While not binding, it is likely that the Irish courts would view this decision as persuasive.

The Irish Law Reform Commission report on Alternative Dispute Resolution: Mediation and Conciliation 2010 notes that parties should be permitted to apply to court to stay proceedings to allow them to resolve disputes through processes such as mediation or conciliation where they are provided for in the underlying contract. The Law Reform Commission report on Alternative Dispute Resolution: Mediation and Conciliation 2010: paragraphs 4.16.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

A multi-tiered clause must be clear and workable to be enforceable. Any agreement regarding dispute resolution procedures should also be documented, either electronically or in hard copy. Depending on the tier in question, the considerations A to G above should be included and would be considered good practice. For example, in the case of negotiation the clause should specify the personnel for the negotiation, the time frame for the meeting and the time frame for a decision and express the step as a condition precedent to escalation. Only once the time frame for a decision had elapsed would the parties be able to progress to the next tier. Conciliation and mediation would also specify a time frame and the applicable rules as conditions precedent.

It is not common for clauses in Ireland to specify the consequences for failure to undertake the prior stages in the multi-tiered clause. In the interest of clarity, however, it may be desirable to include some wording on the consequences of failure to undertake prior dispute resolution steps.

The Irish High Court case of *Clarke Quarries Limited v P.T. McWilliams Limited* [2009] IEHC 403, concerned the right of a party to refer a dispute to adjudication where that same party had previously referred the same dispute to arbitration. The contract provided for any dispute to be determined by arbitration but subject to the provisions of a dispute resolution procedure, which provided for a three stage dispute resolution process: liaison, adjudication and finally arbitration.

Certain disputes arose and on 6 March 2009 the plaintiff referred two matters to arbitration (challenging an adjudicator's decision that the plaintiff had wrongfully terminated the contract and the entitlement of the defendant to suspend or abandon the works). On 9 March 2009 the defendant referred certain matters to arbitration, including the failure of the plaintiff to pay to the defendant all sums properly due under the contract.

On 15 May 2009 the defendant served a notice of adjudication of a dispute concerning the monies due to the defendant as a result of the plaintiff's wrongful termination of the contract.

The plaintiff instituted proceedings and sought an interlocutory injunction restraining the defendant from prosecuting a referral to adjudication on foot of the 15 May 2009 notice of adjudication. The plaintiff asserted that that dispute, concerning the monies due as a result of the plaintiff's wrongful termination, was the same as that referred to arbitration by the defendant on 9 March 2009. It was agreed at the hearing that, as the issue was one of interpretation of the

contract, the Court should treat the interlocutory injunction application as the trial of the issue. The issue was whether, in accordance with the terms of the contract, the Defendant was not entitled to pursue the quantum claim on foot of the 15 May 2009 adjudication notice until the pending arbitration was concluded.

While Ms Justice Laffoy was inclined to the view that the contract did envisage a dispute being referred to adjudication as a preliminary step to arbitration, she could find nothing in the contract to preclude, expressly or by implication, a party from referring the same dispute to adjudication prior to the determination of the arbitration. In her view there were no counter indicators within the contract which would prevent the adjudication process from running parallel to the arbitration. She followed the reasoning adopted by Dyson J in the the English High Court decision in *Hershal Engineering Limited v Breen Property Limited* [2000] BLR 272. As a matter of construction the Irish court did not consider that there was anything to prevent a party from referring a dispute to adjudication while the same dispute was pending arbitration. In principle the Irish court was happy to follow a step clause in accordance with the parties' intentions provided they were clearly set out in the contract.

The contract required that any dispute "*will, except where otherwise specifically provided in this Contract, be subject to the provisions*" of the dispute resolution process under the contract. Ms Justice Laffoy's judgment noted that, "*the use of the word "will" in that provision would suggest that it is mandatory*". This illustrates the need for clear mandatory language as opposed to discretionary language in order to increase the chances of enforcement.

Taking these points together, parties should be careful to use clear, mandatory language which explicitly sets out the step process which they intend to use in the event of a dispute and expresses each step as a condition precedent to the following step in the procedure.

### **3. If your courts have enforced such clauses, how have they done so?**

The limited Irish case law on multi-tiered dispute resolution clauses suggests that the Irish Courts will tend towards enforcing clause by staying formal dispute resolution proceedings until the prior stages have completed.

A decision of Ms Justice Laffoy, *Health Service Executive v Keogh, trading as Keogh Software* [2009] IEHC 419, involved a dispute resolution clause providing that,

*"The independent expert's decision will be final and binding on all parties to this agreement and shall not be subject to appeal to a court in legal proceedings except in the case of manifest error".*

Both parties applied to the Irish High Court for interlocutory relief. Ms Justice Laffoy considered that the dispute resolution terms were agreed in order to facilitate a speedy resolution, which would be more likely if she gave effect to the alternative dispute resolution process. On that basis she ordered that the application to the Court should be stayed pending the completion of the expert determination procedure in accordance with the contract.

In the case of *Clarke Quarries Limited v P.T. McWilliams Limited* referred to above, Ms Justice Laffoy ruled that the defendant could pursue a reference to adjudication in parallel to arbitration.

Further the guidance of the Law Reform Commission in its 2010 report is that,

*"if any party to a mediation clause or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may, at any time after proceedings have been commenced, apply to the court to stay the proceedings. The Commission recommends that the court, unless it is satisfied that the mediation clause or conciliation clause is inoperative, is incapable of being performed or is void, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, should make an order staying the proceedings".*

The Law Reform Commission report on Alternative Dispute Resolution: Mediation and Conciliation 2010: paragraphs 4.19 to 4.20.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The dispute resolution provisions in *Clarke Quarries Limited v P.T. McWilliams Limited* were upheld by Ms Justice Laffoy and can be interpreted from that judgment as reading

*"Clause 26.2*

*Except as expressly provided in any other provision, all disputes will be resolved in accordance with the provisions set out in the Sixth Schedule.*

*Clause 26.3*

*Subject to the provisions of the Disputes Resolution Procedure, if any Dispute arising out of or in connection with this Contract cannot be settled amicably between the Parties within 7 (seven) Working Days after written notice that such a situation exists, then at the election of either Party the matter may be referred to arbitration. Any such arbitration will be governed by the Arbitration Acts 1954 to 1998 as amended from time to time. The language of the arbitration will be English and the seat of the arbitration will be Dublin, Ireland.*

.....

*Sixth Schedule*

*Paragraph 1*

*Any Dispute will, except where otherwise specifically provided in this Contract be subject to the provisions of this Schedule.*

*Paragraph 2*

*The parties are required to use their best endeavours to resolve the dispute through liaison. If the parties fail to achieve resolution within seven working days, then either party may refer the Dispute to an adjudicator in accordance with paragraph 3.*

*Paragraph 3*

....

*3.11*

*The Adjudicator is required to provide both parties with his written decision on the dispute within twenty working days of the date the referral notice is received by him.*

*3.12*

*Unless and until the Dispute is finally determined by arbitration, by legal proceedings or by a written agreement between the Parties, the Adjudicator's decision will be binding on both Parties who will forthwith give effect to the decision. If either Party does not comply with the Adjudicator's decision, the other may bring Court proceedings to secure such compliance.*

.....

*3.14*

*The Adjudicator will be deemed not to be an arbitrator but will render his decision as an expert. "*

## Italy

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As of March 2010, when the legislative decree n. 28/2010 (the “Decree”) introduced the obligation to carry out a mediation procedure before commencing litigation in the majority of commercial and civil matters, the chances of enforcement of Multi-Tiered Dispute Resolution Clauses (“Multi-Tiered Clauses”) increased significantly.

Mediation is always mandatory for banking, finance and insurance disputes, lease of business or real estate disputes, restoration of damages in medical malpractice and several other types of disputes.

### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

The most significant challenges to enforcement of Multi-Tiered Dispute Resolution Clauses are related to:

- i) The lack of express approval according to the requirement provided by Art. 1341 of the Italian Civil Code which provides that arbitration clauses, or derogation from the competence of the courts are ineffective, unless specifically approved in writing;
- ii) Uncertainty of the clause;
- iii) Application of the principle under which, if one party is in breach of contract, the other could refuse to perform any and all obligations on its side, including the obligation to negotiate and/or to mediate (“*inadiplendi non est adimplendum*”).

Multi-Tiered Clause procedures never apply in actions commenced to obtain interim measures, impoundment orders and other reliefs requested under urgency.

### 2. What drafting might increase the chances of enforcement in your jurisdiction?

When drafting a Multi-Tiered Clause, it is always important: *i*) to specify that the Multi-Tiered Clause is independent from the rest of the agreement; *ii*) to make sure that it is expressly approved in writing according to Art. 1341 Italian Civil Code mentioned above; *iii*) to render its



content sufficiently specific; *iv*) to refer to accredited mediation/arbitration institutions, capable of appointing mediators duly qualified under the provisions of the Decree.

### **3. If your courts have enforced such clauses, how have they done so?**

The Decree expressly provides that, in presence of a Multi-Tiered Clause (containing the obligation to enter into a qualified mediation), the Court, upon express request of the interested party (no later than the first hearing), shall invite the parties to commence the administrated mediation procedure and postpone the hearing for three months to allow the parties to enter into the mediation.

In the event the Multi-Tiered Clause provides for arbitration after mediation, the Court would have to declare itself incompetent in favour of the arbitral tribunal.

For a relevant dispute raised before the enactment of the Decree, the Supreme Court stated that:

*“The sanction deriving from the breach of such a contractual duty shall be the payment of damages and interest”* (Italian Supreme Court, September 21, 2012, decision no 16092).

The same principle seems to remain applicable to negotiation obligations contained in Multi-Tiered Clauses.

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The Milan Chamber of Commerce suggests the following Multi-Tier Clause:

*“The parties shall defer the disputes arising out of the present contract to a mediation attempt managed by the Service of Mediation of the Chamber of Arbitration of Milan.*

*If the mediation attempt fails, the disputes arising out of or related to the present contract shall be settled by arbitration under the Rules of the Chamber of Arbitration of Milan (the Rules), by a sole arbitrator / three arbitrators \*\*, appointed in accordance with the Rules".*  
*\*\* alternative choice, to be done considering the real circumstances and the value of the dispute.*

Other clauses are available at

<http://www.camera-arbitrale.it/en/Arbitration/Clauses/Fulltext.php?id=223>

## Japan

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

There are no judicial precedents in Japan in which the court considered the enforceability of multi-tiered dispute resolution (“MTDR”) clauses providing for arbitration as the final resort.

There is, however, a published judicial precedent in Japan in which the court considered the enforceability of MTDR clauses providing for litigation as the final resort. It was highlighted in that case that the current main challenge to enforcement of MTDR clauses seems to be a Japanese court’s particular focus on a plaintiff’s right of access to the courts, which is a fundamental human right under the Japanese Constitution. The following is an outline of the case and the rulings therein.

The relevant MTDR clauses required the contractual parties to (i) negotiate and (ii) undergo mediation at the Japanese Commercial Arbitration Association (the “JCAA”) before they could refer a dispute to litigation. The plaintiff accordingly entered into negotiation, but when that failed, referred the dispute to mediation at the Tokyo Summary Court, instead of the JCAA. When such mediation subsequently proved unsuccessful, the plaintiff filed a lawsuit against three defendants with the Tokyo District Court (the “TDC”). In its answer to the complaint, the defendants asked the court to dismiss the lawsuit, arguing that the lawsuit was illegal because the plaintiff had failed to comply with the dispute resolution procedures set forth in the MTDR clauses.

The TDC held the MTDR clauses to be enforceable and, accordingly, that the lawsuit was illegal, and the TDC proceeded to dismiss the lawsuit (Judgment of December 8, 2010 in re Heisei 22 (wa) No. 2606, as reported by Hanrei Jiho No. 2116 on page 64).

The Tokyo High Court, pursuant to an appeal by the Plaintiff, held the MTDR clause to be unenforceable for the following reasons, and overturned the TDC’s judgment (Judgment of June 22, 2012 in re Heisei 23 (ne) No. 330, as reported by Hanrei Jiho No. 2133 on page 166):

- (a) There has been no in-depth discussion in Japan on the formation and effect of an agreement concerning litigation, with the exception of covenants not to sue and arbitration agreements. As such, there is no judicial precedent expounding on the

issue of litigation agreements and, accordingly, no generally accepted opinion on this issue.

- (b) An arbitration agreement ensures that contractual parties participate in a dispute resolution procedure (i.e. arbitration), which is an alternative to litigation. A covenant not to sue converts a substantive claim into a right to claim for voluntary payment or performance. Thus, there is no need for disputing parties to retain the right of access to the courts under Article 32 of the Constitution of Japan in cases where an arbitration agreement or a covenant not to sue exists between the parties.
- (c) In contrast to arbitration agreements and covenants not to sue, neither the good faith negotiation nor mediation provisions set forth in the MTDR clauses ensures final resolution of a dispute.
- (d) Moreover, neither the commencement of good faith negotiations nor of mediation (other than mediation at an ADR institution certified under the Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of December 1, 2004, the “ADR Act”)), stops the running of the prescription (limitation) period. If the negotiation or mediation continues up to, and is terminated upon or after, the expiry of the prescription period without a settlement being reached, the plaintiff will be precluded from filing a lawsuit. Nevertheless, if a lawsuit instituted by a plaintiff in violation of an MTDR clause is dismissed for reason of such violation, the lawsuit’s effect of stopping the running of the prescription period would effectively be nullified under Japanese law. Such a consequence infringes on the plaintiff’s right of access to the courts under the Constitution.
- (e) Even if the plaintiff had enough time to undertake good faith negotiation and mediation before filing another lawsuit, the Plaintiff would have to pay the same court fees a second time when it files the latter lawsuit.
- (f) In view of the points above, MTDR clauses should not be enforceable. The lawsuit should neither be regarded as illegal nor dismissed. MTDR clauses should be regarded as no more than a sort of gentlemen’s agreement.

The Tokyo High Court added that, even if the court adopted the position that MTDR clauses should have certain legal effects on the litigation procedure, such effects should be limited to the analogous application of Article 25 of the ADR Act to merely grant to the court the discretion to suspend the litigation procedure for a period no longer than four months upon the parties’ joint request.

As the Defendants did not appeal the Tokyo High Court’s judgment to the Supreme Court, the judgment of the Tokyo High Court became final and binding. Accordingly, the case was conclusively remitted to the Tokyo District Court for determination of the merit of the case through the litigation procedure.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As stated above, there is only one published judicial precedent in Japan in which the court considered the enforceability of MTDR clauses providing for litigation as the final resort. As such, it is difficult to conclusively answer this question in the context of Japan. It can, however, be said that the existence of mediation at a certified ADR institution set forth in (d) above in a provision might increase the chances of enforcement. That said, such “enforcement” would be very limited. Specifically, a Japanese court may suspend litigation procedures for a certain period of time if an ADR process is underway at a certified ADR institution under the ADR Act for the same dispute. Although it denied the dismissal of the lawsuit, the Tokyo High Court held in the precedent discussed above that, if the court had adopted the position that the MTDR clause should have certain legal effects on the litigation procedure, such effects should be limited to the granting of discretion to the court to suspend the litigation procedure for a period no longer than four months (being the maximum suspension period permissible under the Japanese ADR Act if an ADR process at a certified ADR institution is concurrently underway for the same dispute) upon the disputing parties’ joint request. This implies that an MTDR clause which specifically provides for mediation through an ADR institution that is certified under the Japanese ADR Act may be enforced to the extent that a court may order the suspension of a litigation procedure for a period of up to four months.


## **3. If your courts have enforced such clauses, how have they done so?**

There is no such precedent in Japan.

## **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

There is no such precedent in Japan.

## Latvia

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Since the declaration of independence of Latvia the legislature has included out of court dispute resolution clauses in almost every law that may have to deal with potential dispute resolution, e.g., Consumer Protection law, Labour law, Protection of the Rights of the Children Law, Civil Procedure law etc.

Consequently, since 1999 the Consumer Rights Protection Law states that prior of submitting a claim to the court the consumer must first address his claim regarding the goods and services to the trader or service provider. If the latter denies the particular claim an expert must investigate his liability. The expert`s opinion is binding on both the consumer and trader or service provider. The consumer may start a court trial only after the trader or service provider has rejected the legitimate expert`s decision and has denied the claim of consumer.

Similarly, the Labour law provides that disputes regarding rights and interests which arise from the collective agreement or which are related to such agreement shall be settled firstly by a conciliation commission.

According to the Civil Procedure law (CPL) the judge may refuse to accept the claim if the claimant has not complied with the procedures of preliminary extrajudicial examination of the dispute or has not taken the measures prescribed by law to resolve the dispute with the defendant prior to initiation of the court proceedings.

The latest incentive of the legislature is the adoption of the Mediation law (in force since June 2014) which offers a relatively new out of court dispute resolution mechanism related to both family and commercial disputes. Although some type of mediation existed prior the enactment of the Mediation law (e.g., in criminal proceedings) the latest amendments of CPL state that the judge may refuse to accept a claim if parties have agreed to use mediation but the claimant has omitted to submit evidence that mediation was rejected, nor has a mediation agreement has been concluded, nor has mediation been terminated without reaching settlement according to procedure prescribed by the Mediation law.

According to Article 128 of CPL the claimant has to provide the court with information regarding mediation. This however doesn`t mean that it is mandatory for the parties to engage in mediation before applying to the court. It simply means that claimant has to state if he has or has not engaged in mediation before applying to the court. If claimant omits to provide such

information, the judge may refuse to accept the claim and return it to the claimant in order to rectify the deficiencies according to Article 133 of CPL.

Prior to starting any court proceedings any party must consider the potential out of court dispute resolution possibility, since apart from CPL several laws provide that the court has an obligation to ascertain whether both parties may reconcile their differences.

If both parties, prior the commencement of litigation, reject the mediation or settlement possibility the court may declare that it will adjudicate on the merits of the matter and proceed to a court hearing. However, one must bear in mind that pursuant to Article 226 of CPL settlement is possible at any stage of the civil court's proceeding. If parties reach settlement during the trial the court may approve their settlement. A settlement approved by the court is executed in a similar way to the execution of court judgments.

### **1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?**

Generally almost every commercial agreement has a clause stating that prior to applying to court the parties have to try to resolve the dispute by negotiation. In practical application, this means that prior to applying to court the claimant sends a pre-trial communication to the defendant requesting that it settle the claim.

The recent activity of the legislature regarding adoption of the Mediation law is a particular effort towards the use of out of court dispute resolution by officially recognizing and introducing a state initiated mediation and institute of certified mediators. However, to date there have been no major cases involving mediation. The lack of positive outcome and the success of mediation may be considered as one of the biggest challenges for the enforcement of multi-tiered dispute resolution (mediation) clauses.

In Latvia there are more than 200 permanent arbitration institutions. However, many of these arbitration institutions are considered to be corrupt and have issued highly disputable but unchallengeable awards. Thereby, the non-existence of generally trusted arbitration institutions in Latvia is the second challenge of the enforcement of multi-tiered dispute resolution (arbitration) clauses.

### **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Additionally to the Mediation law in force since January 1, 2015 a new Arbitration law has been introduced setting strict rules for the foundation and operation of arbitration institutions. This has initiated the liquidation of shady and corrupt arbitration institutions and potentially will reduce the number of unlawful arbitration awards. The arbitration institutions now have to have appropriate premises and an internet website publically providing information on their arbitrators, regulations, fees etc.

### **3. If your courts have enforced such clauses, how have they done so?**

The state courts were mostly involved in approving or rejecting the judgements of arbitration institutions, as every such judgment had to be approved prior its enforcement.

The grounds for rejecting an arbitration institution's judgement are the following:

- 1) a dispute according to law can be seen only before court;
- 2) an arbitration agreement is concluded by underage person or person lacking capacity to act;
- 3) an arbitration agreement is found invalid according to law;
- 4) the party was not notified of the arbitration court proceedings in the appropriate manner, or due to other reasons was unable to submit his or her explanation, and this significantly has or could have affected the arbitration court proceedings;
- 5) the party was not notified of the appointing of an arbitrator in the appropriate manner, and this significantly has or could have affected the arbitration court proceedings;
- 6) the arbitration court was not established or the arbitration court proceedings did not take place in accordance with the provisions of the arbitration court agreement or of Arbitration Law;
- 7) the award of the arbitration court was made regarding a dispute which was not provided for in the arbitration court agreement or does not comply with the provisions of the arbitration court agreement, or issues were decided that were not within the scope of the arbitration court agreement.

Parties unsatisfied with judgements of arbitration institutions actively complained to the state courts, thus until 2015 the major state courts competence in enforcing the multi-tiered clauses was to investigate the proceeding involving decisions taken by arbitration institutions.



When parties are prevented from applying to court because they have omitted to comply with particular dispute resolution methods upon which they have agreed, the state courts have actively proposed that parties seek to reconcile and resolve their dispute by giving time and postponing the first hearing if parties agree to try negotiations or mediation. Thus, one may conclude that the enforcement of multi-tiered clauses is gradually increasing in the correct way intended by the legislature.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Prior to initiating courts proceedings, parties must try to reach settlement by negotiation. Negotiations take place in one or several meetings between the representatives of both parties. The parties are invited to the meetings by a written notification sent via post by registered letter. The negotiations are recorded in a protocol and the protocol signed by the representatives of both parties. If a settlement agreement is not reached within a month during one or multiple meetings, the parties may apply to the court.



## Lithuania

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In accordance with the Civil Procedure Code of the Republic of Lithuania (hereinafter – the **CPC**) access to court is granted to every person whose rights or interests have been violated. However, the CPC includes provisions preventing persons from the access to court should certain conditions not be met. One such condition is the requirement for a party to exercise a so called “pre-court dispute resolution procedure” before applying to the court. In a case where the party applies to court without exercising the above mentioned pre-court dispute resolution procedure, the following procedural consequences may appear:

- 1) In accordance to Article 137 (1) (3), the court may hold the claim inadmissible if the claim is submitted without pre-court dispute resolution procedure. In such a case a party should exercise court dispute resolution procedure before returning to court.
- 2) The court may hold the claim inadmissible if the party did not prove that it actually exercised the pre-court dispute resolution procedure. An additional term to submit evidence proving that the party did exercise the pre-court dispute resolution procedure may be granted. If the evidence is not provided, the claim is not admitted.
- 3) Pursuant to Article 293 (2), the court may dismiss the case if the party applying to the court failed to comply with a compulsory alternative dispute resolution procedure and it is no longer possible to exercise such pre-court dispute resolution procedure. Thus, if the party applies to court without exercising pre-court dispute resolution procedure and later it appears that (1) the party had to exercise pre-court dispute resolution procedure; and (2) it is no longer possible to exercise pre-court dispute resolution procedure (for example, the term set by statutes of limitations has elapsed), the case will be dismissed and the party could not apply

to court with the same issue again. This is the most negative consequences one may face while failing to comply with pre-court dispute resolution procedure;

- 4) In accordance to Article 296 (1), the court may leave the claim without examination if the party applying to the court failed to comply with the compulsory alternative dispute resolution method and it is still possible to exercise it. In this case the court would not decide on the merits of the case and would end the case on formal grounds. If the time to exercise the pre-court dispute resolution procedure is not expired the parties will have a right to come back to court after the above mentioned pre-court dispute resolution procedure is exercised.

Therefore, the compliance or non-compliance with the pre-court dispute resolution procedures shall create the aforementioned procedural circumstances resulting in various limits of the right to apply to court.

It is very important to define what the “pre-court dispute resolution procedure” is in the light of the CPC. In accordance with Article 22 (1) of CPC cases of compulsory alternative dispute resolution provided by the Laws of the Republic of Lithuania are considered as the “pre-court dispute resolution procedures”. The Laws of the Republic of Lithuania provide clear cases of multi-tiered dispute resolution obliging the parties to refer a dispute to an alternative dispute resolution institution at first before applying to the court. Such cases include labour disputes, disputes related to public procurement, disputes arising from consumer protection, energy disputes, etc. Such regulation leaves the parties no choice but to exercise alternative dispute resolution system in order to gain the right to go to court. It must also be mentioned that an agreement of the parties to submit the dispute to mediation is also considered a “pre-court dispute resolution procedure” in accordance to systemic interpretation of the CPC and the Law on Conciliatory Mediation in Civil Disputes of the Republic of Lithuania (hereinafter – the Law on Mediation). In accordance with Article 3 (1) of the Law on Mediation conciliatory mediation shall be used on the basis of a written agreement between the parties to a dispute. The parties to the dispute may agree on conciliatory mediation either after the dispute has arisen or prior to it. In accordance to Article 3 (2) of the Law on Mediation where parties to a dispute agree to settle the dispute through conciliatory mediation, they must attempt to settle the dispute by this procedure before referring to court or arbitration. If a conciliatory mediation agreement sets time limits for the termination of conciliatory mediation, the party to the dispute may refer to court or arbitration only after the expiry of these time limits. Where no time limits for the termination of conciliatory mediation have been set in the conciliatory mediation agreement, the party to the dispute may refer to court or arbitration one month after proposing to the other party to the dispute in writing to settle the dispute through conciliatory mediation. Thus, in accordance to aforementioned provisions of the Law on Mediation whereby the parties include a mediation clause in the contract, they will not be able to apply to court without attempting to resolve the dispute via mediation.

Meanwhile, the general agreement of the parties to solve the dispute amicably (whereby no reference is made to mediation or arbitration) arising out of the contract which is not subject to compulsory alternative dispute resolution (for example, a labour contract would be a subject of

compulsory alternative dispute resolution) is not recognized by the Laws of the Republic of Lithuania as the “pre-court dispute resolution procedure” in terms of the CPC. Thus, such agreements in accordance with the wording of the CPC may not enjoy such protection as compulsory alternative dispute resolution cases or mediation. It is upon the case law of the courts to recognize and enforce such clauses.

To summarize, it must be stressed that the CPC prevents the parties from an application to court if a pre-court dispute resolution procedure was not carried out. However, the Laws of the Republic of Lithuania narrowly apply the term “pre-court dispute resolution procedure”: i.e. the CPC shall allow the courts not to adhere the dispute without pre-court resolution attempt only in limited area, i.e. compulsory alternative pre-court dispute resolution (such as labour disputes, energy related disputes, public procurement, consumer protection law, etc.) and mediation. However, the Laws of the Republic of Lithuania *per se* do not recognize the contractual clauses of multi-tiered dispute resolution as enforceable by the court.

### **1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?**

The biggest challenge to enforcement of multi-tiered dispute resolution clauses in Lithuania is the lack of legal regulation: as was mentioned above, the Laws of the Republic of Lithuania (mostly the CPC) directly provide only very specific cases of multi-tiered dispute resolution which actually prevents parties from going to court if the parties fail to resolve the dispute in pre-court dispute resolution. Such regulation does not include multi-tiered dispute resolution clauses drafted by parties in their contract (if it is not a mediation case). Thus, the courts have to deal the issue without direct regulation and in accordance with general principals of the civil procedure.

Moreover, the case law by the Supreme Court of Lithuanian and the Constitutional Court of the Republic of Lithuania provides a very strong position on the absoluteness of the right to court: i.e. the courts repeatedly rendered that the right of access to the court is absolute and may only be limited in very specific cases and only by the mean of the Laws. The cases provided directly by the Laws (the compulsory alternative dispute resolution method in specific cases), preventing the parties from addressing the court without prior application to pre-court dispute resolution, are mostly reiterated.

Thus, the lack of legal regulation and the position of the courts of highest authority towards right of access to the court are currently the biggest challenges to enforcement of multi-tiered dispute resolution clauses. However, the courts nevertheless are becoming keener to enforce the multi-tiered dispute resolution clauses in contracts. At certain points the courts recognize multi-tiered dispute resolution contractual clauses (whereby the parties agree to try to settle the dispute amicably before applying to the court) as “pre-court dispute resolution procedure” in terms of the CPC. Thus, should the court establish that the party did not go through the pre-court dispute resolution procedure provided by the contract, the court does not admit the claim or requests the party to provide evidence confirming pre-court resolution of the dispute (i.e. the courts apply Article 137 (1) (3) of the CPC before admitting the case). However, the courts refrain from applying Articles 293 and 296 in case the issue of compliance with the contractual multi-tiered dispute resolution clause appears at the later stages of the case. Thus, it should be concluded that

contractual multi-tiered dispute resolution clauses are “enforced” at the stage of admission of the claim.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Precise, strict and clear drafting might increase the chances of enforcement of multi-tiered dispute resolution clauses. The following tips are to be noted:

- Clear identification of the multi-tiered dispute resolution procedure strictly stating that the parties shall have to go through the multi-tiered dispute resolution procedure (identifying such procedure as “condition precedent”) before applying to the court is a must. It is also important that the application to the court must be clearly set as a second tiered stage. If the clause is drafted in the manner whereby the party may alternatively choose whether to settle the dispute by negotiations or go to court, that clause would not be recognized by the court as a multi-tiered clause and thus the intending party would be able to apply the court directly.
- Mandatory language (“shall” or “must”) is very important. The multi-tiered dispute resolution clause should be drafted in an imperative fashion. If the clause in question provides alternatives, or an option, but not an obligation for a party to exercise a multi-tiered dispute resolution clause, the clause would not be enforced.
- A time limit is an important but not a compulsory element of multi-tiered dispute resolution. If the parties stipulate to a certain time limit for multi-tiered dispute resolution, such time limits will be respected by the courts as well. If no time limit is included, the courts would apply the rule of “reasonable time limit” which would usually mean 30 days to settle the dispute.
- Number of negotiation sessions and/or participants of the sessions and/or the order of negotiations are not compulsory conditions. However, if such conditions are included they will have to be respected by the parties. Failing to comply with such conditions would mean failure to carry out the multi-tiered dispute resolution clause and would result in non-admission of the claim.
- As mentioned earlier, mediation clauses are governed by the Law on Mediation which provides specific rules for mediation. When drafting mediation clauses the parties may chose a specific set of rules of mediation or draft their own rules which will have to be respected. The same applies to the choice of a particular mediation institution.
- The clause should specify that a party’s failure to exercise a multi-tiered dispute resolution clause will prevent the party from applying to the court. However, such a clause may not permanently limit the right of party to apply to the court.

