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MULTITIER DISPUTE RESOLUTION AGREEMENT: A PROSPECTIVE RESOLUTION MECHANISM

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INTRODUCTION

The question of whether the non-judicial components of Multi-tiered Dispute Resolution Clauses (MTDRCs), such as negotiation and mediation, are required and enforceable has been at the center of the discussion concerning their value. A significant mechanism for implementing the Alternative Dispute Resolution (ADR) tiers in dispute resolution terms in the international community is the UNCITRAL Model Law on International Commercial Conciliation. Many nations, notably the United Statesand Canada, which have established uniform laws based on their ideas, have attempted to enact laws that are based on or in some way influenced by this Model Law.

ENFORCEABILITY OF DISPUTE RESOLUTION CLAUSE IN INDIA

According to Professor Gary Born, unless there is express wording to the contrary, national courts and arbitral tribunals are loath to recognize pre-arbitration methods like discussion or mediation as requirements. The basic claim is that these first processes, likediscussions or mediations, are primarily voluntary in character and that the party's desire to engage is the only factor determining their effectiveness. Since there are no measurable standards to establish whether the parties have met their commitments to negotiate, such processes cannot be subject to court monitoring or enforcement. When establishing the legitimacy of early tiers, English courts distinguish between determinative and nondeterminative methods. Determinative processes are those that explicitly state that the preliminary stages are a requirement before arbitration.[1]

Contrarily, non-determinative methods are typically ambiguous and vague, which renders them unenforceable. According to Lord Acknew in the case of Walford v. Miles, a straightforward agreement to negotiate lacked the necessary degree of clarity and could not be enforced. In theCable and Wireless Plc v. IBM case, the parties agreed to first attempt to resolve the dispute through negotiation and, if that failed, through the dispute resolution process advised by the Centre for Dispute Resolution, before turning to arbitration. According to Lord Coleman J., an agreement to negotiate is unenforceable. It is unclear, in contrast to an agreement to follow a particular dispute resolution method, which is not unclear because it comprises a well-defined protocol.[2]
In Sulamerica v. Enesa Engenharia[3], the court rendered a significant judgment that upheld an earlier decision in Cable and Wireless. The court determined that the absence of specific and distinct provisions rendered an agreement between parties to seek to settle a dispute through mediation before resorting to arbitration unenforceable. The court adopted a three-part test in Wah v. Grant Thornton to determine whether pre-arbitration processes are enforceable. The procedure must pass the test by making a clear commitment to start the process, outlining the steps that each participant must follow, and being able to be objectively defined to establish thelevel of involvement that is necessary and when the process will be finished. Agreements to negotiate or mediate in good faith are typically not enforceable because they lack precise standards for determining compliance and are viewed as being too ambiguous and unclear.

[1] Philip Naughton QC, Country report for England in Enforcement of Multi-tiered Dispute Resolution Clauses,IBA Newsletter of Committee D (Arbitration and ADR) Volume 6 No. 2 October 2001
[2] Kah Cheong Lye, Case Note: Agreements to Mediate: The Impact of Cable & Wireless plc v. IBM UnitedKingdom Ltd, 16 Singapore Academy of Law J. 530, 535 (2004)
[3] S.A. [2012] EWCA Civ 638

INDIAN VIEW

The courts in India have disregarded the fact that because initial tiers are founded on mutual consent, they cannot be governed or enforced by judicial methods. The Indian courts, regardlessof the legality of such terms, have looked at whether the parties have complied with them rightaway rather than first deciding if they are lawful. Three well-known cases in which the partiesdisputed initiating arbitration because the Initial-tiers were not met were decided by theSupreme Court. But in all three cases, the court just examined whether the parties had adheredto the Initial-tiers without taking their legality into account.

For instance, in the case of Demerara Distilleries Private Limited, the Supreme Court did not clarify whether the clause requiring parties to first attempt to resolve disputes through mutual discussions and mediation before resorting to arbitration was valid or not. However, the courtdid state that it would be pointless to follow this process in light of the extensive correspondence presented in the case. Similarly, in the case of Visa International Limited, thearbitration clause stipulated that disputes should be settled amicably before involving an arbitrator. Although the Supreme Court did not rule on the validity of this clause, it did note that there was no possibility for an amicable settlement in this particular case, as both parties had taken inflexible positions and made accusations against each other.

