Multi-Tier Dispute Resolution Clauses and Arbitration

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ABSTRACT

This article considers the use of multi-tiered dispute resolution clauses which culminate in arbitration. It considers what multi-tiered clauses are and the benefits which encourage parties to use them in commercial agreements. It further considers the implications of non-compliance with each of the steps in a multi-tiered clause and the main issues surrounding the drafting of such clauses, with a focus on judicial consideration of the requirements for an enforceable multi-tier clause in a number of jurisdictions. The article concludes by setting out what can be understood to be internationally accepted best practice for drafting a clear and enforceable multi-tiered dispute resolution clause.

I. INTRODUCTION

Arbitration has long emerged from the shadows of the term alternative dispute resolution (ADR) to hold a place in its own right as the fastest growing method of international dispute resolution. For sophisticated parties entering into a contractual relationship, it is not simply a stark choice between litigation in the state courts, or resolution of disputes by international arbitration. True ADR based on negotiation, mediation or conciliation remains a real option for many parties who find themselves in a dispute.

It is often the case that dispute resolution provisions make express provision for one or more forms of ADR before escalating the dispute to arbitration. The parties’ contract thus contemplates that a dispute will be, for example, mediated, before recourse to a method of final and binding dispute resolution. Such multi-tier clauses are necessarily more complex than a plain vanilla arbitration or litigation clause, however, and this complexity can present challenges. In some cases, this can undermine the dispute resolution process and cause uncertainty, increased cost and delay. At worst, a defective multi-step clause can be fatal to the otherwise final determination of the dispute by an arbitral tribunal.

This article will address multi-tier dispute resolution clauses that culminate in arbitration. It will first consider what multi-tier clauses are and why parties choose to use them. It will then look at the main issues surrounding the drafting of such clauses, focusing on judicial consideration of the requirements of enforceable multi-tier clauses in a number of jurisdictions. Finally it will set out the best practice to be followed when drafting a valid and enforceable multi-tier clause, emphasising the need to get it right at

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the drafting stage to avoid undermining the entire purpose of the clause.

II. WHAT ARE MULTI-TIER DISPUTE RESOLUTION CLAUSES AND WHY USE THEM?

Multi-tier clauses\(^1\) can also be called multi-step or escalation\(^2\) clauses. While the terminology may differ slightly, in essence, all these terms describe the same legal structure and are used interchangeably. These are clauses that comprise different steps, each incorporating a form of ADR, and leading for the purposes of this article, to arbitration as the last method of dispute resolution. As such, these clauses seek to enable the parties to adopt the best method of dispute resolution for the dispute in question by merging ADR and arbitration processes. At each level of ADR, the parties may be able to get off the escalator and reach a satisfactory settlement of the dispute. However, the parties will also proceed in the knowledge that a binding, legal conclusion will ultimately be achieved through arbitration should the ADR process fail.

In a typical escalation clause, the parties may agree that senior representatives with authority to settle the dispute will meet to seek to resolve the dispute. At this stage, resolution is sought at a commercial level without recourse to third parties or greater legal formality. The clause may then provide that, failing settlement by the parties' senior commercial representatives, the dispute will be referred to mediation – often under the rules of a recognised mediation institution – with a neutral mediator. At this stage, the parties will remain able to propose a commercial settlement which might include terms as to future business deals, wrap up other contractual arrangements between the parties or lead to the amendment of certain terms in their underlying agreement. Whatever the preceding step or steps, the parties will agree a fall-back position, often that the dispute will be referred to final and binding arbitration. The ultimate default to arbitration ensures that a final and binding result will be achieved to resolve the dispute once and for all.

Recent studies have indicated that in-house counsel recognise the benefits of mediation even where an arbitration has been started.\(^3\) Parties who wish to, or need to, retain a business relationship will be drawn to methods of dispute resolution which can be achieved at a business-to-business level. For example, parties to long term agreements (e.g. in energy or projects) will often recognise particular value in dispute resolution methods which are ultimately aimed at brokering a business-focused conclusion at an early stage, thus facilitating the on-going co-operation needed for such contracts. The non-binding outcome of a mediation may not focus on legal responsibility for past conduct, whilst in an arbitration the tribunal must reach a reasoned decision on the facts, the evidence and the law and is not empowered to order a creative, commercial solution.

