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JURISDICTION OF ARBITRAL TRIBUNAL ON THE GROUNDS OF MULTI-TIERED DISPUTE RESOLUTION CLAUSE

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ABSTRACT

Focusing on the arbitral tribunal's jurisdiction on the grounds of differently drafted multi-tiered dispute resolution clauses, the paper will first address the principle of Party Autonomy due to its high importance in the field; it then will outline in nutshell the ADR techniques used in multi-tiered dispute resolution clauses. On the basis of the relevant case law it will be demonstrated what are the tendencies with regard to the problems of these particular clauses. This thesis will address the issues related to the arbitral tribunal's jurisdiction in cases when the parties have inserted multi-tiered dispute resolution clause in their contract and only one tier of this clause (usually the final stage) is arbitration. It will be examined whether or not it is of importance to the Arbitral tribunal's jurisdiction the issue of compliance with the previous stages of escalation sequence. Applicability of the NY convention to the multi-tiered dispute resolution clauses as whole will be discussed further. Finally, some suggestions will be made regarding the drafting of these clauses; as if the clause is drafted properly it should not raise any further complications.

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> *"… [T]hose who make agreements for the resolution of disputes must show good reasons for departing from them. But also with the interest of orderly regulation of commerce that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go."*
>
> *Lord Mustill in Channel Tunnel Case*

INTRODUCTION

Nowadays, popularity of "alternative dispute resolution" or ADR is significantly increasing due to the fact that the traditional dispute resolution processes involve greater expenses which are more and more difficult to bear and are not efficient due to associated delays[1]. It should be mentioned that usually term ADR is confusing to some extent, the question here is alternative to what? Arbitration is also alternative to the national courts; however, the result of it, *i.e.* award, "is binding and enforceable determination to the dispute"[2]. Therefore, arbitration is distinctive from the other ADR procedures with this particular element. The ADR procedures are more of consensual nature with involvement of the third neutral party, whereas arbitration is still more of adjudicative process.[3]

The evolution of the dispute resolution methods results in development of different types of possible dispute resolution procedures. This verity of possible choices and parties right granted by the principle of Party Autonomy, in combination is reflected in the multi-tiered dispute resolution clauses, in which parties are free to furnish their own mechanisms using several different procedures. Multi-tier clauses are clauses "which provide for distinct stages involving

[1] Martin Hunter et al., *The Freshfields Guide to Arbitration and ADR: Clauses in International Contracs (*Kluwer Law and Taxation Publishers, 1993) p.63
[2] *Ibid.*
[3] *Ibid.*

separate procedures, for dealing with and seeking to resolve disputes"[4]. These clauses are also known as "escalation", "multi-step", "ADR-first clauses"[5], "layered clause"[6] and even "Wedding Cake Clause"[7]. Multi-tiered clauses are designed to be used in the commercial deals, no matter whether it is a two-party contract or a complex multi-party agreement[8]. These clauses are very frequently used in international construction[9] and engineering contracts.[10] They are considered to be very effective dispute resolution tools in terms of time and money efficiency[11], but also in the level of party involvement throughout the dispute resolution itself, which "aim[s] at cooperation (through management or through technicians) rather than confrontation (the lawyers in an arbitration)[12]. It does not mean that the arbitration cases do not involve the parties' cooperation, however "in significant number of cases this co-operative attitude is forgotten after one of the parties sets the arbitration process into motion."[13]

In spite of many advantages that these clauses can bring, yet there still are certain risks related to them. One of the main risk related to Multi-tiered clauses, as explained by Prof. Berger is that "coming closer to a resolution of [the] dispute, the parties will 'stumble' on the escalation ladder

[4] Michael Pryles, "Multi-Tier Dispute Resolution Clauses," Arbitration International, Vol. 18 No.2 (2001), p. 159
[5] Peter Klaus Berger, "Law and Practice of Escalation Clauses," Arbitration International, Vol. 22 No. 1 (2006), p.1
[6] Robert N. Dobbins, "The Layered Dispute Resolution Clauses: From Boilerplate to Business Opportunity," Hastings Bus. L.J. (2005) p. 162
[7] Richard Craven, "The Wedding Cake Strickes Back (Or Does it all end in Tiers?)," Mayer, Brown, Rowe & Maw International Arbitration and ADR Newsletter no.1, (2002), also available at: http://www.mayerbrown.com/litigation/article.asp?id=305&nid=258 (last accessed on March 19, 2010) p. 3
[8] Dobbins, s*upra n.6*, p.162
[9] Tanya Melnyk, "The Enforceability of Multi-Tiered Dispute Resolution Clauses: English Law Position," Int. Arb. L.R. 2002, p. 113, *see also*: Channel Tunnel Case, full citation *infra* n. 48
[10] *cf* FIDIC Red, Yellow and Silver Books; also, World Bank's Standard Bidding Document Procurement of Works (2000)
[11] Berger, *supra*, n.5, also, Bernardo M. Cremades. "Multi-tiered Dispute Resolution Clauses" Report in 14 ICC International Court of Arb. Bull., No.1 2003 (CPR Institute for Dispute Resolution, 2004), p.1, also available at: http://www1.fidic.org/resources/contracts/cremades_2004.pdf
[12] Berger, *supra* n. 5, p. 2
[13] Tibor Várady, "The Courtesy Trap Arbitration: 'If No Amicable Settlement Can Be Reached", Int. Arb. Vol. 14, No.4, 1997, p.9

during the course of proceedings".[14] Since these clauses are becoming more and more frequent in international contracts, it is very important to find out whether this is a viable form of the dispute resolution and this paper will to examine that.

The following thesis will confer the opinions of the scholars that worked on these topics before, and will offer new developments around the problematic issues of the field. Additionally, it will present what is the approach in the relevant case law. This research will mainly focus on the problems of arbitral jurisdiction in cases where its ground is the multi-tiered dispute resolution clause. To reach a conclusion regarding main subject of the paper, this thesis will address following issues: first, whether it is possible to omit the escalation sequence of the agreement and submit the case directly to arbitration, or whether an ADR procedure is "a mandatory condition precedent to the arbitral proceedings"[15]. This will be discussed based on the relevant case law. Second, what it he approach that different jurisdictions had taken. This question will be examined on the basis of the case law of particular country and legislature (if any). Third, whether the award rendered by the arbitral tribunal, when the agreed escalation sequence was not followed, can be enforced under the NY convention and for closing remark, it will be suggested how to draft the enforceable multi-tier dispute resolution clause, which will not turn into an obstacle for a party, which will need to enforce its claims later.

[14] Berger, supra n.5, p1
[15] *Ibid*., p.4

CHAPTER I. PARTY AUTONOMY AND ADR PROCEDURES IN MULTI-TIERED CLAUSES

The principle of Party Autonomy is widely recognized in the international treaties, national legislation, institutional framework, as well as court decisions and arbitral awards. It is the "*differentia specifica* of arbitration"[16] due to the fact that parties are the ones who decide whether or not the case will be submitted to arbitration and this decision is expressly reflected by their arbitration agreement. Party autonomy usually refers to party's right to choose applicable law (narrow understanding) and to party's right to decide on all details of dispute resolution procedure, considering the limitations imposed by the mandatory law.[17] This principle is fundamental when it comes to the multi-tiered dispute resolution. An ADR agreement fully operates in the scope of the Party Autonomy, since this principle is "closely related to the freedom to conclude contracts and the freedom of the contracted partners to rule on the details of their relationship."[18] Its importance is also determined by the consensual nature of the ADR and arbitration itself, as both the ADR dispute resolution procedures as well as arbitration as based upon the parties' agreement. This is not without a rationale, since business people have strong necessity to form the dispute resolution mechanisms that are fully suited to their particular interests and needs.[19] Although the limitations of party autonomy differ from jurisdiction to jurisdiction[20], as well as from institution to institution[21], as general, it is still recognized and lets

[16] Tibor Várady, John H. Barceló III, and Arthur T. von Mehren, *International Commercial Arbitration: A Transnational Prespective*, 4th ed. (West, 2009), p.69
[17] Karl-Heinz Böckstiegel, "The Role of the Party Autonomy in International Arbitration," in *Handbook on International Arbitration and ADR*, ed. by Thomas E. Carbonneau. (JurisNet LLC New York, 2006) p. 115
[18] *Ibid*., p 116
[19] *Ibid*.
[20] *Ibid*., pp. 119-122
[21] *cf* Art. 1.1 and 16 of AAA Arbitration Rules, Art. 11 of ICC Arbitration Rules, Art. 20 §2 of ICSID Arbitration Rules, Art. 5 of LCIA, and Art. 15 of the UNCITRAL Arbitration Rules. s*ee also*: Böckstiegel, *supra* n. 17, p. 126

the players of contemporary business relations exercise rights that are granted by it. Hence, the existence of the multi-tiered dispute resolution clauses is one of the outcomes of this principle.