The Supreme Court applied a similar strategy to Swiss Timing Limited. This strategy, nevertheless, is faulty since it implies that no matter how a multi-tier clause is phrased, it is still legal. The essential contractual principle of "Certainty" is undermined when clauses are enforced that are unclear, have numerous interpretations, or are uncertain.

The main concerns related to multi-tier clauses pertain to their enforceability. Some of the keyquestions that arise are:

- Can the initial tiers be enforced on their own?
- Are these initial tiers a prerequisite for initiating arbitration?
- What happens if one party seeks arbitration without fulfilling the requirements of the initialtiers, which may involve mediation or negotiation, or both?

The nature of arbitration agreements is directly related to the utilization of multi-tiered disputeresolution clauses. When a dispute resolution provision calls for a pre-arbitration step like mutual consultations between the parties, Indian domestic courts have frequently been engagedin choosing arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996.

In the case of Sunil Manchanda v. Ansal Housing and Construction Ltd.[4], the provision demanded that the parties begin communication within 15 days of the start of the dispute, thengo through conciliation processes and, if they failed, arbitration. The court had to decide whether its authority under Section 11 was judicial or simply appointing when it was requestedto choose an arbitrator. The court decided that before choosing an arbitrator, it was not necessary to determine whether the steps indicated in the arbitration agreement had been followed.

In Tulip Hotels Pvt. Ltd. v. Trade Wings Ltd.[5], the court upheld the enforceability of multi-tiered dispute resolution provisions and found that parties must adhere to any pre-conditions established in the contract before bringing the issue to arbitration.

A disagreement over the legality of a two-tier arbitration provision was at issue in the case of Centro Trade Minerals v. Hindustan Copper Limited[6]. This provision specified that the IndianCouncil of Arbitration would administer the initial arbitration, which would be followed by anICC-administered arbitration in London. The Supreme Court's broader bench was asked to hearthe case since the two justices who were hearing it couldn't agree on whether or not this provision was legal. The 1996 Arbitration and Conciliation statute, according to one judge, forbade an appeal to a different board or an arbitral tribunal, while the other judge contended that the statute

[4] 2004 SCC OnLine Del 707 : (2004) 3 Arb LR 100 (Del).
[5] 2009 SCC Online Bom 1222
[6] 2020 SCC OnLine SC 479

made no mention of the existence of an arbitral appellate forum.

In the matter of Nirman Sindia v. Indal Electromelts Ltd[7], a contract termination issue was first sent to an engineer, then adjudication took place, and if arbitration was required, it was done so. The question of whether the pre-arbitral procedure was enforceable arose when one of the parties requested an arbitrator directly from the court. According to the Kerala High Court, if the parties to a contract stipulate a certain manner of resolving disputes, they must adhere to that approach. They cannot bypass the first stage and proceed directly to the last stepwithout adhering to the method specified in the agreement for resolving the disagreement.

In the case of Sushil Kumar Sharma v. Union of India[8], the Supreme Court issued a ruling onthe legality of pre-arbitration processes. It said that certain obligatory actions must be performed if the parties to a contract have agreed to take them before turning to arbitration. The arbitral tribunal cannot legitimately handle the issue if these formalities are not followed.

We can now consider the problems that result from these conditions since we know what an MDR clause is, why it exists, how it's organized, and how it's controlled (or not regulated sufficiently). The fundamental issue is that it is unclear how to enforce the terms because neither at the international nor national levels do there exist clear legal processes. In this context, "enforcement" refers to having a court uphold the mutually agreed-upon dispute resolution procedure described in the MDR clause. This would stop parties from advancing tothe next stage of the clause without fulfilling the requirements of the first step. Varied geographical areas have varied levels of uncertainty when it comes to putting these regulationsinto action. This puts persons making contracts in a tough position since they must either put up a lot of time and money to research the conditions for enforcement in the relevant field or accept a certain amount of ambiguity. However, because there are frequently no suitable laws,this duty might not be completed properly.