### **3. If your courts have enforced such clauses, how have they done so?**

Lithuanian courts most commonly enforce multi-tiered dispute resolution clauses by declining to admit the claim in accordance to Article 137 of the CPC. After the claim is not admitted the parties shall have to exercise the provisions of the multi-tiered dispute resolution clause. In other cases, courts do not automatically reject the admission of the claim but provide the claimant with an additional period to provide evidence proving the execution of the multi-tiered dispute resolution clause (failure to provide such evidence would lead to non-admission of the claim).

However, the courts are not keen to enforce multi-tiered dispute resolution clauses at later stages if such clauses are not provided by the law (mediation, compulsory alternative dispute resolution methods). In accordance to the CPC, after the initiation of the case the court shall have to take certain steps in order to reconcile the parties; thus even if a party fails to carry out procedures set by a multi-tiered dispute resolution clause and the claim is admitted, the parties will still be able to conduct negotiations and thus such pre-court dispute resolution would partially be exercised. However, a failure of a party to carry out a multi-tiered dispute resolution step may result in specific allocation of litigation costs in accordance with Article 93 of the CPC, which provides that the conduct of a party is a factor in the allocation of litigation costs.

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

No specific clause which would be held *per se* enforceable can be provided as the court would decide the issue on case-by-case basis. However, the following example might increase the chances of enforceability of a multi-tiered dispute resolution clause at the stage of admissibility of the claim:

*”Any and every dispute arising out of this Contract shall be firstly solved amicably by negotiations of the parties. The parties hereby agree and confirm that they have no right to apply the court before the amicable resolution of the dispute in accordance with the requirements set in this clause of the Contract is exercised. The parties a priori agree that their claim presented to the court without prior pre-court dispute resolution in compliance with this clause of the contract shall not be admitted. If the parties may not reach amicable solution of the dispute in 60 (sixty) days as from the initiation of the negotiation the parties will be free to apply the court in accordance to the conditions set by the CPC.”*

The parties may also include stages and terms of pre-court dispute resolution.

## Macedonia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

As to challenges to enforcement of multi-tiered dispute resolution clauses in Macedonia, the situation is very similar to other countries in the Balkans. The main challenge is that there has been no enforcement of multi-tiered dispute resolution clauses by either local courts or arbitral tribunals so far.

Such clauses are nevertheless found in various types of agreements. It is, therefore, reasonable to expect that this issue will surface eventually in litigation or arbitration in Macedonia. At this point it is unclear how the courts and arbitrators will interpret these provisions since Macedonian law does not specifically legislate the enforceability of these dispute resolution clauses.

In the absence of express provisions and jurisprudence the question of enforceability of multi-tiered dispute resolution clauses could be approached in the light of general rules of contract law, civil procedure and mediation.

Among others, a fundamental principle of the Macedonian Obligations Act is that the parties should endeavour to resolve any dispute or controversy through negotiations or mediation. The Civil Procedure Act stipulates that the court should inform the parties to the dispute in writing before the preparatory hearing about the possibility of resolving the dispute through mediation or other form of amicable settlement.

Further, the court may stay the proceeding if the parties decide to settle the dispute through mediation. It is worth noting that under amendments to the Civil Procedure Act proposed in 2013 the parties would be required to try to resolve disputes below a certain threshold through mediation. In this case the parties would be entitled to litigate only if a settlement is not reached through mediation. However, these amendments have not been adopted.

According to the applicable Mediation Act, mediation is voluntary and both parties may decide to terminate mediation at any time. The question arises as to whether the parties are obligated to try mediation if there is such a clause in their contract. Arguments may be put forward in favour of both the obligatory and non-obligatory nature of such clause. However, taking into account

that any party may terminate mediation at any time the court does not have a means to force parties to mediate.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As with other contractual provisions, a multi-tiered dispute resolution clause should be clear and precise leaving no room for ambiguity or vagueness. Not only because parties want to ensure they can enforce it but also because they will benefit from a straightforward business relationship. In addition to this, there are several aspects which are unique to the multi-tiered dispute resolution clause which the parties can consider adopting.

The time frame for first stage of dispute resolution could form the backbone of the multi-tiered dispute resolution clause. Parties could determine the time frame depending on the complexity of the transaction. On the one hand, disputes arising from simple transactions may be settled within shorter time frames (from 10 to 30 days), while, on the other hand, disputes related to complex transactions would need more time for negotiations (e.g. 90 days). Another consideration in connection with the complexity and type of transaction is which persons should be authorised to negotiate. Some disputes of a commercial nature may be settled swiftly by top management. However, in some cases where the dispute deals with technical matters it may be more efficient to include technical staff in the negotiations.

Further the parties should include certain formalities regarding the opening of negotiations. For example, parties can agree that the party that intends to commence litigation/arbitration should first send a written request for negotiations to the other party. It could be required that such written notice specify the dispute in sufficient detail. Also, the parties should agree on the time period within which the other party must respond to the request for negotiations. Subsequently, the parties can agree on the number of sessions, meetings etc. to be held.

In summary, the dispute resolution clause that prescribes negotiation as a first tier for dispute resolution should be precise enough to facilitate its implementation by the parties and to enable the court to easily determine if the parties fulfilled the agreed terms. However, at the same time, it must not deny parties their right to bring their claim before a court as a fundamental constitutional right.

In case of mediation the parties should specify the mediator or mediator selection process or whether the parties are to refer their dispute to a specific institution for mediation.

## **3. If your courts have enforced such clauses, how have they done so?**

Macedonian courts have few options when it comes to enforcement of multi-tiered dispute resolution clauses. These options have been deduced from some general provisions of the Civil Procedure Act which governs court proceedings.

The Civil Procedure Act expressly prescribes that the court will stay proceedings if the parties decide to bring their claim before the mediator. As the mediation cannot last longer than 45 days in accordance with the Mediation Act, if a settlement is not reached within that time frame the

court will continue the proceedings. There are grounds to argue that the court might also stay proceedings where the parties disregarded the first step and made no attempt to negotiate. Yet, such a decision by the court would largely depend on the parties' willingness to engage in the alternative dispute resolution mechanism. If the claimant is not interested in negotiations, and does not wish to seek an amicable settlement, the court has no other option but to continue the litigation. Otherwise, the court would deny justice to the claimant and breach one of the most important judicial standards.

The second option for the court is to dismiss the claim on procedural grounds because the parties failed to fulfill the agreed pre-conditions that could be considered as procedural requirements for filing the lawsuit.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

As has already been noted it is very difficult to provide an example of a multi-tiered dispute resolution clause which has been tested in practice and enforced by the courts. The following are suggestions of the initial draft which should be further amended to the transaction at hand and the parties' intentions.

Where the parties wish to make negotiations the first tier of dispute resolution:

*"Any dispute arising out of or in connection with this Agreement, the parties will endeavour to resolve by negotiation [consider specifying who will participate in the negotiations]."*

*"If the dispute is not resolved within [number] days from the day of receipt of the written proposal for negotiations by the other party, such dispute shall be finally resolved by the competent court in [specify the city]/arbitration [include valid arbitration clause]."*


In the case of mediation, the multi-tiered dispute resolution clause may be drafted to read as follows:

*"In the event of a dispute arising out of or in connection with this Agreement, the parties shall first seek settlement of that dispute by mediation [specify rules of mediation of the institution in question, or specify the mediator, mediator selection process]. A party requesting resolution of the dispute is obliged to send a written proposal for concluding an agreement to mediate to the other party. The other party must respond within 15 days."*

*"If the dispute is not settled by mediation within [specify number] days of the commencement of the mediation, or such further period as the parties shall agree in writing, or if the other party rejects the proposal for mediation or fails to reply to the proposal within 15 days, such dispute shall be finally resolved by the competent court in [specify the city]/arbitration [include valid arbitration clause]."*



## Malaysia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

The issue of enforceability of multi-tiered dispute resolution clauses has thus far not been decided by the Malaysian courts.

In assessing the likely outcome of an action seeking enforcement of such clauses, case law from the Commonwealth jurisdictions, which are of persuasive authority in Malaysia, is useful and indicative.

The recent English High Court decision of *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm), which adopted the approach taken by the Singapore Court of Appeal in the case of *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 and the New South Wales Court of Appeal case of *United Group Rail Services v Rail Corporation New South Wales* (2009) 127 Con LR 202, may shed some light as to the manner in which the Malaysian courts may decide when faced with the question of the enforceability of multi-tiered dispute resolution clauses.

In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973, para [40] the Singapore Court emphasised that such clauses are “*in the public interest as they promote the consensual disposition of any potential disputes*” and “*serve a useful commercial purpose in seeking to promote consensus and conciliation in lieu of adversarial dispute resolution*”, which are values that the legal system should promote.

In *United Group Rail Services v Rail Corporation New South Wales* (2009) 127 Con LR 202, para [80], Alsopp P. said that “*the public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, real and enforceable content be given to [these] clauses to encourage approaches by, and attitudes of, parties conducive to the resolution of disputes without expensive litigation, arbitral or curial*”.

The English High Court in *Emirates Trading* departed from previous English decisions and held that an obligation to seek to resolve a dispute by friendly discussion before proceeding to arbitration was enforceable. Further, the English High Court clarified that cases on multi-tiered clauses are to be distinguished from cases where parties enter into agreements to negotiate new

contracts and where fundamental commercial terms are to be negotiated in good faith. In the former situation, a pre-existing contract has given rise to a dispute. In the latter situation, as seen in the leading House of Lords case of *Walford v Miles* [1992] 2 AC 128 and other authorities, the parties agree to negotiate key contract terms and those attempts to contract fail for lack of certainty.

Given that case law from the Commonwealth jurisdictions is of persuasive authority and judicial assistance will be drawn from these cases, the Malaysian courts are likely to enforce similar multi-tiered disputes resolution clauses provided that the intention of parties is clear and the clauses are certain and sufficiently detailed. The tiers of dispute resolution prior to arbitration or litigation are also likely to be characterised as conditions precedent to any step in the dispute resolution process.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Based on the approach taken by the other Commonwealth jurisdictions as set out above and the common law approach emphasising certainty in the language of the contract, the following factors may increase the chances of enforcement of multi-tiered dispute resolution clauses in Malaysia:

- (i) The clause should use mandatory language such as “shall” or “must”, rather than “may”, to reflect the intention of the parties that the negotiation and/or mediation procedure is to be mandatory and a condition precedent to litigation or arbitration.
- (ii) The negotiation and/or mediation procedure must be clear and sufficiently detailed to eliminate the possibility for parties to argue that the obligations are ambiguous or unclear. All key procedural issues, such as the process or procedure for negotiation and/or mediation, the manner in which the mediator is selected and appointed (in a mediation process), the particular dispute resolution institution and specific rules applicable, and the identity of negotiation participants, must be clearly stated in the clause.
- (iii) There must be clear deadlines and time limits for each of the prior stages, during which the dispute resolution mechanism is to take place and before the end of which litigation or arbitration shall not be commenced.

The clause may include an agreement to resolve a dispute by “friendly discussions” and/or “in good faith” so long as there is contractual certainty in the necessary elements. The court in the *Emirates Trading case* disagreed with the English High Court decision in *Wah (Aka Alan Tang) and Anr v Grant Thornton International Ltd and Others* [2012] EWHC 3198 (Ch), stating that “good faith” is not too open-ended a concept to be certain, saying that “good faith” connotes an honest and genuine approach to settling a dispute.

## **3. If your courts have enforced such clauses, how have they done so?**

It is not yet known as to how the Malaysian courts would enforce such clauses.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Since there is as yet no decided case in the Malaysian courts on multi-tiered dispute resolution clauses, such an example is not available.

## Mexico

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Before acknowledging challenges to enforcement, it is paramount to state that the constitutional amendment to article 17 in 2008, brought a new sense of relevance to ADR in Mexico.

Whether civil or commercial matters, the possibility that parties conciliate their interests can arise spontaneously at any stage of the proceedings. Mexico has followed an ADR trend whereby civil proceedings at the Federal District (largest jurisdiction in Mexico), has a mandatory conciliation proceeding after the parties have lodged their pleadings and before commencing the formal evidentiary period in the proceedings. In commercial matters, there is a new center for mediation at the Federal District and this trend has been followed by most states of the Mexican Republic. To this date there are at least 56 mediation centers in Mexico. Thus, any agreement reached at the mediation proceedings (using the relevant Mediation Center and Law of the Federal District) will have a *res judicata* status and courts will enforce it.

Therefore, prior to commencement of legal proceedings, parties are free to decide on engaging or not in conciliatory talks. In this context, unless there is a statutorily procedural requirement, parties are not bound to enter into conciliation stages at all. The subject matters that raise a conciliatory stage as compulsory for the parties are only in connection with civil proceedings at the Federal District, insurance liability, consumer protection or medical liability.

A recent amendment to Mexican legislation regarding the “oral commercial procedure” (applicable only for commercial cases under an established monetary threshold that are basically below USD\$30,000) has incorporated a preliminary hearing for certain purposes, one of them

being conciliatory talks. However, in practice these hearings are routinely held for limiting the scope of the subject matter only. Hence, any conciliatory meetings are the responsibility of the parties alone.

For these reasons, since enforcement will not come necessarily from the court, parties should define by contract the scope of their ADR clause. Given that the supreme law of the contracts is the parties' will, only clear wording and the *pacta sunt servanda* principle will be a stepping stone towards enforcement but without a guaranteed positive outcome.

In several jurisdictions conciliatory or mediation meetings are deemed relevant for important reasons, aside from litigation or arbitration being the last resort for dispute resolution. For example, these meetings are considered paramount for future recovery of costs or attorney's fees notwithstanding the legal culture in México that each party bears its own cost.

Taking into account the background referred hereto, if a party does not engage in mediation or negotiation as prescribed by a multi-tiered dispute resolution clause the consequences might not be of essence. It is highly unlikely that a Mexican Judge would refer the parties to mediation or negotiation if not expressly requested by them and certainly not before the admission of the claim and response.

On the other hand, it is not uncommon to find multi-tiered dispute resolution clauses pertaining to contracts with government entities. These clauses are usually enforced; however rather than referring to negotiation/mediation as a condition to arbitration or litigation, they usually are employed to make a distinction based on the subject matter of the procedure (this means, technical issues for expert determination whereas all other issues will go to arbitration or litigation).

In criminal procedures a decision was rendered in June 2012 that could be applicable by analogy to commercial litigation. Regardless of its usage, the criterion shows the perception of the courts towards ADR. On its face, the decision essentially establishes that "mediation" comes strictly from consent and it is paramount that parties agree to the referred alternative procedure. It continues by saying that *"since it is evident that the alternative dispute resolution arises with the consent and willingness from both parties, a decision to (in this case) nullify the proceedings to engage an Alternative Dispute Resolution would be contrary to the Political Constitution of the Mexican United States because its effect would be of slowing down the proper administration of justice"*. [Época: Décima Época Registro: 2000997 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Libro IX, Junio de 2012, Tomo 2 Materia(s): Común Tesis: VI.1o.P.3 P (10a.) Página: 883].

In essence, the current challenges to enforcement of multi-tiered dispute resolution clauses is three-fold: First, as a matter of legal culture, counsel must be proactive in including a clause establishing mediation or negotiation as a prior requisite for litigation or arbitration. Second, judges should begin to provide for alternative means or encourage the parties to engage in alternative dispute resolution procedures. And lastly, as a civil law country, support must come from our codes with pre-disposed language that can render mandatory a good faith ADR prior to judicial proceedings.

Attempts are being made to establish the culture of mediation, which could improve the chances of multi-tiered dispute resolution clauses being deemed enforceable. Although there has been a steady progress, the more palpable results have been in private or conventional topics such as family law. Certain institutions (i.e., ICC and JAMS) have recognized the increasing importance of using ADRs, and therefore, are seeking to foster such culture.

Another challenge is to redefine the scope on how counsel (both plaintiff and defendant) presents the case before clients. The Mexican procedure is designed basically for the claimant to pursue a cause of action with the available documentation at hand and it is only during the procedure that a party can foresee how strong its case actually is based on the representations made by the opposing party and on documents filed with the court.

This shows that in contrast to other jurisdictions where there is a discovery process, punitive damages and trial-by-jury to encourage parties to negotiate, in Mexico, parties usually only negotiate after long and burdensome proceedings. Essentially the term “*see you in court*” has a much more ambiguous meaning in Mexico given the unpredictability of the process. For these reasons parties are not convinced of the benefits of trying ADR and courts will not, by themselves oblige the parties to attend or comply with such cause of action.

The latter ideas must not be construed as hostility towards ADR *per se*; on the contrary, in 2008 the Center for Alternative Justice at the Federal District was established with the main purpose to promote mediation and negotiation on all kinds of civil and commercial procedures. The center has been growing in influence and in the last quarter of 2014 more than 50,000 dockets were on file with over 20,000 hours of ADR registered.

In conclusion even though Mexico is behind in terms of the development and acceptance of ADR efforts are being made to encourage parties and counsel to engage in the modern world policies and that might be the way towards the actual enforcement of multi-tiered dispute resolution clauses.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

It would essentially be a matter of construction and interpretation. The “utmost good faith” on which the parties execute and conduct their affairs in respect to the other party would have to be raised before the court.

In Mexico, the parties to commercial agreements are held to their bargain in respect of the consequences of their contractual relationships as executed and from those repercussions arising in good faith therein.

Moreover, the culture of mediation or negotiation has not arisen in full force or with the effect it has been understood in other jurisdictions. Certainly, a clause requiring “mediation” as a condition precedent to court or arbitration proceedings which is drafted with qualifying language might increase the possibilities of the parties being referred to negotiation or mediation stages prior to the legal cause of action being determined in judicial proceedings.

On that note, unless the clause clearly stipulates a respectable institution to conduct mediation proceedings, the time frame for the procedure, the consequences and foremost the consent of the parties, courts might not be inclined to deny the continuation of judicial proceedings.

In essence, the following requirements could increase the chances of enforcement of a multi-tiered dispute resolution clause in Mexico:

- Clear wording for mediation/negotiation to be a condition *sine qua non* for judicial proceedings. Note, however, that unless an ADR is clearly established under the umbrella of a national or international institution, courts may interpret a ground for denial of justice shall they force a party to enter into ADR.
- Clear wording for the parties' consent to negotiate or enter mediation in good faith.
- Mediation/negotiation to be conducted and overseen by an institution rather than being ad-hoc.
- Qualifying language for mediation/negotiation setting forth the timeframe or duration of the conciliatory stages.
- Consequences for failure to undertake an alternative dispute resolution proceeding or to actively renege or impede the ADR.

The recent Human Rights amendment to the Mexican Constitution and the excessive burden on national courts have initiated a wave of ADR conscience which if construed appropriately could establish the way towards judges forcing a party to comply with ADR prior to a formal claim.

The necessity of ADR is embedded in the Political Constitution; however, its effects have been primarily understood or directed towards criminal procedures and not as guidance in itself for legal counsel to engage in such procedures notwithstanding the nature of the action. The fact that they are primarily set forth in the Constitution §17 somehow ensured that ADR are protected thereto and even considered a fundamental human right in our country.

### **3. If your courts have enforced such clauses, how have they done so?**

The enforcement of such clauses by Mexican courts is a work in progress. To our recollection there has not been any case on which courts have stayed proceedings until the parties comply with any sort of amicable ADR.

Moreover, with the recent human rights amendment to the Mexican Constitution, the judicial system has systematically rendered decisions on which access to ADR procedures is considered now a human right. (Judicial criterion 2004630 from October 2013 "Access to ADR, as human right. Enjoys the same dignity as the access to the jurisdiction of the State".)

By implication, courts are apparently starting to give leeway to parties' agreements to solve their disputes through ADR procedures. It is true, however, that it might be going too far to say courts would enforce without hesitation multi-tiered dispute resolution clauses, at least until practitioners demand it as common practice or a binding decision is rendered by higher courts.

For instance, based on the recent Energy Law Reform, the States Oil Company will contract through a third party state entity. On the pre-contractual dispositions there is a mandatory 3-month conciliation period before arbitration can arise. This type of clause would certainly be enforceable given that arbitrators will evaluate the procedural compliance.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

To our knowledge there is no multi-tiered dispute resolution clause that is deemed enforceable as of right. However, we suggest the following clause to be included if conciliatory or mediation stages are considered paramount (with the caveats previously referred to), and under the simpler-the-better-rule.

*Any dispute arising out of or in relation to this Agreement which cannot be resolved by negotiation between the parties within [number] days of either party giving notice to the other party that a dispute has arisen shall be submitted to mediation pursuant to the [Institution] and failing settlement of that dispute by mediation within [number] days thereafter, the dispute shall be submitted by any party for final resolution by arbitration by [insert number] arbitrator(s) conducted in [place ] in [language] and in accordance with the Rules of Arbitration of the [arbitral body].*

Or

*Any dispute relating to this Agreement which cannot be resolved by negotiation between the parties within [number] days of either party giving notice to the other party that a dispute has arisen shall be submitted to mediation pursuant to the [Institution] and failing settlement of that dispute within [number] days thereafter, the dispute shall be submitted by any party for final resolution by the courts of [country] which courts shall thereafter have exclusive jurisdiction.*



## Moldavia

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### 1. Legislative framework

#### (i) Litigation

A legislative basis exists in Moldova to enforce multi-tiered dispute resolution clauses, also known as escalation clauses, where the highest tier on the scale is litigation in the state courts.

Pursuant to art. 166 (2) h) and art. 167 (1) d) of the Code of Civil Procedure of the Republic of Moldova, no.225-XV, dated 30 May 2003, as amended, "while lodging a lawsuit in a state court, the plaintiff shall include in the statement of claim information on the compliance with the preliminary out-of-court dispute resolution procedure and enclose supporting documents, if compliance with the procedure is required by law or contract."

The above and some related legal provisions of the Code of Civil Procedure, which are discussed below, have been challenged in the Moldovan Constitutional Court as being allegedly in violation of a range of constitutional principles, including free access to justice (art. 20 of the Constitution of the Republic of Moldova, dated 29 July 1994, as amended).

The Constitutional Court upheld the challenged provisions and stressed that, in light of art. 6 p.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, dated 4 November 1950, as amended, and jurisprudence of the European Court of Human Rights, "the right of access to justice cannot be absolute, it may imply limitations, including of procedural character, provided that such limitations are reasonable and commensurate with the purpose sought", "do not affect the substance of [that right]" and "do not bring the essence of that right to nought" (p.58, p.61 and p.71 Decision of the Constitutional Court of the Republic of Moldova, no.14, dated 15 November 2012). The Constitutional Court further held that the obligation to have recourse to extrajudicial dispute resolution is not a limitation of free access to justice inconsistent with the Constitution, since the interested party retains his right to bring the claim in court (p.79 and p.84 Decision of the Constitutional Court no.14/2012).

#### (ii) Arbitration

By contrast to civil procedure legislation, Moldovan law governing arbitration does not contain an express requirement for those in dispute to comply with contractually agreed preliminary

dispute resolution procedures. However, that requirement can be derived from the very consensual nature of arbitration.

The Law on Arbitration recognizes party autonomy in tailoring the arbitration agreement. Law on Arbitration of the Republic of Moldova, no.23-XVI, dated 22 February 2008. (By way of background, the law governs both domestic and international arbitration (art. 6 (4) Law on Arbitration). The law, however, also makes reference to a special law, namely the Law on International Commercial Arbitration, which governs "the way of constitution and functioning of international commercial arbitration" (art. 34 (3) Law on Arbitration).)

The Law on International Commercial Arbitration likewise recognizes party autonomy in tailoring the arbitration agreement. Law on International Commercial Arbitration of the Republic of Moldova, no.24-XVI, dated 22 February 2008. (The law largely incorporates the UNCITRAL Model Law on International Commercial Arbitration.)

Party autonomy is clearly articulated in art. 4 of the Law on Arbitration, which among other "basic principles of arbitration" enumerates "the freedom of agreements in arbitration" (art. 4 c) Law on Arbitration) and "constitution of arbitration in conformity with parties agreement" (art. 4 d) Law on Arbitration).

No Moldovan arbitration awards or related court jurisprudence has been identified to expressly address the issue of enforceability of contractual clauses envisaging pre-arbitration dispute resolution mechanisms. If the issue, however, arises in practice, the interested party may argue that the above basic principles of arbitration and certain other provisions of the two Moldovan laws governing arbitration are a sufficient platform for crafting and enforcement of multi-tiered clauses with arbitration at the top of the escalation ladder. In this connection, the arbitration clause can be regarded as covering not only the highest tier, namely arbitration, but the entire array of dispute resolution mechanisms agreed upon by the parties, thus, forming a multi-tiered arbitration clause. Following that logic, both the arbitral tribunal and, where applicable, the state court will have to take into account the parties' agreement on the use of pre-arbitration dispute settlement mechanisms as part of their overarching agreement to arbitrate.

While no such authorities have been located with reference to the Moldovan jurisdiction, in foreign literature and jurisprudence multi-tiered clauses including arbitration are often called "multi-tiered arbitration clauses" (e.g. see Gary B. Born: *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, third edition, p.94). We see no reason why this approach to the qualification of such multi-tiered clauses as a *sui generis* type of arbitration clause cannot be implemented in arbitration proceedings conducted under the Moldovan law.

### (iii) Mediation and other ADR

Among alternative dispute resolution (ADR) mechanisms that can be included in a multi-tiered clause, usually as a step before litigation or arbitration, is mediation. In Moldova mediation is governed by the Law on Mediation, which provides that the parties may include in any agreement a clause on mediation, and the validity of the clause does not depend upon the validity

of the agreement. Law on Mediation of the Republic of Moldova, no.134-XVI, dated 14 June 2007, at art. 2 (4).

Such a clause, as with any other valid contractual clause, shall be honored by the parties and, if necessary, shall be enforced by the state court or arbitral tribunal.

A mediation clause has to be distinguished from a mediation agreement within the meaning of art. 26 of the Law on Mediation. A mediation agreement is a written contract between the mediator and the conflicting parties and it marks the commencement of a mediation procedure (art. 26 (1), (2) and (3) Law on Mediation). Some aspects related to the mediation agreement are discussed below.

As to other ADR mechanisms, such as dispute adjudication, neutral evaluation, expert determination, etc., they are not governed by any specially designed laws. Accordingly, the legal basis for the enforcement of multi-tiered clauses envisaging such mechanisms comprises the above and below provisions of the Code of Civil Procedure on the compliance with pre-trial dispute resolution procedures, the provisions of both arbitration laws governing arbitration agreements, as well as general rules of contract law.

## **2. (Potential) challenges to enforcement of multi-tiered clauses**

### **(i) Relative unfamiliarity with the concept of multi-tiered clauses and ADR**

Multi-tiered dispute resolution clauses, especially those which contain more than one pre-trial or pre-arbitration tier, are far from commonplace in Moldova. Various ADR processes are still deemed to be exotic. Even mediation, which nearly eight years ago was bolstered by the passage of a special law and the carrying out of a massive pro-mediation campaign, is still a rare species in the Moldovan waters. Some local practitioners also regard the use of ADR as an exercise in futility.

Yet, with the inflow of foreign investment and the use of international and foreign financing for the realization of infrastructure and other complex projects in the country, standardized forms of contracts are being imported and increasingly employed in the Moldovan context. See e.g., International Federation of Consulting Engineers' Forms of Contract: <http://fidic.org>. Such standardized forms often contain sophisticated escalation clauses for dispute resolution.

It would be interesting to see whether and when complex multi-tiered dispute resolution clauses, also including some new for Moldova ADR mechanisms, will take root in the country and how the related jurisprudence will evolve. So far, we see at least two potential challenges to the enforcement of complex multi-tiered clauses, in part as a result of the relative unfamiliarity of the Moldovan legal community with them.

First, whereas requiring the parties to undergo an out-of-court dispute resolution process before having recourse to court litigation has been found to be constitutional, it may well be the case that a contractual requirement to go through a longer chain of dispute resolution procedures

(more than one before litigation or arbitration) could be regarded as a too burdensome, unreasonable and thus unlawful limitation of the free access to justice.

Second, some ADR methods, such as expert determination and dispute adjudication, which, if applied in their typical forms, often result in binding decisions, can simply be not exactly understood by many members of the local legal community, including judges, and even mixed up with *ad-hoc* arbitration. Or, a binding decision of an expert or dispute adjudication board may end up being unenforceable on account of the lack of a special legislative framework governing such dispute resolution procedures and enforcement of the resulting decisions. The mere freedom of contract, here – in tailoring the dispute resolution clause, can well be found insufficient for the enforcement of such decisions.

(ii) Statute of limitations

An important issue that may affect the enforceability of a multi-tiered clause is the statute of limitations. As in many other civil law jurisdictions, the rules governing the statute of limitations are part of substantive law. Pursuant to the Moldovan conflict of laws rules, the statute of limitations of the right to file action is determined by the law applicable to the subjective right. Civil Code of the Republic of Moldova, no.1107-XV, dated 6 June 2002, as amended. However, in practice in certain situations Moldovan courts may apply Moldovan substantive law (also the norms governing the statute of limitations) regardless of the agreement of the parties on the applicable law or the conflict of laws rules.

In Moldova the statute of limitations is subject to strict rules. This applies in particular to the duration of the period of limitation and the way of its calculation. Neither can be changed by parties' agreement (art. 270 Civil Code).

The general statute of limitations is three years, whereas special limitation periods in contractual relationships range from six months, e.g. in cases of hidden defects or in disputes arising from carriage agreements, to five years in construction-related matters (art. art. 267 – 269 Civil Code). Different limitations periods set out in law can also apply.

The Civil Code also provides for the grounds for suspension and interruption of the limitation period.

The period of limitation is suspended *inter alia* in the following cases: *force majeure* preventing the plaintiff from bringing a lawsuit, extension of the obligation due to moratorium, suspension of the law or regulation governing the disputed relationship, etc. (art. 274 (1) a), b) and e) Civil Code).

Another ground for suspending the running of the limitation period is signing a mediation agreement. In such a case the limitation period is suspended for the entire duration of the mediation procedure (art. 26 (4) Law on Mediation).

As to the grounds for the interruption of a limitation period, they include (i) bringing a lawsuit in due order or (ii) debtors' actions amounting to acknowledgement of the debt (art. 277 (1) Civil Code).

