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Benefits, Drawbacks and Effects of Non-Compliance

Multi-Tier Dispute Resolution Clauses

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Multi-Tier Dispute Resolution Clauses

Introduction



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- › Benefits and drawbacks of multi-tier DR clauses.
 - › How various jurisdictions have addressed multi-tier DR clauses.
 - › Considerations for transactional lawyers and parties incorporating multi-tier DR clauses into their agreements.
 - › Considerations for arbitration practitioners dealing with multi-tier DR clauses when they encounter them.



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Definition



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- › Simple form: The requirement to engage in a single step prior to commencing arbitration, such as negotiation among party representatives for a defined period of time.
- › Complex form: The requirement to undertake multiple steps prior to commencing arbitration, such as negotiation among lower-level representatives, followed by negotiation among higher-level representatives, followed by formal mediation or conciliation proceedings, all for defined periods of time.
- › Arbitration is the last resort.



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Benefits



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- › Provides the parties a contractually mandated opportunity to resolve disagreements without incurring the costs and delays associated with actual arbitration proceedings.
- › Provides a contractual “cooling-off period” to reassess and evaluate whether to strike a compromise outside of the adversarial arbitration process, which may yield more fruitful and beneficial settlement discussions.
- › Useful in circumstances where parties have a long-term commercial relationship that they wish to preserve.
- › Enables the parties to narrow the issues in dispute.






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Drawbacks



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- › Waste of time and expense if the parties are entrenched in their positions.
 - › May impair a party's ability to secure interim measures.
 - › May give rise to jurisdictional objections in complex disputes.
 - › May give rise to objections to counterclaims.
 - › Statutory limitation periods may lapse.



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Non-Compliance



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- › Is such a clause binding? Answer differs from one jurisdiction to another.

- › **United Kingdom:**
 - › Contradictory decisions.
 - › Prevailing practice: historically, pre-arbitral steps in multi-tier DR clauses did not constitute jurisdictional conditions precedent to arbitration absent clear language to that effect, but there is recent authority to the contrary.

- › **United States:**
 - › Contradictory decisions.
 - › Prevailing practice: pre-arbitral steps in multi-tier DR clauses will not constitute jurisdictional conditions precedent to the commencement of arbitration, unless expressly agreed otherwise.



- › **Switzerland:** Prevailing practice: Failure to comply with a pre-arbitral step in a multi-tier DR clause does not deprive an arbitral tribunal of jurisdiction to adjudicate a dispute
- › **Singapore:** Failure to satisfy the pre-arbitral requirements of a multi-tier DR clause may attract significant jurisdictional consequences.
- › **Australia:** Pre-arbitral steps in multi-tier DR clauses are generally considered to be enforceable and binding on the parties, but it is unclear whether they constitute jurisdictional conditions precedent to arbitration.



› Middle East:

- › The general view is not to attach significant consequences on the failure to comply with pre-arbitral steps.
- › Case No. 513 for the 20th Judicial Year (heard October 11, 2000) by the UAE Federal Supreme Court.
- › The right to refer disputes to litigation cannot be restricted as it is a constitutional right – see, for example, decisions of the Egyptian Constitutional Court.




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Practical Guidelines for Transactional Lawyers



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- › Give careful consideration when drafting a multi-tier DR clause.
 - › Question: Is it necessary to add pre-arbitral steps at all?
 - › Risks should be considered.
 - › Nothing prevents the parties from seeking to negotiate a settlement.



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Practical Considerations before Initiating Arbitration



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- › Ensure that the parties have carefully performed all steps required by the multi-tier DR clause prior to commencing arbitration.
- › Be sure to document the commencement, performance and completion of all pre-arbitral steps required by the multi-tier DR clause.
- › Ensure that all limitation periods or time considerations have been taken into account prior to commencing the pre-arbitral steps.
- › Ensure that all claims that will be made form part of the pre-arbitral negotiations, mediation or conciliation.
- › Ensure that all potential counterclaims form part of the pre-arbitral negotiations, mediation or conciliation.




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Conclusion



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- › Despite the benefits that flow from multi-tier DR clauses, consideration should be given to whether such a clause is really necessary given its potential drawbacks.
 - › Non-compliance with a multi-tier DR clause may result in serious jurisdictional consequences.
 - › Careful consideration is necessary while drafting a multi-tier DR clause. It should not be treated as a “boiler-plate” clause.





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Thank you



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