This uncertainty is a problem for parties who assume that the specified dispute resolution procedures are mandatory and will, therefore, be upheld by an adjudicator, as well as for partieswho, as is frequently the case in the Nordic countries, assume that the specified dispute resolution procedures are merely indicative. Due to this and whether or not they are aware of it, a party may not always be aware of the conflict resolution options that are open to them.

An MDR clause's enforceability is just the start of the problem because it creates a host of otherproblems and ambiguities. These include the precise conditions that must be met for the provision to be enforceable, how it will be enforced (via financial penalties or other proceduralremedies), and whether any related decisions can be subject to judicial review.

The H-41-10A case ruling from the Danish Maritime and Commercial Courts demonstrates anunexpected but significant impact that the enforcement or lack thereof of MDR clauses can have. The presiding judge noted that there were no provisions in Danish civil procedural law at the time that would stop or extend the statute of limitations on claims during ADR. If the MDR clause was enforced, the claim would have become time-barred during the prescribed mediation procedure. When there is no legislative framework for MDR clauses, issues like thiscan limit the effectiveness of MDR clauses in general. Additionally, an enforceable MDR clause may limit access to justice, which is protected by the constitutions of most jurisdictionsand international law.

There are two possible scenarios in which a limitation could materialize. First, due to the practicum de non-pretend component mentioned earlier, some academics contend that theagreement not to sue that is part of an MDR clause might be viewed as a restriction on accessto justice. Second, the right to access justice frequently necessitates prompt resolution, therefore access to justice must be granted in a fair amount of time. It can be claimed that requiring non-mandatory ADR to be finished before gaining access to court might compromisea party's basic right to swift justice, particularly if the MDR clause doesn't provide a deadline for the ADR step(s). In each jurisdiction, these problems are approached and resolved differently.

Due to its extensive ADR history, the Anglo-American legal system has developed a consistentbody of case law regarding the enforcement of MDR clauses. Similar to North America, Continental Europe has likewise established routine MDR clause enforcement in numerous areas. ADR, in particular the use of MDR provisions, was only

[7] 1999 SCC Online Ker 149, 442.
[8] [1997] 5 SCC 536

recently implemented in the Nordic legal system. Even though MDR clauses are being used more frequently in the Nordic region, there is no established legal precedent or structure for their application.

The Nordic nations lack an appropriate legal framework to assist the enforcement of MDR- clauses, and few legal professionals and practitioners are interested in the subject, therefore

there is no scholarly support for such a legal framework. A functional framework for the enforcement of MDR clauses in the Nordic legal systems can be developed by studying what the Nordic legal systems, particularly the Finnish system, can learn from the approaches takenby legal scholars, legislators, and judges in Continental European and Anglo-American legal systems. Due to a paucity of legislation and study on MDR-clauses in the Nordic nations, the research subject is wide.

In the case of M/s Simpark Infrastructure Pvt. Ltd. Vs Jaipur Municipal Corporation[9], the Rajasthan High Court ruled that if an agreed-upon procedure for resolving disputes has been established as a prerequisite for invoking the arbitration clause, then that procedure must be adhered to. The Court referred to a previous ruling by the Hon'ble Supreme Court in SBP & Co. vs Patel Engineering Co[10]. and concluded that the agreed-upon arbitral procedure must befollowed. Additionally, the court held that a party who defaults on the agreed-upon procedurecannot benefit from their wrongdoing. According to Section 11(6) of the 1996 Act, a partymust comply with the agreed-upon arbitral procedure for resolving disputes by signing an agreement with full knowledge, and they cannot ignore it and rely on Section 11(6) of the Actto exercise power.

The Delhi High Court ruled in the case of Ravindra Kumar Verma vs. M/s BPTP Ltd. & Anr. [11] that someone's desire to initiate proceedings for the referral of the issue to arbitration should not be hindered by the availability of conciliation or mutual discussion. To safeguard the rightsdescribed in Section 77 of the Act, this is required. However, conciliation or a comparable process is frequently stipulated in contracts as a part of the agreed-upon process.

Therefore, a petition filed under Sections 11 or 8 of the Act, or for any other legal action necessary to protect the parties' rights, shall not be dismissed based on the presence of a conciliation or mutual discussion mechanism. Parties should be required to participate in the agreed-upon conciliation process within a reasonable, set amount of time before starting formalarbitration procedures. They may continue with arbitration to settle their claims or rights if theyare unable to agree.

