Dealing with Multi-Tiered Dispute Resolution Process

By

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1. INTRODUCTION

Multi-tiered dispute resolution processes are becoming increasingly common, especially in international construction contracts.[1] The process essentially involves resolving disputes through a multi-tiered dispute resolution clause which provides for separate dispute resolution processes at distinct and escalating stages. Techniques which are commonly incorporated into multi-tiered dispute resolution clauses include: negotiation, mediation, expert determination and, finally, arbitration. Furthermore, different stages may engage different personnel, with more senior participants becoming involved as the tiers escalate. While such a process provides certain advantages over traditional forms of dispute resolution, the complexity of combining several processes within one clause can also increase the risk of failure. As a result, making the right choice in relation to a multi-tiered dispute resolution process is vital.

This paper examines both the benefits and risks associated with a multi-tiered dispute resolution process. To that end, it will first outline the benefits of a multi-tiered dispute resolution process. Secondly, it will provide practical examples of multi-tiered dispute resolution clauses. It will then outline the benefits and risks of such a process, in particular focussing on the interpretation and enforcement of individual tiers within the dispute resolution process. Finally, it will discuss the best possible ways to draft multi-tiered dispute resolution clauses so as to best utilise advantages provided by the multi-tiered dispute resolution process.

2. BENEFITS

The primary reasons for using multi-tiered dispute resolution are both to improve efficiency and lower the cost of dispute resolution. Arbitration, while an effective method of dispute resolution, can be costly, lengthy and cumbersome. A multi-tiered process 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. This system produces a more efficient dispute resolution process, saving the parties both time and money by addressing more basic disputes at a lower level.[2]

Another reason for the expansion of a multi-tiered process is its adaptability.[3] This is especially valuable in relation to large construction contracts which tend to be complex and frequently involve conflicts between a number of parties. A well-structured multi-tiered clause can effectively deal with a range of conflicts with a minimum of disruption to the project. In addition, shifting dispute resolution to a series of tiers encourages early resolution of disputes, with minimum hostility achieved by facilitating initial discussions in less adversarial settings.

* The author gratefully acknowledges the assistance provided in the preparation of this paper by Lee Power, Legal Assistant, Clayton Utz.

[1] See, e.g. FIDIC's range of standard conditions of contract.

[2] Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18 *Journal of International Arbitration* 159, 159.

[3] Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18 *Journal of International Arbitration* 159, 159.

As a result, the business relationship between participants is better preserved, a factor which is essential to the success of long-term contracts.[4]

3. PRACTICAL EXAMPLES

At an international level, numerous large construction contracts have adopted a multi-tiered dispute resolution process. For example, construction of the Channel Tunnel between England and France involved a two-tiered process for the resolution of disputes. The first step required referral to a "Panel of Experts", then, if a party was displeased with the experts' decision, the dispute could be referred to arbitration.[5]

However, not all contracts utilise a simple two step process. Construction of the Hong Kong Airport involved the following four-tiered process for dispute resolution: submission of a dispute to an engineer; mediation; adjudication; arbitration.[6]

The range of Fédération Internationale des Ingénieurs-Conseils (FIDIC) standard forms of contract also contain multi-tiered dispute resolution clauses.[7] These rely on a three-tier process for settlement of disputes. Clause 20 of the FIDIC Red, Yellow, Silver and Gold Books provide that in the case of a dispute, the following process occurs: the dispute is referred to a dispute adjudication board (DAB) which then provides a decision; amicable settlement (after notice of dissatisfaction with the DAB's decision); arbitration (final settlement by international arbitration).[8]

Much of the following discussion will be based around a multi-tiered dispute resolution process similar to that found in FIDIC's range of contracts, but with a compulsory mediation at step two, rather than an amicable settlement (in order to facilitate discussion on enforceability).

4. RISKS

Not surprisingly, given its level of complexity, the use of a multi-tiered dispute resolution clause can have difficulties. Inexperience or haste in drafting will often result in confusion concerning the meaning, appropriateness and, sometimes, validity of such clauses. Given the layered nature of multi-tiered clauses, the impact of inadequate drafting is increased.