Commencement of pre-trial or pre-arbitration dispute resolution processes (including those mentioned in a multi-tiered clause), other than mediation, does not suspend the running of the limitation period. At the same time, it can be concluded from the above art. 270 of the Civil Code that the parties' agreement on additional grounds for suspending the flow of the limitation period can be found null and void.

Hence, if the parties agree on the use of long and/or multiple preliminary dispute resolution procedures, while undertaking them in certain cases, a relatively short limitation period (e.g. the six-month period) can expire before the lawsuit is brought in court or arbitration. This can turn out to be a significant challenge to the enforcement of some escalation clauses.

(iii) Unclear drafting

Lack of clarity as to the mandatory character of prior stages of dispute settlement envisaged in a multi-tiered clause may also pose a significant challenge to its enforcement.

### **3. Court's and tribunal's instruments to enforce multi-tiered clauses**

(i) Certain court's instruments

Moldovan Code of Civil Procedure provides for two possible consequences of plaintiff's failure to prove its compliance with the preliminary dispute resolution mechanisms:

- returning the statement of claim to the plaintiff, which is done within five days of the day of assigning the statement of claim to a judge (art. 170 (1) a) Code of Civil Procedure).
- dismissal of claim (without prejudice). This happens if, for instance, the agreement to undergo prior stages of dispute resolution was not included in the materials enclosed with the statement of claim and was disclosed at a later stage (art. 267 a) Code of Civil Procedure).

In both of the above cases:

- the judge shall issue a reasoned decision in which he/she shall indicate the plaintiff's obligation to comply with the prior stage(s) of dispute settlement before bringing the claim in court (art. 170 (2) and art. 268 (1) Code of Civil Procedure).
- the state fee is returned to the plaintiff (art. 89 (1) d) and f) Code of Civil Procedure).

- the plaintiff may challenge the judge's decision in the court of cassation (art. 170 (5) and art. 268 (2) Code of Civil Procedure).
- the plaintiff may re-file the statement of claim after having undergone the prior stages of dispute settlement (art. 170 (4) and art. 268 (3) Code of Civil Procedure).
- the limitation period is deemed not to have been interrupted (art. 278 Civil Code, etc.).

In the earlier quoted Decision no.14/2012, the Constitutional Court emphasized that the above procedural measures, namely returning the statement of claim and dismissing the claim, do not exclude the possibility of repeatedly bringing the same claim against the same defendant in court, provided that the plaintiff has remedied its failure to undergo the prior stages of dispute resolution (p.73 Decision of the Constitutional Court no.14/2012). As the Constitutional Court further elaborated in its decision, the above provisions of art. 170 (4) and art. 268 (3) of the Code of Civil Procedure "clearly express the legislator's will not to limit [by such procedural measures] ... the constitutional principle of free access to justice in the course of its implementation by the litigants." In other words, the Constitutional Court is of the opinion that the requirement to comply with the contractually agreed prior stages of dispute settlement and the above procedural measures to enforce the relevant contractual clause are without prejudice to the disputing parties.

However, this is not necessarily the case where the multi-tiered dispute resolution clause is too complex and its implementation is too time-consuming, whereas the applicable statute of limitation is too short (e.g. six months). Compliance with both in certain cases may simply be impossible. While the Moldovan Civil Code provides for certain exceptional cases in which the elapsed limitation period can be reinstated, this can be done if the obstacle, due to which litigation was not commenced within the statute of limitation, was related to the person of the plaintiff (art. 279 (1) Civil Code). It is arguable whether the obligation to comply with the multi-tiered clause is one of such person-related obstacles. Even if it is, it is the judge's discretion whether to grant reinstatement or not. Hence, in certain cases executing sophisticated multi-tiered clauses can be a rather tricky exercise, which may affect the fundamental principle of access to justice.

## **(ii) Enforcement of the agreement to mediate**

Art. 30 (1) of the Law on Mediation provides that parties' acceptance of mediation suspends, at both parties' request, examination of the civil case in court or arbitration. In other words, the suspension takes place if the parties have asked the court or the arbitral tribunal to stay the proceeding. It is, however, unclear whether a mediation agreement as discussed above (art. 26 Law on Mediation) is sufficient for staying litigation or arbitration proceedings, or a separate parties' request is necessary for that purpose.

It is also not clear whether a mere mediation clause (as also discussed above) can serve the purpose of the above parties' request. In our view, it probably cannot serve such a purpose, at

least in litigation. In case the parties insert a mediation clause in their contract and after a dispute arises one of them brings it directly in court, without having taken a shot at mediation, the court will probably not stay the litigation without parties' mutual request for it, but will rather return the statement of claim to the plaintiff or dismiss the claim, as discussed above.

### **(iii) Arbitral tribunal's enforcement instruments**

Since none of the two Moldovan laws governing arbitration contain specific provisions on multi-tiered clauses, they also do not have specific norms regarding their enforcement. However, such enforcement instruments can be derived from more general provisions of these laws and they may include:

- finding by the arbitral tribunal that it has no jurisdiction to resolve the dispute (art. 16 (a) Law on International Commercial Arbitration and art.27 (3) Law on Arbitration). The reason for such a ruling would be that only following the prior stages of dispute resolution, an arbitral tribunal could be formed to settle the case. This approach would be particularly plausible if the entire multi-tiered clause is regarded as an arbitration clause.
- requiring in the arbitral award the defaulting party (i.e. the plaintiff) to reimburse certain legal costs to the other party, provided that such approach is consistent with the arbitration agreement and, if applicable, the arbitration rules (art. 33 (1) Law on International Commercial Arbitration and art.32 Law on Arbitration). While both arbitration laws expressly or implicitly incorporate the principle "the loser pays", they also leave room for flexibility in allocating costs between the parties. ("Loser pays" is the default approach to cost allocation under the Law on Arbitration (art. 32 (2) Law on Arbitration). Under the Law on International Commercial Arbitration, while ruling on cost allocation, the arbitral tribunal shall take into account the circumstances of a particular case, including the outcome of the arbitration proceedings (art. 33 (1) Law on International Commercial Arbitration). Pursuant to both laws, the parties may agree on a different approach to cost allocation (art. 32 (2) Law on Arbitration and art. 33 (1) Law on International Commercial Arbitration). A different approach can also be envisaged in the arbitration rules (art. 32 (3) Law on Arbitration).)
- other instruments (e.g. stay of the arbitration proceedings) provided that they are consistent with the arbitration agreement and, in case of institutional arbitration, with the arbitration rules.

Furthermore, failure to undertake preliminary stages of dispute resolution in line with the escalation clause before having recourse to arbitration, can, in principle, be a ground for setting an arbitral award aside on the basis of art. 480 (2) e) of the Code of Civil Procedure and, if applicable, art. 37 (2) a) point four of the Law on International Commercial Arbitration, which provide that an arbitral award shall be set aside if the applicant proves that the arbitral tribunal was not formed or the arbitration proceedings were not carried out in conformity with the arbitration agreement.

#### **4. Drafting tools to improve the chances of enforcement of a multi-tiered clause**

In practical terms, in order to maximize prospects of enforcement of a multi-tiered clause in Moldova it is advisable:

- to make it, to the extent possible, rather simple and include one or two preliminary stages of relatively short duration;
- to use dispute resolution mechanisms already known in Moldova (negotiations, mediation, arbitration, litigation);
- to draft the respective tiers clearly and in line with the applicable law and, if the case may be, with the rules of the designated arbitral institution;
- to preserve the pure nature of each particular dispute resolution mechanism and avoid amalgamation of such mechanisms within the same procedure;
- to make sure that the multi-tiered procedure matches the applicable statute of limitation;
- to use clear language requiring the parties to undergo prior steps. Use of the words "must", "shall", and "condition precedent" would be helpful in drafting the clause.
- In addition, if arbitration is included in the multi-tiered dispute resolution clause, it is recommended:
- to name the entire multi-tiered clause as an arbitration clause; and
- to expressly provide in the multi-tiered arbitration clause an enforcement mechanism. Such mechanism can, for instance, provide that if the parties fail to undertake the prior stages, the arbitral tribunal will (i) lack jurisdiction to hear the case or (ii) will be required to stay the proceedings and/or (iii) will have to order the party, which failed to comply with the prior stages, to pay a certain portion of the legal costs incurred by the other party.

#### **Conclusion**

While the legislative framework for the enforcement of multi-tiered clauses exists in Moldova, the related practice is very limited. It will be interesting to see how it evolves.



## Montenegro

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

It has become rather common for parties in Montenegro to stipulate to an obligation to negotiate or attempt to apply an alternative dispute resolution ("ADR") mechanism before commencing arbitration or litigation proceedings to settle disputes arising out of their contracts. However, there are no provisions in Montenegrin procedural statutes expressly regulating this or other types of multi-tiered dispute resolution clauses. There are likewise no settled court practices or available arbitral decisions referring specifically to the enforceability of such clauses. Thus, the enforceability of multi-tiered dispute resolution clauses in Montenegro is not subject to specific conditions established particularly for this purpose. However, the lack of specific criteria governing multi-tiered dispute resolution clauses does not automatically guarantee unrestricted enforceability of these so called "escalation clauses" or "waterfall clauses". Rather, the validity and enforceability of pre-litigation or pre-arbitration tiers in these clauses in Montenegro should be challenged against general legal principles applicable both with respect to contracts and dispute resolution, on a case-by-case basis and depending on the exact wording of each individual clause.

To put the foregoing into the perspective of the Montenegrin legal system, pre-litigation or pre-arbitration stages in these clauses should be construed the same way as any other contractual provision. As such, the initial stage of these clauses must satisfy the basic principles that make a contract provision susceptible to enforcement. These principles include in particular a requirement that the subject matter of a contract be possible, permitted, and sufficiently determinable.

Given that typical ADR procedures and amicable settlement of disputes are values that are not only admissible but to a certain extent even promoted in the Montenegrin legal system, multi-tiered dispute resolution clauses should generally be permitted. Further, the ADR stage of these clauses should be sufficiently clear and precise to allow for determining what steps must be taken in order to comply with the clause. In order to be construed as a positive obligation, it should be clear that the ADR phase in these clauses is a mandatory and unequivocal commitment to attempt the application of the relevant ADR mechanism prior to litigation or arbitration.

Having due regard to the basic principles of contract law, in order to be a valid contractual condition, the ADR tier should not be subject to further agreement of the parties. Since the aim of these clauses is to make recourse to a final and binding dispute resolution mechanism temporarily conditional upon the application of the agreed ADR mechanism, the length of such prerequisite stage should be unequivocally defined, i.e. it should be clear when and under what conditions the ADR stage in a particular multi-tiered dispute resolution clause comes to an end.

Finally, application of a particular multi-tiered dispute resolution clause in its actual effect should not foreclose access to justice for the parties, i.e. should not substantially prevent the parties from obtaining final protection of their rights by virtue of a binding court decision or arbitration award. Fixing a very long period of time for the ADR phase might be seen as actually foreclosing access to justice for the parties. Similarly, other particular conditions that may be found in some escalation clauses, such as negative injunctions when the prior stage is delayed or is not complied with, should also be carefully assessed, based on the circumstances of each particular case, and in the light of applicable general principles of law.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As noted above, given the lack of regulation and available dispute resolution practice addressing this issue, there are no criteria which would serve as reliable guidelines for drafting a multi-tiered dispute resolution clause with the certainty of enforceability in Montenegro.

The most common multi-tiered dispute resolution clauses refer the parties to amicable settlement negotiations before they have recourse to a court or arbitration. These provisions usually do not include any further details other than the time limit for reaching an amicable settlement. Although it could be argued that, in case of negotiations in the first tier of a dispute clause, even the aforesaid simple and short format may suffice, it could also be upgraded to increase the chances that such provision will be enforced as an actual prerequisite to further trial process. This could be done by adding further details on the operation of the relevant negotiation process, e.g. the contact details of persons authorised to lead negotiations, description of the form of such negotiations, conditions for the transition from the negotiations to the litigation or arbitration phase, the consequences of disregarding the first tier, etc.

More complex multi-tiered dispute resolution clauses should also be clearly drafted and detailed enough to sustain any challenge as outlined above under point 1. To reduce the risk of unenforceability, the clause should employ mandatory instead of discretionary language, thus showing the actual will of the parties to be bound by any such prerequisite to arbitration or court proceedings. The provision should clearly specify the start and end points of each such mandatory stage prior to arbitration or litigation. In order to facilitate enforcement and avoid delays in the dispute resolution process, the clause should further specify the procedural steps of the ADR phase including the method of selection of a mediator, expert, or any such third party in the context of the applicable ADR tier. It could be advisable also to indicate the consequences of failure to comply with such prior stage. One should, however, be cautious and ensure that any such negative inference of non-fulfilment of the preceding tier is not unreasonable and will withstand the test of general principles of law. The time period set for such pre-arbitration or pre-

litigation stages should not be too long, in order not to be construed as hindering the party from reaching justice.

### **3. If your courts have enforced such clauses, how have they done so?**

Along with the absence of general regulation and practice in the enforcement of multi-tiered dispute resolution clauses, there are also no provisions or practice clearly indicating the exact procedural action through which the court would enforce such clauses.

As typical preliminary tiers in multi-tiered dispute resolution clauses oblige the parties to attempt negotiation or other ADR mechanism before referring the dispute to arbitration or litigation, under the Montenegrin procedural law, non-fulfilment of such a condition precedent may be qualified as a removable procedural impediment for the admissibility of a lawsuit (*otklonjiva procesna smetnja*). Taking into account the nature of this condition, it could be expected that the court would consider non-fulfilment of such condition only in response to an objection by one of the parties. If the court finds that a valid and enforceable preliminary tier of a multi-tiered dispute resolution has not been fulfilled it may either dismiss the lawsuit or stay the proceeding until such pre-litigation stage has been fulfilled, or, in case of a negotiation clause, until it was at least reasonably attempted. Given that pursuant to the Montenegrin Code of Civil Procedures the court may at any time stay the proceeding and refer the parties to mediation if it finds that such process could bring the parties to settlement, it could be argued that the stay of proceedings may be an even more appropriate solution when deciding on non-fulfilment of multi-tiered dispute resolution clauses.


The effect and enforcement of multi-tiered dispute resolution clauses, where breach of previous stages cannot be subsequently remedied, should be analysed separately and on a case-by-case basis.

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The following could be a sample of a multi-tiered dispute resolution clause with negotiation in the first tier:

*The parties shall endeavour to resolve any dispute, controversy or claim arising out of or in relation to or in connection with this agreement including any dispute in relation to its validity or interpretation ("dispute") by negotiation on the top level meeting held by the authorised executives of the parties. If the parties fail to resolve the dispute by negotiation within [number of days] as of either party's written notice requesting such negotiation of the dispute, any such dispute shall be finally resolved before the competent court in [country and the city to be added] /in arbitration in accordance with [rules, arbitral institutions, seat and other details to be added].*

## Netherlands

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In the Netherlands ever-increasing recourse is being made to out of court dispute resolution arrangements when resolving conflicts, whether private or commercial. In practice the choice will often fall on a linkage of negotiation or mediation to arbitration, whether or not so as to resolve a partial dispute, or binding opinion or on some combination of procedures (tailor-made).

The general underlying premise is that, in respect of legal relationships where they are free to make dispositions, contractual or otherwise, parties enjoy freedom of contract as to the manner in which dispute resolution is to be performed. An example of the area that is exclusively the province of the ordinary courts can be found in the enquiry proceedings that come before the Enterprise and Business Court (the “Enterprise Chamber” attached to the Amsterdam Appeal Court). Enquiry law concerns an exceptional process in law that may result in a direct intervention in the structure of a company. The powers granted to the Enterprise Chamber under the statutory rules in this area (and that are granted to that Court alone) may therefore not be placed in the hands of an arbitrator. Reliance on an arbitral clause agreed between the parties is disregarded [Amsterdam Appeal Court 18 October 2012, ECLI:NL:GHAMS:2012:BY5614].

The growing interest in alternative dispute resolution has been stimulated by the Dutch authorities, their strategy being that of taking disputes outside the formal confines of law and the efficient resolution of disputes together with multiplying the routes of access to the law. Since 2007 the Netherlands has fulfilled a pioneering role in the area of court-annexed mediation and incorporates on a regular basis a provision permitting reference to mediation that applies to all District Courts, Appeal Courts, the Administrative High Court and the Trade and Industry Appeals Tribunal. On 21 November 2012 the Cross-Border Disputes Mediation Act (that is limited to cross-border mediation) came into force. In addition a bill has been tabled before Parliament (number 33723) designed to promote mediation in civil law, which, amongst other things, will lay down that where a mediation clause has been explicitly agreed, that clause will have binding effect (Article 22a(2), Dutch Code of Civil Procedure ('DCCP') under the bill). The court will order *a stay* of the examination of the case where the parties have failed to honour this clause. As the law stands today, doubt surrounds the enforceability of mediation and other types

of mediation/negotiation clauses. For the time being such clauses have the status of a "gentlemen's agreement" to be observed in good faith.

In a number of specific situations the law provides for prior consultation between the parties before recourse may be had to the courts (for example Article 2:349(1), of the Dutch Civil Code ('DCC'), in enquiry proceedings, disqualifying a litigant who fails to observe this and Article 3:305(a)(2), DCC, collective action – although it should be noted that such a consultation may on occasion only be a formality). In addition in various sectors of industry recourse may be had to various forms of dispute resolution that are declared to apply under the general conditions in place in commercial contracts or that are specified in those contracts themselves. Examples of these are to be found, *inter alia*, in the *SGOA* (for the IT industry), *Stichting Raad van Arbitrage voor de Bouw* (for the construction industry), *Kifid* (for the financial services industry) and the *Stichting Gordiass* (for the insurance industry). Institutes such as these will very often tend to use a set of regulations of their own directed at mediation, arbitration, binding opinion and other variants of dispute (or partial dispute) resolution. In addition they may also propose model alternative dispute resolution clauses for incorporation in contracts.

In respect of dispute resolution clauses that have been declared applicable or that have been agreed on there exists a field of tension between, on the one hand, the *pacta sunt servanda* principle (that parties must do what they agreed to do) and, on the other hand, Article 17 of the Dutch Constitution and Article 6, ECHR, that guarantee the right of recourse to the ordinary courts.

Where there is an arbitration clause the sanction for a party addressing a court directly is clear: in principle the court must declare itself to *lack competence* to hear the dispute (Article 1022(1), DCCP). In exceptional cases, a plea based on the Article 6:248, DCC reasonableness and fairness principle may lead to a different result, for example should the likely costs of arbitration in fact impede the claimant in his ability to lodge his claim [NL Supr. Ct. 21 March 1997 ECLI:HR:SC:1997:AG7212].

It is also established case law that where a court is, directly or indirectly, approached in a situation where a binding advice clause operates this results in the claimant being denied standing (declared *inadmissible*) from presenting his claims [NL Supr. Ct. 22 November 1985, NJ 1986, 275 ECLI:NL:HR:1985:AC9117]. Here it is important to determine whether the scope of the binding opinion clause indeed covers the dispute at issue; where it does not the binding adjudicator must decline jurisdiction. Where a binding adjudicator finds he is authorised in respect of questions that go beyond the stated scope his binding opinion is exposed to Article 7:904(1), DCC annulment [Amsterdam Appeal Court 21 October 2014, ECLI:NL:GHAMS:2014:4342].

Case law teaches that a mediation clause may not be equated with a binding opinion clause; mediation is not designed to yield a binding decision by a third party [compare recent Rotterdam District Court 6 August 2004, ECLI:NL:RBROT:2014:7642 and Rotterdam District Court 21 January 2015, ECLI:NL:RBROT:2015:843]. The challenge lies in the question of whether the parties that agreed on mediation in a contract may be held to that undertaking or whether they remain free to go to court immediately. The notion that obligatory mediation is in breach of

Article 17, Dutch Constitution and Article 6, ECHR can no longer stand. In 2010 the European Court of Justice found that a statutory obligation requiring recourse to a mediator prior to recourse to a court did not breach Article 6, ECHR, provided that these proceedings did not result in a judgment that bound the parties and did not bring about any substantive delay in lodging proceedings before a court [CoJ EU 18 March 2010, no. C-317/08-320/08; ECLI:NL:XX:2010:BL9245 (*Alassini et al. v Telecommunications Italia Spa et al.*)].

## 2. What drafting might increase the chances of enforcement in your jurisdiction?

A clause stipulating the route to an amicable settlement / a mediator is generally seen as an ‘additional’ form of dispute treatment and not as an interim *exclusion* of the regular legal approaches to law that are available. This may turn out to be otherwise where the wording of the clause unambiguously shows that the parties explicitly intended to keep the ordinary courts in the waiting room until completion of the negotiations or mediation (which completion is further to be defined). On the basis of the multi-tiered dispute resolution clauses in use in various industry sectors and a quick scan of case law issued by the lower courts concerning the enforceability of mediation clauses in particular (case law about other types of dispute resolution clauses is sparse) the following factors appear to be relevant to the issue of enforceability.

Enforceability will depend on the drafting of the relevant clause/agreement, the context of the undertaking (an *ad hoc* agreement or part of a more wide-ranging contract), the nature of the parties (whether private individuals or commercial parties), the manner in which the undertaking came into being (undertakings that are the product of negotiations are given greater weight than provisions imposed unilaterally), the type of conflict the clause refers to (an agreement in respect of a specific kind of dispute carries a greater weight than a generic agreement covering all conceivable disputes) and the knowable interest of the parties in negotiation/mediation as a means of dispute resolution (an interest in mediation in the case of long-term relations or in the course of projects carries greater weight than where there is no on-going relationship).

The following elements (that are sketched out using mediation terminology) help promote or are indeed necessary if a dispute resolution clause is to be enforceable:

- a declaration stating that the rules and procedures of a recognised mediation body are to apply (for example the Dutch Mediation Institute, NMI);
- a concrete description of the duty to attempt mediation: when it comes to *initiating* mediation as such the parties are under an obligation to arrive at a result;
- a provision that, should at the time of the start of the mediation there exist pending court or linked proceedings about the dispute subject to the clause, the parties will request the court/arbitrator to stay these for the duration of the mediation (except for measures designed to preserve rights and matters of urgency);

- a concrete description of the duty to go through the mediation process: this duty to furnish genuine endeavour is considered to have been complied with where the parties attend the first mediation meeting;
- a clear time frame and a time limit: so as to avoid delay and misunderstandings as to the moment at which the parties are entitled to go to court / to an arbitrator, without disregarding the dispute resolution clause;
- a sanction or sanctions in case of non-compliance with duties set out under a dispute resolution clause, such as the obligation to pay the costs of the action. A provision to the effect that a court is to declare the claim inadmissible in the event a party fails to comply with the clause relates to a sanction of procedural law that cannot be contractually regulated at the outset;
- an express provision to the effect that the mediation clause is enforceable.

### 3. If your courts have enforced such clauses, how have they done so?

In a judgment of 20 January 2006 on the voluntary nature of mediation in a family law context the Supreme Court found that this was conclusive and denied the obligatory nature of the mediation agreement:

*“This concerns disputes between two private individuals who in the course of a dispute undertook to attempt to arrive at a consensual agreement by means of mediation. In view of the nature of mediation as a medium both parties are free at all times to withdraw their cooperation or, for reasons proper to themselves, to terminate that cooperation.”*

[NL Supr. Ct. 20 January 2006, ECLI:NL:HR:2006:AU3724, NJ2006/75 legal ground 3.4]. This approach has been followed in subsequent case law [*inter alia* NL Supr. Ct.8 May 2009, ECLI:NL:HR:2009:BH7132] where at issue were preponderantly agreements made in any case with a single private individual [see Amsterdam District Court 16 October 2002, ECLI:NL:RBAMS: 2002:AF5797, NJ 2003/87, legal ground 5, concerning a mediation clause in an employment contract and Haarlem District Court 4 June 2002 ECLI:NL:RB:HAA:2002:AQ2615, legal grounds 4.4 and 4.5, a dispute between two private individuals].

The advisory opinion that Advocate General Huydecoper issued [attached to NL Supr. Ct.20 January 2006] is worthy of note. He observed that a situation might exist in which just one of the parties was obliged to cooperate with an attempt at mediation, for example where the parties agreed "that in such situations of conflict as were to be expected they might need some form of mediation assistance before recourse to a court may be sought" [no. 16, advisory opinion Advocate General Huydecoper, attached to Supreme Court 20 January 2006]. It is likely that the situation would be different in the case of professional parties that agree on mediation. Academic legal writers have taken the line that a commercial party could not so easily cast aside a carefully drafted mediation clause [reference is made, *inter alia*, to E.J.M. van Beukering-Rosmuller and

P.C. van Schelven, *De implementatie van de Europese mediationrichtlijnen in het Nederlandse recht, juridische gevolgen en betekenis voor de commerciële praktijk*, The Hague, Boom Lemma Uitgevers, 2013].

The picture of the sparse lower court case law in respect of commercial parties is changeable. In a dispute between health care insurers and a health care provider (that referred to NL Supr. Ct 20 January 2006), the Utrecht District Court, ruling in summary proceedings, held that the mediation clause in the health care contract did not find the claimant *inadmissible* [President Utrecht District Court 15 August 2008, LJN BE 2719 ECLI:NL:RBUTR:2008:BE2719]. Two months later the same District Court once again ruled on the obligatory nature of a mediation clause, this time in a licensing agreement. The court first observed that the parties were in principle bound to honour these agreements. The court then held that the *pre-litigation conduct* of the party relying on this clause before the court (it had not placed any reliance thereon before) and the voluntary nature of mediation justified a different conclusion (Utrecht District Court 15 October 2008, ECLI:NL:RBUTR:2008:BF9266].

That pre-litigation conduct may frustrate enforceable reliance on a clause is also to be found in a judgment on appeal heard by the Amsterdam District Court in an employment dispute. The employment contract incorporated an NMI mediation clause. The employee went directly to court, so by-passing an NMI mediator. The subdistrict court followed the employer's defence and held that mediation should first have taken place and declared the employee's claims *inadmissible*. On appeal it was found relevant that, before the suit before the court had started, the parties had not made any mention whatsoever of the possibility or desirability of mediation. The District Court declined to disqualify the employee, holding that mediation took place on a voluntary basis and that a process of mediation does not produce a decision on the dispute made by a third party that could be considered binding [Amsterdam District Court 16 October 2002, ECLI:NL:RBAMS:2002:AF5797].

The following rulings are illustrations of enforceable clauses. In a dispute opposing two IT companies the Arnhem District Court declared the claimant's money collection claim *inadmissible* because that party had failed to pursue the alternative dispute resolution scheme that had been agreed between the parties by means of the general conditions [Arnhem District Court 14-01-2004 ECLI:NL:RBARN:2004:AO3003]. The wording ran as follows:

*“Such disputes as may arise between One Step to Knowledge BV and the customer following a contract concluded by One Step to Knowledge BV with the customer or following further contracts that are the consequence thereof shall be resolved by the competent Dutch court, but not after the procedure in line with the 'Minitrial Regulations' of the 'Stichting Geschillenoplossing Automatisering' of The Hague (a non-binding opinion procedure) has been followed, without prejudice to the right of the parties to seek relief in summary proceedings.”*

The wording of this clause fits in with the wording in the general conditions used by the FENIT, the IT industry organisation. This wording itself refers to the SGOA, the arbitration and mediation institute of the Dutch IT industry and, in point of fact, refers to a mediation clause. The Court found the wording of this alternative dispute resolution scheme to be ‘of itself clear’



as this clause, so it found, 'rendered compulsory' the alternative SGOA procedure, thereby following a purely linguistic interpretation.

Complications may arise where a party finds itself obliged to take protective or urgent measures for which the alternative dispute resolution scheme makes no provision. In such a case, cutting across the scheme, recourse to a court (if need be, to a court in summary proceedings) must remain open to a party. In a case opposing a software supplier and its client, where the SGOA alternative dispute resolution scheme also applied (mediation via the 'minitrial' route, which term was replaced by 'ICT mediation'), the client had, so as to protect his rights and following leave granted to that effect by a court in summary proceedings, levied protective attachment to the detriment of the software supplier, as a consequence of which Article 700(3), DCCP obliged the client to lay his claim in an action on the merits before a district court. A 'minitrial' could not be seen as an 'action on the merits', so the Appeal Court concerned ruled [The Hague Appeal Court 12 December 2002, NJ Kort 2003, 17]. That the party levying attachment was thus obliged to go to court in an action on the merits before beginning the case did not mean, so the Court ruled, that the agreed 'minitrial' procedure could be leapfrogged. When referring the case back to the district court the appeal court made the following recommendation:

*“The Appeal Court suggests that the District Court may, for reasons of litigation efficiency, wish to consider staying its decision for an indefinite period and to refer the case to the cause list so as to enable the parties to follow the procedure in line with the 'Minitrial' scheme of the Stichting Geschillenoplossing Automatisering of The Hague.”*

A practical approach of this nature (that promotes efficient case management) may not result in the infliction of paralysis on the legitimate litigation interests of the parties; since a stay for an indefinite period may not result in a denial of recourse to the courts (safeguarded in the Constitution). In the case of protective measures (such as attachment) a pragmatic approach appears to apply where a court in summary proceedings, in the context of leave to levy attachment, fixes a lengthy or flexible term for the lodging of a suit in an action on the merits, such that in the intervening time the parties concerned may attempt the agreed alternative dispute resolution arrangements.

Another approach can be found in the arbitral award in summary proceedings of the Netherlands Arbitration Institute [KG NAI 9 February 2007, TvA 2008, 31]. In the context of a distribution agreement the parties had undertaken to put any dispute to mediation, in line with the rules of the CPR, prior to any filing for arbitration. The clause ran as follows:

*“Any dispute arising out of or in connection with the present contract or any related contract (...) shall first be submitted to mediation according to the CPR Mediation Procedure for Business Disputes in Europe. Such mediation shall be attended on behalf of each party for at least one session by a senior business person with authority to resolve the dispute (...)”*

One of the parties nevertheless addressed himself directly to the arbitrator. In the context of the admissibility issue the arbitrator recalled Netherlands Supreme Court 20 January 2006, but found

this ruling not to hold in this case where the matter concerned a dispute between two commercial undertakings that, in a contract incorporating a properly worded clause that expressly referred to the rules of a US mediation institute, had bound themselves to lay the dispute for mediation.