Based on the contrasting rulings noted above, it may be inferred that if parties have stipulatedan arbitration procedure for resolving disputes, which is a requirement for using the arbitration

clause, then it must be followed before applying under Section 11 of the 1996 Act. The applicant who requests the establishment of an arbitral tribunal is not permitted to directly useSub-Section (6) of Section 11 of the 1996 Act after giving a 30-day notice under Sub-Section

(4) of Section 11 of the 1996 Act, disobeying the established arbitration process. However, it may be argued that the agreed-upon arbitration procedure is not needed to be followed since it would be futile and only a formalistic exercise if a party is clear of the position adopted by theother party as a result of the circumstances and facts.

It might be claimed that specific language in a multi-tiered dispute resolution agreement is necessary for the clause to be lawful in light of the aforementioned decisions. Therefore, partiesshould exercise greater caution when creating such a clause than when establishing a typical arbitration agreement. However, as was already said, parties frequently tack on disputeresolution provisions to their contracts at the eleventh hour without appreciating their significance, expecting that disputes won't happen. Due to this disregard for dispute resolutionprocedures, multi-tiered clauses are extremely difficult to enforce. On the other hand, one couldcontend that the drafting issues that render a multi-tiered dispute resolution clause unenforceable are primarily related to the negotiation and mediation stages, taking into accountthe pertinent cases and the widespread acceptance of expert determination as a conclusive andenforceable process similar to arbitration. The first issue in writing a multi-tiered clause is theuse of permissive language like "may" rather than obligatory language like "shall."

[9] 2009 SCC OnLine Raj 2738

[10] 8 SCC 618 : AIR 2006 SC 450 (Supreme Court of India)

[11] 2014 SCC Online Del 6602

Parties are not required to follow these procedures and may instead proceed directly to arbitration if a dispute resolution provision permits dialogue, mediation, or expert decision before arbitration. However, the paragraph should be expressly written to indicate the parties' intention if ADR processes are to be a prerequisite to arbitration. The section should provide criteria for deciding whether ADR processes preceding arbitration have been effective as wellas a description of when each stage is deemed to have failed. It is insufficient to just state thatif parties cannot resolve their differences via dialogue or mediation, they should go toarbitration. To be enforced, the provision must be specific and understandable. To achieve a fluid and easy procedure, each phase should also be outlined precisely. In other words, each step's technique should be clearly and precisely written.

Therefore, it's important to take into account all practical concerns and appropriately include them in the clause in addition to merely deciding the procedures to take when escalating a disagreement. As was already indicated, parties can create a hierarchy of conflict resolution processes that are appropriate for their particular relationship by using multi-tiered dispute resolution agreements. The usefulness of such a clause, however, primarily rests on how exactly it is written, allowing arbitral tribunals or courts to understand the parties' objectives about settling their disagreements. It is thus essential for parties to assign the work of creating the provision to an expert given the importance of wording.

ESSENTIALS AND EFFECTIVENESS OF MULTI-TIERED DISPUTE RESOLUTION CLAUSE

Arbitration, expert determination, negotiation, mediation, and multi-level conflict resolution clauses are frequently included. It is crucial to pay close attention to how the negotiation and mediation procedures are structured to secure the enforcement of such clauses in courtand arbitration proceedings. Although it has been determined in Cable & Wireless v. IBM Colman that some contractual references to negotiation or mediation without a specified method may still be enforceable, it is advised to take caution when writing a multi-level disputeresolution clause. Each stage in the ADR process that precedes arbitration must be specificallyoutlined as a need for the next step and, eventually, the start of arbitration for it to be enforceable.

To put it another way, you must finish the steps' specific instructions before going on to the next one. To do this, drafters should avoid using terms that make ADR procedures optional andinstead use language that obligates parties to follow a certain ADR protocol. For example, usingmandatory language like "disputes related to this contract can be resolved amicably..." insteadof more effective language like "Any dispute arising from this Agreement shall be resolved through negotiations between senior management representatives of the parties, and if an amicable solution cannot be reached..." Additionally, each ADR step needs to have distinct ways to end the process that step is created.