Two types of issues generally occur. The first concerns the interpretation of a tier and what is required to complete a tier. This issue arises where, for example, a party ignores the initial tier and files a request for arbitration without having engaged in adjudication and mediation. The second issue is one of enforceability of the tiers, in particular, the degree to which the lower level tier decisions of the DAB and the mediator are enforceable.

What comprises a tier and when is a tier completed?

While terms such as adjudication and mediation are well understood, the procedures for each are varied. In the absence of a clearly specified procedure, parties can end up in a dispute about whether or not a step in the dispute resolution process has been satisfied.

[4] Klaus Peter Berger, "Law and Practice of Escalation Clauses" (2006) 22 *Arbitration International* 1, 2.

[5] Alan Connerty, "The Role of ADR in the Resolution of International Disputes" (1996) 12 *Arbitration International* 1, 50.

[6] Connerty, "The Role of ADR in the Resolution of International Disputes" (1996) 12 *Arbitration International* 1, 53.

[7] e.g. *Conditions of Contract for Construction* (the Red Book) (1999); *Conditions of Contract for EPC Turnkey Projects* (the Silver Book) (1999); and *Conditions of Contract for Plant and Design-Build* (the Yellow Book) (1999); *Conditions of Contract for Design, Build and Operate* (the Gold Book) (2007).

[8] FIDIC, *Conditions of Contract for Design, Build and Operate* (2007), cl.20.

Who decides whether pre-arbitration requirements have been met?

The capacity of an arbitral tribunal to decide whether pre-arbitration requirements have been met does not stem directly from the arbitration agreement itself. If this were the case, it would result in the logical problem that the power of an arbitral tribunal to decide the validity of an agreement cannot come from the very same agreement. Rather, there is a general consensus that if there is a valid arbitration agreement, this issue is to be decided by the arbitrators.[9] This result corresponds with the principle of competence-competence which refers to an arbitral tribunal's power, or competence, to rule on its own jurisdiction. The competence-competence principle is recognised in most national arbitration legislation. The principle can be found in the English Arbitration Act 1996:

> "Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement;
> (b) whether the tribunal is properly constituted; and
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."[10]

Similarly, in the Model Law:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[11]

These provisions, replicated in various forms across most international arbitration legislation, provide the source of an arbitral tribunal's capacity to decide its own jurisdiction.

Does failure to satisfy the DAB or mediation pre-arbitral requirements affect the arbitral tribunal's jurisdiction?

The effect of a failure to comply with pre-arbitral requirements under the multi-tiered process (DAB and mediation) may be that jurisdiction over the dispute does not pass to the arbitral tribunal. If a party raises an objection to this effect, the arbitral tribunal will decide the jurisdictional question, relying on authority under the competence-competence principle.

The Model Law is silent as to the enforceability of processes that the parties have addressed in the contract as a precondition to arbitration. However, pursuant to the ICC Rules:

> "[I]f any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself."[12]

As a result, the effectiveness of the clause will depend on whether or not there is doubt as to the parties' intention to resolve the dispute by arbitration, should previous tiers fail. Generally however, an arbitral tribunal will hold that it has jurisdiction where the wording of the dispute resolution clause makes the use of lower tiers optional.

[9] Alexander Jolles, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement" (2006) 72 *Arbitration* 329, 335.
[10] Arbitration Act 1996 s.30(1).
[11] International Arbitration Act 1974 (Cth) Sch.2 art.16(1).
[12] ICC Rules of Arbitration 1998 art.6(2).

ICC Case No.4230[13] involved a multi-tiered dispute resolution process which required the parties to first enter into conciliation proceedings, before submitting the dispute to arbitration. However, arbitration proceedings were initiated without undertaking conciliation. Following the defendant's challenge to the arbitral tribunal's jurisdiction, the tribunal found that it had jurisdiction to hear the dispute because it interpreted the clause as not being expressly obligatory.[14]

Further, in ICC Case No.10256,[15] it was held that the word "may" in a three-tier clause, which provided as a second tier that the parties *may* refer the dispute for mediation, was permissive rather than mandatory. As a result, the tribunal retained jurisdiction.