**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

In partial response to Supreme Court 20 January 2006 industry sector organisations and commercial parties making use of alternative dispute resolution clauses proceeded to tighten up the wording in the provisions. The alternative dispute resolution scheme in the Nederland ICT Terms and Conditions 2014, that calls for SGOA alternative dispute treatment, incorporates a mediation clause designed to be enforceable at law that prescribes a contractual obligation to attend at least one joint meeting of the mediator or mediators and the parties. Article 20.4 incorporates the following stipulation:

*“(.) The other side undertakes to participate actively in such ICT mediation procedure as has been lodged, which undertaking incorporates at all events a legally enforceable obligation to attend at least one joint meeting of the mediator or mediators and parties in order to give this out of court form of dispute resolution a chance. At any time after the first joint meeting of the mediator or mediators and the parties each of the parties are at liberty to terminate the ICT mediation procedure. The provisions in this paragraph of the article do not bar a party that believes this to be necessary from seeking relief or taking protective measures in summary proceedings, be those arbitral or other.”*

The CPR mediation clause and the SDR Rules of the International Chamber of Commerce oblige parties not to terminate the mediation procedure before a first joint meeting with the intervening third party has taken place. This puts into concrete terms the parties' duty to furnish genuine endeavour so as to arrive at mediation. The clause cited above is consistent with the case law cited under section 3 above and with relevant criteria, such that it may be expected (and provided that the commercial parties concerned adopt the appropriate pre-litigation conduct) that a court will disqualify the claims of a party that, in disregard of these arrangements, has lodged claims; or will stay the pending action for a specified (i.e., limited) period.

## Norway

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From a Norwegian law perspective, the short story is that enforcement of multi-tiered dispute resolution clauses is normally limited to having certain effects on courts decisions on attorney fees and costs. In 2015, a German newsletter reported that a suit was not dismissed, even though the plaintiff had not complied with a multi-tiered dispute resolution clause, because the plaintiff had to act to avoid the expiry claim's limitation period. In Norway this would hardly count as news, because dismissal based on non-compliance of such a clause would never be a possibility for the court.

To provide an adequate overview of the subject, we have to first go to the Norwegian Civil Procedure Act of 2005. A main objective of the implementation of this act was to facilitate for civil cases to be solved amicably to a greater extent than before. This involved inter alia that a mediation board was established as a first instance institution which is mandatory for small claims.

Also in line with the act's objective, Section 5-4 sets out an obligation for all parties to seek settlement negotiations before a suit is brought before the courts. This includes exploring whether the case may be settled amicably, and if so the parties shall enter into negotiations. Alternative routes are mentioned, such as mediation before the abovementioned mediation board or other extrajudicial mediation boards, the latter most relevant for B2C cases in aviation, finance and commerce.

Being interpreted as only an obligation to explore whether settlement is possible, and naturally not an obligation for the parties to settle, the provision is hardly enforceable. The provision does not authorise courts to dismiss a suit if the plaintiff fails to seek settlement negotiations before filing the suit. The argument is that if a party does not want to negotiate, imposing settlement negotiations is futile.

The only remedy for non-compliance with the provision is that it may have an effect on the court's decision on awarding attorney fees and costs. The provision is however rarely referred to in courts' rulings on fees and costs, and the real effect of the provision is therefore uncertain.

Thus, the dispute resolution provision in Section 5-4 has little or no significance because of its very limited enforceability.

What has been said about Section 5-4 also applies to a great extent to pre-trial clauses in which specific remedies are not provided for. A prerequisite for enforcement is that the clause uses mandatory language, such as “shall” or “must” negotiate or mediate. It cannot be ruled out that clauses with discretionary language impose a form of duty of loyalty that may give grounds for damages in certain cases of non-compliance. This is however a situation that we have not been faced with so far and we believe that it is a very peripheral issue.

The boilerplate wording “[t]he parties shall seek to solve any dispute arising out of this Agreement amicably”, and the likes, will therefore at best have an effect on the court’s decision on awarding attorney fees and costs.

Enforcement of multi-tiered dispute resolution clauses that explicitly provide for specific remedies is in principle a question of interpretation of the relevant contract. Also here it is required that the clause uses mandatory language.

It is however essential that courts never dismiss a case based on non-compliance with these clauses. To that end, a clause providing that prior stages are “conditions precedent” will not be respected by the courts, in that the courts will not dismiss the suit based on such a provision. Further, the courts do not have the option of staying the proceedings because such clauses have not been complied with.

In Norway there is no culture for strict and comprehensive dispute resolution clauses. The application and enforcement of more sophisticated dispute resolution clauses is therefore fairly uncertain. We believe that monetary remedies of non-compliance will be enforced in accordance with the contract, but that courts will be more sceptical about requiring parties to take certain actions.

## Philippines

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### I. Background: Alternative Dispute Resolution is favored in the Philippines

Alternative Dispute Resolution (“ADR”) methods – like arbitration, mediation, negotiation, and conciliation - are encouraged means of settlement (RCBC Capital Corporation v. Banco De Oro Unibank, G.R. No. 196171, 10 December 2012). By enabling the parties to resolve their disputes amicably, they provide solutions that are less tedious, less confrontational, and more productive of goodwill. (*Id.*)

In 2004, the Philippine Congress enacted the “Alternative Dispute Resolution Act” (Republic Act 9285), which provided a more solid framework within which parties can resolve their disputes without going through litigation, likewise making enforceable agreements by parties to settle conflicts extra-judicially. The ADR Act states in no uncertain terms the Philippine policy on ADR:

*“It is hereby declared the policy of the State to actively **promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes.** Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets.”* [Emphasis and underscoring supplied.]

This primer provides a general overview on the matter.

As will be further highlighted, Philippine procedural law’s *mandatory two-step mediation process* effectively reads into contracts multi-tiered dispute resolution processes, which is an important consideration in reviewing the enforceability of such provisions in the Philippine experience.

Procedural rules on mandatory mediation, it seems, dissuade litigants from squarely putting in issue the enforceability of contractual provisions that require negotiations between parties. This is due to the fact that both parties will in any event discuss the possible settlement of the dispute in a compulsory two-step procedure. This shall be explained succinctly at the end of this primer.

## II. Enforcement of Multi-Tiered Dispute Resolution Clauses

Under the ADR Act, arbitration is itself considered an alternative dispute resolution procedure in the Philippines. However, for purposes of this primer and based on information sought, focus shall remain on possible enforcement of dispute resolution clauses *prior to* litigation and/or arbitration.

- In General: A contract is the law between the parties and must be complied with in good faith

Obligations arising from contracts have the force of law between the parties, and must be complied with in good faith. A contract is the law between the parties (Civil Code of the Philippines, Art. 1159; *Spouses Chung v. Ulanday*, G.R. No. 156038, 11 October 2010).

It is thus arguable that one can ask the court or arbitral tribunal to dismiss a complaint, on the ground that negotiations in good faith have not yet been done as agreed upon. However, it still remains to be seen how courts will rule on the enforceability of a clause that makes no reference to any special dispute resolution method, manner, or law, such as a loosely drafted agreement to enter into talks in good faith.

- The fulfillment of a contractual agreement to enter into mediation is a condition precedent for filing a civil complaint

Meanwhile, reference to “mediation” (or any of the other alternative dispute resolution methods in the ADR Act) in a contract makes such a provision easier to construe and enforce.

Under Philippine procedural law, failure to comply with a *condition precedent* before filing a claim is a ground to dismiss a complaint (Rule 16, Section 1(j), Rules of Court). The ADR Act supports this procedural rule by expressly defining “Court-Referred Mediation” in this way: a mediation ordered by a court **to be conducted in accordance with the Agreement of the Parties when an action is *prematurely* commenced in violation of such agreement**” (ADR Act, Section 3(m); emphasis supplied).

Pursuant to the foregoing, an agreement to mediate that is crafted in view of and with regard to the provisions of the ADR Act may be enforced by the court, by dismissing a complaint filed before the parties have gone through mediation (or such other methods under law and noted in the contract) as agreed upon.

With an agreement to settle disputes in a manner and under a framework already provided by law, it is easier for the court to ascertain parameters that will help it determine if there is in reality something to enforce.

### III. Special Cases

- Multi-tiered dispute Resolution in Construction Disputes

Apart from general civil law principles as mentioned above, construction disputes in the Philippines may be resolved by a body known as the Construction Industry Arbitration Commission (“CIAC”). The CIAC acquires jurisdiction over a construction dispute if the issue is somehow connected to a construction contract, and if the parties agree to submit the dispute to arbitration proceedings. (*Manila Insurance v. Spouses Amurao*, G.R. No. 179628, 16 January 2013).

- Multi-tiered dispute resolution in Employment Law

An unequivocal provision in a Collective Bargaining Agreement to resolve disputes through a particular grievance procedure, which includes multi-tiered dispute resolution methods, is binding and must be complied with. The Philippine Supreme Court ruled that “when parties have validly agreed on a procedure for resolving grievances and to submit a dispute to voluntary arbitration then **that procedure should be strictly observed** (*Ace Navigation v. Fernandez*, G.R. No. 197309, 10 October 2012).

- Multi-tiered dispute resolution in Family Law

The Philippine Family Code categorically provides that a suit between members of the same family shall be dismissed, if it is shown that no “earnest efforts” toward a compromise were undertaken (Article 151, Family Code of the Philippines).

### IV. Securing Better Enforcement of Multi-Tiered Dispute Resolution Clauses

From a review of cases and applicable law, better enforcement of multi-tiered dispute resolution clauses may be secured if the provisions are:

- a. Anchored on law such as the ADR Act, where the parties can point to rules (in the law or of particular institutions) that have to be followed prior to litigation, allowing the parties to work within realistic guidelines and with achievable goals.
- b. Crafted in a very detailed manner as to parties, timeframes, number of negotiation sessions, manner of selecting mediators/ presiding officers, allowed participants, place, etc.- either in the contract itself or through an adoption of established rules and procedures of a dispute resolution institution. In this manner, courts will be able to see the “conditions precedent” that should have been met before a case is brought to it.
- c. Worded to categorically require the fulfillment of dispute resolution procedures before resort to litigation is made.

## V. Samples of Clauses that have been Held as Binding

- a. Manila Insurance v. Spouses Amurao, G.R. No. 179628, 16 January 2013.

*“ARTICLE XVII – ARBITRATION*

*17.1 Any dispute arising in the course of the execution and performance of this Agreement by reason of difference in interpretation of the Contract Documents set forth in Article I which the OWNER and the CONTRACTOR are unable to resolve amicably between themselves shall be submitted by either party to a board of arbitrators composed of Three (3) members chosen as follows: One (1) member shall be chosen by the CONTRACTOR AND One (1) member shall be chosen by the OWNER. The said Two (2) members, in turn, shall select a third member acceptable to both of them. The decision of the Board of Arbitrators shall be rendered within Ten (10) days from the first meeting of the board, which decision when reached through the affirmative vote of at least Two (2) members of the board shall be final and binding upon the OWNER and CONTRACTOR.*

*17.2 Matters not otherwise provided for in this Contract or by Special Agreement of the parties shall be governed by the provisions of the Arbitration Law, Executive Order No. 1008.”*

- b. Department of Foreign Affairs v. Falcon, G.R. No. 176657, 1 September 2010.

*“Section 19.02 Failure to Settle Amicably – If the Dispute cannot be settled amicably within ninety (90) days by mutual discussion as contemplated under Section 19.01 herein, the Dispute shall be settled with finality by an arbitrage tribunal operating under International Law, hereinafter referred to as the “Tribunal”, under the UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976, and entitled “Arbitration Rules on the United Nations Commission on the International Trade Law”. The DFA and the BCA undertake to abide by and implement the arbitration award. The place of arbitration shall be Pasay City, Philippines, or such other place as may mutually be agreed upon by both parties. The arbitration proceeding shall be conducted in the English language.”*

- c. Ace Navigation v. Fernandez, G.R. No. 197309, 10 October 2012.

*“Any Dispute, grievance, or misunderstanding concerning any ruling, practice, wages or working conditions in the COMPANY or any breach of the Contract of Employment, or any dispute arising from the meaning or application of the provisions of this Agreement or a claim of violation thereof or any complaint or cause of action that any such Seaman may have against the COMPANY, as well as complaints which the COMPANY may have against such Seaman shall be brought to the attention of the GRIEVANCE RESOLUTION COMMITTEE before either party takes any action, legal or otherwise. Bringing such a dispute to the Grievance Resolution Committee shall be unwaivable prerequisite or condition precedent for bringing any action, legal or otherwise, in any forum and the failure to so refer the dispute shall bar any and all legal or other actions.”*



d. Golanco Construction v. Ray Burton, G.R. No. 163582, 9 August 2010.

*“33. SETTLEMENT OF DISPUTES AND ARBITRATION*

*33.1. Amicable Settlement*

*Both parties shall attempt to amicably settle all disputes or controversies arising from this Contract before the commencement of arbitration.*

*33.2. Arbitration*

*All disputes or controversies arising from this Contract which cannot be settled between the Employer and the Contractor shall be submitted to arbitration in accordance with the UNCITRAL Arbitration Rules at present in force and as may be amended by the rest of this Clause. The appointing authority shall be Hong Kong International Arbitration Center. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Center (HKIAC).”*

## **VI. Mandatory Mediation in Philippine Procedural Law**


As noted earlier, Philippine Procedural law requires a two-step mediation procedure before a full trial is had in civil cases (as well as other cases enumerated in the rules).

These are Mediation before the Philippine Mediation Center and Judicial Dispute Resolution (“JDR”) before the presiding judge. For JDR, the judge acts not as the presiding officer but as mediator, conciliator, and neutral evaluator. Mediation and JDR are, when applicable, mandatory.

As such, a “mandatory” multi-tiered dispute resolution process is effectively read into contracts, which is beyond the contention of any litigant. Should parties seek to enforce contractual provisions on the matter, they may end up just prolonging the dispute when a reasonable compromise is completely beyond view, given that they will meet in another mediator’s table if the complaint is brought to court.

This note is made in light of the fact that the enforceability of contractual provisions to negotiate do not tend to be a serious area of contention between parties, considering that if the case is filed, they will have to mediate and talk to each other in anyway, effectively bringing to life the very same provisions on multi-tiered dispute resolution.

## Poland

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In Poland multi-tiered dispute resolution clauses have been rarely challenged to date. In most known scenarios the parties followed the route described in the contract.

The express provisions of law only provide that the court - upon the defendant's objection - will reject a statement of claim if the parties agreed to arbitrate, and shall send a case to the mediation if the parties concluded the mediation agreement.

The few court decisions indicate that the judiciary tends to consider the pre-arbitration proceedings as non mandatory and in fact not enforceable.

The Court of Appeal in Katowice accepted that in the case where parties failed to appoint the Adjudication Board under an FIDIC-based contract the parties were free to litigate in the court instead of applying the whole dispute resolution system provided in the contract. However, the decision is justified more by the lack of clarity in the dispute resolution clause rather than by the impossibility of appointing an Adjudication Board as the first tier of the dispute resolution system.

A recent decision of the Warsaw Court of Appeal (VI ACa 432/13) held that any proceedings before an expert or contract engineer (required under the particular language of the given contract) should be considered as the pre-arbitration phase and does not deprive the arbitrators of the competence to decide upon any other disputes not submitted to the expert. In particular the Courts did not find that a lack of the expert phase constitutes grounds to overrule the arbitration judgment under the public order clause.

The same conclusion has been reached by the Court of Appeal in Gdansk approving the arbitration award issued in the absence of the adjudication board procedure provided by a FIDIC

contract. This judgment has been recently approved by the Supreme Court (19 March 2015), but the detailed arguments are not published yet.

It must be also noted that decisions issued by experts, adjudicators etc. are not enforceable under Polish civil procedure law. Therefore if a party fails to comply with such decisions regular arbitration or litigation is unavoidable.

All these factors indicate that it would be rather difficult to enforce multi-tiered clauses and pretend that the lack of the expert tier nullifies arbitration or court proceedings.

Some authors indicate that arbitrators will enforce multi-tiered clauses, but to date this position has not been reflected in court decisions.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

The approach taken in the few cases dealing with the issue indicates that it may be helpful to:

- a) describe the pre-dispute phase as mandatory and being condition precedent for the arbitration or build in this phase into the arbitration phase (with some amendment of the rules of the chosen arbitration),
- b) use the mandatory language ("shall" instead of "may"),
- c) opt rather for expert procedure (adjudication board etc.) type clauses rather than negotiation clauses,
- d) opt for mediation carried on by the same arbitration institution as that chosen for the arbitration tribunal in the next tier of the clause,
- e) provide for liquidated damages as the remedy for omitting the preliminary phase of the dispute resolution procedure,
- f) use mediation as the preliminary part of the dispute resolution clause.

## **3. If your courts have enforced such clauses, how have they done so?**

The known decisions tend towards refusing the enforcement of multi-tiered clauses. However, the judgments indicate that in theory the courts could consider a stay of proceedings until the earlier stages are not completed or even reject the claim if the earlier stages are not satisfied.

Under general rules of the civil procedure the court could probably consider the refusal of entering into an earlier stage of litigation as a basis for charging the party responsible for that with litigation fees.

It must be also noted that in the case of an arbitration, the party who believes that the preliminary stage is mandatory in nature must object to the competence of the tribunal at the beginning of the


arbitral procedure. Otherwise, the argument will not be considered by the court of law when reviewing the arbitration award.

The new legislation being now prepared by the government is supposed to oblige the parties to litigation to inform the court about any pre-litigation procedures applied. However, no sanction is provided if the parties fail to inform the court about such procedures or do not apply such procedures.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

For the reason explained above it is difficult to present the model of the enforceable clause in Poland providing for multi-tiered dispute resolution procedure.

## Romania

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Under the jurisdiction of Romanian courts of law the enforceability of multi-tiered dispute resolution clauses is still a rather debatable issue and the decisions may indeed vary from one court to another. Romania is a civil law jurisdiction and the judges are not bound by precedent. Therefore case law may not be unitary on a particular matter. Depending upon the position of the party that is being represented, the case law can be presented to the Judge in one sense or another. Relevant law includes the following:

- Under art. 21 (1) “*Free access to justice*” of the Romanian Constitution: “*Access to justice is available to all persons for the defense of their legitimate rights, liberties and interests*” and under art. 21 (2): “*The exercise of this right shall not be restricted by any law*”. Therefore access to justice is guaranteed in Romania under the Constitution.
- Art. 1270 “*Binding power*” of the Romanian Civil Code: “*Agreements entered into according to the law have binding power over the contracting parties (“pacta sunt servanda”)*. The effect of the “*pacta sunt servanda*” principle is that the parties may freely regulate contractually their civil and commercial relationships as long as this does not infringe public policy rules. Therefore, the parties can also agree upon the insertion of a contractual clause regulating their obligations in case of dispute (namely, to seek alternative dispute resolution methods, prior to going to court).
- Given the purpose of mediation, namely for the parties to voluntarily reach a settlement prior to going to court, the provisions of article no. 2 of Law no. 192/2006 (obliging the parties to attend mediation prior to going to court) were seen by the Constitutional Court as being incompatible with the principle of free access to justice and, therefore, unconstitutional.

In light of the above mentioned law provisions, when called to enforce an alternative dispute resolution clause agreed by the parties, Romanian judges are faced with the decision whether to: (i) give precedence to the contractually agreed provisions and dismiss the claim as prematurely

submitted if the plaintiff did not proceed with the preliminary procedure or (ii) continue the judgment based on the constitutional right of free access to justice. The court has discretion to rule depending upon the circumstances of the case and their own opinion.

Even if the judgment continues, this would not spare the plaintiff from paying damages arising from the contractual breach. Nevertheless, this must be raised as an exception by the defendant, because the judge cannot offer the damages *ex officio*.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As a matter of principle clear and precise drafting increases the enforceability of contractual clauses. However in this particular case as discussed in detail above, a successful defence based on free access to justice may potentially overcome the enforceability of multi-tiered dispute resolution clauses.

## **3. If your courts have enforced such clauses, how have they done so? For example, the courts of some jurisdictions have enforced such clauses by:**

- A. *Dismissing litigation where the parties have failed to undertake the prior stages.* This seldom happens in practice because this would mean a denial of one's free access to justice. However the court has discretion.
- B. *Staying litigation or arbitration until the parties have completed the prior stages.* In practice, it is highly unlikely that the proceedings in court would be stayed. The statutory stay of the proceedings is a separate institution in the Romanian Civil Procedure Law occurring solely in certain situations expressly provided by the law. A voluntary stay may be requested by the parties by mutual agreement but this is not applicable to this situation. The judge has no express legal ground to stay *ex officio* the proceedings and order the parties to follow the contractual procedure.
- C. *Awarding attorney fees and costs to a party that commenced litigation or arbitration without first undertaking the prior stages.* If the court decides to reject the claim as prematurely introduced (because one party commenced litigation or arbitration without first undertaking the prior stages) that party will bear the court fees and attorney fees if such costs are claimed by the party who was prepared to undertake the preliminary contractual procedure.
- D. *Vacating arbitration awards or reversing court judgments where the parties failed to undertake the prior stages.* This is highly unlikely to happen in the practice of Romanian courts.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Please find below a clause we have encountered in our practice (the clause referred to an insurance policy):

*"If any differences shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an Arbitrator to be appointed by the parties in accordance with the Statutory Provisions in that behalf for the time being in force. Where any difference is by this Condition to be referred to arbitration the making of an Award shall be a condition precedent to any right of action against the Insurer."*

Here the wording of this clause contained in an insurance policy was rather unclear as: (i) the term "arbitrator" has to be understood as "mediator" rather than "arbitrator" because the policy also contained a separate arbitration clause and (ii) it was not clear which body/person could serve as "mediator" between the insurer and its client under the relevant Romanian statutory provisions.

Our client carried out this procedure with the association of insurers and the opposite party challenged this choice and asked the court to dismiss the case as premature indicating that the association of insurers was not the appropriate body to hear the dispute but failed to indicate which authority would actually have jurisdiction under this clause

Nevertheless, the initiation of this procedure by our client sufficed for the court which proceeded to hear the case.

## Russia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Russian legislation requires some types of disputes to be negotiated on a mandatory basis before they can be referred to the state courts, notwithstanding the agreement on this by the parties (disputes on termination of the contracts, carrier's disputes, etc.).

For avoidance of the doubt, the following article does not cover these types of disputes and contains information about non-regulated types of disputes.

MTDR clauses in the contracts in Russia can be divided into two basic groups:

- Simple clauses containing a basic agreement “to negotiate” all disputes;
- Complicated clauses with a description of several stages of dispute resolution.

Simple clauses in most cases are deemed by Russian courts as non mandatory. However, there is no unanimity on this issue between judges; therefore, enforceability of such clauses is usually decided on a case-by-case basis.

Complicated clauses, if properly drafted, can be enforceable. Exceptions are unilateral option clauses which are declared void by Russian courts.

The Supreme Court of the Russian Federation has recently offered amendments into Russian procedural law requiring as mandatory 30-day period for settlement of a dispute prior to filing a complaint with the court, unless the parties agree otherwise. Currently these amendments have not been implemented.

#### 1.1. Court decisions on simple clauses.

Simple MTDR clauses usually state that the parties agree to negotiate all disputes and refer disputes to the court only in case where negotiations were unsuccessful. The Supreme Court of the Russian Federation has not provided its opinion on the enforceability of such clauses. State courts interpret such clauses differently. In most cases courts find such clauses non-mandatory.



For example, Federal Arbitrazh Court of Moscow Region in its ruling dated 19 November 2009 case number KG-A41/11910-091 provided the following reasoning:

*“the argument of the cassator about non-performance by the claimant of the negotiations’ procedure should be rejected, because negotiations’ procedure can be deemed set up only in case the agreement contains certain requirements to the form of the request for negotiations and also procedure and terms of sending and considering such request. Other pre-trial procedure can be deemed set up, if the agreement contains precise information about this procedure. Reference to negotiations to settle disputes cannot be deemed as mandatory pre-trial procedure of settling disputes”.* [Free translation from Russian language.]

The same reasoning can be found in rulings of the Federal Arbitrazh Court of Moscow Region dated 11 January 2010 case number KG-A41/14299-092, Federal Arbitrazh Court of North-West Region dated 25 March 2010 case number A56-20175/20093, Federal Arbitrazh Court of North-West Region dated 22 January 2013 case number A56-72260/20114.

However, in some cases similar clauses are interpreted by courts as mandatory (see, for example, rulings of the Federal Arbitrazh Court of Volgo-Vyatskiy region dated 23 September 2009 case number A29-10718/20085, Federal Arbitrazh Court of East-Siberian Region dated 19 March 2012 case number A58-2092/20116).

Accordingly, enforceability of simple MTDR clauses depends a lot on the opinion of the particular judge and can not be foreseen with certainty. Therefore, even when the clause appears to be non-mandatory it is recommended to try to settle the dispute by negotiations.

It is worth mentioning that Russian courts also interpret differently what pre-trial actions will be deemed sufficient prerequisite to filing a claim with the court where the agreement lacks precise procedures and contains the basic principle “to negotiate disputes”.

Analysis of the court precedents allows us to provide the following recommendations:

- (i) The request for negotiations should be in writing;
- (ii) The request for negotiations should contain (a) facts of a dispute, (b) specific demands, (c) legal grounds of such demands, (d) reference to a particular agreement (especially if there are several agreements between the parties), (e)

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<sup>1</sup> [http://kad.arbitr.ru/PdfDocument/10bd41d0-8f78-47c5-8223-c00eba379034/A41-10267-2009\\_20091119\\_Reshenija%20i%20postanovlenija.pdf](http://kad.arbitr.ru/PdfDocument/10bd41d0-8f78-47c5-8223-c00eba379034/A41-10267-2009_20091119_Reshenija%20i%20postanovlenija.pdf).

<sup>2</sup> [http://kad.arbitr.ru/PdfDocument/f2e34bd9-5f52-4318-819e-52717614f89c/A41-10440-2009\\_20091229\\_Reshenija%20i%20postanovlenija.pdf](http://kad.arbitr.ru/PdfDocument/f2e34bd9-5f52-4318-819e-52717614f89c/A41-10440-2009_20091229_Reshenija%20i%20postanovlenija.pdf)

<sup>3</sup> [http://kad.arbitr.ru/PdfDocument/82013f36-9814-45d8-b36d-49916c14e0e2/A56-20175-2009\\_20100325\\_Postanovlenie%20kassacii.pdf](http://kad.arbitr.ru/PdfDocument/82013f36-9814-45d8-b36d-49916c14e0e2/A56-20175-2009_20100325_Postanovlenie%20kassacii.pdf)

<sup>4</sup> [http://kad.arbitr.ru/PdfDocument/1b092ecd-1ee4-42ca-a8ae-247ec2a78c8b/A56-72260-2011\\_20130122\\_Postanovlenie%20kassacii.pdf](http://kad.arbitr.ru/PdfDocument/1b092ecd-1ee4-42ca-a8ae-247ec2a78c8b/A56-72260-2011_20130122_Postanovlenie%20kassacii.pdf)

<sup>5</sup> [http://kad.arbitr.ru/PdfDocument/7a039a2a-a1df-4d6e-a286-6974044b3587/A29-10718-2008\\_20090923\\_Postanovlenie%20kassacii.pdf](http://kad.arbitr.ru/PdfDocument/7a039a2a-a1df-4d6e-a286-6974044b3587/A29-10718-2008_20090923_Postanovlenie%20kassacii.pdf)

<sup>6</sup> [http://kad.arbitr.ru/PdfDocument/c78efe5b-35d3-4be7-9caa-0df4fd210f5c/A58-2092-2011\\_20120319\\_Postanovlenie%20kassacii.pdf](http://kad.arbitr.ru/PdfDocument/c78efe5b-35d3-4be7-9caa-0df4fd210f5c/A58-2092-2011_20120319_Postanovlenie%20kassacii.pdf)

calculation of the claim, (d) other information necessary for the effective settlement of a dispute;

- (iii) There must be a proof of receipt of the request for negotiations by the empowered person.

### 1.2. Court decisions on complicated clauses.

Complicated MTDR clauses, if properly drafted and not related to disputes under the special jurisdiction of Russian state courts, are valid and binding under Russian law based on the principle of freedom of contract (article 421 of the Civil code of the Russian Federation).

Exceptions to the general rule are clauses which provide a different amount of rights to the parties of the contract, so called “unilateral option clauses”.

In the *Sony Ericson case* the Supreme Commercial Court of the Russian Federation analyzed a clause that stipulated that disputes between the parties were to be settled by the ICC and at the same time one of the parties had a right to refer disputes to the national courts (ruling dated 19 June 2012 case number 1831/127).

As a result of such analysis, the Supreme Commercial Court formulated the following rule:

*“Based on common principles of protection of civil rights, dispute resolution agreement can not grant the right to file a complaint to a competent state court only to one party (seller) and can not deprive the other party of such right. In case of conclusion of such agreement, it is void as violating of the balance of rights of the parties. Therefore, the party who’s right is violated by such dispute resolution agreement, also has a right to file a complaint to a competent state court, performing guaranteed right for court defense in conditions equal with its counteragent’ ”* [Free translation from Russian language.]

Legal authors have different views on this precedent; some of them criticized the position of the Supreme Commercial Court finding the clause completely void. However, if the contract involves a Russian party, it is better not to implement a unilateral option clause.

### 1.3. Proposed amendments to procedural legislation.

The Supreme Court of the Russian Federation has proposed amendments to procedural law under which, unless it is stipulated by the law or by agreement by the parties, all disputes (excluding some specific disputes, corporate disputes and class actions) would be subject to mandatory negotiation before being referred to a court (draft law number 638178-6). The obligatory negotiation period is 30 days.

Though these amendments have not been implemented so far, it is worth taking them into account.

