Multi-Tier Dispute Resolution Clauses

Benefits, Drawbacks and Effects of Non-Compliance

Bennett Jones (Gulf) LLP

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Introduction
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.
Definition
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.
Benefits

Multi-Tier Dispute Resolution Clauses

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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.
Drawbacks
› 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.
Non-Compliance
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.
Practical Guidelines for Transactional Lawyers

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Multi-Tier Dispute Resolution Clauses
› 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.
Practical Considerations before Initiating Arbitration
› 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.
Conclusion

Multi-Tier Dispute Resolution Clauses
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.
Thank you

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