Conversely, where the multi-tiered dispute resolution process imposes a clear obligation on the parties to take prior dispute settlement steps before entering into arbitration, such as in cl.20 of the current range of FIDIC contracts, the arbitral tribunal will decline jurisdiction. In the ICC Case Nos 6276 and 6277, the arbitral tribunal considered a situation involving the equivalent to cl.20 under the previous 1989 FIDIC conditions in which the claimant had failed to satisfy the condition precedent set forth in the dispute resolution clause. As a result, the tribunal found that it lacked jurisdiction and that any request for arbitration was premature.[16]

A failure to satisfy a pre-arbitral tier could be addressed in two ways. First, it could be addressed via a procedural approach in which the issue is treated as a matter of admissibility. Under this approach, parties must comply with previous tiers before they can progress. Secondly, it could be addressed as a matter of substantive contract law under which non-compliance with previous tiers may amount to a breach, the classical remedy for which would be damages.[17]

In most instances, such a problem has been addressed as a procedural matter.[18] This way of resolving the issue seems to satisfy the parties' expectations. When parties agree to a multi-tier dispute resolution process, they expect that a tribunal:

> "[S]eized with the matter at a premature stage would decline to review the case prior to the initial steps having been complied with by the parties."[19]

Of course it is always open to the parties to alter any agreement to remove a tier, thereby conferring jurisdiction on the arbitral tribunal and ensuring that the dispute can head straight to arbitration.

Nevertheless, the question remains whether an arbitral tribunal that lacks jurisdiction due to non-compliance with a mandatory pre-arbitral tier can accept jurisdiction on the proviso that the parties satisfy pre-arbitral requirements. On this point, it should be noted that art.16(3) of the Model Law states:

> "The arbitral tribunal may rule on a plea [that the arbitral tribunal does not have jurisdiction]... either as a preliminary question or in an award on the merits."

It therefore seems possible that, where a tribunal is asked to rule on its own jurisdiction due to non-compliance with a pre-arbitral tier, it could do so as part of a final award, amounting

[13] ICC Case No.4230 JDI 1975 at 934–938.
[14] Peter M. Wolrich, "Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules", Special Supplement to *ICC International Court of Arbitration Bulletin* (2001), pp.7–22.
[15] ICC Case No.10256 interim award of August 12, 2000.
[16] Wolrich, "Multi-Tiered Clauses", Special Supplement to *ICC International Court of Arbitration Bulletin*, 2001, pp.7–22.
[17] Jolles, "Consequences of Multi-tier Arbitration Clauses" (2006) 72 *Arbitration* 329, 336.
[18] Jolles, "Consequences of Multi-tier Arbitration Clauses" (2006) 72 *Arbitration* 329, 336.
[19] Jolles, "Consequences of Multi-tier Arbitration Clauses" (2006) 72 *Arbitration* 329, 336.

to the tribunal making a ruling on the proviso that a party satisfy pre-arbitral requirements at a later date.

In contrast, courts have held that an arbitration initiated in breach of a pre-arbitral condition is null. This theory is basic and stems from the fact that an arbitral tribunal's jurisdiction is based on an agreement between the parties to submit their dispute to arbitration. A failure to fulfil a pre-arbitral obligation means that, in effect, there is no agreement to arbitrate, and as a result the arbitration is void.[20] Such a step would not be taken lightly by the court, given that closing proceedings would have adverse effects on any relevant limitation periods.

What if a party refuses to proceed with the next tier?