\(^1\) See e.g. IBA Guidelines on Drafting International Arbitration Clauses, adopted on 7 October 2010, para. 86.
\(^3\) In the 2013 International Mediation Institute (IMI) International Corporate Users ADR Survey, 74% of in-house counsel who responded agreed that ‘Parties to an Arbitration proceeding should be actively encouraged by the arbitration provider to use mediation to settle their dispute.’ <http://imimediation.org/cache/downloads/5pm4uddkuacc0sw40cck0cscl/IMI%20ADR%20Users%20Survey%20March%2024,%202013%20-%20full%20results.pdf> (accessed on 6 October, 2014).
There is also some value in a process which protects against the risk of a knee-jerk reaction leading to the issue of a request for arbitration whenever a dispute arises. The incorporation of an in-built negotiation process, or alternatively an agreed cooling off period before initiating proceedings, may assist to take the immediate heat out of a dispute.4

Furthermore, parties have more control over the outcome of an ADR process – whether negotiation, conciliation or mediation – than they do when an arbitral tribunal fulfils a quasi-judicial role. Where there is a greater control over outcome, there is necessarily greater scope for reducing, or at least managing, risk.

Multi-tier clauses also appeal to parties keen to avoid or reduce the costs of a protracted arbitration process and potential enforcement costs. It has been argued that a multi-stage dispute resolution clause essentially acts as a filtering process. With this filtering system, only the complex disputes, or those disputes requiring more extensive procedures, extra cost and greater time, will result in arbitration.5 The motivation of parties in seeking to avoid the time and expense of arbitration by agreeing an escalating dispute resolution process has also been recognised by the courts.6

III. THE PITFALLS IN DRAFTING A MULTI-STEP DISPUTE RESOLUTION CLAUSE

A multi-tier clause is a flexible and useful tool. The parties are able to design a process which is most likely to bring about a satisfactory conclusion. In theory, there are no limits to the number of different steps that can be included, nor to the imaginative methods of ADR which might be specified at each step. Yet it is important to bear in mind that the drivers that motivate the drafting of a multi-tier clause may well be different to the drivers that are in place once a dispute has arisen.

At the time of negotiating a contract, the parties may understandably be reluctant to envisage a situation in which their relationship may be less than cordial. Subsequent events, however, may lead to a situation in which the relationship is damaged beyond repair, and in which the parties are unwilling to navigate a contractual disputes process which requires the parties to negotiate for many months before arbitration can be commenced. A complex multi-tier process may have seemed like a good idea at the time of drafting, but, at the time of the dispute when one or both sides are entrenched in their

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4 Many bilateral investment treaties provide for a cooling off period, although ICSID tribunals have taken divergent approaches as to whether fulfilment of the cooling off period is a pre-condition to jurisdiction or whether the requirement is procedural only in nature. See e.g. Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, and Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3.


...Where commercial parties have agreed a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their dispute by friendly discussions the courts should seek to give effect to the parties’ bargain. Moreover, there is a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation.
positions, it may no longer be fit for purpose.

The challenge of designing a process which is fit for every type of as-yet-unknown dispute is not the only one. Indeed, this assumes that the dispute resolution clause has even been a matter of detailed consideration in the first place. In many cases, and even for the most high value or complex contract, the dispute resolution clause is often one of a number of highly important clauses termed as *boiler plate* which is replicated from a precedent with little or no consideration as to its present suitability. The process itself may be pathological,7 with gaps or uncertainties or, as is more frequently seen, its fulfilment may depend on entirely subjective criteria, without any clear objective indicator as to when or by what action it will have been completed.