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<sup>7</sup> [http://kad.arbitr.ru/PdfDocument/bcda657d-dfa5-477b-b62d-0cf96ccd7471/A40-49223-2011\\_20120619\\_Reshenija%20i%20postanovlenija.pdf](http://kad.arbitr.ru/PdfDocument/bcda657d-dfa5-477b-b62d-0cf96ccd7471/A40-49223-2011_20120619_Reshenija%20i%20postanovlenija.pdf)

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Most litigation lawyers in Russia consider that MTDR clauses usually do not help resolve disputes, but rather create obstacles for filing claims with the court. If parties are ready to use mediation or conciliation, it is not necessary to have obligatory clauses in the contract. If one of the parties does not intend to resolve a dispute quickly, MTDR clauses provide an opportunity to make dispute resolution more complicated and longer.

However, if including MTDR clause is inevitable, the general rule for drafting a MTDR clause is to make the procedure as clear and concise as possible. Recommendations can be the following:

- (i) To make the MTDR clause in writing and in one contract;
- (ii) To specify that prior stages are “conditions precedent” to litigation or arbitration;
- (iii) To use mandatory language (e.g., “shall” or “must” negotiate or mediate) as opposed to discretionary language (“may” or “should”);
- (iv) To specify deadlines and time limits for each of the prior stages (not forgetting to take into account short statutory limitations periods);
- (v) To specify, if necessary, a particular dispute resolution institution;
- (vi) To specify consequences for failure to undertake the prior stages;
- (vii) To specify what actions constitute “bad faith” behavior of the other party granting the claimant the right to skip the next procedures and file a claim to the court.

## **3. If your courts have enforced such clauses, how have they done so?**

If Russian courts find MTDR clauses binding, they leave the claim without consideration with no limitation on the claimant’s right to file a claim again after fulfilling the MTDR clause requirements under the contract (article 148 of Arbitration procedural Code of the Russian Federation, article 222 of Civil procedural code of the Russian Federation).

The decision of the court to leave the claim without consideration can be crucial in cases when a statutory limitation period is close to expiration; therefore, it is better to negotiate, at least formally, all disputes.

Russian law does not provide other remedies for breaching an agreement to negotiate and the party cannot recover damages which occur because of such a breach. However, if the court leaves the claim without consideration, the respondent is entitled to recover its attorney fees, though the amount of such fees covered is at the discretion of the judge and is still rather low.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The most simple, but enforceable clause can be the following:

*“All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination (‘Dispute’), shall be resolved in accordance with the procedure specified below.*

*The parties shall endeavor to resolve any Dispute amicably by negotiation. In case of Dispute, the party must send to the other party a written request for negotiation [by means of postal office/courier/fax].*

*Any Dispute not resolved by negotiation within [30] days after either party requested in writing negotiation shall be settled by [Arbitrazh court of Moscow]”.*

## Serbia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Multi-tiered dispute resolution clauses are frequently present in agreements concluded by Serbian parties. Typically these are rather simple provisions, which provide for the parties to attempt to settle amicably any disputes arising out of or in connection with the agreement; in case amicable settlement is not possible the clause proceeds to specify the competent court. More complex clauses, which specify negotiation techniques or mediation, can be found in complex, high-end, high-value transactions, which usually involve sophisticated parties. It appears that alternative dispute resolution mechanisms (negotiation or mediation) are more often emphasised before resorting to litigation, than before arbitration.

However, enforcement of such clauses has not yet been tested before Serbian courts. There is no court practice in this regard. Likewise, there are no arbitral awards available that dealt with this issue. Thus it remains unknown how the courts and arbitration tribunals will interpret these clauses and what legal force and effect will be assigned to them. Serbian law does not contain specific provisions on multi-tiered dispute resolution clauses and their enforceability.

In the absence of express provisions and judicial practice the question of enforceability of multi-tiered dispute resolution clauses could be approached in the light of general rules of contract law, civil procedure and mediation.

One of the fundamental principles of the Serbian Obligations Act is that the parties should endeavour to resolve any dispute or controversy through negotiations or mediation. The Civil Procedure Act requires the court to educate parties about the possibility of resolving the dispute through mediation or other form of amicable settlement. Further, the newly adopted Mediation in Dispute Resolution Act emphasises that courts and other bodies must provide the parties with all necessary information to ensure full awareness about the possibility of recourse to mediation.

It can be argued that these principles should facilitate the enforceability of multi-tiered dispute resolution clauses and allow (or even require) the court to analyse their nature and effect. However, the courts would not perform this analysis *ex officio*, as the scope of such issues is defined by law, and multi-tiered clauses are not among them. The court would thus not be likely

to take any action regarding the enforceability of multi-tiered dispute resolution clauses in the absence of an express request, i.e. objection by a party.

Yet due to the above mentioned principles, there are reasonable grounds to expect that courts would not simply disregard a party's objection and treat these clauses as unenforceable without going into the "merits" of such agreement and analysing the effect the parties intended on achieving by way of such clauses.

This is truer still if the parties envisioned mediation as a first tier. Namely, the Mediation in Dispute Resolution Act provides that if the parties undertook the obligation to mediate before initiating litigation or arbitration, the future claimant must send the other party a written proposal for mediation. The other party must then respond within 15 days. The Act does not venture as far as to state the consequences of failure to comply with these rules. But it can be reasonably argued that sending a written proposal for mediation would be considered a condition precedent for the initiation of litigation or arbitration. The future claimant would then be able to proceed to court or arbitration only if the other party does not agree to mediation or fails to reply within 15 days of receipt of the claimant's written notice. However, the Mediation in Dispute Resolution Act entered into force on 1 January 2015 and has not yet had a chance to prove the efficiency of its provisions.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Since there is no jurisprudence in respect of the application of multi-tiered dispute resolution clauses, there is no "tested" model that is deemed enforceable. Proper drafting may significantly affect its potential enforceability. This would depend on the goal parties want to achieve.

Parties may wish just to reaffirm their positive attitude towards a transaction and the counterparty and emphasise their preference for amicable settlement of any future disputes, without, however, introducing particular conditions that must be fulfilled before either of the parties may turn to court or arbitration. In such a case, a general clause that the "parties will try to settle the dispute amicably" without specifying the mechanism of the amicable settlement (negotiation, mediation) would suffice. This is an option they have in any event, even if it is not specifically stated in the agreement.

If the parties wish to introduce negotiation as a mandatory first step there are several aspects to consider for making such clause enforceable. The idea would be to make the clause as clear and as specific as possible to reduce or eliminate ambiguity. Ideally, it should be possible to reduce such a clause to a "checklist" which needs to be completed before filing a lawsuit or request for arbitration.

For example, a fixed time frame for negotiations. The time frame for negotiations will vary depending on the type of the contractual relationship. In simple commercial matters this period may be as short as five days, while in complex construction agreements it may be between 60 to 90 days. In the context of timing, it is advisable to specify the starting point for negotiations, e.g. a requirement that the party sends a written request for negotiations to the other party specifying

the dispute in sufficient detail; fixing the deadline for the other party to respond to the request, the number of rounds, etc.

Depending on the type of transaction it could be useful to specify the persons who will take part in the negotiations. Some disputes of a commercial nature may be settled swiftly by top management. However, in some cases where the dispute deals with technical matters it may be more productive to include technical staff in the negotiations (e.g. engineers).

Thus, the clause should be precise enough to facilitate its implementation by the parties and to enable the court to easily determine if the parties fulfilled the agreed requirements. However, at the same time, it must not be overly burdensome or complicated. The clause must not deny parties their right to bring their claim before a court as a fundamental constitutional right. The objective of the clause is to expedite resolution of the dispute resolution, not to obstruct it.

The importance of precise wording of the multi-tiered dispute resolution clause is particularly noticeable when reading the new Mediation in Dispute Resolution Act. Namely, the act provides that if, when concluding the agreement, the parties *undertook* to mediate before initiating litigation or arbitration, the future claimant *must* send a written proposal for mediation to the other party. However, the potential claimant would not be obliged to send this written proposal if the agreement states that the parties *may* try to resolve the dispute by mediation. This would be an option for the parties but not an obligation required by the Act.

Additionally, in the case of mediation it would be very useful to specify the mediator or the mediator selection process or or which institution the parties should refer their dispute to.

### **3. If your courts have enforced such clauses, how have they done so?**

The absence of jurisprudence in this area points to a certain (high) level of uncertainty as to how the courts will enforce multi-tiered dispute resolution clauses. The current framework of the Civil Procedures Act suggests several ways as to how a court may proceed in the event a defendant raises an objection that the plaintiff failed to undertake prior stages.

One option is to stay the proceeding and direct the parties to follow preventative-stage procedure. The court is authorised to do so in cases where special laws require the parties to attempt mediation or the parties agreed to try to mediate in the course of the proceeding. Thus, the court might use this authority where the parties have skipped the first stage and made no attempt to negotiate. Yet, such an order by the court would largely depend on the parties' willingness to try an alternative dispute resolution mechanism. If the claimant is clearly not interested in negotiations, and does not wish to seek an amicable settlement, the court has no other option but to continue the litigation. Otherwise, it could be argued that it unnecessarily prolonged the dispute and denied the claimant an efficient court proceeding.

Another option is for the court to dismiss the claim on procedural grounds because the parties did not fulfill the agreed pre-conditions which indicate that the procedural requirements for filing the lawsuit have been met. This approach has been suggested in some commentaries on resolution of disputes arising from collective bargaining agreements that contain multi-tiered dispute

resolution clauses and negotiations as a first tier. Additionally, this approach appears to be more in line with the provisions of the Mediation in Dispute Resolution Act which states that if the parties in their agreement undertook the obligation to attempt mediation, the potential plaintiff must send written notice to the other party. Otherwise, the potential defendant would be deprived of its right to try mediation. In such case, if no agreement on mediation has been reached or the mediation was unsuccessful, the party may refile the lawsuit.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

As explained above, it is difficult to provide an example of a multi-tiered dispute resolution clause which has proved its enforceability and remains to be enforceable. Moreover, this applies to the clauses which provide for mediation as the Mediation in Dispute Resolution Act has been recently adopted. The following are suggestions of the initial draft which should be further amended to the transaction at hand and the parties' intentions.

Where the parties wish to make negotiations the first tier of dispute resolution:

*"Any dispute arising out of or in connection with this Agreement, the parties will endeavour to resolve by negotiation [consider specifying who will participate in the negotiations].*

*If the dispute is not resolved within [number] days from the day of receipt of the written proposal for negotiations by the other party, such dispute shall be finally resolved by the competent court in [specify the city]/arbitration [include valid arbitration clause].*

In the case of mediation, the multi-tiered dispute resolution clause may be drafted to read as follows:

*"In the event of a dispute arising out of or in connection with this Agreement, the parties shall first seek settlement of that dispute by mediation [specify rules of mediation of the institution in question, or specify the mediator, mediator selection process]. A party requesting resolution of the dispute is obliged to send a written proposal for concluding an agreement to mediate to the other party. The other party must respond within 15 days.*

*If the dispute is not settled by mediation within [.....] days of the commencement of the mediation, or such further period as the parties shall agree in writing, or if the other party rejects the proposal for mediation or fails to reply to the proposal within 15 days, such dispute shall be finally resolved by the competent court in [specify the city]/arbitration [include valid arbitration clause]".*



## Singapore

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In Singapore, there are no real challenges to enforcement, whereas there might have been a challenge some years ago due to the then perceived common law principle that good faith clauses were difficult to ascertain in terms of scope and performance and therefore difficult to enforce.

Now the Singapore Court of Appeal has made clear that it will enforce good faith negotiation clauses in cases where it is clear to the court that parties have not fulfilled or performed the good faith obligation. (*HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 (“*HSBC v Toshin*”)).

Equally the Singapore Court of Appeal has recently clarified and reiterated that multi-tiered dispute resolution clauses will be enforced, and has gone further to require full and actual compliance with previous tiers (as opposed to substantial compliance) before subsequent tiers may be proceeded with. (*International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 (“*IRC v Lufthansa*”)).

### 2. What drafting might increase the chances of enforcement in your jurisdiction?

- Drafting clear words into a clause that good faith negotiations and/or mediation is a necessary step to be fulfilled in actuality and fully before a dispute is to be resolved by arbitration would demonstrate clearly the intention of parties and increase the chances of enforcement.
- Use of mandatory as opposed to discretionary language would increase the chances of enforcement.
- Specifying deadlines and time limits for each of the prior stages may increase the chances of enforcement in that it will better demonstrate to the court the overall intention of parties. For example, if the mediation stage involves a short period of

time, the court may come to the conclusion that mediation is meant for smaller and/or simpler disputes and that parties did not intend to imply into the clause any room for extension of time for mediation. Generally time limits may also serve to mark the end of one stage and the beginning of the next.

- Specifying the number of negotiation sessions may assist in the chances of enforcement in that it increases certainty as there is a fine demarcation of the end of one tier and beginning of the next tier. However a “session” should be well-defined in the clause.
- Specifying the identity of negotiation participants may increase the chances of enforcement in that it will better demonstrate to the court the overall intention of parties. However the “identity” of negotiation participants should be well-defined in the clause.
- Specifying specific rules for mediation may increase the chances of enforcement in that it will better demonstrate to the court the overall intention of parties.
- Specifying a particular dispute resolution institution for mediation may increase the chances of enforcement in that it will better demonstrate to the court the overall intention of parties.
- Specifying consequences for failure to undertake prior stages may increase the chances of enforcement.

### **3. If your courts have enforced such clauses, how have they done so?**

Where the clause provides for certain procedures to be complied with as conditions precedent to commencing arbitration, courts have enforced such a clause by finding that Arbitral Tribunals constituted in contravention thereof lack jurisdiction over the dispute between the parties. (see *IRC v Lufthansa*). Alternatively, where such clauses do not involve arbitration, courts have also enforced them by directing parties to comply with the terms of the clause and the relevant procedures provided by the clause. (see *HSBC v Toshin*)

### **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The clause upheld in *IRC v Lufthansa* provided as follows:

*“37.2. Any dispute between the Parties relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:*

*37.2.1 first, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);*

37.2.2 *second, to a committee consisting of Datamat's designee and Lufthansa Systems' Director Customer Relations; and (if the matter remains unresolved);*

37.2.3 *third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director for resolution by them, and (if the matter remains unresolved);*

37.2.4 *fourth, the dispute may be referred to arbitration as specified in Clause [37.3] hereto.*

37.3. *All disputes arising out of this Cooperation Agreement, which cannot be settled by mediation pursuant to Clause 37.2, shall be finally settled by arbitration to be held in Singapore in the English language under the Singapore International Arbitration Centre Rules ('SIAC Rules'). The arbitration panel shall consist of three (3) arbitrators, each of the Parties has the right to appoint one (1) arbitrator. The two (2) arbitrators will in turn appoint the third arbitrator. Should either Party fail to appoint its respective arbitrator within thirty (30) days as from the date requested by the other Party, or should the two (2) arbitrators so appointed fail to appoint the third arbitrator within thirty (30) days from the date of the last appointment of the two arbitrators, the arbitrators not so appointed shall be appointed by the chairman of the SIAC Rules within thirty (30) days from a request by either Party.”*

The clause upheld in *HSBC v Toshin* provided as follows:

“(c) (i) *Prior to the commencement of each Rental Term (other than the first), the Lessor and the Lessee shall in good faith endeavour to agree on the prevailing market rental value of the Demised Premises (excluding service charge payable and disregarding the value of all fixtures and fittings installed by the Lessee) for [the] purpose of determining the New Annual Rent for the relevant Rental Term.*

(ii) *If by three (3) months (time being of the essence) before commencement of the relevant Rental Term the parties have not reached agreement on the New Annual Rent, the parties shall appoint three international firms of licensed valuers (the ‘licensed valuers’) on the basis that each of the licensed valuers shall proceed to separately determine the prevailing market rental value of the Demised Premises. The licensed valuers shall be nominated by agreement between the Lessor and the Lessee or in the absence of agreement by the parties on any one of the licensed valuers by a date ten (10) weeks (time being of the essence) before commencement of the relevant Rental Term, such of the licensed valuers as have not been agreed upon shall be nominated by the President for the time being of the Singapore Institute of Surveyors and Valuers (or its successor institute) on the application of either the Lessor or the Lessee. If the said President is not available or is unable to make such*

*nomination at the time of [the] application, the nomination may be made by the Vice-President or the next senior officer of the said Institute then available and able to make such nomination. All costs and expenses of and in connection with the appointment of the licensed valuers shall be borne by the Lessor and the Lessee in equal shares. The licensed valuers shall act as experts and not as arbitrators and their respective decisions shall be binding and conclusive on the parties.*

- (iii) *Each of the licensed valuers shall be required by the Lessor and the Lessee to submit its report to the Lessor and the Lessee within one (1) month from the date of its appointment and the licensed valuers in determining the prevailing market rental value shall have regard to the annual rental value of the Demised Premises in the open market as a shopping centre at the date of review on a lease for a term equal to the relevant Rental Term based on an assumed area (the 'assumed area') of 21,000 square metres. Each of the licensed valuers in determining such prevailing market rental shall:*

  - (aa) *take into account the notional circumstance that the assumed area would necessarily include areas used for circulation;*
  - (bb) *disregard the service charge payable and the value of all fixtures and fittings installed by the Lessee;*
  - (cc) *assume that the Demised Premises are ready for and fitted out for immediate occupation and use for the purpose or purposes required by the willing tenant.*
- (iv) *The prevailing market rental value of the Demised Premises thus agreed by the Lessor and the Lessee pursuant to clause 2.4(c)(i) or the average of the three market rental values as determined by the licensed valuers, as the case may be, shall be the New Annual Rent for the relevant Rental Term Provided Always that:*

  - (aa) *if the prevailing market rental value is less than the Current Annual Rent, the Current Annual Rent shall continue in force and shall be deemed to be the New Annual Rent for the relevant Rental Term; and*
  - (bb) *if the prevailing market rental value is an amount which exceeds one hundred and twenty-five percent (125%) of the Current Annual Rent, the New Annual Rent for the relevant Rental Term shall be fixed at an amount equivalent to one hundred and twenty-five percent (125%) of the Current Annual Rent.*

- (v) *In the event the New Annual Rent has not been determined in accordance with this clause prior to the commencement of the relevant Rental Term, the Current Annual Rent shall continue until the New Annual Rent has been determined, but shall be adjusted retrospectively to the commencement of the relevant Rental Term as soon as the New Annual Rent has been determined. Any accumulated arrears of rent owing to the difference between the New Annual Rent and the Current Annual Rent shall be paid by the Lessee to the Lessor within thirty (30) days of the determination of the New Annual Rent.*”

## Slovakia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Currently, multi-tiered dispute resolution clauses are not legally defined according to Slovak law. However, multi-tiered dispute resolution clauses are legally possible and depend on the contractual freedom of the parties. Usually these include agreements to resolve issues arising out of the contract amicably in negotiation, mediation and/or arbitration with the latter being the most commonly used.

Mediation in Slovakia is an informal, voluntary and confidential procedure for resolving conflicts out of court by using a mediator. In the area of civil, commercial, family and labor law mediation is regulated by Act No. 420/2004 Coll. on Mediation, as amended. Hereunder, agreement to mediate must be in writing and contain an agreement that the parties will make an effort to settle all or certain disputes that arise or have arisen between the parties out of a defined contractual relationship or another legal relationship in mediation. The parties may agree that such obligation will be binding on their legal successors as well. The filing of the agreement on commencement of mediation with the notarial registry stops running of the statute of limitation period.

The agreement resulting from the mediation procedure must be in writing and is binding on the parties. On the basis of the agreement, the entitled party may apply for judicial enforcement or for distraint if the agreement is (i) drawn up in the form of a notarial deed, (ii) endorsed as conciliation by a court or an arbitral body. If no mediation agreement is reached, the matter can still be forwarded to the court or arbitral body.

Arbitration proceedings held in Slovakia are governed by the Act No. 244/2002 Coll. on Arbitration, as amended. An arbitration agreement/clause has to be in written form and sufficiently precise. Looking at different ADR clauses, only an arbitration clause might cause *lis pendens* and *res iudicatae*.

Although, it is quite common to find agreements obliging the parties to settle disputes amicably in negotiation before submitting them to a court or arbitration, their enforceability has not been tested before Slovak courts yet. Although such clauses may bind the parties, their successful enforcement is complicated by the fact that the outcome of such dispute resolution depends on

the agreement of the parties. Moreover, Slovak Act No. 99/1963 Coll. the Civil Procedure Code, as amended, obliges the court to stop proceedings only in where a valid arbitration clause has been concluded (though even in this case some exceptions apply, e.g. consumer dispute). Therefore, the importance of other ADR stages is quite low.

However, even arbitration clause faces various enforcement challenges, in particular if a consumer is involved. Often in consumer disputes, enforcement of arbitral awards has been rejected by the court arguing with invalid arbitration clause.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As already noted above, ADR stages before arbitration do not have much legal support in Slovakia. They might be construed as contractual obligations, however, in practice it is hard to imagine that a court would simply deny the case and refer parties to mutual negotiation based on their agreement.

Regarding drafting of arbitration clauses, they must contain sufficient identification of the parties, the disputes to be referred to arbitration, the arbitral body, the applicable law and the procedural rules.


## **3. If your courts have enforced such clauses, how have they done so?**

There is no specific case law available on this matter. Only in relation to a valid arbitration clause, Slovak law obliges the court to stop proceedings.

## **4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

There is no specific case law available on this matter.

## Slovenia

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

At the outset, it should be observed that the relevant case-law in Slovenia provides little, if any, guidance as to the question of what objective criteria must be satisfied in order for a multi-tiered dispute resolution clause to be found enforceable. Courts in Slovenia are yet to set forth the standards by which a particular clause could be measured.

That said, this does not mean that escalation clauses are not used in practice.

In accordance with Art 16 of the Mediation in Civil and Commercial Matters Act ("**Mediation Act**"; *Zakon o mediaciji v civilnih in gospodarskih zadevah*), insofar as the parties to a contract have agreed on a mediation and have expressly committed themselves not to commence any litigation or arbitral proceedings in relation to a particular dispute (whether existing or future) before the lapse of a specific period of time or occurrence of a specific event, the court or arbitral tribunal will – upon an objection raised by the defendant - declare a lawsuit filed in disregard of this commitment as inadmissible, *unless* the plaintiff succeeds in demonstrating that complying with that commitment would have caused him to incur serious and irreparable harm.

It is important to note that the term "*mediation*" used in the Mediation Act serves as a collective term that encompasses not only mediation proceedings, but extends to any means of alternative dispute resolution procedure that enables the parties to find an amicable solution through the help of an impartial third party (mediator), irrespective of how any such procedure is called (i.e. mediation, conciliation etc.).

It is further noteworthy that based on Art 17 of Mediation Act, limitation periods are suspended during the course of mediation, and begin to run again once the mediation has been concluded. In the event a party is under the law required to file a lawsuit within a specific period of time, such time limit shall not be deemed to have expired earlier than 15 days following the conclusion of mediation.

Against that background, and bearing in mind the absence of escalation clause enforcement-related case-law, the primary challenge is to determine what features an escalation clause would have to comprise for a court to render a claim inadmissible if disregarded. In addition, it remains



to be seen what stance the courts will take as concerns the applicability of the "*serious and irreparable harm*" exception.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

As indicated above, case-law in Slovenia provides no answer as to what should and / or should not be included in an escalation clause so as to improve the prospects of its enforcement.

With that in mind, it would be reasonable to assume that the clearer and more definite the wording of the clause, the greater the chances that the court would enforce it. Any vague and indefinite clauses indicating a mere *intent* (in contrast to a *firm commitment*) to try to resolve disputes outside the context of litigation or arbitral proceedings, but lacking any specific details on the procedures the parties would be required to pursue and timeframes within which such a procedure must be conducted would very likely be held unenforceable (this includes clauses such as "*disputes shall be settled in an amicable fashion*"; agreements to "*negotiate in good faith*" etc.).

To increase the chances of enforcement, the parties would be advised to identify the particular alternative dispute resolution procedure(s) they intend to integrate into the pre-trial dispute resolution phase. To increase the chances of having a clause held enforceable, the contract should also state in a clear and unequivocal manner that the pre-trial settlement process is mandatory in the sense that it serves as a condition precedent for any subsequent litigation or arbitral proceedings. In contrast, a provision *allowing* (as opposed to *imposing an obligation upon*) the parties to engage in a specific pre-trial dispute resolution process before resorting to court or arbitration would in all likelihood be construed as unenforceable (i.e. such clause would likely not have prevented a party from pursuing the adversarial proceeding).

The pre-trial stages should envisage the involvement of a third-party mediator (ideally, the clause should either spell out the procedure for appointment or perhaps identify the mediator in advance) and must be limited in time so as to only temporarily prevent the parties from accessing the court. In general, any additional features that enhance the definiteness of the dispute resolution clause at the same time indirectly increase the possibility that the court will enforce such a clause (i.e. use of a particular dispute resolution institution; specification of the rules under which the respective dispute resolution process would be conducted).

## **3. If your courts have enforced such clauses, how have they done so?**


Based on the provisions of the Mediation Act, any lawsuit filed by a plaintiff that has failed to exhaust the mandatory alternative dispute resolution procedure(s) would be held inadmissible by the court, and would as a result be dismissed. It is, however, important to note that a decision to dismiss a lawsuit may only be rendered upon an objection raised by the defendant, i.e. the court cannot on its own initiative examine whether or not a particular clause has been observed in practice (and – to the extent it has not – whether or not the clause itself is enforceable). Such objection must be raised by the defendant no later than in the reply to the lawsuit.

However, the fact that a particular multi-tiered clause has been found to be unenforceable (on account of e.g. being too vague), does not in and of itself preclude the defending party from initiating separate proceedings with the aim of seeking damages it has incurred as a result of the plaintiff's failure to observe the order of steps laid out in the multi-tiered dispute resolution clause.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Absent relevant case-law on this matter, no example can be singled out of a clause that has been found to be enforceable in Slovenia.

## South Africa

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Multi-tiered dispute resolution clauses, which provide for some form of alternative dispute resolution (“ADR”) as a condition precedent to litigation or arbitration, are generally enforceable in South Africa. These clauses are widely used in standard form building and construction contracts, but are increasingly found in other commercial agreements. Generally, these clauses provide for the dispute resolution process to be initiated by interim steps such as adjudication or mediation, followed by arbitration if the interim steps do not result in the resolution of the dispute. These interim steps are conditions precedent to litigation or arbitration and a party to an agreement with a dispute resolution clause that is subject to these conditions precedent cannot, without satisfying the conditions, compel litigation or arbitration.

An issue which arises in relation to the interpretation of multi-tiered dispute resolution clauses is whether a clause which provides for “good faith” negotiations as a preliminary step is enforceable or whether the undertaking to enter into good faith negotiations constitutes an unenforceable agreement to agree.

The leading South Africa case regarding the enforceability of a preliminary agreement to negotiate in good faith linked to an arbitration clause is *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA). In *Southernport* the parties had concluded an agreement in terms of which the appellant’s predecessor in title had concluded an agreement in which it had the option to lease certain properties from the respondent on terms and conditions to be negotiated between them in good faith. That provision was linked to an arbitration clause which provided that in the event of a dispute arising between the parties in respect of any of the terms and conditions of the lease agreement, the dispute would be referred to arbitration and the decision of the arbitrator would be final and binding on the parties. The appellant instituted proceedings in which it sought an order compelling the respondent to engage in good faith negotiations. The respondent’s exception to the appellant’s particulars of claim was upheld by the court *a quo* on the basis that there was no agreement between the parties as to the essential terms of the lease and that the agreement to negotiate in good faith was an unenforceable preliminary agreement. The Supreme Court of Appeal held that the agreement to negotiate in good faith was not an agreement to agree as it was not dependent on the absolute discretion of the parties. The inclusion of the arbitration clause distinguished it from an unenforceable

agreement to agree, and the final and binding nature of the arbitrator's decision rendered certain and enforceable what would otherwise have been an unenforceable preliminary agreement. The court held, accordingly, that the appeal had to succeed.

The importance of *Southernport* is that the final and binding nature of arbitration rendered certain and enforceable what would otherwise have been an unenforceable preliminary agreement. Although, in *Southernport*, the final step in the dispute resolution process was arbitration, this principle should also apply where the final step is litigation. However, no South African court has yet gone this far in circumstances where the agreement to negotiate in good faith has not been rendered enforceable by an arbitration clause. There is still some uncertainty in this regard and most multi-tiered dispute resolution clauses will therefore probably continue to provide for arbitration, rather than litigation, as the final step in the process.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

The most important principle in drafting a multi-tiered dispute resolution clause is that the clause should reflect the circumstances and requirements of the parties in relation to the commercial agreement between them. The drafting of the clause may be affected by a number of factors, including the following –

- Are the parties involved in an on-going commercial relationship where it is important for them to avoid formal dispute resolution processes, if possible?
- Is there a danger that a clause providing for ADR as a condition precedent to litigation or arbitration will be used by a recalcitrant party to delay the dispute resolution process?
- A multi-tiered dispute resolution process which does not result in settlement and which ends in litigation or arbitration is likely to be more costly than a process in which litigation or arbitration proceedings are commenced immediately. Do the parties understand and appreciate that the multi-tiered dispute resolution process can be costly if a successful outcome is not achieved at an early stage?
- In many cases it will immediately be apparent, at least to one of the parties, that there is no prospect of preliminary ADR processes resulting in a settlement. In those circumstances, should one of the parties be entitled to bypass those preliminary ADR steps and insist on going straight to litigation or arbitration or is it important, in the circumstances of the particular matter, that the ADR steps should be conditions precedent to litigation or arbitration?

Against this background, the multi-tiered dispute resolution clause should –

- be clear as to whether or not the preliminary ADR steps are conditions precedent to litigation or arbitration;

- if the preliminary ADR steps are conditions precedent to litigation or arbitration, be certain as to –
  - each step in the process;
  - the procedure to be followed in each step of the process and the rules applicable to each step (for example, mediation);
  - the time limits applicable to the various steps which are required to be taken;
  - the consequences of failure to take preliminary ADR steps, either timeously, or at all.