In order to better understand the mechanisms that are used in multi-tiered dispute resolution clauses, one should first look at the nature of the procedures itself that are elements which form such sequence of dispute resolution. Such clauses may introduce the dispute resolution through negotiation, mediation, expert panels, and/or arbitration[22]. Although litigation also can be the stage of escalation, this paper will focus on clauses with arbitration as a final stage of the dispute resolution sequence. Before analyzing specific types of multi-tiered clauses on the examples of actual cases, it will be briefly outlined the procedures that the multi-tiered clauses might have as a different stage of the dispute resolution and their particularities:

a. Negotiation

Negotiation is the least expensive and the fastest dispute resolution mechanism, which allows parties to preserve the balance of their business relationship and to maintain their continuance in future. The negotiations are usually the first step in multi-tiered dispute resolution clauses. However, one may raise the question why the parties need to have contractually mandated negotiations, when they are always free to negotiate and it is not restricted by any means. The presumption here is that, contractually binding provisions have more of a psychological effect on parties, as they are more likely actually negotiate, when there is such an obligation imposed on them by the binding contract, then in circumstances when negotiation is not compulsory. The drafters go even further with contractually mandated negotiations and oblige parties to multi-

[22] Melnyk, *supra* n.9, p. 113; Alexander Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement", 72 Arbitration 4(2006), p.329

level negotiations, with different authority levels to negotiate amongst each other in order to reach a successful result.[23]

b. Mediation/Conciliation

The terms *mediation* and *conciliation* are usually interchangeable and there is no generally accepted or consistent conditions of their usage.[24] Mainly, they both are the variation of the negotiations, with the added component, which is third neutral party - mediator/conciliator. The parties need to negotiate with help of the mediator/conciliator, who in practice is a well-trained professional and should help the parties to find the best solution to the dispute. Generally distinction between the mediation and conciliation is that in mediation mediator has only recommendatory function, while in conciliation conciliator has more of facilitation function and he/she even drafts the possible settlement agreement and proposes it to the parties. In one way or another mediator/conciliator should be knowledgeable in the disputed issues, will it be the technical specification or the question of law. He/she should help the parties to identify the strength and weakness of their positions, which in the result should lead to the settlement. However in both cases, the mediator/conciliator "cannot compel the parties to reach a settlement."[25] This form of ADR procedure is confidential. It is more of "creative"[26] nature, in terms of the outcome: the settlement can be furnished absolutely based on parties' interests and their needs. In the end, the mediation/conciliation procedure can be also adjusted to the parties' interests. The mediator/conciliator can serve as the administrator of the meeting, without being

[23] Dana N. Freyer, "Practical Considerations in Drafting Dispute resolution Provisions in International Commercial Contract: A US perspective," Int. Arb. Vol 15 No 4, (1998), p.8
[24] Hunter et al., *supra* n. 1, p. 64
[25] *Ibid*. p. 65
[26] Freyer, *supra* n.23, p.9, *see also*: Kathleen M. Scanlon, "Multi-Step Dispute Resolution Clauses In Business-To-Business Agreements", American Bar Association Continuing Legal Education Advanced New ALI-ABA Course of Study September 18-19, 2003, Mediation and Other ADR Dispute Resolution for the 21st Century, American Law Institute , New York, 2003, p. 5;

involved in the discussions itself, or in the other hand, try to help parties to identify the key issues of the dispute and their possible resolution.[27] The parties can choose to have ad hoc mediation/conciliation, with the procedural details specified by their agreement, or refer this procedure to the institutional framework.[28]

c. Dispute Resolution Boards

In the complex agreements, especially in agreements involving specific and very technical details (construction, engineering, etc.) parties may opt for their dispute to be submitted to the dispute resolution boards, which consist of the experts in the contract-specific field. The main purpose of such options is usually the fact, that this allows "technical issues to be handled by the experts on the matter before arbitral tribunal considers them."[29] At some point, these panels make timely and effective decisions while the execution of the contract is not finished yet, preserving parties' cooperation.

This is not the exhaustive list of the ADR procedures existing today. However, these are the ones that are at issue and of interests of the topic as they are most frequently met in the contracts.

The following cases will illustrate what combinations were used in practice before. Observing the details of surrounding facts of each case will make clear what is the rationale behind this clauses and in the end, will lead to examination whether or not such clauses are effective or "pathological i.e. being to capable of functioning in practice."[30]

[27] Freyer, *supra* n.23, pp.10-11
[28] *Ibid*., p. 9
[29] Hunter et al, *supra* n. 1, p. 1
[30] Berger, *supra* n. 5, p. 2

Chapter II. Multi-Tiered Dispute Resolution: A Right or an Obligation

Although Multi-tiered dispute resolution clauses seem to be very attractive nowadays, giving parties there way of dealing with their disputes, one should be very careful with them. The risk is attached to any clause that the party can draft in general; however, this risk is very high in dispute resolution clauses, since this is the party's tool to resolve all the controversial issues with the opposing party. When this risk not only exists but also blocks the party from enforcing its claims that is when the dispute resolution clause becomes "pathological"[31].

What are the risks that Multi-Tiered Dispute resolution clauses bring with them? As multi-tiered dispute resolution clause introduces the escalation sequence, which maybe compared to a several-storey house, if the first storey of this building is not build, there is no possibility to build second one. Returning back to the dispute resolution it basically means that if the party does not comply with the first level of the escalation, hence there is no chance for it to move forward to the second one. However, the main question which arises is - is it really mandatory to comply with all the steps that the multi-tiered dispute resolution provides for? What are the consequences if party does not comply? Or can party omit these steps, considering them as not productive, even though they do not necessarily involve great costs or efforts? The answers to these questions will be determined according to the case law, which had specifically dealt with the issues of the jurisdiction of the tribunal on the grounds of multi-tiered dispute resolution clauses. The approach is not the same in all cases, therefore, to draw common conclusion whether or not party should comply with the escalation sequence, will be observed according to the factual background and the wording of the dispute resolution clauses.

[31] *Ibid.*

II.1 Amicable Settlement Precedent to Arbitration

Parties can shape their own dispute resolution clauses and one of the possible shapes is to have duty to attempt to reach amicable settlement through negotiation as a pre-arbitral stage. According to such clauses, parties become entitled to resort their case to arbitration, only if amicable settlement is not reached at the first stage of dispute resolution.

