

Multi-Tier Dispute Resolution Clauses – Definition and Examples

ASA Conference

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Definition

- Multi-tier dispute resolution clauses provide for a dispute resolution mechanism using different dispute resolution methods in sequence.
- Each tier, or step, is designed to handle the dispute if it has not been resolved by the previous step.
- Typically, multi-tier dispute resolution clauses involve an escalation of dispute resolution methods with, as a rule, a final decision by a court or an arbitral tribunal.

Purpose of Multi-Tier Clauses

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- Enable parties to formulate the best dispute resolution mechanism that accords with the specific needs of their relationship
- Resolve disputes in a less adversarial setting
- Resolve disputes efficiently in terms of
 - Time
 - Costs

Toolbox for Multi-Tier Clauses

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Amicable resolution/negotiation

Management escalation

Mediation/conciliation

Expert determination/dispute adjudication boards (DAB)

Arbitration/litigation

Example: Negotiation

Tailor-made clause

"11. Dispute Resolution and Arbitration

11.1 In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned in 9.2, 9.3, Clauses 10.1(d) and/or 10.1(e) above, the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. 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."

Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd [2014] EWHC 2014 (Comm)

Example: Management Escalation

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Tailor-made clause

"All Disputes arising out of or in connection with this Agreement shall firstly be subject to the Parties conducting consultation meetings, by the senior executives of each Party, in good faith whereby each Party will use best efforts and without prejudice to resolve the dispute in a reasonable time frame, not to exceed 30 (thirty) days. In the event that the consultation meetings are not successful within the said time frame, the dispute(s) shall be finally settled in arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC), by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Geneva (Switzerland). The language of the arbitration shall be English."

[own practice]

Example: Mediation

Tailor-made clause

"11. Mediation

If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation. [...]

12. Arbitration

In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules. [...]"

Sulamerica CIA Nacional De Seguros S.A. and others v. Enesa Engenharia S.A. and others [2012] EWCA Civ 638

Example: DAB

Standard clause

20.4 - Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, [...] either Party may refer the dispute in writing to the DAB for its decision [...]. If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. [...]

20.5 - Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 - Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. [...]"

FIDIC Red, Yellow and Silver Books (1999 editions), Clause 20

Take-Aways



- Steps can be combined freely
- Standardized clauses can be used if desired
- Order can be played with

Example: Arb-Med-Arb

Standard clause

- "1. Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution ('SCAI') in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.*
- 2. Following the constitution and receipt of the case file, the arbitral tribunal shall stay the arbitration proceedings and invite the Secretariat of the Arbitration Court to initiate mediation in accordance with the Swiss Rules of Commercial Mediation of SCAI in force on the date on which the Notice of Arbitration was submitted. However, the arbitral tribunal may proceed with the arbitration if the Respondent does not submit an Answer to the Notice of Arbitration within the deadlines granted.*
- 3. If the dispute has not been fully settled by mediation within 60 days from the initiation of the mediation by the Secretariat of the Arbitration Court, the arbitration proceedings shall resume. Any settlement reached in the course of the mediation, whether full or partial, shall be referred to the arbitral tribunal and may be converted into a consent award. [...]"*

SCAI Arb-Med-Arb Clause (draft)

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Thank you for your attention.

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