Therefore, notwithstanding the benefits, the decision to include a multi-tier clause is not to be taken lightly. A further challenge may arise in the binding or non-binding nature of the steps specified in the process. In a situation where a relationship has irreparably broken down, discussions at an executive level or an attempt at mediation may be unlikely to achieve a satisfactory conclusion. One party may wish to proceed directly to arbitration without further delay. However, the counterparty may be aware that it has an unfavourable case and may see an obligation to discuss the matter or to mediate as an opportunity to delay the process. The question therefore arises as to whether one party may ignore the ADR steps and proceed directly to arbitration. Can the other party enforce the multi-tier clause and compel compliance with the ADR steps? And what are the consequences of a lack of clarity in the binding nature of those steps?

**IV. THE ENFORCEABILITY OF MULTI-TIER CLAUSES**

On one view, the very nature of ADR suggests that the steps in multi-tier clauses should entitle, but not compel, the parties to initiate, for example, negotiation or mediation. One might reasonably question the realistic benefit to either party of forcing participation in a dispute resolution process which requires the positive co-operation of both sides, in terms of preparation, information-sharing and willingness to listen and consider the counterparty’s position. These are, surely, the minimum requirements if the process is going to have any chance of success.8 It also bears emphasis that public policy reasons may dictate that parties which have agreed to litigate in a state court

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7 In a recent example, the English Court considered a clause that read ‘In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction.’ Whilst the clause was, on its face, a two-tier dispute resolution clause, it was not possible for a clause to be effective that consisted of a binding first tier and another binding second tier. Notwithstanding the benevolent construction given by the English courts to putative arbitration agreements, in this case a stay of proceedings under section 9 of the English Arbitration Act 1996 was not granted. See *Christian Kruppa v. Alessandro Benedetti and Bertrand des Pallieres*.

8 Klaus Peter Berger, ‘Law and Practice of Escalation Clauses’, *Arb. Int’l* 22 (1) (2006): 1–17: The escalation system should provide a flexible framework for the resolution of disputes, but should not, however, force the parties into a tight ‘corset’ of dispute resolution levels which are mandatory and must be ‘executed’ in each individual case, before the dispute is able to be submitted to the arbitral tribunal provided for at the end of the escalation ladder. Ultimately, it is the parties who are in the best position to decide whether strict compliance with the escalation proceedings is even sensible in the individual circumstances, or whether they are already so ‘alienated’ that it is preferable for the dispute to be taken before an arbitral tribunal directly.
should make attempts to resolve their dispute before putting the state to the expense of providing a forum for a more formal resolution. It is not to say that there is no public interest in holding parties to their agreements to negotiate, irrespective of forum, but, rather that this reasoning is less persuasive when the parties have agreed that disputes will be resolved by arbitration.9

However, the question of whether the multi-tiered process can hope to lead to resolution of a dispute without the need to appoint an arbitral tribunal is a very different one to the legal question of whether there is a binding obligation to comply with a multi-tiered dispute resolution process and a corresponding legal right to insist that each stage of the process is followed.10 A related issue is the nature of the obligation and whether it can be defined. As will be discussed below, the courts in a number of jurisdictions have considered the answer to the second question to be of paramount importance to the first.

The question of whether the steps in a multi-tiered dispute resolution process are binding is of fundamental importance. Indeed, if those steps constitute a condition precedent to arbitration, then a tribunal will not have jurisdiction until they have been complied with. The language used in the drafting of the multi-tier dispute resolution clause is therefore critical, as it forms the starting point for any consideration as to whether there is an obligation, the content of that obligation, and, finally, whether it has been satisfied. As parties look increasingly to mixed dispute resolution clauses that combine references to negotiation, more formalised ADR methods such as mediation, and ultimately arbitration or litigation, these questions are increasingly being considered by the courts.

V. THE ENGLISH COURT APPROACH

In considering whether, under English law, a multi-tier clause must be complied with, the English Courts start from a position that a bare agreement to negotiate lacks the certainty

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9 In the Emirates case, supra, Teare J suggested that there was ‘a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation.’ It is not clear what public interest there is above and beyond the public interest in the court upholding the parties’ bargain. See also HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd, [2012] SGCA 48 at [40], per VK Rajah JA: ‘... we think that such negotiate in good faith clauses are in the public interest as they promote the consensual disposition of any potential disputes’.