Engineering contracts will often require disputes first to be submitted to the engineer for decision, then to a mediator and finally to arbitration. The question which arises is whether this entire procedure (or any similar multi-tiered procedure) should be considered to be one of arbitration, in which event the submission of the dispute to the engineer would amount to subjection of the dispute to arbitration. The issue is one of considerable importance in the light of the judgment in *Murray & Roberts Construction Cape (Pty) Ltd v Upington Municipality* 1984(1) SA 571 (AD), in which the court considered whether the submission of a dispute to the engineer, as the first step in a multi-tiered dispute resolution process, amounted to the subjection of the dispute to arbitration for the purpose of delaying the completion of prescription in terms of the Prescription Act of 1969. The court held that the submission of the dispute to an engineer did amount to subjection of the dispute to arbitration and that the completion of prescription (time barring) had been delayed thereby. In reaching this conclusion, the court gave consideration to the wording of the dispute resolution clause and held that the submission of the dispute to the engineer for decision pursuant to the clause amounted to a subjection thereof to arbitration. The draftsman should be careful therefore to ensure that the procedure laid down by the dispute resolution clause, taken as a whole, is one of arbitration, so that the dispute is considered to be submitted to arbitration when the first step, such as the submission of the dispute to the engineer, is taken.

### **3. If your courts have enforced such clauses, how have they done so?**

- Upholding the enforceability of a preliminary agreement to negotiate in good faith linked to an arbitration clause.
- Refusing an application for a declaratory order in circumstances where the completion of prescription had been interrupted by the submission of the dispute to an engineer as the first step in a multi-tiered dispute resolution process. The process, taken as a whole, was held to be one of arbitration.
- Dismissing or staying litigation where some form of ADR is a condition precedent to the litigation and the condition has not been met.

As appears above, no South African court has yet enforced a preliminary agreement to negotiate in good faith except in circumstances where that agreement has been rendered enforceable by an arbitration clause. However, it is possible that the approach followed in *Southernport* will be followed in cases where the multi-tiered dispute resolution clause provides for litigation as the final step in the process.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

The clause upheld by the court in *Murray & Roberts* (supra) prescribed a procedure for the subjection of disputes to arbitration which required the dispute to be first submitted to the engineer for decision. His decision was *prima facie* final and binding on both parties. However, if the engineer did not give a decision within 45 days of being requested to do so or if either party was dissatisfied with his decision, the dispute could be submitted within a further 45 days to a mediator. No legal representation was allowed before the mediator who had to determine whether the parties' submissions were to be presented in writing or orally. The mediator's decision was final and binding upon the parties unless, within 28 days, one of them took the final step allowed by the clause of requiring the matter, upon completion of the works, to be referred to arbitration before a single arbitrator.

## South Korea

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Multi-tiered dispute resolution clauses contemplate that the parties will proceed to arbitration or courts only after they have attempted to resolve the dispute amicably through negotiation, mediation, or other forms of non-binding settlement procedures, typically during a specified time period.

In Korea, such clauses are mostly encountered in contracts involving various stakeholders, including construction contracts and contracts involving state entities. As with any other jurisdiction, multi-tiered clauses are utilized extensively in these contracts to bring about timely and cost efficient resolution of disputes arising thereunder, without the parties having to go through a full-blown arbitration or litigation.

Reflecting the growing need to utilize multi-tiered dispute resolution clauses in resolving disputes, legislative effort has been undertaken to clarify the meaning of these clauses, with the aim of encouraging their use. In particular, the Korean Framework Act on the Construction Industry (“FACI”) – one of the framework acts that govern domestic construction contracts in Korea – was amended in February 2014 to provide that:

- I. A Construction Dispute Conciliation Committee (“Committee”) is established under the jurisdiction of the Minister of Land, Infrastructure and Transportation to conciliate disputes relating to the construction business and construction service business (Article 69 (1));
- II. Upon request of one or both parties, the Committee shall review the matters referred to it, including, (i) disputes on the division of responsibility between persons involved in the construction works, such as responsibility for design, execution, supervision, etc.; (ii) disputes relating to construction works that arise between persons ordering works and contractors; and (iii) disputes relating to subcontracts for the construction works that arise between contractors and subcontractors (Article 69 (3));

- III. Upon request of one party to the Committee, the counter party is obligated to participate in the dispute resolution process. Failure to do so results in multiple fines which could total to as much as KRW 5,000,000 (approximately USD 5,000) (Article 72, 99); and
- IV. If the parties accept the draft conciliation by the Committee, a settlement in court is deemed to have been reached between the parties as stated in the written conciliation (Article 78 (4)).

Despite these developments, there is no specific statutory provision or court precedent on point regarding the validity of an arbitration or litigation initiated in breach of a multi-tiered dispute resolution clause. Hence, it is widely believed that agreements requiring that the parties negotiate before commencing arbitration do not give rise to a binding precondition to arbitration under Korean Law, and no specific consequences would arise from a breach of such clauses. In a similar vein, while parties, particularly Korean parties, will often agree to mediation after a dispute has arisen, either on an ad hoc basis or under the auspices of the Korea Commercial Arbitration Board (“KCAB”), the breach of such an arrangement does not, in principle, affect the validity of an existing arbitration agreement. In fact, in a case where there was a dispute over whether a multi-tiered dispute resolution clause was observed (i.e., whether the parties carried out a pre-arbitration mediation process), the Korean Supreme Court decided that the arbitral tribunal had jurisdiction to decide the merits of the case given that the parties’ difference over the adherence to the multi-tiered dispute resolution clause itself indicated the existence of a dispute subject to arbitration i.e., a dispute between the parties arising from the performance of the contract (Supreme Court Judgement dated 27 May 2005, 2005 Da 12452).

As a related issue, in Korea there has traditionally been the issue of whether a “split dispute resolution clause” (“Split Clause”) can constitute a valid arbitration agreement. Split Clauses characteristically provide for future disputes to be referred to “arbitration OR court adjudication” or “arbitration OR mediation” without designating any priority between the two. Hence, in a number of cases decided between 2002 and 2004, the lower courts held that a Split Clause was valid and enforceable by its terms. However, in a more recent series of decisions dealing with a particular group of Split Clauses appearing in contracts to which the Korean government or a Korean state entity was party, the Supreme Court has held that the Split Clauses at issue were unenforceable as arbitration agreements save where a party was deemed to have waived any objection to arbitral jurisdiction or had given its implied consent to arbitrate. The Korean courts’ position on Split Clauses is dealt with in detail in the answers to the queries below.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Under Korean law, it is important to bear in mind that in cases involving a dispute as to the existence or validity of an arbitration agreement, a Korean court will, in principle, seek to establish the parties’ true intent by reference to the contract language at issue, the negotiation and drafting process, and any other facts and circumstances relevant under the principles of contractual interpretation.



Though not expressly set out in any law or prevailing precedent, this principle would invariably apply in interpreting multi-tiered dispute resolution clauses. This essentially means that for multi-tiered clauses to be *enforced* (i.e., be reason for a Korean court or arbitral tribunal governed under Korean law to dismiss an arbitration because the parties did not go through a pre-arbitration dispute resolution process), not only should the clause clearly state the parties' agreement that insofar as the pre-arbitral process is not adhered to, the arbitration agreement will be invalid, but such an understanding should also be evidenced by facts and documents that were produced before and after the arbitration clause was entered into.

In Korea, enforcement requirements for Split Clauses (i.e., whether Split Clauses constitute valid arbitration agreements) have generally been a more frequent subject of dispute. While it may seem that this is an issue separate to multi-tiered dispute resolution clauses, Split Clauses are often indistinguishable from multi-tiered dispute resolution clauses in that they often include multi-tiered dispute resolution mechanisms. Therefore the Korean courts' position on the enforcement requirement of Split Clauses bears relevance to the enforcement of multi-tiered dispute resolution clauses.

The initial case in this line, decided in 2003 (Supreme Court Judgement 2003Da318, 22 August 2003), involved a dispute between the Republic of Korea and a Korea-based supplier of rolling stock. Article 10(1) of the Special Conditions of Contract, which conditions formed a part of the Supply Agreement in that case, provided as follows:

*Disputes shall be resolved in the following manner under Article 28 of the General Conditions of Contract: Upon the occurrence of a dispute between the Purchaser [i.e. Republic of Korea] and the Seller [i.e. Korea-based supplier] who share the same nationality, the dispute shall be referred to adjudication/arbitration in accordance with the laws of the Purchaser's country.*

In this case, the Korean court took the view that a clause providing for disputes to be referred to “*adjudication/arbitration*” does not, as such, constitute a binding arbitration agreement, but may become binding if a party refers a dispute to arbitration and the counter-party does not raise an objection to the dispute resolution clause in its answer to the request for arbitration.

Interestingly, the Korean Supreme Court has taken the same basic approach in subsequent cases which involved clauses providing for disputes to be submitted either to arbitration or to mediation. The first such case was in November 2004 (Supreme Court Judgement 2004Da42166, 11 November 2004), where the dispute resolution clause at issue was found in the General Terms and Conditions of Contract and provided as follows:

1. *Any dispute arising between the Parties during the performance of the Contract shall be resolved by mutual agreement.*
2. *In the event that the Parties fail to reach an agreement as in paragraph 1 above within thirty (30) days from the occurrence of the dispute, the dispute shall be resolved in the following manner.*

- a. *The dispute shall be submitted to either mediation by the Mediation Committee established under the applicable law or arbitration by an arbitration authority under the Arbitration Act.*
- b. *In case where an objection is raised to the mediation prescribed in paragraph 1 above, the dispute shall be subject to adjudication by the competent court having jurisdiction over the place where KERCC is located.*

In this case, the Korean court's ultimate view was that the dispute resolution provision at issue was a Split Clause and therefore enforceable only if one party initiates arbitration proceedings and the other party participates without objection. Accordingly, because the Respondent (KERCC) had alleged the non-existence of a valid arbitration agreement in its answer to the request for arbitration, the Korean court held that the arbitration agreement was not enforceable in the circumstances.

For reference, although the dispute resolution clause at issue provided a choice between arbitration and mediation, it provided for disputes initially referred to mediation to be subject to court adjudication in the event of an objection to a formal mediated settlement proposal. Though not explicitly stated in the Korean court's judgement, the reference provisions cited by the Korean court in the case suggest that the Korean court considered the mere possibility in the clause of having the merits decided by a court to be inconsistent with the definition of "arbitration" under the Korean Arbitration Act, which envisage a procedure for settlement of disputes "not by the judgment of a court, but by the award of an arbitrator." Based on this understanding, the Korean court held that the arbitration agreement was not enforceable as long as the counterparty did not forego a challenge to it.

In another case decided by the Supreme Court in June 2005 (Supreme Court Judgement 2004Da13878, 24 June 2005), the Korean government challenged the enforcement of a KCAB award, rendered in favour of the plaintiff (a construction company), on multiple grounds, including the absence of a valid arbitration agreement. The KCAB arbitration had been initiated by the plaintiff on the basis of a Split Clause that provided as follows:

*Except for matters provided in the present contractual document or in statutory provisions relating to accounting, disputes arising from this contract shall be resolved by mutual agreement of the parties.*

*If the parties are unable to reach an agreement as provided in the preceding paragraph, they may resolve the dispute through mediation by a mediation committee set up in accordance with relevant statutory provisions or through arbitration of an arbitral body in accordance with the Arbitration Act.*

In response to the plaintiff's request for arbitration, the Korean government had submitted an answer on the merits and had also asserted counterclaims, but had not contested the existence or scope of the arbitration agreement at that time. On these facts, the Supreme Court upheld the lower court's finding that the arbitration clause at issue constituted an optional arbitration clause

but that it had regardless become effective as an arbitration agreement when the Korean government participated in the arbitration proceedings without raising a jurisdictional objection, in effect waiving its objections under the Korean Arbitration Act.

In summary, the Korean Supreme Court has repeatedly held that a Split Clause – whether offering a choice between litigation and arbitration, or between mediation and arbitration – is an invalid arbitration agreement, though it may become enforceable if one party initiates arbitration proceedings and the other party participates in those proceedings without challenging the arbitrator’s jurisdiction or otherwise alleging the non-existence of a valid arbitration agreement. Such an objection or challenging, however, should be raised no later than the submission of a party’s first statement of defense on the merits of the dispute in accordance with the Korean Arbitration Act.

Accordingly, it is pertinent to conclude that a Split Clause defers the decision on dispute resolution until an actual dispute arises: if both parties are willing to arbitrate at that time, or one party is willing and the other party fails to make a timely objection, then an enforceable arbitration agreement will likely be recognized.

### **3. If your courts have enforced such clauses, how have they done so?**

In circumstances where a multi-tiered dispute resolution clause is found to be enforceable, under the Korean Arbitration Act the legal ramification would be that arbitration is dismissed, unless the arbitration agreement is found otherwise inoperative.

*A court before which an action is brought in a matter which is the subject of arbitration agreement shall, when the respondent raises a plea for the existence of arbitration agreement, reject the action: Provided, that this shall not apply in cases where it finds that such arbitration agreement is null and void, inoperative or incapable of being performed.*

Article 9(1) of the Korean Arbitration Act.

If an arbitral award is rendered despite the fact that a party has objected to the validity or enforceability of such dispute resolution clause, such an award would, in principle, be subject to be set-aside pursuant to article 36(2)1(c) of the Korean Arbitration Act which provides:

*Article 36 (Action for Setting Aside Arbitration Award to Court)*

- (1) *Recourse against an arbitral award may be raised only by an action for setting aside such arbitral award to a court.*
- (2) *An arbitration award may be set aside by the court only if:*
  1. *The party making an application for setting aside an arbitral award furnishes proof that:*

[...]

- (c) *The award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration: Provided, That if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;*

This being said, in view of the Korean court's position on Split Clauses that failure to raise a valid defense against an inoperative arbitration agreement will result in giving rise to a valid arbitration agreement, it would be prudent to conclude that if the party challenging the legality of the award has failed to make a timely objection on the adherence of the multi-tiered dispute resolution clause, then the set-aside action initiated by that party could very well fail in a Korean court.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

There is no standardized multi-tiered dispute resolution clause in Korea that has been found enforceable, though certain Split Clauses containing multi-tiered dispute resolution mechanisms have been held enforceable where there is found to be a waiver of objections to arbitral jurisdiction or where there exists an implied consent to arbitrate. In any event, and as noted previously, for a multi-tiered dispute resolution clause to be enforceable the clause should clearly state the parties' agreement that insofar as the pre-arbitral process is not adhered to, the arbitration agreement will be invalid, but such an understanding should also be evidenced by facts and documents that were produced before and after the arbitration clause was entered into.

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## Spain

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Spain does not have an established tradition of using alternative dispute resolution such as multi-tiered dispute resolution clauses (“**MTDRC**”). This type of clause is a relatively recent phenomenon and is linked to the internationalization of contracts and the promotion of alternative dispute resolution.

However, MTDRC are valid and binding for the parties under Spanish legislation because: (i) they are not contrary to applicable law and do not harm third parties in accordance with the provisions of article 6.4 of the Spanish Civil Code (“**SCC**”); (ii) they are covered by the principle of contract freedom (article 1255 SCC); and (iii) the parties are required under Spanish law to comply with the agreed provisions (article 1090 SCC). In addition, article 1258 SCC states that agreements are concluded by mere consent, and are thereafter binding upon the parties. In this regard, see Judgment of 20<sup>th</sup> February of 1988 rendered by the Spanish Supreme Court [RJ 1988, 1072].

The purpose of MTDRC means that the aggrieved party should inform the other party of the existence of a dispute and explore the possibilities of reaching an amicable resolution. These clauses represent an opportunity for the dispute to be resolved before resorting to arbitration or to court, thereby avoiding the financial costs and delays involved in the process. Moreover, MTDRC allow the respondent to better prepare their defence in the event that negotiations do not lead to a satisfactory solution to the dispute, as stated in the Judgment of 9<sup>th</sup> June of 1988 rendered by the Spanish Supreme Court [RJ 1988, 5259].

As the MTDRC are not expressly regulated under Spanish law, its legal nature is defined on a case-by-case basis by Spanish courts with regard to the circumstances of the case, the common intention of the parties and the drafting of the clause.

Thus, even if the concept of MTDRC is not regulated under Spanish law, similar concepts such as the failure to exhaust previous administrative remedies stated in former article 533.7 of the Spanish Civil Procedure Act (“SCPA”) of 1881 or the mandatory labour conciliation set out in article 63 of the Spanish Labour Procedure Act do however exist.

a. Breaching the agreement to negotiate

Under Spanish law, breaching the agreement to negotiate is the same as the breach of any other material obligation, and will result in the payment of damages, according to articles 1101 and 1902 SCC, as Prf. Díez-Picazo states.

The majority of Spanish scholars –Prf. Fernández-Ballesteros amongst others– consider MTDRC to be settlement agreements as defined by article 1809 SCC. Regarding the force of *res judicata*, article 1816 SCC states that settlement agreements have a binding effect upon the parties but not the excluding force of a subsequent review typical of an arbitral decision or a judicial ruling. In this regard, see Judgment of 5<sup>th</sup> April of 2010 rendered by the Spanish Supreme Court [RJ 2010, 2541].

The agreement to negotiate at each stage of the dispute resolution procedure as stated in the clause, as well as what has been agreed within such negotiations, is enforceable as a contract. Therefore, the parties must respect the negotiation process stated and must adapt their future conduct to what has been agreed upon.

However, it is important to note that there are no judicial precedents on the enforcement and consequences of non-compliance with these clauses. Spanish courts have adopted a case-by-case analysis in terms of the compliance and enforcement of similar clauses. This shows a certain flexibility and willingness to promote judicial efficiency in the interests of the parties.

Moreover, we would highlight that Spanish courts adopt similar reasoning regarding the requirement to exhaust administrative remedies, and always take into account the interests of the parties and respect the right to due process, as stated in Judgment of 16<sup>th</sup> March of 1989 rendered by the Spanish Constitutional Court [RTC 1989, 60].

b. Good faith standard

Spanish courts usually place significant importance on the parties’ conduct throughout their contractual relationship and beyond it. In particular, the good faith rule is particularly relevant in order to prove compliance with the parties’ obligation to negotiate.

Furthermore, the good faith rule is expressly stated in Spanish law: article 1258 SCC states that “*Contracts are concluded by simple consent, and from then on bind the parties, not just to the*

*performance of the matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, custom and the law*". Article 7 of this same Code provides that "*Rights must be exercised in accordance with the requirements of good faith*", thereby including this rule as a general principle applicable to all legal relations.

The good faith rule implies the exercise of a right in accordance with the rules of loyalty, trust and fair behaviour that the other party could reasonably expect. The good faith rule is also closely linked to the prohibition of the *venire contra factum proprium* concept which constitute the hypothesis that a party has given the other party the reasonable and objective expectation that a certain conduct will be displayed, implying that this first party must be consistent with this conduct in order to maintain the trust placed in them– to some extent equivalent to stoppel defence. This theory means that the party in question should avoid carrying out any action which contradicts their previous conduct and which is reasonably expected by its co-contracting party.

Furthermore, the parties may establish specific obligations related to the conduct they must adopt and which might not be explicitly included in the agreement and which constitute additional and binding obligations for these parties (*i.e.* ancillary obligations deriving from the essential obligation).

Failure to comply with these obligations arising from the good faith principle is generally considered as unlawful and can be a source of liability, insofar as it causes damage to the aggrieved party and it is definitively carried out.

The good faith rule also entails that the parties are totally free to negotiate or to stop the negotiations if they have not reached an agreement, as long as their conduct is in line with this principle (*i.e.* if one of the parties holds negotiations without any real intention to reach an agreement, his conduct is contrary to the good faith rule).

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

Due to the limited Spanish court rulings on this matter, we need to look to arbitral awards and scholars to determine the current state under Spanish law. Arbitrators have found that where the wording of the dispute resolution clause makes the use of ADR optional, a party is entitled to submit a request for arbitration whenever it wishes. The words "may" –as used in the arbitration clause in ICC Case 10256– and "however" –as used in the arbitration clause in ICC Case 4229– leave no room for doubt that the parties wish to be bound only by the obligation to submit their disputes to arbitration, the second option contemplated in the clause.

Vagueness in the wording of clauses has also led tribunals to rule that the parties did not wish to be forced into an amicable settlement stage. On the other hand, when wording expressing an obligation is used in connection with amicable dispute resolution techniques, arbitrators have found that it makes the provision binding upon the parties. This is illustrated in ICC Case 9984, where the word "shall" requires the parties first to seek an amicable solution.

The award in ICC Case 6276 points out the difficulty sometimes encountered when conducting such a factual analysis: "*Everything depends on the circumstances and chiefly the good faith of*

*the parties*”. In that case, the clause did not state clearly how and by what date the parties were required to comply with their obligation to seek an amicable settlement of the dispute.

In Spain, enforcement of MTDRC is based on a case-by-case analysis in light of the basic principles of contract law and the common intention of the parties arising from article 1281 SCC, as stated in Judgments of 18<sup>th</sup> May of 2012 [RJ 2012, 6358] and 5<sup>th</sup> June of 2013 [RJ 2013, 4969] rendered by the Spanish Supreme Court. The circumstances permitting the enforcement of a MTDRC by Spanish courts have to be determined *in concreto*, depending on the nature and complexity of the contract and the dispute. However, authors and scholars such as Entrena, López-Peña, López de Argumedo and Prf. Fernández-Ballesteros have provided specific recommendations:

- i. Regarding the formal requirements, and unless otherwise agreed by the parties, the request should be made in writing in order to inform the receiving party of the nature of the dispute and to demonstrate compliance with the obligation to negotiate (in fact, a verbal request to initiate negotiations is more difficult to prove). This written request can be a simple letter or document referring to the nature of the controversy and the request for a meeting to start the negotiations.
- ii. The wording of the clause shall be clear and precise indicating that negotiation, mediation or conciliation are mandatory prerequisites in order to proceed to the following means of dispute settlement provided in such clause (e.g. arbitration or litigation).
- iii. The clause shall accurately foresee material conditions under which the negotiation process, mediation process, etc. have to be held, establishing certain substantive and procedural parameters in order to evaluate compliance with the obligation. It is essential that the clause provides details on how the procedure must be followed. The most important point is that the foreseen procedure should operate without the need for subsequent negotiations on how it should be carried out. This requirement implies that the clause does not merely constitute an agreement to agree.
- iv. To avoid problems, the procedure to evidence good faith negotiations should, as far as possible apply to all possible disputes. This is sometimes difficult to achieve. MTDRC sometimes state these friendly methods of resolving disputes although they would only be applicable at certain stages or in relation to very specific issues related to the contract performance. This is very common in construction contracts: once the obligations have been performed, the application of certain procedures provided by the clause no longer hold the meaning that the contract established for them. As an example: a mediation procedure on how to remedy damages of an urgent and provisional nature for construction defects discovered during the execution of the construction will no longer be relevant once the construction process has finished or if the defect is clearly irreparable.



- v. It is advisable for the parties to establish a specific time period during which a party may request negotiations, and after which arbitration or court proceedings would be the only possible course of action. The request to negotiate must be presented within a reasonable period of time after the dispute has arisen. This requirement is closely linked to the good faith rule required, related to the parties' conduct, and provides the parties with the opportunity to collect the necessary evidence and files needed to attempt to settle the dispute.
- vi. Depending on the nature and complexity of the contract and the dispute, the MTDRC should be appropriately detailed. However, it is advisable that the consequences of the breach of each step in the dispute resolution procedure are previously agreed by the parties and expressly included in the clause. Compliance with the MTDRC is evaluated on a case-by-case basis and can be considered as partially met, for example, when representatives of the parties who have carried out the negotiations were not the representatives specifically appointed in the clause (*i.e.* the negotiations were supposed to be held between "senior representatives" of the parties and a only a lower level representative of a party attended the meeting). Moreover, the negotiation requirement should be considered fulfilled when the position of the parties is so different that it is impossible to reach an out-of-court agreement. A decision as to whether the MTDRC have been complied with or not will be made in accordance with the common intention of the parties and the objective of judicial/arbitral efficiency.

The appearance of the MTDRC is closely linked to the increasing importance of the will of the parties. Thus, including this type of clause in contracts implies that Spanish courts will need to be flexible and comply with judicial efficacy.

It is necessary to analyze the exact drafting of the MTDRC in order to identify if the provisions are deemed as facultative or voluntary, or have been stipulated as necessary or mandatory, according to the common intention of the parties arising from article 1281 SCC and the *pacta sunt servanda* principle.

With some hesitation of the courts under Spanish law the parties may submit certain aspects of the dispute to an arbitration process and others to a litigation process. Spanish courts allow the parties to agree to a "double agreement" (*i.e.* the dispute can be submitted to an arbitration process and to a litigation process). In this regard, please see the Judgments of 11<sup>th</sup> December 1999 and 10<sup>th</sup> July 2007 [RJ 2007, 5586] rendered by the Spanish Supreme Court [RJ 1999, 9018]. It is worth noting that in any case those clauses do not work as they do under English or US law, and thus before including them in a contract subject to Spanish law or Spanish jurisdiction (including Spain as the arbitration place) some deep legal analysis should be carried out.

The Spanish Supreme Court states that this "double agreement" is justified under the following circumstances: (i) when the parties decide to withdraw the arbitration process; (ii) when the controversy may not be submitted to arbitration in accordance with the law applicable to

arbitration proceedings; and (iii) when the arbitration agreement is null and void, ineffective or impossible to fulfil.

In any case, the parties may refer to the *IBA Guidelines for Drafting International Arbitration Clauses adopted by a resolution of the IBA Council on 7 October 2010* as a model when drafting MTDRC, or to any other model clause that has been used before court and/or arbitral tribunal (FIDIC, MA, etc.).

### **3. If your courts have enforced such clauses, how have they done so?**

The existence of MTDRC establishing the duty to negotiate or participate in a previous dispute settlement mechanism raises the issue of the admissibility of the request for arbitration or the statement of claim before a court if this previous mechanism has not been complied with.

Minimal Spanish case law on this issue prevents us from being able to make an exhaustive analysis of how an arbitral tribunal or a court would enforce a MTDRC under Spanish law. From a procedural point of view, the failure by the parties to negotiate as it is stated in the MTDRC raises the question of the consequences of this failure once an arbitral or court proceeding has already been initiated.

If the parties have agreed to submit their dispute directly to arbitration, the commonly held view is that the arbitrators should decide on this issue by virtue of the powers entrusted in them by the parties and the *kompetenz-kompetenz* principle. Therefore, the arbitrators must decide if the previously established requirement is sufficient or not for impeding (at that time) the arbitration process, and in the event that the arbitration process has indeed been initiated, whether it should continue or not.

If the parties have agreed to submit their dispute to a national court, the court must decide whether to accept the claim. At a later stage the judge will decide whether to suspend the process until the previous requirement of negotiation, mediation or the like will be considered as performed. The court will consider the drafting of the clause, taking into account the common intention of the parties and their conduct throughout their contractual relationship (*i.e.* whether or not the parties have acted in good faith and have respected their obligations, etc.).

If the law were to impose this –although for the time being this is not the case, the performance of these previous requirements will be considered as an admissibility prerequisite of the claim, which can essentially be remedied. Until there is a legal regulation, article 404 SCPA requires the court clerk to register the claim and neither the MTDRC nor the agreements established by the parties are the exception to this rule. Its effect should be limited to suspending temporarily the legal dispute or the arbitration. The decision on whether to suspend the process or not should be taken by the competent judge or arbitrator by virtue of their full freedom and full jurisdiction.

This uncertainty does not disappear completely, even in the case of legal regulation, as is the case with the Spanish Mediation Act. Article 6.2 of this Act merely states that, when contracting

mediation as a prior option, the parties should turn to it before proceeding to arbitration or to court.

It therefore follows that, if the parties have agreed and formalized a mediation process within the contract, it must be complied with by the parties and initiated before turning to arbitration or court proceedings. Moreover, once the mediation process has been initiated, none of the parties have the obligation to exhaust the process.

In order to demonstrate compliance with the MTDRRC, the parties must provide evidence of: (i) the request to negotiate; (ii) the negotiation process; and generally (iii) compliance with all the dispute resolution processes stated in the clause.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

In the most simple clauses, an attempt at prior negotiations can only be established before submitting the dispute to national state courts or to arbitration, while in the most complex, we can consider several successive and previous stages permitting the parties to find a friendly solution before submitting their dispute to the courts or to arbitration

A model of an enforceable MTDRRC clause under Spanish law proposed by Cremades taken from the model clause of the CPR Institute for Dispute Resolution would be the following:

*“In the event that any disputes arise between the parties regarding the application or interpretation of this Agreement, X’s and Y’s project managers shall use their best good faith efforts to reach a reasonable, equitable and mutually agreed upon resolution of the item or items in dispute. In the event that the project managers cannot so resolve the disputed matter(s) within [\*] days, the parties shall use their best good faith efforts to agree, within a further [\*] days, upon an appropriate method of non-judicial dispute resolution, including mediation or arbitration. In the event that the parties shall decide that any disputed matters shall be resolved by arbitration, such arbitral proceedings shall be governed by the [\*] Rules of Arbitration and there shall be three arbitrators, one of whom shall be selected by the claimant in the request for arbitration, the second shall be selected by the respondent within [\*] days of receipt of the request for arbitration, and the third, who shall act as presiding arbitrator, shall be selected by the two parties within [\*] days of the selection of the second arbitrator. The place of arbitration shall be [city, country]. This agreement is governed by, and all disputes arising under or in connection with this agreement shall be resolved in accordance with [\*] law.”*

However, it is important to note that a step may be added or withdrawn, depending on the nature of the contract, its complexity and the specific circumstances of the case in question.

## Sweden

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In Sweden, it is an open question whether multi-tiered dispute resolution clauses are enforceable.

Multi-tiered dispute resolution clauses are not used on a general basis in Swedish contracts, although they are relatively popular in for instance long term service agreements such IT-outsourcing agreements. If a multi-tiered clause is included in the agreement it may be either of a more general nature stating that the parties should strive to settle any dispute through negotiation or mediation before resorting to arbitration or litigation, or very specific in which steps must be taken prior to commencement of any legal action.

If the multi-tiered dispute resolution clause points to litigation in the Swedish public courts as the final step after the required negotiation it is quite certain that a Swedish court would accept to hear the dispute regardless of whether any negotiations had taken place or not. This is because Swedish courts would not deem it to be possible for a party to agree to limit its access to the justice system unless there is support in Swedish statutory law for it.