Transport-en Handelmaarshappij "Vekoma" B.V (Netherlands) v. Maran Coal Corporation (USA)[32] involves clause reflecting this construction:

> Any dispute of whatever nature arising out of or in any way relating to the Contract or to its construction or fulfillment may be referred to arbitration; such arbitration shall take place in Geneva (Switzerland) and shall proceed in accordance with the rules of the International Chamber of Commerce. The said difference or dispute shall [be] so referred by either party within 30 days after it was agreed that the difference or dispute cannot be resolved by the negotiations.[33]

According to this clause, parties should attempt to negotiate over the possible amicable settlement and can only turn their case to arbitration, if the amicable settlement is not reached. In the case at hand, parties connected the transition point from one stage to another to "agree[ment] that the difference or dispute cannot be resolved by the negotiations".

In the case at hand, ICC tribunal had to decide whether claimant had submitted the case to arbitration timely. This tribunal found that parties were obliged to comply with 30-day requirement provided by the agreement. Respondent (seller) argued that this requirement was not fulfilled and therefore, Claimant (buyer) could not initiate arbitration. In this case, Tribunal should have found when in time parties reached the point when they "agreed that the difference or dispute cannot be resolved by the negotiations". The factual background of the case showed that once the dispute had emerged, parties met twice, however the result of the negotiations was

[32] Decision of the Swiss Bundesgericht of 17 August 1995 (unpublished) found in Várady, *supra* n.12, p. 12-13
[33] *Ibid*.

not successful. On January 9, 1992, Claimant sent a fax message to Respondent expressing its readiness to answer any questions that it might have regarding the dispute. This letter also indicated that Claimant would wait for the reply till January 17, 1992 and if by that time parties would not have been able to settle the dispute, they would need to go further with arbitration. There was no reply and only 3 month later, on April 3, 1992, Claimant wrote a letter to respondent again, stating that Claimant still was waiting for settlement proposal. Respondent however replied that it did not have any obligations under the contract and the matter was closed for them.

Claimant moved with its claim and initiated arbitration on May 11, 1992. On the grounds of above illustrated correspondence Respondent raises an objection to arbitral tribunal's jurisdiction, arguing that 30-day period found in the agreement had expired on February 17, 1992 and hence, arbitration should not continue. Tribunal did not accept Respondent's argument, and ruled that contract between the parties that first step of dispute resolution has failed before 30-day period could have been commenced required explicit agreement. Tribunal also discussed why respondent's silence cannot be construed as conclusive for the purposes of the clause. First, in that particular factual set Respondent's silence was not explicit statement that negotiations failed; second, Respondent was not acting in good faith, as its silence was dilatory tactic that Respondent used in order to overcome 30-day period for initiation of arbitration; third, Respondent's letter dated April 13, 1992 is prove that party had made decision regarding failure of negotiations only at that date, and not earlier. On the bases of all this, Tribunal found that 30-day period had commenced on April 13, 1992 and hence, Claimant's submission of the case on May 13, 1992 was made in due time.

Respondent moved to set aside this award in the Swiss Supreme Court. One of the grounds was that the ICC Tribunal had no jurisdiction as Claimant initiated arbitration without meeting time limits provided in parties' agreement. The Supreme Court ruled that 30-day period started to run once it became obvious that parties had failed to settle through negotiations, therefore, Respondent's silence showed that it was not going to settle dispute and Claimant could have resorted the case to arbitration. In its reasoning the Court also stated, that if the parties' negotiation agreement would call for an explicit statement to acknowledge the failure of negotiations, then any party could remain silent and by acting so postpone the initiation of arbitration, which by no means could have been the parties' primary intention. Consequently, Swiss Supreme Court set aside arbitral award.

A duty to negotiate as a pre-arbitral stage was also found in ICC case no. 9977[34] and ICC case no. 8462[35]. In the ICC case no. 9977 contact provided before arbitration the negotiations, which should have been conducted by the senior managers of the companies. When dispute arose parties conducted several negotiation meetings. This negotiation did not bring any result and Claimant initiated arbitral proceedings. Respondent contested Tribunal's jurisdiction on the grounds of Claimant's non-compliance with pre-arbitral stage, as during one of those negotiation meetings Claimant was represented by its legal counsels, rather than senior managers, that were required by the clause. The Tribunal found that Claimant complied with first tier of the dispute resolution agreement, holding that:

> Nevertheless, a prior mandatory process of communication between the parties in conflict cannot be understood as a process wherein a formal description of its contents (such as description of the representatives, timing provisions, formal encounters) is of the essence. A prior process . . . rather implies an attitude and behavior of the parties inspired in a true and honest purpose of reaching an agreement."[36]

[34] ICC case no. 9977, Final Award of June 22, 1999 discussed in Jolles, n.22, p. 334
[35] ICC case no. 8462, Final Award of January 27, 1997, discussed in Jolles, n.22, p.334
[36] *supra*, n. 34

Also, Tribunal stated that if party considered the representation to be of importance to it, it should raise an objection during the meeting itself, and any objection at arbitration stage was late and of no-relevance. The Tribunal found that it had jurisdiction over the dispute.

In ICC case no.8462 parties were required to negotiate within 30 days and if the settlement has not been reached, then either party could have resort the case to arbitration. The ICC Tribunal again faced the issue of jurisdiction, as objected by Respondent. Respondent based its objection on the ground that Claimant while resorting to arbitration did not inform Respondent about the issues to be arbitrated and accordingly, Respondent had no chance amicably settle those issues. The Arbitral Tribunal found that claimant made enough efforts to fulfill pre-arbitral step as required by the agreement and was entitled to resort case to arbitration.

It all proves that these clause can be absolutely party-tailored, parties' can make it extensively detailed, or in the other hand, only cover basic procedural issues, such as ADR mechanism involved, applicable legal framework, time limits, they can determine the procedural moment when one tier has ended.

Contractually mandated negotiation may be even more dangerous than any other procedures that parties can choose for their dispute resolution. Especially, when agreement calls for best effort duty or good faith negotiations, it becomes more difficult to determine when the stage of negotiations has exhausted its possibilities of settling the dispute. As envisaged by case law, when one party wants to object tribunals jurisdiction negotiation can give good argument. Even if one party is not quite acting in good faith, there might be a court which will find its decision to be in favor of such party. It does not mean that the court is bias, no way, but rather it reveals the dual nature of legal actions and all possible ways of its interpretation. One should be very careful once including negotiations as part of the contract clause, as stated above, party is not stopped by

any means to conduct such negotiations, and while forming it as a specific stage prior arbitration may hinder the dispute resolution as whole.

II.2 Mediation/Conciliation Precedent to Arbitration

Another type of the multi-tiered clauses is when mediation/conciliation is a prerequisite to arbitration. It differs from the negotiation + arbitration model in a way that, negotiations are party facilitated, having no other parties participating and in terms of financial efficiency, involve low transaction cost, while mediation/conciliation is conducted with assistance of mediator/conciliator, not in the premises of the parties, in order to keep it neutral and balanced. Parties incur some expenses, however if we look at the numbers of the cases when these procedures are chosen for dispute resolution,[37] it leads to conclusion that they are becoming increasingly popular and parties actually are willing to pay for mediation/conciliation.

In *Empresa Nacional de telecomunicaciones (Telecom en Liquidación) (Colombia) v. IBM de Colombia S.A. (Colombia)*[38] parties have undertaken to carry out conciliation before coordination committee and solve the dispute by direct communication of the CEOs of the Parties prior to initiation of arbitration. Dispute aroused between the parties, and Claimant (in this case, Telecom) submitted its case directly to arbitration, omitting conciliation. The Arbitral Tribunal in Bogota had to decide whether or not it had jurisdiction, as Respondent was requesting Tribunal to reject its jurisdiction, since parties need to comply with the escalation sequence and conduct conciliation, in which Claimant was refusing to participate. This Tribunal

[37] Frank E.A. Sander, Lukasz Rozdeiczer "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach", *11 Harv. Negotiation L. Rev.1 (2006)*

[38] Bogota Case – decision of ICC tribunal 17 November, 2004 (Bogota, Colombia), case not available at Kluwer Arbitration Online Database, available at: http://www.kluwerarbitration.com/document.aspx?id=ipn80480&query=AND(content%3A%2217%22,content%3A%22november%22,content%3A%222004%22,content%3A%22bogota%22)

found that it had jurisdiction, as dispute resolution clause requiring parties to have preliminary conciliation was barring party's right to "access to administration of justice", which was granted by the Colombian Constitution and this right could not have been limited by parties' agreement. The Tribunal also reasoned, that *any requirements* i.e. any pre-arbitral steps that parties should carry out prior arbitration, are unconstitutional since they limit party's constitutionally guaranteed right.