In Australia[21] and the United States[22] there is a willingness by courts to exercise their discretion to order parties to undertake dispute resolution processes, whether they have been agreed upon or not. This is based on the idea that, even where a party is initially unwilling to participate, an unexpected outcome may be achieved with the aid of experienced dispute resolution facilitators. As such, it may sometimes be appropriate to compel one or more parties to undertake dispute resolution processes such as mediation.[23] It is worth noting that this is at odds with the English view as given in the judgment in *Halsey*.[24] In *Halsey*, the English Court of Appeal considered whether the parties should be compelled to mediate. The Court answered this in the negative, indicating that, while mediation should be strongly encouraged, it could not be compelled. However, in recent years English courts have shown an increased willingness to encourage litigants to explore dispute resolution processes before (or even after) going to trial.[25]

5. ENFORCEABILITY

Perhaps the most challenging question concerning the multi-tiered dispute resolution process is that of its enforceability. While the enforceability of the arbitration tier is well established in practice, the question as to the enforceability of earlier pre-arbitral tiers (in this instance the DAB and compulsory mediation tiers) is less certain. This paper will now turn to a discussion of how various courts have approached the issue of enforceability of such tiers.

Enforceability of the DAB tier

Essentially, the substantive obstacle to enforcement of an agreement to submit a dispute to a DAB is the courts' lack of statutory basis for staying concurrent court proceedings to allow the unfettered operation of the expert determination procedure which operates in the DAB.[26] In contrast, the court *does* have the statutory power to stay its proceedings in favour of arbitration.

[20] Kah Cheong Lye, "Agreements to Mediate: The Impact of *Cable & Wireless Plc v IBM United Kingdom Ltd* [2003] BLR 89" (2004) 16 S.A.C.L.J. 530.

[21] *Hopcroft v Olsen* [1998] SASC 7009.

[22] *Atlantic Pipe, Re* 304 F.3d 135 (1st Cir. 2002).

[23] Kent Dreadon, "ADR post-Halsey: recent amendments to the CPR further encourage mediation" (2006) *The In-House Lawyer* 76.

[24] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.

[25] For further discussion see Dreadon, "ADR post-Halsey" (2006) *The In-House Lawyer* 76. [See also the hints on future developments from Lord Phillips and Sir Anthony Clarke (2009) 74 *Arbitration* 406 and 419 - Editor]

[26] The English Arbitration Act 1996 s.9(2) can be used to enforce some expert determination agreements since it provides that an application to enforce an arbitration agreement by staying court proceedings may be made, "notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures".

In the Australian state jurisdictions it may be possible to invoke the inherent jurisdiction of the Supreme Court to seek the stay of court proceedings which are the subject of a DAB agreement. There have been challenges to the enforceability of similar agreements, on the basis that such agreements constitute an impermissible ouster of the jurisdiction of the courts. It has been argued that public policy renders void any contractual provisions purporting to oust the jurisdiction of the courts on a question of law, thereby disentitling parties in such agreements to a stay of the court proceedings.

However, the tendency of courts to give weight to the freedom of parties to contract has meant that courts have generally refrained from interfering with these agreements. Generally speaking, their approach to DAB agreements has been to interpret these clauses as not ousting the jurisdiction of the courts. In Australia, decisions[27] have relied on the 1935 High Court judgment of *Dobbs v National Bank of Australasia Ltd*.[28] The majority in that case said that:

> "Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon arbitrament or discretionary judgement of an ascertained or ascertainable person."

To this effect, a court is unlikely to interfere with a decision unless the decision maker has acted outside their terms of reference, as set out in the contract.[29] The situation is the same in other jurisdictions with courts generally willing to recognise public policy favouring alternative dispute resolution clauses. As a result, courts will hold that an agreement to submit a decision to a DAB is valid, provided it is sufficiently certain.[30]

This approach is by no means uniform. A recent decision of the Western Australian Supreme Court refused to enforce an expert determination agreement on the basis that it was against public policy for purporting to oust the jurisdiction of the courts.[31] With respect, this case appears to contradict the general position adopted by courts in Australia, though it can perhaps be distinguished on the grounds that the dispute involved significant issues of law, a claim of $400,000 and a cross claim of approximately $3.6 million. Because the case involved complex questions of law, the Supreme Court was of the opinion that the expert determination procedure prescribed by the agreement was wholly unsuited to the resolution of the dispute.