If the multi-tiered dispute resolution clause points to arbitration in Sweden as the final step after the required negotiations the question is slightly more open. Arbitrations in Sweden are conducted in accordance with the Swedish Arbitration Act (SFS 1999:116) (“the Arbitration Act”) and, quite often, a set of institutional arbitration rules from the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC), the ICC or some other institution.

Whether a multi-tiered dispute resolution clause is enforceable or not is not specifically addressed in the Arbitration Act. If the parties to an arbitration agreement have agreed that arbitration may not be initiated until the parties have gone through certain steps in a multi-tiered dispute resolution clause and a party despite this initiates arbitration prior to these steps being fulfilled the respondent may object that the arbitrators lack jurisdiction. In such a situation the arbitrators have to rule on their own jurisdiction to decide the dispute before them.

The situation has been discussed by Swedish legal scholars who have come to slightly different conclusions. On one hand it has been suggested that if an agreement contains specific and clear provisions to be fulfilled before arbitration may be initiated, non-compliance could affect the arbitrator's competence and thus lead to the case being dismissed. On the other hand it has been suggested that such provisions are of little use if one of the parties is not interested in negotiations. There is no reason to force an unwilling party to participate in negotiations or mediation. At the same time, it has been held that non-compliance with a multi-tiered dispute resolution clause could be considered a breach of contract. This argument seems sensible but it is of course difficult to establish the amount of damages caused by such breach, if the claimant wishes to have the dispute resolved through arbitration.

The question of enforceability has not, to our knowledge, been tried by the Supreme Court in Sweden and not by any of the courts of appeal.

It can be noted that dispute clauses referring to mediation in accordance with The Swedish Mediation Act (SFS 2011:860) ("the Mediation Act") prior to arbitration, will not prevent arbitration without first mediating. This is explicitly expressed in the preparatory works of the Mediation Act.

It can also be noted that the mediation rules of The Arbitration Institute of the Stockholm Chamber of Commerce, SCC, (in force as of 1 January 2014) states that "*unless the parties have agreed otherwise, an agreement to mediate pursuant to these Rules does not constitute a bar to court proceedings or a bar to initiate arbitration*".

In sum, the question of enforceability is still unclear in Sweden. If the parties consider implementing a multi-tiered dispute resolution clause they should be aware of this uncertainty. To maximize the opportunity that the clause is enforceable the clause should be specific and clear and provide for arbitration as the dispute resolution method after the negotiation phase. However, our assessment is that it is more likely that a multi-tiered dispute resolution clause would not be enforceable in Sweden.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

The below suggestions are subject to the uncertainties above and they thus describe what one should do if one wishes to have a multi-tiered dispute resolution clause have the best chance of being accepted by an arbitral tribunal applying Swedish law.

- The clause should preferably expressly provide that prior stages are "conditions precedent" to litigation or arbitration.

- The clause should preferably use mandatory language.
- Short and specific deadlines will most likely increase the possibility that the clause would be enforceable.
- The more specific and measurable the provisions of the clause are the more likely it is that it would be enforceable. Thus, the clause should rather specify that “two negotiation meetings shall take place” than stating that “the parties shall negotiate during one or several meetings until they conclude that the negotiations will not lead to a satisfactory result.”
- Likewise, it would be advisable to specify which mediation rules should apply and agree to any deviations from them beforehand. However, as mentioned above, mediation in accordance with the Mediation Act will not prevent arbitration in Sweden.
- As mentioned above it has been held by legal scholars that a failure to adhere to a multi-tiered dispute resolution clause would constitute a breach of agreement, although it is probably difficult to prove that such breach has caused a loss. A solution could be to include a provision providing for (reasonable) liquidated damages in case of breach of a multi-tiered dispute resolution clause. Sweden is relatively liberal in accepting such clauses so perhaps that could be a way to, indirectly, ensure that a multi-tiered dispute resolution clause is adhered to, despite not being enforceable.



**3. If your courts have enforced such clauses, how have they done so?**

To our knowledge, this issue has not been before the Swedish courts so there is no definitive answer.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Unfortunately no such example can be provided and we refer to the general advice provided above.

## Switzerland

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| <p><b>Marcel Frey</b></p> <p>Prager Dreifuss<br/>Zürich</p> <p>marcel.frey@prager-dreifuss.com<br/><a href="#">Law firm bio</a></p>  |  A professional headshot of Marcel Frey, a man with short hair, wearing a dark suit, white shirt, and a blue tie. He has his arms crossed.                          |

### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

In Switzerland, there is still to date very little published jurisprudence on the matter of multi-tiered dispute resolution clauses (MDR-clauses). Typically a matter of commercial litigation, the first cantonal judgments in Switzerland stem from the late 90'ies and early years of the new millennium. Only recently has the highest court of the country, the Federal Tribunal, dealt with certain aspects of MDR-clauses. However, the Federal Tribunal has to date not been required to make a pronouncement on the actual sanction of the non-compliance with MDR-clauses.

Since the first cantonal decisions there has been a remarkable shift from the earlier court stance that MDR-clauses constitute little more than substantive provisions that require parties to negotiate (but without procedural sanction if not adhered to) to a more progressive approach that clear and binding MDR-clauses actually constitute a condition precedent to litigation or arbitration.

In view of the Federal Tribunal decisions since 2007, the greatest challenge would therefore seem to lie in the actual drafting of MDR-clauses so that they are both unambiguously compulsory and sufficiently detailed to grant certainty about their adherence and exhaustion. At the same time, on the level of the behavior of the parties, the main challenge is ensuring that the aggrieved party has performed all necessary acts according to the MDR-provision to be entitled to invoke the court or arbitral tribunal after conclusion of the pre-trial stages.

The challenges are thus two-fold and may be split into two distinct phases: the pre-conflict phase of drafting and negotiating MDR-clauses and a second phase once a dispute has arisen and parties are confronted with the exigencies of the MDR-process.

**2. What drafting might increase the chances of enforcement in your jurisdiction? For example, in a number of jurisdictions the decision to enforce or not has come down to considerations such as the following:**

- A. Does the clause expressly provide that prior stages are “conditions precedent” to litigation or arbitration?

In Switzerland, no single MDR-clause has evolved which could be said to be universally applicable to any contract and potential dispute. The limited jurisprudence of the Federal Tribunal on this matter has shown that MDR-clauses will be assessed on a case-by-case basis and no two may be equally suitable for different situations. Nevertheless, certain features have come to the fore in the recent decisions that may be analyzed here with a view to optimizing their chances of being enforced by the courts. One such consideration is the primary question of formulating the MDR-process as a condition precedent.

From the rulings by the Federal Tribunal it has become apparent that a party complaining that an MDR-clause has not been complied with by a responding party must be able to evidence that the intent of the parties at the conclusion of the MDR-clause was to establish a pre-trial conflict-solving mechanism that was to be adhered to by both parties unconditionally before arbitration or litigation could be pursued.

In order to ensure that the courts may find that the escalation process is mandatory, formulating the participation in prior stages as conditions precedent to actual litigation or arbitration is highly advisable and will go towards ensuring that the provision can be enforced by the courts.

- B. Does the clause use mandatory language (e.g., “shall” or “must” negotiate or mediate) as opposed to discretionary language (“may” or “should”)?

Choosing mandatory language will go towards ensuring that a court may find in favor of a party complaining of the non-adherence of a responding party to an agreed MDR-process. The Federal Tribunal has found that, MDR-clauses must be construed pursuant to the general interpretation rules governing contract (BGer. 4A\_18/2007, consid. 4.3.2). Hence, formulating MDR-clauses in narrow, mandatory language will significantly increase a party's chances of securing a positive judgment forcing a responding party to take part in agreed early tier dispute resolution. Offering leeway and various options may on the other hand cloud the question whether the parties' intention was to avoid a direct lodging of the dispute with a court or arbitration tribunal.

In its most recent decision on the matter, the Federal Tribunal found that the term "shall", which the parties had used together, with a holistic appraisal of the MDR-process, led to the conclusion that it was a mandatory requirement before arbitration (BGer. 4A\_124/2014, consid. 3.4.3.1).



C. Does the clause specify deadlines and time limits for each of the prior stages?

Although no general rule can be made that would adequately address all types of contracts and party situations, the use and effect of deadlines has been addressed by the courts.

In an earlier decision, the Federal Tribunal held that not including strict deadlines could be an indicator for the non-binding nature of the MDR-requirement (BGer. 4A\_18/2007, consid. 4.3.2). Later, the Federal Tribunal confirmed that a lack of precision and clear steps in an MDR-clause would be interpreted as to mean that it was not intended to be mandatory (BGer. 4A\_46/2011, consid. 3.5.2).

In its latest judgment, the Federal Tribunal has however also noted that the mere absence of particular time lines could not of itself be interpreted to mean that an MDR-process was not mandatory (BGer. 4A\_124/2014, consid. 3.4.3.4). The Federal Tribunal held that the MDR-process as a whole needed to be assessed in gauging whether such a clause was intended to be mandatory or not. In view of this jurisprudence, it seems advisable to use clear language identifying periods during which parties must comply with certain actions in order to underline the compulsory nature of the MDR-process.

D. Does the clause specify the number of negotiation sessions?

As noted above, a court will be more readily inclined to accept a party's plea that an MDR-clause is mandatory and order the recalcitrant party to comply with the requirements under the provision if there are clearly indicated steps both with regard to timing and the process. Therefore, identifying the number of negotiating sessions and a deeming provision based on which a party may justly claim to have participated in all required sittings is helpful for parties to know when they have complied with all necessary conditions precedent. This limits the legal uncertainty and enables parties to end, from their own accord, any suspended proceedings and to promote a conclusion of the dispute by initiating the next step.

E. Does the clause specify the identity of negotiation participants? E.g., project engineers, company officers, etc.

No general rule can be made on this question. Generally, the contract parties will be free to identify in advance whom they wish to contact to mediate in case a dispute arises.

F. Does the clause specify mediation pursuant to specific rules?

In a few of the published cases in Switzerland where state courts have had to deal with the question of MDR-clauses, the provision included specific rules governing the mediation / conciliation proceedings and also the institutions competent to perform the mediation (see below under section G). Adding such a specification is advisable since it goes towards setting a discernable framework for the parties and enables them to establish where in the process they are and what the options are. Agreeing on certain rules may assist in establishing whether or not a party has been fully compliant and entitled to escalate the dispute further.

G. Does the clause specify mediation using a particular dispute resolution institution?

The inclusion of dispute resolution institutions, although useful, will depend on the industry sector the parties are engaged in. However, some of the published cases included MDR-clauses that referred to the specific rules of an industry institution. In an earlier decision by the High Court of the Canton of Thurgau (ASA Bulletin 2/2003, p. 418-420) the dispute was to be submitted to the legal department of Gastrosuisse, the Swiss professional association of hospitality services. In the Federal Tribunal case of 2007 (BGer. 4A\_18/2007) the dispute was to be submitted to the WIPO arbitration institution while in the most recent Federal Tribunal decision (BGer. 4A\_124/2014), claims were to be subject to FIDIC arbitration.

H. Does the clause specify consequences for failure to undertake the prior stages?

Including timelines and actions required by the parties is advisable. Consequently, setting out what rights a party shall have if the other party fails to partake in the MDR-process is also vital to avoid a stale-mate situation, where the matter cannot be progressed. Therefore including language that clearly identifies the factors which entitle a party to commence litigation or arbitration after the recalcitrant party has reneged on its undertaking to negotiate or mediate, is evidently helpful and advisable.

In the most recent case, the Federal Tribunal dismissed a claim by a party complaining that an obligatory MDR-process had not been finalized because it found that the proceedings had dragged out for too long. Although it found that the MDR-clause sought to establish a compulsory MDR-process the frustration of the claimant was severe enough to warrant the commencement of arbitration proceedings (BGer. 4A\_124/2014, consid. 3.5).

**3. If your courts have enforced such clauses, how have they done so? For example, the courts of some jurisdictions have enforced such clauses by:**

A. Dismissing litigation where the parties have failed to undertake the prior stages.

As noted, the jurisprudence on the enforcement of MDR-clauses in Switzerland is very limited. This has two reasons: Firstly, MDR-clauses which have become subject to review in Swiss courts seem not to have been implemented much before the later part of the 1990s. Secondly, international arbitration awards are hardly ever successfully challenged in Switzerland since the reasons for appealing an award to the sole instance, the Federal Tribunal, are very limited and the jurisprudence by the court very strict. Therefore, no absolute guidelines are established yet.

In the first reported case in 1999, the Court of Cassation of the Canton of Zurich found that an MDR-clause could not be construed to be of a procedural nature thus concluding that the non-adherence to MDR-proceedings did not lead to the court finding that it was not competent to hear a matter (ZR 99/2000 no. 29, p. 86-87). The Court of Cassation thus dismissed the action by the party claiming that the MDR-process had not been adhered to by the other party. Rather than dismissing the claim of the party having failed to comply with the MDR-clause, it actually sanctioned the behavior.

Only two years later, in 2001, the High Court of Zurich noted that the question of whether an MDR-clause provided for a compulsory conciliation hearing prior to the commencement of arbitration was up to the arbitration tribunal seized with the matter to decide (ZR 101/2002 no. 21, p. 77-81). In the case at hand, the High Court did not have to decide this question itself since it had only been approached to appoint an arbitrator. The finding seemed to indicate, at the time, that the court was sympathetic to the notion that an MDR-clause constituted a procedural condition and that litigation by a non-complying party might well be dismissed.

Also in 2001, the High Court of the Canton of Thurgau held in a similar vein that an ordinary court seized with the question whether the claimant had complied with all conditions precedent and would have to dismiss – upon application by the claimant – proceedings until the MDR-proceedings had been concluded (ASA Bulletin 2/2003, p. 418-420.).

Whilst the Federal Tribunal has to date not been required to address the core question of how to sanction non-compliance of an MDR-requirement, it would seem from two more recent obiter dicta that it would support the notion of the majority of Swiss legal scholars that not taking part in MDR-proceedings would lead to the court temporarily staying proceedings until the responding party engaged in the prior phases of dispute settlement to the minimum degree required (BGer. 4A\_18/2007, consid. 4.3.3.2, BGer. 4A\_124/2014, consid. 3.5). In the latter judgment, the Federal Tribunal also held that the law applicable to the ensuing arbitration proceedings shall equally be applicable for the interpretation of the MDR-proceedings (BGer. 4A\_124/2014, consid. 3.2).

B. Staying litigation or arbitration until the parties have completed the prior stages.

As noted above, the Swiss courts seem to be moving towards the view that staying proceedings is the most adequate result when approached by a party complaining that a respondent party has not engaged in the requisite MDR-process (BGer. 4A\_46/2011, consid. 3.1.3.). Scholarly opinions support this approach and note that this type of ruling most adequately protects the intent and expectation of the parties which have concluded an MDR-clause at the outset.

C. Awarding attorney fees and costs to a party that commenced litigation or arbitration without first undertaking the prior stages.

We would expect such a procedural order to accompany a judgment by a state court ordering a party to take part in MDR-proceedings.

D. Vacating arbitration awards or reversing court judgments where the parties failed to undertake the prior stages.

To date, no arbitration award has been lifted by the Federal Tribunal for reasons of non-compliance with MDR-proceedings because it has never been confronted with a clearly mandatory MDR-clause.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

Since there is no single formula for an MDR-clause in Switzerland we note below aspects that ought to be included in such a clause if parties wish for a potential dispute to be subject to an MDR-process, the adherence of which would fall in the competence of a Swiss court.

- Include language that unmistakably states that the MDR-process is binding and compulsory and a condition precedent for any later arbitration or litigation,
- Include a definite time line which will be applicable for the complaining party to bring its grievance to a specified panel or body and which constitutes the beginning of the MDR-process,
- Include and identify the persons responsible for progressing the MDR-proceedings in which specific timeframes,
- Identify a final outcome or latest point in time after which an aggrieved party may rightfully find that the MDR-process has been complied with and ended without a solution entitling it to approach the courts or an arbitration tribunal,
- Nominate a set of rules governing other aspects of the MDR-process.

As an illustrative example, we add a free translation of the applicable clause of the standard planning and construction management contract of the Swiss Association of Engineers and Architects (SIA):

*"[...] Disputes arising between the parties shall be resolved amicably by direct discussions. If required, the parties shall call upon an independent and competent person whose duty it will be to mediate between the parties and resolve the dispute. Each party may notify to the other party in writing that it is willing to enter into the dispute resolution proceedings (e.g. by direct discussions, mediation or conciliation through a competent third party, who will propose an own solution). The parties shall agree in writing on the appropriate proceedings and applicable rules with the help of the mediator or intermediary.*

*If no dispute resolution proceedings are agreed upon or if the parties cannot resolve the matter or agree on the choice of mediator or intermediary within 60 days after receipt of the written notification or where such mediation / conciliation fails after within 90 days after receipt of the written notification, each party shall be entitled to pursue the matter*

- *before the ordinary courts*
- *before an arbitral tribunal pursuant to SIA-Guideline 150 (most recent edition).*

*[...]"*

## Turkey

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### Progress of Multi-tiered Dispute Resolution Clauses

Considering the heavy workload of Turkish state courts and the ordinary length of proceedings (approximately 18 months), it is becoming increasingly inevitable for Turkish individuals and legal entities to resolve their disputes through alternative dispute resolution mechanisms including multi-tiered dispute resolution clauses connected with mediation and arbitration.

Nowadays alternative dispute resolution (ADR) does not form part of court procedures and applies only if the parties voluntarily agree to settle a dispute through ADR methods. However, the courts do encourage parties to resolve their disputes through settlement.

The number of disputes referred to ADR mechanisms has substantially increased in recent years. The increase in the number of arbitration proceedings after the enactment of the International Arbitration Law in 2001 (published in the Official Gazette dated 5 July 2001) was followed by an increase in the use of mediation upon enactment of the Law on Mediation for Civil Disputes in 2012. (Published in the Official Gazette dated 7 June 2012.) It is expected that the number of arbitration proceedings will increase even more, thanks to the enactment of the Law on the Istanbul Arbitration Center in late 2014. (Published in the Official Gazette dated 29 November 2014.)

### Legal framework

Article 412 of the Code on Civil Procedure in respect to domestic arbitration and Article 4 of the Turkish International Arbitration Code in respect to international arbitrations, set out the definition and formal requirements for the validity of an arbitration agreement. A valid arbitration agreement must be:

- Executed between the parties with the aim of resolving a part or all of the disputes which have arisen or which may arise from the legal relationship between them, whether from a contract or not.
- Executed in writing. It can be an arbitration clause in a contract or a separate agreement. This requirement is considered fulfilled if a written document is signed by the parties; there is a written communication between the parties

confirming the agreement; or in case of presence the reference to a document containing an arbitration clause, provided it is part of the main contract.

- Accord with the rules of the jurisdiction agreed by the parties. In the absence of an agreement on jurisdiction, it must be valid in accordance with Turkish law.

The basic element of the arbitration agreement (clause) under the Turkish law is the will of the parties. If the parties' intention to arbitrate is clear it's enough for the arbitration agreement (clause) to be valid

### **Multi-tiered clauses regulation in Turkish Law**

The Turkish Law approach does not have clear-cut jurisprudence regarding multi-tiered dispute resolution clauses. Interpretation of the parties' intentions is the key to determining whether preliminary dispute resolution methods constitute a right or an obligation. Moreover, one should consider whether the various "steps" of a multi-tiered dispute resolution clause comply with whatever legal provisions may govern them.

For example, civil procedure is governed by the Code of Civil Procedure (the CCP) dated 01.10.2011 and numbered 6100. There is no particular formality to be followed before initiating proceedings (including mandatory extrajudicial procedure). So, the plaintiff can initiate proceedings by filling a petition and depositing the application fees.

The Turkish legal system contains a variety of legal acts that set aside ADR mechanisms. Some of them are below:

- Code of Civil Procedure
- Attorneys Act
- Code of Labor
- Code of Consumer Protection
- Law on Mediation for Civil Disputes
- International Arbitration Law

### **Prospects of cultivation of multi-tiered clauses for dispute resolution in Turkey**

The main basis for the implementing of multi-tiered clauses in Turkey is given by the Law on Mediation in Civil Disputes (Law No. 6325, LMCD), entered into force on June 22, 2013. The LMCD regulates mediation in Turkish civil law for the first time.

In that regard, Article 1 of the LMCD stipulates that mediation shall be applied only in the resolution of private law conflicts, including those having a foreign element, arising from acts or transactions of interested parties who have the capacity to settle such conflicts.

Under LMCD mediation is defined as "*a method of voluntary dispute resolution system carried out with the intervention of an impartial and independent third party; who is specially trained to*

*convene the relevant parties by way of systemic techniques and with a view to help such parties mutually understand and reach a resolution through a process of communication”.*

The litigation process shall be adjourned for up to three months if the parties declare their intention to resort to mediation after the court case is filed. The parties may extend this period once for three more months upon joint application.

The main purpose of such a concept is to arrive at a more expedited solution of the disputes simply and easily.

In addition to mediation, which is a relatively new dispute resolution method for Turkey, "negotiation" is already regulated under Article 35/A of the Attorneys Act. As per Article 35/A, settlement agreements concluded to resolve a dispute, signed by the parties and their attorneys, are treated as final and binding court judgments and these are not subject to appeal. Therefore, in the event they are not complied with, settlement agreements can be directly enforced against the violating party.

### **Challenges of enforcement of multi-tiered dispute resolution clauses in Turkey**

Two different divisions of the Court of Appeal (which is the highest court in Turkey) have issued two apparently contradictory decisions concerning the hybrid dispute resolution clause which can be considered as an example of multi-tiered clause.

The 11th Civil Division held that an arbitration agreement was invalid due to lack of clear and definitive intent to arbitrate (Decision No. 2013/16901). The agreement contained an arbitration clause and a clause giving Istanbul courts jurisdiction over disputes that cannot be resolved by the arbitrators. The court noted the exceptional character of arbitration, emphasizing the need to state in clear and unequivocal terms that all or certain disputes are to be exclusively resolved through arbitration.

On similar facts, the 15th Civil Division (Decision No. 2014/4607) held that the arbitration agreement was valid and that the jurisdiction clause should be restricted to matters that require court intervention, i.e., interim measures and interim attachments. The only justification is that since the arbitration agreement was very detailed, the parties' intention, arguably, was to arbitrate all disputes arising from the agreement.

The main challenge is the lack of legislative regulation and therefore rare incorporation of the multi-tiered clauses to the contracts.

### **What drafting might increase the chances of enforcement?**

Taking into account the lack of legislative regulation and a short period of practice of commercial arbitration in Turkey the major points for or against possible enforcement will be connected with the specific contract provisions.

Also we should take into account that CCP does not contain provisions which allow courts to close the case or to leave the suit without consideration in case of violation of pre-court complaint procedures which may be provided for in commercial contracts. These arguments will have effect primarily within domestic or international arbitration proceedings.

So to be on the safe side one should follow these recommendations:

- The clauses of the contract should expressly provide that prior stages are “conditions precedent” to litigation or arbitration and should use mandatory language (expressions). That is ”shall” or “must” negotiate or mediate is better than “may” or “should”.
- One should include as much concrete detail of the mediation / negotiation / other ADR mechanism process as you can including specifying deadlines and time limits for each of the prior stages in order to verify the mandatory and imperative nature of such proceedings.
- But in any case one should not exceed reasonable limits for such details. For example it will be very difficult to argue that these violations should lead to negative consequences for the opposing party. Such unreasonable details may be connected with specifying the number of negotiation sessions, the functions of representatives of the parties involved and so on.
- It is very important to specify a particular dispute resolution institution and clarify the mediation procedure. Otherwise the intention of parties would be deemed unclear and the clause as invalid. According to the Turkish Law on Mediation in Civil Disputes, parties can freely determine the mediation procedure provided that it does not conflict with the mandatory legal rules.

### **Enforcement of the multi-tiered dispute resolution clauses by the courts**

Because multi-tiered dispute resolution clauses have no specific legal regulation, according to Turkish Law, in cases when the court finds the multi-tiered clause is valid, but wasn't fulfilled, the court is entitled to impose general arbitration clause provisions.

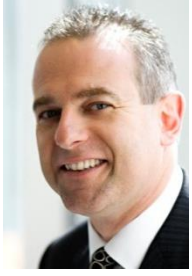

If a claim is issued in court relating to a dispute that is the subject of arbitration proceedings, the other party can file an "objection of arbitration". If the court accepts the objection, the claim will be rejected on procedural grounds. The objection of arbitration must be filed as a first objection in the response petition of the defendant (the court cannot consider this issue at a later date).

If the defendant fails to file an objection of arbitration, it is deemed to have waived its right to arbitration. Turkish courts do not have authority to restrain proceedings commenced overseas in breach of an arbitration agreement.

*(Article 413, Code of Civil Procedure and Article 5, Turkish International Arbitration Code).*



## UAE

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

#### UAE Courts

The UAE Courts have consistently found multi-tiered dispute resolution clauses, also known as waterfall clauses, to be unenforceable. The UAE Courts have held that a multi-tiered dispute resolution clause cannot “prevent [a party] from having recourse to the courts **directly**” (emphasis added).

The Dubai Court of Cassation (the highest instance court in Dubai) in case number 14 of 2008 has found that “[i]f the parties agree to follow certain specific procedures in order to resolve amicably any difference that may arise between them concerning the execution of certain work, that does not prevent them from having recourse to the courts directly on grounds that the court has a general jurisdiction to determine disputes.”

The Court went on to state that “the fact that one of the parties has resorted to the courts directly is **indicative evidence** of failure to arrive at an amicable solution or settlement” (emphasis added).

#### Arbitration in the UAE

Arbitration Tribunals, on the other hand, have typically taken a much more cautious approach. A growing number of Arbitration Tribunals have decided to stay the proceedings in order to give



the parties the opportunity to go through the alternative dispute resolution processes, whether it be through direct negotiation or mediation.

It is of course arguable that an Arbitration Tribunal, standing in place of the UAE courts, should have little scope to take a different approach to the UAE courts based on the case law available.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

The UAE Courts have taken a hard line approach against the enforcement of multi-tiered dispute resolution clauses. The UAE Courts generally take such a hard line approach with any clause, absent an arbitration clause, that would restrict or limit a party's right to seek recourse from the courts directly. The UAE Courts routinely find such clauses to be a violation of public policy. As such, it is our view that the UAE Courts are unlikely to enforce multi-tiered dispute resolution clauses irrespective of the adoption of any of the above suggestions.

## Ukraine

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

#### State courts

According to Ukrainian law and current court practice, Ukrainian courts are not entitled to reject a statement of claim (lawsuit) solely based on the fact that the parties did not follow contractual provisions in the alternative dispute resolution stage prior to commencing litigation. This is based on the following considerations.

According to Article 124 of the Constitution of Ukraine, justice in Ukraine is administered by courts only. Delegation of functions of courts, and also appropriation of these functions by other bodies or officials is prohibited. The jurisdiction of courts covers all legal relationships which arise in Ukraine.

The official interpretation of provisions of section 2 of Article 124 of the Constitution of Ukraine (a case on pre-trial settlement of disputes) was made by the Constitutional Court of Ukraine (the "CCU") in its Decision No.15-пн/2002 of 9 July 2002 (the "**CCU Decision**"). The Constitutional Court of Ukraine exclusively exercises the constitutional jurisdiction in Ukraine; it is entitled to consider cases connected with the interpretation of Ukraine's Constitution and laws (in particular, a law's compliance with Ukraine's Constitution).

The CCU *inter alia* stated the following:

*"[Provisions on] mandatory pre-trial settlement which exclude the possibility of accepting a claim for consideration and effectuation of justice by a court violate the right of a person to court protection. A possibility to use pre-trial dispute settlement may serve as an additional mechanism of legal protection provided by the state to the participants of legal relations. Given the need to increase the level of legal protection, the state may encourage the resolution of disputes through pre-trial procedures, however, their application is a right rather than an obligation of a person who needs such protection.*

*The right to court protection does not deprive the participants of legal relations of a pre-trial dispute settlement option. Such option may be stipulated by a civil-law agreement when the participants of legal relations voluntarily choose a mechanism for protection of their rights.*

*Taking into account the above provision of section 2, Article 124 of the Constitution of Ukraine, the expansion of court jurisdiction on all legal relations in the state, from the point of view of constitutional interpretation should be understood as follows: the right of a person (a Ukrainian national, a foreigner, a stateless persons, a legal entity) to turn to court for dispute resolution may not be limited by law [(i.e. statutes)] or by other legal acts. A provision on pre-trial dispute settlement based on free will of the participants of legal relations, stipulated by law or an agreement, does not limit jurisdiction of courts and the right to court protection."*

Based on this decision state courts in Ukraine consistently refuse to recognize and enforce obligatory pre-trial (or alternative) dispute settlement obligations provided in the relevant contractual clauses. Although agreements of parties providing for the alternative dispute resolution stage prior to commencing litigation are recognized as lawful and valid, Ukrainian courts, as a matter of practice and for the reasons mentioned above, ignore them.

As a result, if a contractual party applies directly to the Ukrainian court skipping the pre-trial stage provided by the agreement, the court would accept the claim and consider it in any event (even if the other party insists on the application of the pre-trial procedure provided by the agreement). The court would not stay proceedings until the parties have completed the prior stages, unless both parties request the court to do so.

### International arbitration courts

The Ukrainian law provides that an international arbitration in Ukraine may be conducted either by a tribunal set up specifically for a given case (*ad hoc* arbitration), or by an arbitral institution. The Law of Ukraine "On International Commercial Arbitration" No 4002-XII dated 24 February 1994 (the "**ICA Law**") provides for the establishment of the following two permanent Ukrainian arbitral institutions: the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**") and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (the "**MAC**").

Please note that access to the awards of ICAC and MAC is limited as such awards are considered private and confidential. However, from time to time, ICAC and MAC publish in their official publications some of their awards demonstrating their established practice with respect to particular issues.