This decision can be debated in light of the term "*administration of justice*" which is used in Art. 229 of the Colombian Constitution and became the keystone of this decision.[39] If this term refers to justice as party's right to have its dispute resolved, then, since conciliation can be a way how to settle the dispute, hence it cannot limit person's exercise of this right; on the other hand, if this term only refers to the national courts, then arbitration cannot be considered not limiting this constitutional right; and finally, if the meaning behind it is binding procedure with binding award/decision as an outcome, the it makes the arbitration and national courts proceedings falling under the scope of this article. Therefore, only in 3rd possibility this ruling will be correct. If Colombian constitution when referring to this right, used the term "court or *any other tribunal*" this issue would have been clear, however there is further explanation of "justice"can be deduced from the terms used in following articles. In Art. 230[40] drafter is using such terms as "judges" "judicial proceedings", and in the end all these articles are in the Title VII named "Concerning The Judiciary Branch". In conclusion, it will be very formalistic and narrow interpretation stating that this constitutional right only refers to court adjudication. However,

[39] Art. 229 of the Colombian Constitution: *"The right of any person to have access to the **administration of justice** is guaranteed. The law will stipulate in which cases this may be done without the representation of counsel". (emphasis added)* English text of Constitution available at: http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (last accessed on March 14, 2010)

[40] Art. 230: "*In their decisions, the **judges** are bound exclusively by the rule of law. Fairness, jurisprudence, and the general principles of law and doctrine are auxiliary criteria of **judicial proceedings**. (emphasis added)*

since justice i.e. resolution of the dispute is possible through conciliation also, it is obvious that the Tribunal is taking contra-ADR approach and rules in favor of arbitration.

In Australian case decided by the Supreme Court of New South Wales, *Hooper Bailie Associated Ltd v. Natcon Group Pty ltd*[41] court also had to address the issue connected to multi-tiered dispute resolution clause. Hooper Bailie sub-contracted Natcon for service related to its contract for provision of construction services related to the new Parliament building in Canberra, Australia. This sub-contract contained an arbitration agreement. Disputes arose regarding some work performance and they were submitted for arbitration. However, on February 16, 1990 Hooper Bailie suggested Natcon to conciliate the dispute in order to have possibility to resolve some of the disputed issues and narrow down the submissions for arbitration. Natcon accepted this suggestion; parties communicated and provided information necessary for conciliation. There were several attempts to conciliate. Hooper Bailie's lawyers also requested conciliation outcome with regard to some issues to be final and binding on the parties. Conciliator was appointed in due time and parties proceeded with the procedure. Some of the issues were addresses, but not all of them, when liquidation has started in Natcon and an appointed liquidator instructed lawyers disregard conciliation and continue with only arbitration. Before the conciliation officially ended or had any official result, Natcon sought to proceed with the arbitration.

This case is distinct from others that have been mentioned above, as parties agreed on the multi-tiered dispute resolution not necessarily at the time of conclusion of the contract, but rather proposed the tiered dispute resolution after the dispute itself arose. This is an indication that the

[41] *Hooper Bailie Associated Ltd v. Natcon Group Pty ltd* (1992) 28 NSWLR 194 discussed in Pryles, supra n.4, p. 161-163 and Spencer, full citation infra n.88, p.3 *et seq.*

multi-tiered dispute resolution clauses, not quite being arbitration clauses,[42] share the feature of arbitration agreement, namely, arbitration agreement as well as multi-tiered dispute resolution clause can be agreed upon at stage of contract drafting - prior the dispute has emerged and in the other hand, it can be agreed once after the dispute already has arose.[43]

Hooper Bailie appealed in the New South Wales argued that parties have concluded binding agreement to conciliate, which became pre-arbitral stage and therefore, arbitration cannot be continued until conciliation has been terminated. The court in this case found valid conciliation agreement concluded between the parties, which was still binding upon the parties. The court analyzed previous case law of England and Australia. This case law was supporting both arguments that agreement to conciliate in not enforceable and that it is. The English case law[44] proposed concept of non-enforceability of agreements to agree, however the court distinguished conciliation agreement from an agreement to agree, as it was certain enough and actually obliged parties to participate in the procedure itself. To summarize another approach – that conciliation agreement is enforceable, court reasoned:

> Conciliation or mediation is essentially consensual and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent can not be enforced; equally, they say 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. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come." [45]

The court also noted that since in this particular case parties had intended to have not quite ordinary conciliation, but rather specifically outlined procedure with binding outcome and since

[42] Cremades, supra n. 11, p.2 "[…] As the steps prior to arbitration do not constitute arbitration agreements…", also p. 10, See also, discussion in Pryles, supra n. 4, p.160-161
[43] Várady *et al*, *supra* n.16, p.97
[44] *see* Paul Smith Ltd v. H& S International Holding, (1991), 2nd Lloyd's Rep. 127
[45] Pryles, *supra* n. 41, p.162

Natcon's decision to continue arbitration was without further explanation, court ruled that it had power to stay arbitration until parties have not concluded conciliation, according to their agreement. This court went on its discussion and stated that court should have power to stay arbitral proceedings in cases when there is a valid conciliation/mediation agreement which can be enforceable under particular circumstances and when the agreement to conciliate/mediate is sufficiently certain.

The standard of certainty that court mentioned in Hooper Bailie was later applied in another Australian case, namely *Elizabeth Bay Developments Pty Limited v. Boral Building Services Pty Ltd.*[46] In this case two construction agreements provided multi-tier dispute resolution clause. The Elizabeth Bay- Trustee Company concluded a joint venture agreement with the Boral Building Services with the purpose to develop a residential property sub-division on the central coast of New South Wales. Elizabeth Bay considered Boral's refusal in participation in this project as repudiation and terminated the contracts. Elizabeth Bay turned the case to the Supreme Court of New South Wales seeking declaration that it rightfully terminated contracts and was entitled to receive damages it claimed on the ground of breach of contract. Boral filed a plea requesting termination or stay of the judicial proceedings as dispute resolution clauses in the both contracts concluded between the parties, not being identical, but similar, required parties to mediate their disputes first. One of the dispute resolution clauses was as follows:

> 16.i. If a dispute arises out of or relates to this agreement or the breach, termination, validity or subject matter hereof, the parties agree to first endeavor to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC).
> 16.ii. In the event that the dispute has not been settled with 28 Days (or such other period as agreed to in writing between the parties hereto) after the appointment of the mediator the dispute shall be submitted to arbitration administered by and in accordance with the Arbitration Rules of the ACDC.
> 16.iii. The arbitrator shall be a person agreed between the parties. ACDC will assist the parties by providing a list of suggested arbitrators. Failing agreement, the arbitrator

[46] Elizabeth Bay Developments Pty Limited v Boral Building Services Pty Ltd (1995) 36 NSWLR, 709 discussed in Pryles, *supra* n. 4, p.163-165

> shall be a person appointed by ACDC. The arbitrator shall not be the same person as the mediator.
> 16.iv. The arbitration shall be held in Sydney or such other place as the parties may agree in accordance with and subject to the laws of the State of New South Wales.
> 16.v. The decision of the arbitrator shall be final and binding upon the parties."[47]