Thus parties cannot confidently predict that their "final and binding" decision by a DAB will be enforced in the face of court proceedings commenced in respect of its subject matter.

Enforcement of the outcome

There is no legislative basis upon which a DAB's decision may be enforced. Any avenue of enforcement of a DAB's decision is therefore dependent on the terms of the contract

[27] See for example, *Atlantic Civil Pty Ltd v Water Administration Ministerial Corp* (1992) 39 N.S.W.L.R. 468; *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* Unreported July 14, 1997 Supreme Court of New South Wales, Rolfe J.; *Fletcher Construction Australia Ltd v State of New South Wales* Unreported December 1, 1997 Supreme Court of New South Wales, Hunter J.

[28] *Dobbs v National Bank of Australasia Ltd* (1935) 53 C.L.R. 643.

[29] For example, in the English case *Bouygues UK Ltd v Dahl-Jensen UK Ltd* Unreported November 17, 1999 TCC, per Dyson J., the court (drawing an analogy in this respect between adjudication and expert valuation) refused to rectify a clear miscalculation made by the adjudicator in coming to his award, because the mistake was as to fact not jurisdiction. See also *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 E.G.L.R. 103, in which a factually erroneous expert valuation as to a rent review was not set aside because it could not be demonstrated that the expert had not performed the task assigned to him.

[30] Tanya Melnyk, "The Enforceability of Multi-Tiered Dispute Resolution Clauses: The English Law Position" (2002) 5 Int. A.L.R. 113.

[31] See *Baulderstone Hornibrook Engineering Ltd v Kayah Holding Pty Ltd* (1997) 14 B.C.L. 277.

between the parties. For this reason, a successful party usually brings an action for breach of contract for failure to comply with the DAB's decision, or sues for the value of the decision as a debt due and payable to it.[32]

For multi-tiered dispute resolution processes with an international element, a feature which they commonly have, particular difficulties arise due to the purely contractual nature of the DAB tier. Parties to a decision featuring an international element are faced with having to rely on the various conventions, treaties and national laws governing the enforcement of foreign judgments in different countries. Understandably, a party would only seek to enforce a foreign judgment in the event that another party is withholding money owed and, considering the time and added cost involved in launching an action to have a foreign judgment enforced, the amount of money owed would have to be considerable. In this respect, arbitration would appear to have a distinct advantage over the use of a DAB in light of the New York Convention,[33] which is widely observed, simple and effective. The formalities require a party to simply produce the original or a certified copy of the arbitral award and the original arbitration agreement to the relevant court, and the court will grant recognition and enforcement provided none of the grounds for refusal are satisfied.

In practice, international organisations have tended to adopt the use of a DAB as a binding interim dispute resolution procedure, thereby enabling recourse to arbitration when a party wishes to appeal or needs to enforce a DAB's decision.[34] Incorporating a DAB as a step before possible arbitration reflects a recognition that the outcome of a DAB is not itself easily enforceable and, apart from the delay involved, is an appropriate fabric for dealing with transnational matters. However, one would query whether it is necessary to have a DAB at all, when there is a risk that a lack of co-operation between the parties will force disputes to arbitration. An answer to this might be that the risk of having to resort to arbitration to enforce a DAB's decision is outweighed by the benefits to be gained from using a DAB.

6. PROCEDURAL ASSISTANCE

If the DAB process breaks down because, for example, the parties cannot decide upon the appointment of board members, or if the agreement between the parties is incomplete as to a procedure necessary for the DAB to be effective,[35] then the agreement to use a DAB may be unenforceable and therefore void. This is a challenge typically brought by a party reluctant to abide by DAB provisions. Such challenges could be avoided by prescribing the procedure for the DAB in the dispute resolution clause. An example of this can be seen in cl.20.3 of the FIDIC Gold Book where, if there is failure to agree upon a listed aspect of the DAB:

> "[T]he appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official."