Based on the available decisions and unofficial information obtained from the above arbitral institutions, the following trends with respect to the enforcement of multi-tiered dispute resolution clauses should be mentioned:

- Around up to 2008, the Ukrainian arbitral institutions generally did not pay sufficient attention to contractual provisions on pre-trial procedures (especially if such provisions did not expressly set out terms and clear procedure for such pre-trial procedures). The arbitral institutions accepted cases for consideration and ruled on the existence of their jurisdiction to consider the cases on their merits on the basis of the view that "*the jurisdiction cannot depend on the defendant's wish to escape responsibility under pretence of non-compliance with the pre-trial procedure of resolution of the dispute*". Moreover, at that time, there was no clear answer to the question of whether the CCU Decision was applicable to cases considered by the arbitral institutions.
- The abovementioned practice was changed after the Supreme Court of Ukraine, which is the highest instance court in Ukraine, issued its decision of 20 February 2008 in the case of *International Port Services Ltd. v. SE "Odessa Sea Trade Port"*. The Supreme Court of Ukraine satisfied a claim of the SE "Odessa Sea Trade Port" on cancellation of the arbitration award of the ICAC on the basis that "*the arbitration procedure was violated since the fact of compliance with the terms of arbitration agreement regarding pre-trial dispute settlement has not been verified. The evidence that the parties had bilateral negotiations on the subject matter of the dispute and that the dispute was resolved following such negotiations has not been submitted to the court by the claimant*".

From the point of view of international arbitral practice such an approach seems to be quite logical and consistent. At the same time, the position of the Supreme Court of Ukraine appears to contravene the above-discussed CCU Decision. This may be explained by the fact that international arbitral institutions, unlike state courts, are not qualified to exercise justice and do not serve as guarantors of the "right to court protection". The role of international commercial arbitration comes down to the creation of a method of dispute resolution as an alternative to adjudication by state courts. Courts of international commercial arbitration have wide discretion when considering disputes while the state has a limited control function in the form of recognition or revocation of arbitral awards and secondary measures taken by state courts in support of international arbitral proceedings (e.g. attachment of assets, etc.). In any case, the Supreme Court of Ukraine has endorsed a particular position and this position fully meets the principle of the freedom of contract.

- To our knowledge, currently ICAC and MAC have a rather stable practice as to the enforcement of multi-tiered dispute resolution clauses. In particular, in case an agreement between the parties contains clear provisions on the pre-trial dispute resolution procedure(s), ICAC and MAC do not initiate arbitration proceedings until the claimant provides evidence that a pre-trial dispute resolution procedure has been duly complied with.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

### State courts

As mentioned above, the state court of Ukraine consistently refuses to acknowledge and enforce pre-trial (or alternative) settlement obligations even if they are expressly stipulated in the dispute resolution clauses. Therefore, in our view, no drafting suggestions would increase the chance of enforcement of multi-tiered dispute resolution clauses, unless the court's approach fundamentally changes.

### International arbitration courts

Notwithstanding the fact that generally Ukrainian arbitral institutions tend to enforce multi-tiered dispute resolution clauses, enforceability of each such clause will, in our view, largely depend on its wording.

Please note, that the ICAC and MAC web-pages do not contain any recommended wording for multi-tiered dispute resolution clauses (that would be deemed acceptable and enforceable by the arbitral institutions). Due to the absence of access to all awards of ICAC and MAC, we are not able to comment on the position that the arbitral institutions might take with respect to drafting suggestions. At the same time, below are our recommendations on the preferred wording for multi-tiered dispute resolution clauses that we usually provide to our clients.

As a general rule, contractual parties should do everything possible to avoid the risk of ambiguity in construction of a dispute resolution clause. Unclear wording causes uncertainty and delay and might hinder or even compromise the dispute resolution process. When incorporating a multi-tiered dispute resolution clause into their contract, the parties are advised to take account of any factors that may affect enforceability of such clause under applicable law.

From the Ukrainian law and practice point of view, we recommend that multi-tiered dispute resolution clauses be based on the following main principles:

- Certainty of procedure. Terms and provisions regarding negotiations, mediation and/or any other pre-trial procedure should be sufficiently detailed and certain to eliminate the possibility for parties to argue that their obligations are unclear. For example, a mediation procedure should refer to a particular mediation process or a specific mediation services provider. The clause should not leave key procedural issues unspecified (such as the manner in which the mediator is selected and appointed, etc.).

- Mandatory language. In our view, if the parties intend for the pre-trial procedure(s) to be mandatory and a condition precedent to arbitration, the relevant provisions should be drafted in a way that makes such conditions compulsory (for example, the verb “must” should be used instead of “may”). By employing non-compulsory language (“may”), the parties only acknowledge that the pre-trial proceedings are available to them at any time, even though they are not obliged to initiate such proceedings.
- Deadlines. We recommend setting a clear time period, during which the pre-trial stage (or each of the prior stages) should take place and before the end of which the arbitration may not be initiated.
- Fair behaviour of the parties. The multi-tiered dispute resolution clauses should identify a standard of parties' behaviour, namely, fairness, honesty and open negotiations aimed at resolving a dispute. If a claimant, acting in good faith, informs its counterparty about the claim and takes all reasonable action for the initiation of pre-trial procedures, but the counterparty (as the case may be) ignores this initiative, the claimant should not be deprived of the opportunity to use the arbitration mechanism.
- Connection to arbitration clause / arbitration agreement. We recommend the pre-trial dispute resolution provisions should be part of the arbitration clause / arbitration agreement agreed by the parties or clearly refer to it. In such a case the possibility and the right to initiate arbitration will be clearly conditioned on prior pre-trial actions which, arguably, become a binding contractual obligation of the parties.

### **3. If your courts have enforced such clauses, how have they done so?**

#### State courts

As mentioned above, the state courts of Ukraine consistently refuse to recognize and enforce pre-trial (or alternative) settlement obligations (even obligatory) provided by the parties in dispute resolution clauses. Therefore, if a contractual party applies directly to the Ukrainian court skipping the pre-trial stage provided by the agreement, the court would accept the claim and consider it on the merits in any event (even if the other party insists on application of the pre-trial procedure provided in the agreement).

#### International arbitration courts

In case an agreement between the parties contains a clear provision(s) on commencement of a pre-trial dispute resolution procedure(s), the major Ukrainian arbitral institutions ICAC and MAC do not initiate arbitration proceedings until the claimant provides evidence that the pre-trial commitments were duly complied with.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

State courts

Not applicable for the reasons discussed above.



International arbitration courts

Please find below an example of the multi-tiered dispute resolution clause providing for the pre-trial mediation procedure. The proposed clause creates an obligation for parties to first refer a dispute for resolution by the Ukrainian Mediation Center (UMC) under its Rules. In addition, the clause provides that the arbitration proceedings may not be commenced until the agreed 45-day period (or other period that the parties may additionally agree on) has expired following the filing of the Request for Mediation. The clause also establishes the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry as the forum for final settlement of disputes.

*"In the event of any dispute arising out of or in connection with the present contract, or the interpretation, execution, breach, termination or invalidity thereof, the parties, acting in good faith, must first refer the dispute to proceedings under the Rules of Ukrainian Mediation Center (UMC). Only in case 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 must thereafter be finally settled by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in accordance with its Rules."*



## New York

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Under New York law, multi-tiered dispute resolution clauses are generally enforceable as conditions precedent to initiating arbitration or litigation. Where such a clause calls for parties to engage in negotiation, mediation or some other method of dispute resolution prior to commencing litigation, New York courts generally will respect the parties' agreement and enforce the clause by dismissing any litigation brought before the parties have engaged in the agreed upon resolution mechanisms. *MCC Dev. Corp. v. Perla*, 81 A.D.3d 474, 474 (N.Y. App. Div. 2011). Likewise, where arbitration is initiated by one of the parties before the contemplated dispute prerequisites are complete, courts (and at times arbitrators) will generally enforce the clause by staying arbitration until the parties have so complied. *Lakeland Fire Dist. v. E. Area Gen. Contractors, Inc.*, 16 A.D.3d 417, 417-18 (N.Y. App. Div. 2005). Multi-tiered dispute resolution clauses are enforceable in New York, even where, as often is the case, the contractually required initial stages of the dispute resolution process are non-binding. *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 459-62 (E.D.N.Y. 1985).

### **1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?**

In New York, the primary challenge to the enforcement of multi-tiered dispute resolution clauses relates to the enforceability of agreements to negotiate. Under New York law, agreements to negotiate are enforceable only where the contract provides some definite and objective criteria or standards for determining whether a sufficient negotiation took place. *Jilcy Film Enterprises, Inc. v. Home Box Office, Inc.*, 593 F. Supp. 515, 520-21 (S.D.N.Y. 1984) (discussing the enforceability of agreements to negotiate under New York law). Thus, for example, an agreement that calls for parties to use their "best efforts" to reach an agreement generally is unenforceable unless there is "a clear set of guidelines against which to measure a party's best

efforts." *Mocca Lounge, Inc. v. Misak*, 94 A.D.2d 761 (N.Y. App. Div. 1983). To make enforceable an agreement to negotiate prior to litigation or arbitration, parties should include in their clause specific criteria for determining what will constitute a sufficient negotiation. This may be accomplished simply by specifying the timing, duration, location and/or participants of a negotiation session or sessions. For example, in *American Broadcasting Companies, Inc. v. Wolf*, the New York Court of Appeals—New York's highest court—found that the obligation of a good faith negotiation was sufficiently definite to be breached where the parties' agreement required a forty-five day period of exclusive negotiations that would be followed by a second forty-five day period. 52 N.Y.2d 394, 397-401 (N.Y. 1981).

Another potential obstacle to the enforcement of such clauses is that, under New York law, a party will waive its right to enforce a multi-tiered dispute resolution clause if it does not raise the pre-condition to litigation or arbitration in a timely manner, or it is otherwise at fault for the non-compliance. For example, one New York court found that a party had waived its right to assert the requirement of a good faith negotiation as a pre-condition to arbitration where it allowed the petition to arbitrate to "languish for years" before asserting the negotiation pre-condition. *Sas Group, Inc. v. Claney*, No. 23818/07, 2010 WL 4167155, \*4 (N.Y. Sup. June 28, 2010).

Although there is no indication that arbitrators are less willing to enforce such clauses, New York courts have also held that the question of whether parties have complied with or waived any pre-conditions to a binding arbitration agreement is a procedural question for the arbitrator to decide, unless the parties designate otherwise. *New Avex, Inc. v. Socata Aircraft, Inc.*, No. 02 Civ.6519 DLC, 2002 WL 1998193 (S.D.N.Y. 2002) (finding the issue of whether the parties had engaged in three months of good faith negotiations before submitting the matter to arbitration an issue of procedural arbitrability to be determined by the arbitrator). The New York Court of Appeals has held that the issue of whether a prerequisite to initiating arbitration is a condition precedent to arbitration (compliance to be decided by the court) or a mere pre-condition to arbitration (compliance to be decided by the arbitrator) depends on "its substance and the function it is properly perceived as playing—whether it is in essence a prerequisite to entry into the arbitration process or a procedural prescription for the management of that process." *County of Rockland v. Primiano Constr. Co.*, 51 N.Y.2d 1, \*9 (N.Y. 1980). Parties should be aware that, where they have clearly agreed to arbitrate the controversy, seeking redress in the courts to enforce a multi-tiered dispute resolution clauses' pre-conditions may be unavailing.

## **2. What drafting might increase the chances of enforcement in your jurisdiction?**

It is common for parties to use specific language in drafting a multi-tiered dispute resolution clause, including by expressly indicating that a pre-litigation or arbitration dispute resolution process is a condition precedent to proceeding to litigation or arbitration. Many agreements explicitly use the words "condition precedent." For example, such a clause may provide that the dispute is "subject to mediation as a *condition precedent* to arbitration or the institution of legal or equitable proceedings." *MCC Dev. Corp.*, 81 A.D.3d at 474. While including such express language is a good idea to ensure that a court will interpret the agreement accordingly, no specific language is necessary and New York courts generally will construe the initial dispute resolution mechanisms provided in the agreement as conditions precedent to the initiation of arbitration or litigation, even in the absence of such language. For example, in *Key Restoration*



*Corp. v. Union Theological Seminary*, a New York trial court interpreted a contractual requirement that the parties submit their dispute to mediation prior to initiating arbitration or litigation to be a condition precedent, even in the absence of specific language stating that it was a "condition precedent." No. 155981/13, 2014 WL 883647, at \*3 (N.Y. Sup. Ct. Feb. 20, 2014).

There is, however, one significant potential pitfall under New York law in the arbitration context when drafting multi-tiered dispute resolution provisions that impose an obligation to negotiate or mediate prior to binding arbitration. The danger is that, if the pre-arbitration process is not followed, a court may retain jurisdiction over such a matter on the rationale that the parties only agreed to arbitrate the dispute if the condition precedent—*i.e.*, the obligation to negotiate and/or mediate—was satisfied. For example, in *Darrah v. Friendly Ice Cream Corp.*, a New York court retained jurisdiction over a controversy in which the parties' agreement stated that all disputes would be resolved through an internal corporate mediation process—Friendly Ice Cream Corp. (Friendly)'s so-called "Open Door Policy"—and that a dispute would then proceed to arbitration only if the mediation process "failed." 328 F. Supp.2d 319, 322 (N.D.N.Y. 2004). The court accepted as true the fact that the plaintiff had brought her grievance to management in accordance with the agreement, and that management did not make any good faith effort to engage in the "Open Door Policy" mediation process. When the plaintiff brought suit and Friendly moved to compel arbitration, the court found that engagement in the "Open Door Policy" was a condition precedent to the parties' overall agreement to arbitrate, noting that the plaintiff had agreed to arbitrate the dispute only if that mediation process "failed." It found that Friendly's failure to engage in the "Open Door Policy" was a failure to comply with a condition precedent to the arbitration agreement, and that "[u]nder such circumstances, there was never an agreement by *both* parties to arbitrate" the dispute. 328 F. Supp.2d at 322-23. Parties hoping to avoid this result should make clear in drafting their agreements that any condition precedent to arbitration is a condition precedent to the initiation of arbitration (enforced by a stay of the arbitration) and not a condition precedent to the arbitration agreement itself.

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

In New York, multi-tiered dispute resolution agreements are common in commercial contracts, and are especially prevalent in the construction industry. One very common clause that has repeatedly been held enforceable under New York law is an agreement that requires claims to be initially referred to the architect of a construction project for a non-binding decision and provides that an "initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all claims between the Contractor and Owner." *MCC Dev. Corp.*, 81 A.D.3d at 474. Such an agreement also typically provides that "[a]ny Claim arising out of or related to the Contract . . . shall, after initial decision by the Architect . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings."

## USA

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### 1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

When courts have held multi-tiered dispute resolution clauses to be unenforceable, the most common rationale has been that they are insufficiently definite or certain.

### 2. What drafting might increase the chances of enforcement in your jurisdiction?

The more definite and certain the clause, the better the chance that it will be enforced. The following drafting guidelines will increase the likelihood that a court in the U.S. will deem the clause to be sufficiently definite and certain.

- ***Expressly state that the prior steps are conditions precedent to the initiation of arbitration.*** See e.g., *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 42 (1st Cir. 2003) (where contract provided that claims “shall . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings” party could not compel arbitration because there had been no request for mediation); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335 (7th Cir. 1987) (affirming summary judgment against dealer where contract provided that “Appeal to the Policy Board shall be a condition precedent” to the dealer’s right to commence litigation and dealer failed to so appeal); *Bill Call Ford Inc. v. Ford Motor Co.*, 830 F. Supp. 1045, 1048, 1053 (N.D. Ohio 1993) (same); *Ponce Roofing, Inc. v. Roumel Corp.*, 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (granting motion to dismiss, and ordering the parties to submit their claims to mediation, and, if necessary,

arbitration, in compliance with contract requiring that claims “shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party”); *Weekley Homes, Inc. v. Jennings*, 936 S.W.2d 16, 17 (Tex. App. 1996) (affirming denial of defendant’s motion to compel arbitration where agreement provided that “Mediation of the Disputes is an express condition precedent to the arbitration of the Disputes” and defendant failed to fulfill that condition). When drafting multi-tiered dispute resolution clauses that impose conditions precedent to arbitration one should exercise care not to unintentionally deprive the tribunal of jurisdiction for reasons not contemplated by the parties.

- ***Use mandatory language when describing the obligation to undertake the prior steps.*** In *White v. Kampner*, 229 Conn. 465, 468, 641 A.2d 1381, 1382 (1994), the parties’ agreement contained a clause captioned “mandatory negotiation” which provided that in the event of a dispute the parties “shall negotiate in good faith at not less than two negotiation sessions” prior to commencing arbitration. The agreement also contained an arbitration clause which provided that any dispute “which has not been resolved under” the mandatory negotiation provision was to be resolved by arbitration. The parties had a dispute, and, instead of undertaking the mandatory negotiations, the plaintiff filed a demand for arbitration. The arbitration took place over the objections of the defendant. The court vacated the tribunal’s arbitration award, holding that the agreement called for mandatory negotiation as a condition precedent to arbitration.

In *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287, 1289 (11th Cir. 2002), the agreement between a supplier and its distributor provided that “In the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph. . . . In the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party.” The parties had a dispute, and, instead of either party seeking to mediate, the supplier commenced litigation and the distributor filed a motion to stay the litigation pending arbitration. The court held that mediation was a condition precedent to arbitration, and the failure to request mediation precluded enforcement of the arbitration clause.

- ***Provide a clear set of guidelines against which to measure obligations to negotiate or mediate in good faith or to use best efforts.*** See, e.g., *Mocca Lounge, Inc. v. Misak*, 94 A.D.2d 761, 763, 462 N.Y.S.2d 704 (1983) (“[E]ven when called upon to construe a clause in a contract expressly providing that a party is to apply his best efforts, a clear set of guidelines against which to measure a party’s best efforts is essential to the enforcement of such a clause.”) (citations omitted); *Jilley Film Enters. v. Home Box Office, Inc.*, 593 F. Supp. 515, 521 (S.D.N.Y. 1984) (“Because no definite, objective criteria or standards against which HBO’s conduct can be measured were provided in the July 21, 1982 letter agreement, the provision is unenforceable on the grounds of uncertainty and vagueness and should be dismissed.”).

- ***Specify the deadline for commencing each step.*** In *Red Hook Meat Corp. v. Bogopa-Columbia, Inc.*, 31 Misc. 3d 814, 819, 918 N.Y.S.2d 706, 710 (Sup. Ct. 2011), the contract provided that lessee “may, within ten (10) days after [lessee] has received notice that [lessor] has withheld its consent[ to allow a sublease,] give notice ... of [lessee’s] intention to submit the question ... to expedited arbitration.” The plaintiff failed to provide the defendant with notice of its intention to submit the issue to arbitration within the 10 day period. The court thus denied lessee’s motion for arbitration because lessee “failed to comply with a condition precedent ... with respect to the arbitration provision.” See also *Wagner Const. Co. v. Pac. Mech. Corp.*, 41 Cal. 4th 19, 30, 157 P.3d 1029, 1034 (2007) (“A party may also waive the right to compel by failing to comply with a time limit for demanding arbitration specified in the contract. Compliance is a condition precedent to the right to arbitration.”) (internal citations and quotation marks omitted).
- ***Specify the duration of each step.*** See, e.g., *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (the claim “shall, after initial decision by the Architect, or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to” further proceedings); *Fluor Enters. v. Solutia Inc.*, 147 F. Supp. 2d 648, 650 n.1 (S.D. Tex. 2001) (“‘[I]f a controversy or claim should arise,’ the project managers for each party would ‘meet at least once.’ Either party’s project manager could request that this meeting take place within fourteen (14) days. If a problem could not be resolved at the project manager level ‘within twenty (20) days of [the project managers’] first meeting ... the project managers shall refer the matter to senior executives.’ The executives must then meet within fourteen (14) days of the referral to attempt to settle the dispute. The executives thereafter have thirty (30) days to resolve the dispute before the next resolution effort may begin.”). But see *Cumberland & York Distributors v. Coors Brewing Co.*, No. 01-244-P-H, 2002 WL 193323, at \*4 (D. Me. Feb. 7, 2002) (declining to stay action to enforce mediation clause: “The contract at issue also includes a term requiring mediation before the defendant’s president as a condition precedent to arbitration, with no time limit for completion of such mediation. Even in the unlikely event that such a proceeding could possibly be considered mediation, this court is not required by law to stay actions for purposes of mediation, nor will it do so. The court should grant the defendant’s motion for a stay only on the condition that the defendant agrees to proceed immediately to arbitration.”).
- ***If negotiation is a step, specify the negotiation participants.*** See, e.g., *Fluor Enters Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648, 649 and n. 1 (S.D. Tex. 2001) (enforcing contract specifying negotiations first between “project managers” and then between “senior executives”).
- ***If negotiation is a step, specify the number of negotiation sessions.*** See, e.g., *White v. Kampner*, 229 Conn. 465, 468, 641 A.2d 1381, 1382 (1994) (“[The parties] agree that they will attempt to negotiate in good faith any dispute of any nature arising under this [agreement]. The parties shall negotiate in good faith at not less than two

negotiation sessions prior to seeking any resolution of any dispute under the [arbitration provision] of this [agreement]. Each party shall have the right to legal representation at any such negotiation session.”).

- ***If mediation is a step, specify mediation pursuant to specified rules or under the auspices of a particular dispute resolution institution.*** In *Fluor Enterprises, Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648 (S.D. Tex. 2001), the agreement provided that the parties shall “attempt in good faith to resolve the controversy or claim in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes.” However, “[i]f the matter has not been resolved pursuant to the aforesaid mediation procedure within thirty (30) days of the commencement of such procedure ... either party may initiate litigation.” The parties disagreed what actions commenced the “procedure” that set the 30 day clock in motion. Plaintiff argued that the procedure began when the parties chose a mediator, whereas defendant argued that the procedure was the actual meeting with the mediator. The court observed that in the absence of guidance from the express language of the contract, the court would agree that a mediation procedure is not commenced until the actual substantive discussions begin. However, the court held that, because the referenced Model Procedure included “selecting the mediator,” the act of selecting a mediator constituted a commencement of the mediation procedure.
- ***If a step requires the involvement of a third party, specify the identity of the third-party.*** The American Institute of Architects offers a form contract that is widely used in the construction industry. The contract has a multi-step dispute resolution procedure. It provides that “[c]laims . . . shall be referred initially to the Architect for decision,” and that the Architect’s “initial decision . . . shall be required as a condition precedent to mediation, arbitration or litigation.” It also provides that “Any Claim . . . shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration.” The form contract includes a fill-in-the-blank space allowing the parties to designate the identity of the Architect. Parties often fail to fill in the blank, and courts then have to decide whether or not the failure prevents the parties from proceeding to arbitration. *Ameristar Coil Proc., LLC v. William E. Buffington Co.*, 269 P.3d 55 (Okla. 2011) (instructing trial court to conduct an evidentiary hearing to decide whether the parties intended the mandatory arbitration provision to apply in the absence of an architect); *Tillman Park, LLC v. Dabbs-Williams Gen’s Contractors, LLC*, 298 Ga. App. 27, 679 S.E.2d 67(2009) (it is for the trier of fact to determine whether the parties’ failure to name an architect “results in a failure to meet a condition precedent thereby dispensing with the agreement’s arbitration requirement, or whether it results in an impossibility to satisfy the condition precedent thereby dispensing with the condition-precedent requirement”); *Auchter Co. v. Zagloul*, 949 So. 2d 1189 (Fla. Dist. Ct. App. 2007) (because the parties failed to name an architect, the arbitrator’s decision was not a condition precedent to mediation, arbitration, or litigation). See also *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 459 (E.D.N.Y. 1985) (designating the National Advertising Division of the Council of Better Business as the “advisory third party” for advisory negotiations over certain claims); *Compare Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*,

290 F.3d 1287, 1289 (11th Cir. 2002) (“If the parties are unable to select a mediator, the Florida Mediation Group shall select a mediator.”).

- ***Ensure that the steps are enforceable in the jurisdictions of both parties.*** In *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1081, 51 Cal. Rptr. 3d 19, 24 (2006), the court refused to enforce a construction contract purportedly requiring mediation in Nevada because Calif. Code of Civ. P. 410.42(a) renders such a provision void and unenforceable if it “purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state.”
- ***Consider adding consequences for failure to meet prior steps, such as forfeiting attorney fees and costs for failing to engage in mediation.*** See, e.g., *Frei v. Davey*, 124 Cal. App. 4th 1506, 1508, 22 Cal. Rptr. 3d 429, 431 (2004) (“Many written contracts include provisions requiring the parties to mediate before filing a lawsuit or arbitration proceeding, and conditioning recovery of attorney fees by a prevailing party on an attempt to mediate. . . . [W]e hold that the prevailing parties are barred from recovering attorney fees [if] they refused a request to mediate.”); *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1077, 51 Cal. Rptr. 3d 19, 22 (2006) (“If either party resorts to arbitration or court action . . . without first attempting to resolve the matter through mediation, then in the discretion of the Arbitrator or Judge, that party shall not be entitled to recover their attorney’s fees and costs even if such fees and costs would otherwise be available to that party . . . .”).

### **3. If your courts have enforced such clauses, how have they done so?**

- ***They have denied motions to compel arbitration, allowing litigation or other proceedings to proceed.*** See, e.g., *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (movant could not compel arbitration or stay litigation because mediation, which was a condition precedent to litigation or arbitration, had not occurred); *Anagnostopoulos v. Union Tpk. Mgmt. Corp.*, 300 A.D.2d 393, 394, 751 N.Y.S.2d 762 (2002) (“[T]he Supreme Court should have denied the motion to compel arbitration based upon the respondent’s failure to fulfill in a timely fashion the contractually mandated condition precedent.”).
- ***They have allowed litigation to proceed because the parties failed to perform the prior steps.*** See, e.g., *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (11th Cir. 2002) (trial court properly declined to stay court action because neither party fulfilled conditions precedent to arbitration).
- ***They have dismissed litigation without prejudice because the parties failed to perform the prior steps.*** See, e.g., *Delamater v. Anytime Fitness, Inc.*, 722 F. Supp. 2d 1168, 1177 (E.D. Cal. 2010); *Tattoo Art, Inc. v. TAT International, LLC*, 711 F. Supp. 2d 645 (E.D. Va. 2010); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1986). Courts generally do *not* dismiss claims with prejudice.
- ***They have stayed litigation or arbitration pending performance of the prior steps.*** See, e.g., *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 561 (7th Cir.



- 2008) (“the proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings rather than to dismiss outright”), *cited in N-Tron Corp. v. Rockwell Automation, Inc.*, No. CIV. A. 09-0733-WS-C, 2010 WL 653760, at \*7 (S.D. Ala. Feb. 18, 2010) (dismissal without prejudice would effectively be *with* prejudice because statute of limitation already had run); *Swartz v. Westminster Servs.*, No. 810-CV-1722-T-30AEP, 2010 WL 3522141, at \*2 (M.D. Fla. Sept. 8, 2010).
- ***They have enforced provisions that deny an award of attorney fees due to failure to perform the prior steps.*** See, e.g., *Frei v. Davey*, 124 Cal. App. 4th 1506, 1508, 22 Cal. Rptr. 3d 429, 431 (2004) (attorney fees should have been denied for movant who failed to mediate before suing; parties conditioned attorney fees on participation in mediation).
  - ***They have vacated arbitration awards because the arbitrator lacked authority due to parties’ failure to perform the prior steps.*** See, e.g., *White v. Kampner*, 641 A.2d 1381, 1382 (Conn. 1994) (trial court properly vacated award because contract contained a “mandatory negotiation” clause, and plaintiff commenced an arbitration before any negotiations could take place).
  - ***They have severed unenforceable portions of a clause in order to save the clause as a whole.*** See, e.g., *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1084, 51 Cal. Rptr. 3d 19, 27 (2006) (“Here, the interests of justice are best served by severing only the portion of paragraph 11.3.3 that violates section 410.42—the terms that state mediation must take place in Nevada.”); *Estrada v. CleanNet USA, Inc.*, No. C 14-01785 JSW, 2015 WL 833701, at \*3 (N.D. Cal. Feb. 24, 2015) (severing ambiguous clause that was arguably unconscionable in that the parties “impermissibly shorten[ed] the limitations period to 180 days when they state that, if negotiations fail, the dissatisfied party must submit the dispute to mediation or arbitration within 180 days. . . . The Court agrees that this statement is ambiguous, however, in an abundance of caution the Court SEVERES the requirement . . .”).
- 4. Conduct causing courts to decline to enforce such clauses**
- ***Party frustrated or prevented the occurrence of a condition.*** See, e.g., *Coby Electronics Co. v. Toshiba Corp.*, 108 A.D.3d 419, 968 N.Y.S.2d 490 (2013) (petitioner argued that independent audit of royalties was a condition precedent to awarding underreported royalties in arbitration; court refused to require audit where petitioner frustrated such an audit); *Tillman Park, LLC v. Dabbs-Williams Gen. Contractors, LLC*, 298 Ga. App. 27, 31-32, 679 S.E.2d 67 (2009) (parties intentionally declined to staff position of architect who was assigned to hear disputes).
  - ***Party waived condition due to actions inconsistent with the process.*** See, e.g., *Metzler Contracting Co. LLC v. Stephens*, 774 F. Supp. 2d 1073, 1087 (D. Haw. 2011), *aff’d* 479 F. App’x 783 (9th Cir. 2012) (party waived conditions by voluntarily submitting construction defect claims to arbitration despite a clause that otherwise

required submission to the project architect); *Gladwynne Const. Co. v. Mayor & City Council of Baltimore*, 147 Md. App. 149, 197-98, 807 A.2d 1141, 1169-70 (2002) (city waived condition precedent requiring submission of dispute to city official where city failed to bring the issue to the trial court's attention until the first day of trial, city had engaged in substantial litigation activity before then, and "the basic purpose of the 'arbitration' clause was accomplished"); *Morrison Restaurants, Inc. v. Homestead Vill. of Fairhope, Ltd.*, 710 So. 2d 905, 907 (Ala. 1998) (defendant waived right to mediation/arbitration where "eight months passed from the filing of the complaint before Homestead first asserted its right . . . [P]erhaps more important, when Homestead did assert its right to mediation or arbitration under the contract, it was not until after it had suffered an adverse ruling, in the form of the summary judgment as to liability.").

**4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.**

No such clause serves as a good exemplar. Better exemplars can be found at paragraphs 86-96 of the IBA Guidelines for Drafting International Arbitration Clauses. These can easily be modified for situations where the parties wish to litigate their disputes rather than arbitrate them.