Court examined whether or not this clause was sufficiently certain. While analyzing Art. 16.i, the Judge took a position that although ACDC has its guidelines for mediation, first, parties did not intend to have those guidelines incorporated in this agreement, and second, even if they had, these guidelines were not consistent with parties' agreement to mediate. However, on this stage, it is not clear form the decision, whether or not court considered this clause enforceable. Then court makes a presumption that the parties' agreement incorporated guidelines, and gave an outcome of this assumption. This guidelines while requiring parties to sign the mediation agreement, does not necessarily refer to ACDC mediation agreement, and such an obligation imposed on parties, *i.e.* concluding mediation agreement which was formed from ACDC guidelines, was unclear and ambiguous and could not be enforceable, as it failed to be sufficiently certain. On the other hand, if guidelines would request parties to enter into specific ACDC mediation agreement, then this agreement would have been sufficiently certain and could sustain this test for its enforceability. The Court found this mediation agreement to be unenforceable. Furthermore, it also ruled that court had power to decide whether or not to stay proceedings, and it rejected Boral's arguments and continued proceedings. In addition, it should be noted, that mediation was only the first step that the parties should have taken under the dispute resolution clauses found in their contracts. However, Boral, did not consider another argument that would have been stronger: all agreements called for arbitration and not judicial proceedings as the final stage of dispute resolution. Boral could have raised an argument and requested court to stay its proceedings on the grounds of the arbitration agreement. Maybe Boral

[47] *Ibid*.p.613

considered that this step would be also unenforceable since mediation as a pre-arbitral step was not enforced, but in any case, if this argument would have been raised, practice would have a very interesting case, which would determine the nature of tiers in multi-step dispute resolution clauses when it comes to parties' non-compliance with these steps and the effects of this failure to comply on the jurisdiction of arbitral tribunal, hence, it would give an answer whether or not unenforceability of the pre-arbitral stage would result in unenforceability of arbitral agreement itself.

II.3 Expert Panels Precedent to Arbitration

The next set of the multi-tiered dispute resolution clause type is the clauses which introduce the expert panels or expert decision making before the arbitration. As from the word *expert* itself can be deduced, this clauses are usually found in the contracts with very specific scope, typically these are construction, engineering contracts, also contract of complex and complicated nature, which by itself contain necessity for experts, *i.e.* professionals with knowledge of that particular field and its characteristics that are involved. These clauses may oblige the parties to have one expert for the entire project, in order to solve day-to-day technical issues, which parties cannot agree upon, or require parties to nominate the expert panel which will hear their case in the event of the dispute. Others in addition, might request parties to submit the case to a specific institution.

In England was decided the Channel Tunnel Case,[48] which falls under this category and is very important part of case law in this field due to the court reasoning. English courts were not

[48] Channel Túnel Group Ltd (UK) and France Manche S.A. (Fr.) v. Balfour Beatty Construction Ltd. (UK) et. al, [1992] Q.B. 656 (C.A.).

favoring ADR agreements "traditionally"[49], however over the past decades this tendency has been changed.[50] In this case, the main construction contract entered into by the parties provided that if dispute arose between the parties during the progress of the works, it should be resolved by a panel of experts consisting of three experts. This panel in 90 days would decide the case. Unanimous decision became final and binding, unless parties referred the case to arbitration according to ICC Rules within 90 days after receiving this decision. Also parties had right to resort to arbitration if there is no unanimous decision reached by the panel.

From the beginning this project did not include services for cooling system of tunnel. The construction revealed that such a system was necessary; however the constructors considered that it can be added later on, after the official opening of the Tunnel. After some time, necessity of the cooling system at the opening became obvious that Respondent should have provided this cooling system. Dispute emerged regarding the amount payable for these works. Respondent threatened to suspend the works, in case if the amount would not have been paid to them by October 7, 1991. Although, Respondent did not suspend works, on October 14, Claimant sought an injunction restraining Respondent from suspending the works. Respondent filed cross-application requesting court stay proceedings, as any dispute arose between parties should be solved not by court, but rather in accordance with the dispute resolution procedure that parties had contracted for. Respondent based its objection on two arguments, basically that: (i) the dispute resolution clause in the contract between the parties was an arbitration agreement within the meaning of Section 1 of the English Arbitration Act 1975[51] and (ii) an inherit power of the

[49] Berger, *supra* n.5, p.6
[50] *Ibid.*
[51] **Section 1: Staying Court Proceedings Where Party Proves Arbitration Agreement**. (1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the

court to stay proceedings when the in case to be decided dealt with parties' non-compliance with their agreement which sets forth dispute resolution in any other way. The main difference between these two was in nature of the power to stay - under the Arbitration Act stay was mandatory, while on the grounds of the inherent power the stay was discretionary.[52] The court ruled that dispute resolution clause in the present contract was no quite an arbitration agreement within meaning of Section 1 of the English Arbitration Act, but the court exercised its inherent power to stay the proceedings, using the analogy of power to stay proceedings when according to parties' agreement the dispute is issue of foreign court's jurisdiction. Although it was court ruling and is grounds were obvious, court still examined the issue of interpreting arbitration agreement within the meaning of Section 1. The Court stated that it was ready to declare dispute resolution clause in the contract as an arbitration agreement, however, in that regard, if English legislator had taken wording of Art. II (3) of the New York Convention[53], court would have been obliged to compel parties to arbitration, which was impossible under the present clause, as it called for expert panel first to render their decision, which would further give power to arbitration. Under the wording of the English Arbitration Act, court is only required to stay proceedings and therefore, leave the decision of the further dispute resolution up to parties. By stating this, the court made clear that it could stay the proceedings both on the grounds of inherent power and Arbitration Act of 1975. This case is very good indication what problem can

proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (text also available on: http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&parentActiveTextDocId=1227941&ActiveTextDocId=1227941&filesize=21740 ; last accessed on March 16, 2010)

[52] Pryles, *supra* n.4 , p. 169

[53] Art.II(3) of NY Convention: *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

cause multi-tiered dispute resolution, both on international and domestic legislative basis as it becomes more evident how different interpretation might lead to one result or another.

II.4 Complex multi-tiered dispute resolution clauses

Under this sub-chapter the paper will focus on the clauses which provide the distinct levels of dispute resolution, which I consider to be complex due to the nature of the ADR procedures involved and/or the amount of the sequence levels that the parties should undergo itself.

The contract for the Hong Kong Airport Project provided for four-tiered dispute resolution clause.[54] The Government included multi-tier dispute resolution clause in all project-connected contracts in order "to avoid, or at least mitigate, the threat of delay, cost escalations and overruns, litigation costs, the risk of judicial interference, and the myriad other problems that frequently - if not inevitably - plague complex construction projects".[55] The procedure was following: first, parties should have made their submissions to an Engineer, and then the sequence was continued by the mediation, adjudication and finalized with arbitration.[56] Mainly, this system is based on the pre-selected expert panels, having both procedural and substantive expertise in subject matter, which is designed to immediately address any emerging controversies "in order to nip potential or emerging disputes in the bud"[57] by attempt to resolve them in voluntary manner[58]. However, the clause providing the binding arbitration is "backed"[59] for the situation when the differences are not solved by the parties though the pre-selected expert

[54] Cremades, *supra* n.11, p.1

[55] Robert K. Wrede, *Dispute Resolution Boards and the Hong Kong Airport: An Exciting Example of Commercial Dispute Resolution in Action*, p.3-4 available at: http://www.mediate.com/acrcommercial/docs/Bob%20Wrede%20DRB%20Article%20ACR%20Commercial%20Sec%20%20IF%20Aug09(2).pdf (last accessed on March 9, 2010)

[56] *Ibid.p.4*

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

facilitator or facilitators. In case of this particular project, the clause has proven itself to be effective in evading, controlling and resolving the conflict that emerged during the performance. It should be noted, that in projects like this "the threat of conflict palpable, and litigation-related delays and escalating costs could be catastrophic."[60]

The ICC Case no. 10256[61] did not involve a very complex and complicated agreement, however this power purchase contract provided for the multi-step dispute resolution first, through dispute settlement by mutual discussions of the parties, in case of failure of which, parties could refer to expert mediation, and it also failed, then parties could resort the case to arbitration. This case envisages one of the other models of the multi-tiered dispute resolution clauses. These clauses are very frequent. As described above, parties tend to insert the contractually mandated negotiations, thinking that it is an effective tool, or maybe efficient wording of the clause, not realizing the real risk behind it. Being so popular, mediation is also introduced as the second level of the sequence, and finally, parties provide the arbitration for the cases when voluntary and party-friendly mechanisms do not work.