10 In at least one case, this distinction has been made in very clear terms. In ordering a stay of arbitration proceedings until the conclusion of a conciliation proceeding which the parties agreed to follow after an arbitration had been started, Giles J commented in Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd, [1992] 28 NSWLR 194 (N.S.W. S.Ct.) at [206]: ‘...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 a 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...What is enforced is not co-operation and compromise but participation in a process from which co-operation and consent might come.'
required to be enforceable. The Courts have often considered the enforceability of clauses requiring parties to engage in certain ADR steps before arbitrating disputes and have focussed consistently on the need for certainty. For example, in *Cable & Wireless v IBM*, Colman J explained that, in the case of a mere undertaking to negotiate, ‘the court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision’ and concluded that this would be fatal to enforceability of the clause.

By 2013, in the case of *Wah v Grant Thornton*, the English Court recognised that there had been sufficient consideration of the issue that relevant principles were emerging. The summary of these relevant principles amply demonstrates the need for unequivocal drafting:

The test ... is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect... In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined 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. In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.

These guidelines are of value to any party seeking to draft an enforceable multi-tiered dispute resolution clause, whether or not the governing law of the contract is English law.

However, since the *Wah* case, the English Court has appeared to struggle with the application of a formal test or set of guidelines and has tended instead to consider clauses on a case-by-case basis. In the latest decision on this issue, *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*, the English Court was careful to distinguish

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13 *Supra*.


16 *Supra*. In this case the English Court considered a clause which provided that ‘the Parties shall first seek to resolve the dispute or claim by friendly discussion...If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration’.
previous decisions on the facts. The Court revisited a number of the previous authorities in some detail, but returned on a number of occasions to the overarching imperatives of upholding the agreement of commercial parties which seeks to prevent them from ‘launching into an expensive arbitration’\(^{17}\) without first trying to reach a settlement, and the public policy argument in favour of enforcing clauses which seek to avoid the expense of litigation or arbitration.\(^{18}\) In the *Emirates* case, the Court upheld the requirement to engage in time-limited *friendly discussions* as an enforceable condition precedent to arbitration on the basis that the agreement was not incomplete, nor uncertain.

The practical significance of this case to parties using arbitration lies not in the particular wording which the Court found ‘after many twists and turns’ to be enforceable, but in its procedural history. The issue was first argued before and decided by the arbitral tribunal, which found it had jurisdiction on the basis that the clause was unenforceable but that, in any case, it had been satisfied. Thereafter, because a challenge as to jurisdiction under the English Arbitration Act 1996 requires a full re-hearing, it was argued anew before the Court. Whatever the parties intended by their dispute resolution clause, clearly they did not intend to incur this level of delay and expense in order to establish whether or not the arbitral tribunal had jurisdiction.

**VI. THE SWISS COURT APPROACH**

The Swiss Federal Supreme Court considered this issue recently when asked to consider whether a party was obliged to refer disputes to a Dispute Adjudication Board (DAB) as a condition precedent to arbitration under the general conditions of the International Federation of Consulting Engineers (FIDIC).\(^{19}\) The majority of the tribunal found that, although the DAB procedure had not been completed, it had jurisdiction. The Swiss Court applied Swiss general rules on the interpretation of contracts to the arbitration agreement and found that the reference to the DAB was a mandatory step. However, in the circumstances (where there was no standing DAB and significant time had passed with no DAB having been put in place) it concluded that the tribunal’s decision to accept jurisdiction was correct. The Swiss Court took a very pragmatic approach: it took into account the nature of the construction industry and the industry-specific methods developed to deal with disputes in an ‘efficient, economical, and swift manner without jeopardizing the continuation of their contractual relationship.’\(^{20}\) It found that, whilst completing the DAB dispute resolution procedure was mandatory before arbitration, the language of the clause permitted some exceptions – one being where, given the procedural behaviour of a party, the principle of good faith prevents that party from

\(^{17}\) Per Teare J, *Emirates*, *supra*, at 50.

\(^{18}\) See also *Sulamérica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others*, [2012] EWCA Civ 638.