[32] The capacity of parties to overturn an expert's decision for even obvious error is generally limited to mistakes as to the expert's terms of reference only, a principle recently confirmed by Dyson J. in *Bouygues UK Ltd v Dahl-Jensen UK Ltd* Unreported November 17, 1999 TCC, a case concerning an adjudication under the CIC Model Adjudication Procedure.

[33] Alan Redfern and Martin Hunter discuss the origins of the New York Convention in Chs 1 and 10 of *Law and Practice of International Commercial Arbitration,* 3rd edn (Sweet & Maxwell, 1999). See also Lord Mustill, "Arbitration: History and Background" (1989) 6 *Journal of International Arbitration* 43.

[34] See for example, cl.20.7 of the FIDIC Red Book, *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer* (1999).

[35] In *Fletcher Constructions Australia Ltd v MPN Group Pty Ltd* Unreported July 14, 1997 NSW Supreme Court it was held that if the parties cannot decide upon an appropriate procedure, the expert is to decide.

However, it is difficult if not impossible to provide contractual machinery for every conceivable procedural difficulty. This represents a key risk of the DAB process, as opposed to more established dispute methods such as arbitration, where statutes typically provide for assistance by the courts where procedural difficulties arise. For example, if the parties cannot agree on the appointment of an arbitrator, or an arbitrator's impartiality is doubted, there are legislative procedures to help facilitate arbitration and ensure it stays on foot.[36] However, no such procedural assistance applies to a DAB. The courts have refrained from "filling gaps" in agreements which utilise a DAB,[37] and it is therefore imperative that such agreements set out a comprehensive procedure and default provisions which apply when procedural difficulties arise. The common practice is to provide that, in certain situations, a third party will step in to make a decision as to procedure in order to prevent the DAB process from breaking down.

Moreover, the liabilities of members of the DAB, as compared to arbitrators, may be contrasted. If the parties fail to specify how the proceedings are to be conducted in the DAB, the DAB members are left to their own opinions or devices. But, unlike arbitrators, DAB members do not have any legislative protection from liability in relation to their conduct in making a decision.[38] This raises the possibility of the parties suing for professional negligence or breach of the contract with respect to the procedure adopted by the DAB, as well as for the decision itself. Of course, a DAB member can avoid liability by obtaining an indemnity from the parties with respect to the decision, or attempt to limit potential liability by providing reasons for his or her decision. At any rate, neither an arbitrator nor the court can intervene, provided the decision has been made honestly and within power (in the sense of "in accordance with the contract").[39] If a contract fails to outline the DAB's duties they may still need to comply with an implied duty to act fairly,[40] and will owe a duty of care to the parties to the decision.

It may well be that the only time a lack of statutory procedural assistance would prove a real disadvantage would be in the situation where a recalcitrant party refused to cooperate or the appointed DAB failed to resolve a procedural difficulty. The effect, after all, of there being no facilitative legislation for a DAB's decision is that the procedure remains at all times in the hands of the contracting parties. But the lesson is that if a DAB clause is poorly drafted, then parties are likely to have difficulty enforcing the dispute resolution mechanism. In an effort to avoid these difficulties, parties usually incorporate into the DAB agreement a set of standard rules promulgated by a professional body.

7. PRACTICAL PROBLEMS

Like any dispute resolution procedure, the DAB process may be utilised by a recalcitrant party to disrupt a contract and delay dispute resolution. However, in arbitration, the arbitrator has powers to combat a party's dilatory tactics. For example, a court can issue a subpoena to force the production of material, or the arbitrator(s) can progress with an ex parte arbitration.[41] A

[36] See uniform Commercial Arbitration Acts Pt 2, "Appointment of arbitrators and umpires"; s.42(1), "Power to set aside award"; and s.44, "Removal of arbitrator".

[37] e.g. *Triano Pty Ltd v Triden Contractors Ltd* (1992) 10 B.C.L. 305.

[38] See uniform Commercial Arbitration Acts s.51 in relation to the exclusion of liability of arbitrators and umpires for negligence.

[39] See *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 15 Const. L.J. 488; (1999) 15 B.C.L. 49.