In order to better understand parties' objections and tribunals ruling, one should look into the dispute resolution clause itself:

> (1) Any dispute arising out of or in connection with this contract shall be settled in good faith through mutual discussions between the parties.
> (2) In the event that the parties are unable to resolve a dispute in accordance with Section 1 above, then either party, in accordance with this Section 2, may refer the dispute to an expert for consideration of the dispute …
> (3) Any dispute arising out of or in connection with this Agreement and not resolved following the procedures described in Sections 1 and 2 above shall, except as hereinafter provided, be settled by arbitration in accordance with the Rules of procedure for Arbitration Proceedings."[62]

[60] *Ibid.*
[61] ICC Case No. 12056, ICC International Court of Arbitration Bulletin Vol. 14, no.1- Spring 2003, p. 87
[62] *Ibid.*

Respondent objected tribunal's jurisdiction on the basis of this clause, which in Respondent's opinion required parties to have expert mediation prior arbitration, and therefore, since Claimant did not fulfill this obligation, it could not resort case to arbitration. The Tribunal found that this requirement was not of mandatory nature due to the "may refer" language used in this clause, which meant that it was a right of a party but not obligation, and hence, party could initiate arbitration at any time. When drafter is using such "soft"[63] language, it is obvious that parties do not intend to impose any obligation, it rather gives a party right to use this contractual tool upon its own consideration.

Another type of the differently drafted was encompassed in *Belmont Constructors v. Lyondell Petrochemical Co.*[64] This clause provided for variety of ADR procedures. Parties could have resorted to mediation, mini-trials, mock trial or other techniques which they consider to have been useful for the subject matter. There was no limit on the parties regarding to the amount and the types of such procedures they could have used. In addition, transition from one ADR procedure to another should have been agreed by the parties. In the end, if the dispute was not solved under so many different available ADR techniques, parties could have resorted to arbitration. Dispute emerged between the parties and they opted for amicable settlement as required by the clause. Conducted mediation was not successful. Lyondell brought an action to the court, while Belmont initiated arbitration and was requesting the court to give effect to arbitration agreement and send parties to arbitrate. The court ruled that an agreement between parties required them to agree on other ADR procedure, and failure to do so barred arbitration. This court reasoned that, although parties carried out mediation and it turned out to be

[63] Berger, supra n.5, p.5
[64] 896 S.W. 2nd 352 (Texas Court of Appeals 1st Dist., 23 March 1995) found in Várady, *supra* n.13

unsuccessful, still did not fulfill the precondition of arbitration. Claimant's motion to send parties to arbitration was denied.

Complex agreements by their nature involve difficulties as do not deal with simple issues, to overcomplicated the dispute resolution may be just the proper according to the same nature of the agreement, but in the other hand, since it is harder to deal with difficulties in that set, it might be wise to have easier way for dispute resolution, rather than having too many stages to go through until one gets binding decision.

II.5 UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law International Commercial Conciliation[65] frames unified legal framework that can be used by the states wishing to enact or reform their conciliation law. The model law has taken an approach which is of a great importance for discussion of multi-tiered dispute resolution. Article 13 of Model Law reads:

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

Model Law recognizes the mandatory nature of the conciliation with respect to the cases when parties have undertaken to conciliate. However, model law cannot operate by itself, meaning that if the parties' agreement sets terms of conciliation which are not quite the same, contract should prevail. Therefore, if the language of the contract itself does not give raise to a mandatory obligation to conciliate, but rather grants a right to conciliate, although the model law recognizes

[65] Adopted by UNCITRAL on 24 June 2002

such obligation, it cannot create it without parties' agreement. On the other hand, this article merely emphasis that conciliation is not only voluntary and non-binding but once the parties have agreed to conduct it and had set specific requirements for it, would it be with the incorporation of the already available conciliation rules or just party-tailored ones, not only they should comply but the court and arbitral tribunal while deciding upon this issue should give an effect to such agreement. This topic was also very problematic while drafting the Model Law.[66] It was hard to reach consensus, bearing in mind all the consequences this or that wording could cause, but basically Article 13 is "dealing with the hypothesis where the parties would have specifically agreed to waive their right to initiate arbitral or judicial proceedings while conciliation is pending. The consequence of that provision is that the court or arbitral tribunal will be obliged to bar litigation or an arbitration from proceeding if that would be in violation of the agreement of the parties."[67] Thus, acknowledging that conciliation can be a mandatory step prior to arbitration in the Model Law also indicated that conciliation is not only simple formality, which can be terminated without any relevant consequences.

In addition, UNITRAL also has drafted Conciliation Rules which can be used by parties as the guidelines for crafting their own conciliation procedure or the rules according to which their it can be held. It sets basic conditions how conciliation will be carried out starting from the initiation and finishing it with settlement, or unsuccessful termination.

UNCITRAL Model Law on International Commercial Conciliation and UNCITRAL Conciliation Rules are by their nature not mandatory, however, parties can incorporate them into

[66] See Guide to Enactment of Model law on international commercial conciliation, Commentary on Art. 13, p. 53-54 (also available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf last accessed on March 16, 2010)
[67] *Ibid.* p. 53

their contract by reference, and state by enacting Model Law type legislation as national law, can make it applicable to the cases.

These cases clearly show how different the clauses can be, how the parties make them suitable to their particular situations, however not considering the adverse consequences that ill-drafted multi-tiered dispute resolution clause can bring. Although there is no one standard which can set the guidelines for multi-tiered dispute resolution clause and under examination of which one can easily tell whether or not these clauses will be enforceable, and whether they create strict obligation to comply with pre-arbitral stages or not. It is hard to draw one common conclusion after this analysis, answering the question of jurisdiction with one word, either yes or no, but the common features still can be found:

(1) the tribunal or court will always examine the clause itself, therefore if the parties intend to have mandatory pre-arbitral steps, they should make it more than clear from the wording and parties conduct.

(2) one should bear in mind standard that many courts have applied when it comes to multi-tiered dispute resolution – standard of sufficient certainty, and provide necessary details while drafting this clauses, as at the same time, multi-tiered dispute resolution can be an effective tool of resolving conflicts, and on the other hand, it can keep the competent tribunal (or court) from rendering final and binding decision.

Chapter III. Approaches of Different Jurisdictions

National courts as well as national legislation of different courtiers have differently tackled the issue of multi-tiered dispute resolution. Some jurisdiction have taken an approach that only first tiers (everything before arbitration) of multi-tiered dispute resolution cannot be enforceable, on the other hand, others have acknowledge the enforceability of the whole clause.

III.1 Germany

Although cases that are related to multi-tiered dispute resolution clauses in Germany do not have arbitration as final stage of sequence, but there is high likelihood that in case if the dispute emerges in relation to arbitral tribunal's jurisdiction and the German court will need to decide whether parties have an obligation to carry out pre-arbitral steps, these cases will be brought to attention.