\(^{20}\) See *A. SA v B. SA*, *supra*, referring to Brown-Berset and Scherer, ‘Les modes alternatifs de règlement des différends dans le domaine de la construction’, *Journées suisses du droit de la construction*, (Fribourg, 2007), 265, fn, 266.
The Turkish Commercial Law Review Volume 1 Issue 1 February 2015

objecting to the jurisdiction on the basis of the absence of a DAB decision. 21

VII. THE SINGAPORE COURT APPROACH

In the *Emirates* case referred to above, the English Court drew on jurisprudence from a number of jurisdictions, including Singapore. In *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd.*, 22 the Singapore High Court considered whether a clause which referred to arbitration disputes ‘which cannot be settled by mediation’ provided a condition precedent to arbitration. The arbitral tribunal had considered first the question of whether it had jurisdiction, concluding that the clause was too uncertain to be enforceable as a condition precedent. However, the Singapore High Court held that the clause was enforceable. 23 The agreed mediation procedure was certain and set out various steps and stages, such that the Court was able to discern whether they had been complied with.

Furthermore, the mediation procedure was a condition precedent to the commencement of arbitration and no duty to arbitrate arose until the condition precedent was satisfied. However, the Singapore High Court held that the condition precedent had been complied with in substance on the basis of a series of meetings between the parties. On appeal – although it was not asked to revisit the question of whether the clause constituted a condition precedent – the Singapore Court of Appeal confirmed its agreement with the enforceability of the clause, and that it constituted a condition precedent. The Singapore Court of Appeal emphasised that where the parties have provided a specific set of procedures to resolve disputes as a precondition to arbitration, then those preconditions to arbitration had to be complied with.

VIII. OBLIGATIONS TO NEGOTIATE IN GOOD FAITH

Parties often agree in their multi-tier dispute resolution clauses that they will negotiate *in good faith*. *Good faith* is a subjective and rather flexible concept, the treatment of which varies considerably under civil and common law systems. A detailed consideration of the good faith requirement in multi-tier clauses is outside the scope of this article. In brief, however, whilst it is possible to prove whether or not a party attended negotiation meetings as an objective fact, it is by definition more difficult to establish the parties’ attitude towards those negotiations, save as to how that attitude allegedly manifested itself in the negotiations. Indeed, it has been said that *good faith* is entirely inconsistent with the self-interest with which parties negotiate the settlement of disputes. 24 The uncertainty

21 See *A. SA v. B. SA*, supra. See also, *Peterborough City Council v. Enterprise Managed Services Ltd* [2014] EWHC 3193 TCC, in which the English Court held the parties to their agreed contractual method of dispute resolution, staying proceedings in favour of the DAB procedure.


23 Relying on *HSBC Institutional Trust Services (Singapore) Ltd v. Tosbin Development Singapore Pte Ltd*, supra.

24 See *Walford v. Miles*, supra, per Lord Ackner, 138, paras D-G:

However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to
inherent in a requirement to negotiate in good faith has not, of itself, undermined the enforceability of such a clause, provided that the clause is otherwise sufficiently certain and is not a bare agreement to negotiate in good faith. Such obligations have been upheld in a number of jurisdictions.\textsuperscript{25} By way of an example, the English Court approached the matter on the basis that ‘a difficulty in proving breach should not be confused with a suggestion that the clause lacks certainty’.\textsuperscript{26}

**IX.** **THE APPROACH OF ARBITRAL TRIBUNALS**

In a system characterised by private hearings and confidential awards, it is difficult to draw firm conclusions on the approach of arbitral tribunals to the issue of whether multi-tiered dispute resolution clauses have been complied with, or at least to do so without relying on largely anecdotal evidence. Although the approach of arbitral tribunals is scrutinised in national courts from time to time, many other tribunal decisions on jurisdiction will inevitably remain unchallenged in court. It is reasonable to conclude that those cases which reach the courts are those where the arguments are perhaps more finely balanced. International tribunals may consider themselves to be in an unenviable position when required to rule on the point, given that the jurisprudence is not necessarily consistent within a single jurisdiction, e.g. England, let alone globally, because the issue is a matter of the applicable substantive governing law. In the majority of cases which have reached national courts considered for the purposes of this article, the courts have not considered in any detail the tribunal’s reasons for accepting jurisdiction\textsuperscript{27} and the decisions reached by the courts have largely not been consistent with those reached by arbitral tribunals.