[40] Where the contract is silent as to a duty to act fairly there is support for the position that the expert is obliged to be fair: see *Lee v Showmen's Guild* [1952] 2 Q.B. 329 at 342, per Denning L.J.

[41] e.g. uniform Commercial Arbitration Acts s.18(1) and (2), "Refusal or failure to attend before arbitrator or umpire etc."; also *WFA Pty Ltd v Hobart City Council* [2000] NSWCA 43, where it was held that the powers given the arbitrator under the Tasmanian Commercial Arbitration

mere expert, on the other hand, has no coercive power, and a court cannot assist the process. The DAB process could be easily derailed if party relations turn sour and co-operation ceases.

Some agreements have attempted to overcome the difficulty of delay by inserting time restraints in the DAB clause. If a party fails to submit documents or attend meetings in accordance with the DAB clause it will be liable for breach. Another clause can be inserted into the DAB agreement referring any dispute or claim arising out of or in connection with the DAB's decision, or breach thereof, to be finally settled by arbitration. These contractual provisions may create enough dissuasion to avoid delay altogether, but the question again arises: why choose a DAB over arbitration if it is probable that a dispute will ultimately be determined by arbitration anyway?

A further complication arising from use of a DAB is the scope for further delay where the DAB agreement fails to clearly delineate the board's jurisdiction and the types of matters which can be submitted to it. Parties may be forced to abandon DAB proceedings in order to determine subsidiary questions relating to the board's jurisdiction.

In relation to the issue of what should be referred to the DAB, cl.20.4 of the FIDIC Gold Book provides:

> "If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract."

8. ENFORCEABILITY OF A COMPULSORY MEDIATION TIER

Various courts internationally have traditionally adopted different approaches regarding enforceability of a mediation clause. In recent times, however, there has been a trend towards enforcing mandatory mediation clauses. In Australia, the trend in recent court decisions, including *Hooper Bailie*[42] and *Aiton,*[43] has been to hold that, if mediation is a clear and determinative pre-condition to arbitration, a court or tribunal will be likely to forgo jurisdiction until the pre-condition tier has been followed.[44]

In the most recent decision, *Aiton*, Einstein J. adopted Giles J.'s test for enforcement from the earlier case of *Hooper Bailie*:

> "An agreement to conciliate or mediate is not to be likened to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement."[45]

The court in *Aiton* then provided some guidance as to what is enforceable:

- The clause should operate to make the completion of mediation a condition precedent to court proceedings (or arbitration).
- The processes established by the clause must be certain. There cannot be stages in the mediation process where agreement is needed on some course of action before the process

Act enabled him to refuse deviation from the arbitration timetable formulated by himself and the parties in accordance with the contract.

[42] *Hooper Bailie v Natcon Group* (1992) 28 N.S.W.L.R. 194.

[43] *Aiton v Transfield* [1999] NSWSC 996.

[44] See also Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18 *Journal of International Arbitration* 159.

[45] *Aiton v Transfield* [1999] NSWSC 996 at [45].

can proceed since, if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.

- The processes for selecting a mediator and determining their remuneration should be specific, with a mechanism for selection by third parties should the parties not reach agreement.
- The clause should also set out in detail the process of mediation to be followed, or incorporate these rules by reference. These rules will also need to state, with particularity, the mediation model that will be used.[46]

Beginning with the *Channel Tunnel*[47] case, English courts have also tended towards enforcing mediation clauses. The situation in the United States is also very similar, with courts willing to enforce a mediation clause as long as it is a mandatory pre-arbitral component. It can therefore be seen that the wording of any clause is vital to its enforceability, for while a discretionary mediation clause is not enforceable, a mandatory one probably is.

However, the courts' willingness to enforce mandatory mediation clauses is not to say that mediation and arbitration are on an equal footing. For example, the costs of not complying with an arbitration agreement are usually greater than those of non-compliance with a mediation agreement. Furthermore, an arbitrator can begin, conduct and conclude the proceedings in the absence of a party. A mediator cannot, with mediation depending squarely on the continued consent and co-operation of the parties.[48] Given party autonomy is necessary for mediation, a multi-tiered dispute resolution clause must consider and resolve certain issues in advance of a dispute arising. If this is not done, failure in the dispute resolution process is likely to occur.