Simply said, the words used in a sentence must make it apparent when one phase stops and the next one starts. The clause cannot be enforceable without this. Drafters can add objective criteria, such as a time limit, and declare that if the parties are unable to achieve a settlement within that time range, the issue will be brought to mediation to facilitate aseamless transition between processes and settle any disagreements that may occur. Even if theprovision can have a deadline, the parties might always agree to extend it if necessary. A clause

indicating that the next course of action shall be followed if one party tells the other in writingthat discussions have failed can also be included by the parties.

A multi-tiered conflict resolution agreement must be explicit and unambiguous regarding the negotiation and mediation processes as well as the transition between each phase. As found inpertinent cases, including the phrase "good faith" in an ADR stage of the clause might lead to ambiguity and make the process ineffective. Consequently, it could be wise to steer clear of language like "attempt in good faith to resolve the dispute or claim through an ADR procedure"when crafting such a clause. In the negotiation stage, it is also important to address practical issues such as who will negotiate on the parties' behalf and where and how discussions will take place. If a settlement is achieved, the phrase should specify that it is legally binding.

Mediation, which involves a third party, requires a more intricate structure than negotiation. This means that in addition to the essential issues for successful negotiation, mediation also needs to establish procedures for appointing the mediator and determining their compensation.The process for mediation should also be outlined in greater detail than that of negotiation.

To avoid uncertainty regarding practical matters in a mediation clause, it has been suggested that organizations' mediation rules be referenced. Adopting such rules means that parties do not have to draft every detail, including the start, conduct, and termination of the proceedings,selection of the mediator, and fees and costs. This reference can also help parties avoid omittinga critical requirement, which may render the clause unenforceable.

Poorly drafted negotiation or mediation mechanisms are often responsible for problems that make a multi-tiered dispute resolution clause unenforceable. However, expert determination also requires careful consideration to ensure that the clause is enforceable. This is because expert determination is frequently used as a separate and complete alternative dispute resolution remedy that is distinct from arbitration. It is therefore important to clearly define itsrole and relationship with arbitration if it is included as a step before arbitration in a multi-tiered dispute resolution clause. To facilitate the transition between these two procedures, parties should establish a criterion, such as dissatisfaction with the decision of the expert, as demonstrated in the dispute resolution clause in the Channel Tunnel project. Similarly, Clause20 of the FIDIC Conditions of Contract for Construction stipulates that disputes shall be adjudicated by a dispute adjudication board (DAB), and if either party is dissatisfied with the DAB's decision, they may commence arbitration on or after the fifty-sixth day after giving notice. Without such a criterion, the parties will be bound by the expert's decision, and arbitration will be rendered meaningless.

It takes great attention to detail to draft a multi-tiered conflict resolution provision, especially when creating each phase and how it relates to the others. To make sure the provision can be enforced, this is crucial. The parties must indicate their desire to follow each step-in order without skipping any when a dispute resolution provision lists various methods for resolving disagreements. Without the need for further agreement, the clause should be sufficiently detailed to specify every aspect of the parties' intended behavior throughout each phase, including the transition between steps. It might be claimed that the provision should be acknowledged and enforced as the parties' option if these important factors are taken into account while it is being written.

As has been noted, implementing multi-level dispute resolution clauses can be problematic if a party doesn't follow the contract's intended method, and how the negotiation and mediation processes are written and understood will mainly determine how the disagreement is resolved. Some academics claim that because these methods are consensual and non-determinative in nature, they cannot be enforced.

The key factor in the success of a negotiation or mediation process to resolve disputes is whether the parties are willing to participate. However, it is important to recognize that the process for resolving a dispute is determined by the agreement of the parties, which is known as party autonomy. This principle is fundamental to both contract law and international commercial arbitration. Therefore, if the parties have agreed to a multi-tiered dispute resolution clause that outlines the procedure to be followed, each step of this clause should be enforced even if there is no explicit consent at each stage. The case of Hooper Bailie Associated Ltd. v.Nation Group Pty Ltd. highlights that what is important in these procedures is not necessarily cooperation and consent, but rather participation in a process that could potentially lead to cooperation and consent. It is also worth noting the growing use of alternative disputeresolution methods, such as mediation and arbitration, in the international business community.