The German Federal Court in its decision of 1998[68] enforced dispute resolution clause requiring parties to attempt to conciliate prior judicial proceedings. The Court ruled that claim requested litigation prior fulfillment of pre-litigation stage was not admissible. In addition, section 1031, §6, and section 1032 §1 of German Code of Civil Procedure establishes that respondent should first argue Claimant's non-compliance with ADR proceedings and if Court will consider the argument acceptable, it will dismiss the case as "currently inadmissible"[69]. In cases, if respondent will proceeded with merits not raising the issue of non-compliance at the very first procedure, this will be deemed as respondent's waiver to raise this issue at any later stage[70]. By

[68] BGH decision of November 18, 1998, VIII ZR 344/97, disscussed in Jolles, n.22, p.332
[69] Berger, *supra* n.5, p. 6
[70] *Ibid.*

agreeing on any ADR procedure before litigation/arbitration, party is obliged to comply with this agreement and therefore, this implies parties' agreement "not to sue […], which must be qualified as a procedural law agreement i.e. dilatory waiver of right to sue." [71] Furthermore, party is also protected "against the loss of rights during the ADR proceeding by art. 203 of the German Civil Code which provides for suspension of the limitation period and by the principle of good faith in form of estoppels by conduct."[72]

III.2 England and United States of America

For a long time approach of common law with regard to multi-tiered dispute resolution clauses was that they were not enforceable, as concept of "agreement to agree" could not have been enforceable, in addition these agreement were usually not sufficiently certain, which was another ground in favor of non-enforceability. However over past years, this approach has been changed. In England, as was demonstrated above in Case, court recognizes its power to stay proceedings when non-compliance with multi-tiered dispute resolution agreement is involved. In *Cable & Wireless Plc v. IBM Uniter Kingdom Ltd*[73] court once again dealt with multi-tiered dispute resolution clause, which provided that parties "shall attempt in good faith to resolve the dispute […] through an Alternative Dispute Resolution (ADR) procedure, […] [h]owever an ADR procedure which is being followed shall not prevent any party or local arty from issuing proceedings."[74] In this case court had to decide whether or not under this provision it was compulsory to conduct pre-litigation stage before turning case to court. Court found that an ADR

[71] *Ibid.*
[72] *Ibid.*
[73] *Cable & Wireless Plc v. IBM United Kingdom Ltd (2002) 2 All E.R.(D.)* found in Cremades, *supra* n.11 p. 12
[74] *Ibid.*

agreement in this case was creating an obligation, it was certain; therefore, agreement was declared enforceable and parties had to comply with first stage of sequence.

The US courts took a different direction ruling the enforceability of these clauses if they fulfilled the requirement of certainty. Going even further, US courts have enforced agreement to mediate under Federal Arbitration Act, reasoning that Congress's policy was to "enhance alternative methods of dispute resolution."[75] The court effectively used principle of analogy while applying the Federal Arbitration Act to mediation agreement.[76]

III.3 France

The French Court came to the same conclusion in Poire v. Tripier[77]. The clause in this case provided for mediation for two month, in the event if mediation had not resulted in settlement, parties could start litigation. Poire initiated judicial proceedings without respecting parties' agreement with regard to mediation. The Court of First Instance decided case on merits not touching upon procedural issues involved. The Court of Appeals of Paris found an obligation imposed on the parties to mediate which was a mandatory pre-requisite to litigation. Finally, the French Cour de Cassation affirmed decision of the Court of Appeals and enforced agreement to mediate.

[75] Cremades, *supra* n.11, p.11
[76] *see* Cecala v. Moore, 982 F. Supp. 609 (ND III 1997)
[77] Poiré v. Tripier: Decision of 14 February 2003 of the French Cour de Cassation in (2003) Rev. Arb. 403

The French Contract law in art. 1134 of the French Civil Code[78] establishes a legal ground for enforcement of ADR agreements, as under this article party is required to both comply with the mediation agreement and all its actions should be in good faith.[79]

III.4 Switzerland

There is not much relevant case law in Switzerland regarding multi-tiered dispute resolution clauses, yet there are two cases which had addresses the issue of nature of multi-tiered disputed resolution agreement, and both of them have different outcomes: one suggests that multi-tiered agreements are of substantive nature, and another, advocates that it is of procedural nature.

In First case[80] dispute arose from construction agreement. The contract provided as initial stage conciliation. Litigation could have been carried out once conciliator issues a written recommendation that parties could now commence litigation. After the construction works were finished Claimant found out the defects of the work. Parties turned to conciliation; they conciliated two issues and settled. Respondent started repair works, when Claimant initiated litigation requesting court remedy for all defects in Respondent's works. Respondent argued that there was settlement agreement between the parties, and the court does not have jurisdiction over this dispute and should dismiss the case. Futhermore, although settlement agreement concerned only two defects, parties should again undergo conciliation and refer to litigation in accordance to dispute resolution agreement. All the instances rejected respondent's argument. Finally, the Cassation Court of Canton of Zurich ruled that conciliation agreement is agreement of

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

[79] *see* Cremades, *supra* n.11, p. 13

[80] Cassation Court of the Canton of Zurich on March 15, 1999, published in ZR 99 (2000) No.29, discussed in Jolles, *supra* n. p. 330

substantive nature and its breach cannot have any relevant consequences to court's jurisdiction and should be addressed as any breach arising out of the substantive law.

Contrary, Zurich Court of Appeals took a different approach in one of its later decisions.[81] The case involved multi-tiered dispute resolution clause, according to which parties should have conducted conciliation prior arbitration. Respondent refused to participated in composition of tribunal, since Claimant did not participate in conciliation, hence requirement was not fulfilled, and ascertained that appointment of arbitrator at that stage was pre-mature as pre-requisite to arbitration was not met. Court found that "it was not its function to determine whether the requirements for arbitration had been met… [as] the issues regarding jurisdiction were to be decided by the arbitrators and not by the courts"[82]. This statement was interpreted by the legal scholars as courts approach that conciliation agreement was of procedural nature, since it was acknowledged that it could have an effect on arbitral tribunal's jurisdiction.

III.5 Spain

Civil Code provides that ground for enforceability of the multi-tiered dispute resolution clause in Spain. Multi-tiered dispute resolution clauses will be given effect in Spain if they create a clear obligation to carry out pre-arbitral stage(s). Articles 1125 and 1127 of the Spanish Civil Code established that if initiation of arbitration is connected to expiration of time period that parties have contractually assigned for pre-arbitral stages, arbitration will only commence after expiration of such time-period[83]. In contrary, when a vague obligation of negotiation in good

[81] Decision by Zurich Court of Appeals of September 11, 2001, published ZR 101 (2002) No. 21, discussed in Jolles, *supra* n.22, p. 330
[82] Jolles, *supra*. n.22, p. 330 on Decision by Zurich Court of Appeals of September 11, 2001
[83] Cremades, *supra* n.11, p.14

faith is preliminary step before arbitration, the chances that this obligation will be enforced are very low.[84]

III.6 Australia

As demonstrated by the cases discussed above, the Supreme Court of New South Wales has a decent practice of dealing with multi-tier dispute resolution clause. The approach is that conciliation/mediation agreements are distinguished from so called "agreements to agree" and therefore, if the clause precisely indicates that parties have made all the tiers compulsory and agreement satisfies certainty criterion, multi-tiered dispute resolution clauses are enforceable.

[84] *Ibid.*

CHAPTER IV. SOME POINTS OF CONSIDERATION

This Chapter will address some point that are of relevance to the main topic of the paper. It will be examined whether or not NY Convention can be applied to the Multi-tiered Dispute resolution Clause, and what are the necessary elements, that the drafted should not forget while crafting Multi-tiered Dispute Resolution Clause.