**X. THE NEED TO GET IT RIGHT: HOW TO DRAFT A BINDING AND ENFORCEABLE MULTI-TIER CLAUSE**

Whilst there is no single test which is determinative as to whether a reference to ADR reopen the negotiations by offering him improved terms. Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an agreement? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a proper reason to withdraw. Accordingly a bare agreement to negotiate has no legal content.

\textsuperscript{25} See, Alsopp P in United Group Rail Services v. Rail Corporation New South Wales, (2009) 127 Con LR 202: An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance with the standard impossible of assessment. Honesty is such a standard’, holding that clauses requiring parties to negotiate in good faith are generally enforceable. See also HSBC Institutional Trust Service v. Tobin Development Singapore Pte Ltd., supra, cited by the Singapore High Court in International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd, supra, per Chan Seng Onn J, 93: ‘Given the Court of Appeal’s attitude towards mediation clauses, any doubt about an obligation to negotiate in good faith under a multi-tiered dispute resolution clause should be laid to rest.

\textsuperscript{26} Teare J in Emirates, supra, 64.

\textsuperscript{27} An exception is the Swiss Court’s judgment in A. SA v. B. SA, supra.
is an enforceable condition precedent to arbitration, a *best practice* for drafting escalation clauses is discernible at an international level. Indeed, a valiant attempt to define that *best practice* was made by the Arbitration Committee of the International Bar Association in 2010. In our view, *best practice* requires that the multi-tier clause requires a comparatively high level of prescription in the drafting:

- In order to be enforceable, the clause must be intended to be binding and *sufficiently certain*.\(^{28}\)
- In order to be *sufficiently certain*, there should be clear, ascertainable time limits for each step, such that it is unambiguous when one step ends and the next begins.
- The process itself needs to be clear and certain: what does *negotiation* entail and how can that negotiation be proven? When does one step fail and the next begin? How can the next step be started, and by whom?
- Exhaustion of the procedure in each step should be expressed to be mandatory in order to be able to proceed with the next step. The language employed must be clearly binding and not permissive: use *shall*, not *may*.\(^{29}\)
- Mediation may be more readily accepted as a binding and certain step than *negotiation*, especially where a particular set of mediation rules or institutional approach is referred to.
- An agreement to *negotiate in good faith* may be enforceable if the other criteria, e.g. a prescribed time limit, are met. However, there may be difficulty in proving that the requirement has been complied with because of its subjective nature.
- Details of the procedure should be objectively determinable (who must attend, when, where and for how long) before the next step in the escalation clause applies.

This level of prescription may be difficult to negotiate and agree in a commercial setting. Moreover, it could be said that it cuts across what some parties would say is the purpose of such a clause: it undermines the flexibility of a process that could be adapted to suit the circumstances of a particular dispute. However, a significant level of prescription does not undermine the other benefits of escalation clauses. It can reasonably be said that if a degree of prescription can avoid protracted arguments as to jurisdiction (at both tribunal and national court level), well-advised international commercial parties may well consider it in their best interests to adopt such an approach.

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\(^{28}\) An escalation clause will generally be effective in law so as to constitute a legal obligation which is a condition precedent to arbitration if it defines the parties’ rights and obligations with sufficient certainty to enable it to be enforced. Each clause will be considered on its own terms. See e.g. *Sulamérica CIA Nacional De Seguros SA and others v. Enesa Engenharia SA and others*, supra.

\(^{29}\) Even language that suggests that a referring a dispute to ADR is optional (such as use of the word *may*) has been found to be mandatory. See e.g. the Swiss Federal Supreme Court’s finding that the clause in the FIDIC Red Book which states that ‘either party may’ refer disputes to adjudication meant that a reference to adjudication was mandatory before commencing arbitration. The word *may* was held to operate to indicate that the reference could be made by *either party* (*A. SA v. B. SA*, supra).