ADR is a technique for settling problems that don't involve the courts or arbitration, as was previously indicated. ADR is more widely used in business since it avoids drawn-out, complicated, and expensive litigation procedures. ADR is seen as a more appealing alternativeince it is thought that courts and arbitral tribunals don't always sufficiently address the core problem in commercial conflicts. While the primary objective in contemporary business interactions is to retain the contractual connection, courts or arbitral tribunals may not preserve the dynamics of the contract. Successful conflict resolution in these situations entails that bothparties gain from the settlement.

Therefore, including clearly defined Alternative Dispute Resolution (ADR) clauses that include negotiation or mediation techniques shows that both parties' preferences and the needs of the global business community are taken into account. The aforementioned circumstances can be used to draw the following broad conclusions. First off, completing the ADR procedures beforemoving on to arbitration is a procedural need in a properly drafted multi-tiered dispute resolution agreement, and so satisfying this requirement pertains to the validity of the claim.

Therefore, the courts may suspend the arbitration proceedings in favor of an incomplete ADRstep, over the protest of the other party, if one party skips the earlier dispute resolution processesand submits the matter directly to arbitration. The arbitral tribunals may also decline to acceptthe arbitration request in such cases. Second, if

litigation rather than arbitration is the last stepin a multi-tiered dispute resolution agreement, the courts may stay the lawsuit in favor of theskipped ADR procedures.[12]

(ii) According to court decisions, regardless of whether they are used, ADR clauses must be written in a binding and "sufficiently certain" way to be enforceable. Although an ADR provision's enforceability can be determined by its text, a court's interpretation will decide howdetailed the clause is. When mediation is incorporated in a multi-tiered conflict resolution agreement, it is typically seen to increase its enforceability, provided the language is correctlydrafted. The Cable & Wireless v. IBM ruling elevated mediation to a useful dispute resolutiontechnique by recognizing ADR references as distinct agreements equivalent to arbitration agreements.

The courts generally do not view negotiation as a distinct method of resolving disputes, exceptin one particular case. This is because agreements to negotiate are not seen as enforceable, since they do not create legally binding obligations. Some argue that even when parties agree to negotiate "in good faith," it is still uncertain whether they are truly committed to resolving. However, it could be argued that if parties include a clear and binding clause in their agreement that begins with a negotiation stage, this should be respected as part of their autonomy to handle disputes. Furthermore, the only difference between negotiation andmediation is that mediation involves a third party assisting the parties, whereas negotiation is conducted solely by the parties themselves. In both cases, parties may reach a bindingagreement at the end of the process. In the context of alternative dispute resolution (ADR), good faith means that parties must conduct negotiations properly and constructively, including starting negotiations and participating in them, considering options proposed by the other party, proposing their options, and not withdrawing from negotiations withouta reason and reasonable opportunity for the other party to respond. Thus, good faith negotiationis not related to a party's state of mind, but rather to their behavior during the process, which can be evaluated by the courts.

INTERPRETATION OF ICC ON MULTI-TIER DISPUTE RESOLUTION

A notion that multi-tiered dispute resolution clauses requiring parties to negotiate in good faithare often legitimate and enforceable throughout the negotiation stage was backed by the rulingin United Group Rail Services Ltd. v. Rail Corp. New South Wales[13]. The ICC arbitral tribunal looks at whether the parties were required to try alternative dispute resolution (ADR) before arbitration when the claimant is accused of submitting the arbitration request without finishingthe requisite pre-arbitration formalities. If so, the tribunal evaluates the circumstances to determine whether this responsibility was met. The tribunal deems ADR obligatory on the parties if the paragraph expressly makes it a requirement.

ICC tribunals may have interpreted multi-tiered dispute resolution clauses, particularly the negotiation steps, more flexibly than court decisions. They have not addressed concerns aboutthe enforceability of negotiation and mediation procedures but have considered them as obligations of the parties before arbitration if clearly stated in the clause. These tribunals haveenforced such clauses even if the clause did not specify how and when the parties were requiredto comply with their obligation to negotiate. Additionally, specific comments related to some cases have been made, including criticism of the House of Lords' decision in Walford v. Miles.It was argued that the distinction between an agreement to negotiate a contract (unenforceable)and an agreement to use best endeavors to agree on the terms of a contract (enforceable) wasnot convincing, as a best endeavors negotiation is still a negotiation.