The most important of these issues involves the appointment of the mediator. Ideally, the contract should indicate who will serve as a mediator or detail a process by which a mediator will be selected. Any process must be clear given that when the clause is invoked the parties will be in the thick of their dispute, making agreement on a mediator at that point highly unlikely. Other factors, such as how the parties will allocate the cost of the mediation phase, must also be addressed in advance. It is also vital that each party be represented at the mediation by an individual who has full and complete authority to resolve the case, as mediation can often fail if the individual with authority to resolve the dispute is not present.

The most contentious of the criteria with respect to enforcement of a dispute resolution clause is whether or not the clause is of sufficient certainty. In December 2008, the uncertainty rule was interpreted broadly by the New South Wales Supreme Court in *United Group Rail Services Ltd v Rail Corp New South Wales*.[49] The issue was whether the requirement (in the written contract) to negotiate a building dispute "in good faith," without a predetermined procedure was void for uncertainty. Detailed dispute resolution clauses were inserted into the contract. However, the plaintiff claimed that the clause requiring senior representatives of each firm to meet and undertake genuine good faith negotiations was void for uncertainty.

Rein J. held that a provision requiring contractual disputes to be the subject of negotiation in good faith is binding and enforceable, expressing the view that an obligation of good faith in the performance of a contractual obligation has "content" and is not void for uncertainty[50]:

[46] *Aiton v Transfield* [1999] NSWSC 996 at [69].

[47] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334; [1993] 2 W.L.R. 262.

[48] Bobette Wolski, "New rules to facilitate the use of ADR in the resolution of international commercial disputes" (2003) 5(9) *ADR Bulletin* 149, 150.

[49] *United Group Rail Services Ltd v Rail Corp New South Wales* [2008] NSWSC 1364.

[50] *United Group Rail Services* [2008] NSWSC 1364 at [13].

> "Because I am of the view that 'good faith in negotiation' has content, I think that parties could legitimately gain comfort in extracting a promise from the other party that disputes will be the subject of good faith negotiations in attempt to resolve them."[51]

The negotiation clause was held to be valid and enforceable notwithstanding that the parties had a broad requirement to meet and resolve disputes (after they arise) in good faith.

9. DRAFTING TO ENSURE VALUE OF CLAUSES

In light of the discussion above, the following measures should be taken into account when drafting to ensure the enforceability of a multi-tiered dispute resolution clause: the suitability of dispute resolution techniques chosen for potential disputes and their order in the tiered system; ensuring that parties are obligated to comply with a tier, rather than simply being entitled to employ it; and the establishing of a smooth transition between tiers to ensure proper functionality in the event of a dispute. [52]

With respect to the first point, it is important to remember that while the choice of the dispute resolution technique is generally left to the parties, there may be circumstances where "less advanced" processes, such as a DAB, may be viewed as inappropriate by the courts.

In relation to the second and third points, direct criteria should be used to provide a clear trigger from participation in, or completion of, a tier. Subjective criteria, such as "make all efforts", to describe satisfactory completion of a stage will usually lead to unwanted disputes and should be avoided. The best way is often to do this by way of a time limit which provides that a decision or an agreement has to be reached within a set period or else the next tier is automatically initiated.

10. CONCLUSION

The multi-tiered dispute resolution process is on the rise in international contracts. While there have been a range of reasons for this, it is largely due to the adaptable nature of such processes in resolving a diverse range of disputes. However, as multi-tiered clauses get progressively more complex, the risks of a tier being held unenforceable are compounded. As a result, clear drafting, which imposes an obligation on the other party to comply with each tier of the process, is required. Those that do not have clear drafting will inevitably end up in the courts.

[51] *United Group Rail Services* [2008] NSWSC 1364 at [15].
[52] Berger, "Law and Practice of Escalation Clauses" (2006) 22 *Arbitration International* 1, 5.