IV.1 Is NY Convention of Relevance?

In order to examine whether or not a multi-tier dispute resolution clause may have any effect on arbitration, one should consider following hypothetical situation: claimant initiated arbitration, failing to comply with multi-tiered dispute resolution clause. Respondent raises the objection to the tribunal's jurisdiction and requests tribunal to decline jurisdiction. Arbitral tribunal decides that it has jurisdiction over the case and will proceed with arbitration, and in the result will render an award. Claimant seeks recognition and enforcement of this award and respondent raises a challenge, that arbitral award should not be enforced according to Art. V(1)(d), which stipulates, that:

> Recognition and enforcement of the award may be refused if […] [t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties"

This article places burden of proof that error occurred on the respondent.[85] Although this is very rarely used ground for refusing the recognition and enforcement[86] and there were no specific

[85] Albert Jan van den Berg, *The New York Arbitration Convention of 1958.* Kluwer Law and Taxation Publishers, 1994, p.322

cases that had dealt with this issue in terms of a multi-tiered dispute resolution, the further discussion will show how far the consequences of the non-compliance with the multi-tiered procedure can go.

There are two main questions - is a multi-tiered dispute resolution an arbitration agreement within the meaning of Art. 2 of the NY Convention? And what is the arbitral procedure in terms of Multi-tiered dispute resolution?

Starting with first question, Prof. Cremades argues that the multi-tiered dispute resolution clause is not an arbitration agreement since it is somewhat conditional, as the parties may settle the dispute in the first stages of their multi-level dispute resolution clause and therefore, an agreement to arbitrate within the multi-tiered dispute resolution clause might not become active at all. In addition Prof. Pryles in his article states:

> A question which arises is whether a multi-tiered clause, by providing for arbitration only in the final stage, falls outside conventions providing for the enforcement of arbitration agreements, and therefore removes an important plank from the enforceability of the contractually agreed dispute resolution clause. The argument against the applicability of a provision such as Article II(1) of the New York Convention is that a multi-tiered clause is not an agreement in writing under which the parties have undertaken to submit to arbitration all or any differences which have arisen between them but rather an agreement providing for the resolution of disputes by a procedure other than arbitration, with the possibility of arbitration if the dispute is not resolved through the earlier procedures."[87]

It is hard to think of an argument which can support submission that multi-tiered dispute resolution is an arbitration agreement. Arbitration agreement in itself is very complex "animal" which does not necessarily shares the features of ADR proceedings, which can be met as preliminary steps of multi-tiered dispute resolution clause. Therefore, multi-tiered dispute resolution clause can be divided into two main parts: (i) ADR agreement, and (ii) Arbitration

[86] *Ibid*.323
[87] Pryles, *supra* n.4, pp.160-161

agreement, and NY Convention will only apply to the second part of a multi-tiered dispute resolution clause.

If tiers of the dispute resolution all together will be considered as one whole arbitration procedure, just because arbitration is a final stop, the meaning behind "arbitration" will be broadened. Each and every set of rules that provide detailed outline of the arbitration have indication of commencement of arbitral proceedings, in most case it is registration of Notice of Arbitration (or request for arbitration), in others the receipt of the arbitration fees by the institution. Therefore it becomes clear that arbitration procedure as such starts at the point when parties resort the case to arbitration and not when they are trying to negotiate, mediate, conciliate, or are waiting for expert's decision. Accordingly, challenge of the award on the ground of art. 5(1)(d) of NY convention, presumably will not be accepted by the Court.

IV.2 Drafting Multi- Tiered Dispute Resolution

Dispute resolution clauses are the bottleneck of a contract and "drafters are caught between 'the devil and the deep blue sea' when it comes to [their] drafting."[88] The strategy of dispute resolution is negotiated prior the drafting and the parties are free to determine the procedure that is convenient for them to follow, however in making their choice parties must take into account the view of the courts' on enforcing the procedure proposed by the contract. What are the issues that the drafter should take into consideration?

Provisions drafted as the dispute resolution clauses, especially ones that set the requirement of the whole sequence of dispute resolution mechanisms should be drafted as detailed as possible.

[88] Spencer, David L., To What Degree of Certainty Must a Dispute Resolution Clause Be Drafted? (May 2, 2003). Australasian Dispute Resolution Journal, Vol. 14, No. 153, 2003. Also available at SSRN: http://ssrn.com/abstract=1262099 p.10

The standard of certainty was addressed in the cases discussed above, but still, what can be regarded as elements of the dispute resolution clause which leads to this certainty? The common "ingredients" can be drawn out according to the relevant case law:

- First and of the main elements of the multi–tier dispute resolution clause is the dispute resolution mechanism. It is highly suggested to have the procedures though which the parties intend to try to resolve their dispute. Therefore, it is crucial to indicate, is it amicable negotiation, then mediation/conciliation and finally the arbitration. It is not suggested to have the option variations, because it might give raise to separate debates which of proposed options can the party use in case of dispute.
- Second, parties should allocate time limit to each procedural step which makes transition from one step to another easily determinable. It is also suggested indicating the mechanism how to count this time-period.
- Third, it is very helpful to insert in details or with reference the procedural rules or conditions that govern each and every step of dispute resolution sequence. If the parties chose to have these conditions incorporated in the contract by the reference, it is better to attach as an annex to the contract to rules, or at least indicate that the terms were negotiated and the parties have a copy of them.
- Fourth, draft the clause in a way where all possible deadlocks have the unlocking key. For instance, if the parties will need to decide about the neutral mediator for their dispute, what happens if they fail to do so? The clause should suggest the external mechanism of reaching the agreement for that particular issue, which is not linked to the concrete person, but rather the institution (e.g. President of ICC).

- Fifth, it is better not to have any open term, which parties can determine later if the dispute arises. It is always unpredictable when can happen, will it be the very first delivery of ordered goods, or at the tenth year of cooperation. Therefore, it is wiser to have the procedural terms drafted in details not leaving the decision to be made at the later stage.
- Sixth, to make the life easier, there were model clauses drafted. Each institution provides for such model Clause. Considering using that particular clause might be also a good option.

As there is two ways of drafting contracts, general and exhaustive, it is upon the drafter to realize the possible risks of both these ways. General might be good as it leave more space for interpretation of the details which can be suitable in that particular moment of dispute resolution. However, too vague clauses can be declared as unenforceable to this specific reason. In the other hand, by having detailed clauses, one possible detail might be left out and since the contract does not provide for general notions it might become harder to prove that this detail was meant to be regulated and in the scope of particular dispute resolution.

Conclusion

It should be noted, that, the ADR procedures are designed to help the overloaded courts, both national and arbitration courts, with many cases in the docket to free that docket. The purpose of the ADR is speedy, less expensive and effective adjudication outside these proceedings, and if the tribunal's/court's intervention is needed to determine if the clause is effective, and then whether he parties can proceed with the dispute resolution process as they intended and expressed in their contract, it is not speedy any more, nor it is less expensive. But in order for court to turn to the tendency that the ADR clauses are effective and can be enforced without courts intervention, it is drafter's task to design the dispute resolution clause in a way that it will not lead to further confusions.

As was demonstrated by the case law the better the clause shows the real intention of the parties to have or not to have the preliminary obligatory stage before arbitration, the better chances the clause has to survive any challenge it can face. In addition it will be easily identifiable for parties what is expected for them to do next, is it negotiation and after arbitration, or it is directly arbitration. More clear is clause, the faster will be dispute resolved. Multi-tiered dispute resolution does not precludes that the dispute should be settled at the very first stage, however it should be at least possible to go from one stage to another and not to "stumble" in the escalation sequence.

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