Furthermore, it has been asserted that the misconception in Walford v. Miles stems from the belief that negotiation only takes place in an adversarial or competitive manner. Problem-

solving negotiation, on the other hand, is a different kind of negotiation that is equally advantageous to the practice of Alternative Dispute Resolution (ADR). By utilizing the phrase"good faith," parties that agree to negotiate in good faith recognize both types of negotiation and choose problem-solving negotiation.

It would be unreasonable from a commercial standpoint for the court to reject a businessperson's stated consent to bargain. In addition to these concerns, it can be claimed thatthis judgment should not be considered in the context of the bargaining process in a multi-tiered dispute resolution clause. The negotiation phase in a dispute resolution

[12] Ashish Kumar, Multi-Tier Dispute Resolution Clause, available at https://www.scconline.com/blog/post/2022/02/21/multi-tier-dispute-resolution-clause/

[13] [2009] NSWCA 177

provision is intended to resolve the disagreement between the parties coming from an existing agreement, whereas the agreement to negotiate in this case is focused on achieving an agreement.

Despite the possibility of an agreement being reached after dispute settlement discussions, the parties' original goal is to work out their differences without committing to a particular resolution. Therefore, the negotiation stage of a multi-tiered dispute resolution clauseshould be enforced if the parties intend to participate in discussions. The Supreme Courtof New South Wales' ruling in the matter of Elizabeth Bay Developments may be analyzed from two different perspectives. First of all, based on his own decision in Hooper Bailie, JusticeGiles recognized the significance of mediation as a technique for resolving disputes and accepted the enforceability of mediation agreements provided, they are well established.

Second, due to the ambiguity of several phrases in the institution's standard protocols governingmediation, Justice Giles disregarded the parties' specific reference to mediation conducted by the ACDC.

Despite admitting mediation as an essential technique of conflict settlement, one may argue that ignoring a party's clear decision to resolve their problems through mediation within a certain framework is paradoxical and violates party sovereignty. Additionally, there were otherissues with the decision made by McKinnon, J. in Halifax Financial Services Ltd. First, it wassaid that it was regretful to treat every stage of the dispute resolution provision as being unenforceable, even in the absence of the term "shall." The determination that there was no arbitration agreement was also in conflict with the Arbitration Act of 1996, which protects allmethods of private dispute settlement, including alternatives to arbitration. Finally, it was determined that distinguishing mediation and negotiation as non-final methods was weak sinceparties might reach a binding agreement.

The defendants in the case of Walford v. Miles[14] were the owners of a business and a piece of real estate, and they had discussions with the plaintiffs about selling these assets. On March 17, 1987, they verbally agreed to stop talking to other parties and solely talk to the plaintiffs. On March 27, however, the defendants altered their intentions and opted to sell to a third partyrather than the plaintiffs. The defendants maintained that the agreement was too ambiguous tobe enforced, and the plaintiffs filed a lawsuit for damages based on the breach of the March 17agreement.

The March 17 agreement was declared unenforceable by the House of Lords because it lackedthe requisite level of precision and was only a negotiation agreement, which is not legally binding. Lord Acknew made a statement during the hearings that negotiations and agreementswere unenforceable because they lacked assurance.

CONCLUSION

Many parties choose to add multi-tier dispute resolution procedures in their contracts due to the high expense of arbitration in India. In addition, not all issues can be resolved by arbitrationsince they need specialized expertise that is not always of a legal character. To overcome this,parties may be obliged to use pre-arbitral procedural steps with the aid of an expert to settle the dispute themselves. The Singapore Court of Appeal's approach in the International Research Corp PLC v. Lufthansa Systems case, where the court ruled that mandatory preconditions must be clearly and specifically defined, and that vague or general requirements cannot be imposed as mandatory, may be more practical for Indian courts to follow.

[14] [1992] 2 A.C. 128