FROM MEDIATION TO ARBITRATION: UNDERSTANDING THE ENFORCEABILITY OF MULTI-TIERED DISPUTE RESOLUTION CLAUSES

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ABSTRACT

A multi-tier dispute resolution clause is a provision in a contract that outlines a step-by-step process for resolving disputes, usually involving mediation or arbitration before proceeding to litigation. This type of clause can be enforceable, as long as it is clear and specific, and the parties have agreed to it voluntarily. This article will discuss the enforceability of multi-tier dispute resolution clauses and the legal considerations to keep in mind when drafting and negotiating such a provision. In addition, the article will examine the legal standards for enforcing multi-tier dispute resolution clauses, including the requirements for the valid formation of the contract and the doctrine of good faith. The article will also explore the role of courts in enforcing and interpreting such clauses and the potential challenges to enforceability that may arise in certain situations. The article will conclude with an evaluation of the effectiveness of multi-tier dispute resolution clauses in resolving disputes in a timely and efficient manner.

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Keywords: *Law, Alternative Dispute Resolution, Arbitration, Conciliation, Mediation, Negotiation, Expert Determination, and Dispute Adjudication Board.*

I. INTRODUCTION

Alternative Dispute Resolution has come as an alternative to strict time-bound court adjudication for its flexible nature of the operation. It allows the participants to formulate the procedure according to the nature of their dispute. For these reasons, many parties are shifting to dispute resolution via alternative mechanisms. The law of Arbitration in India is the Arbitration and Conciliation Act, 1996 (inclusive of all the latest amendments). The enactment aims to ensure speedy dispute resolution amongst the parties with minimum intervention of judicial forums. With the advent of time, these mechanisms are gaining popularity and finding their place even in resolving disputes arising from various commercial contracts. These contracts consist of clauses to refer disputes to arbitration, and now they are going a step ahead by including 'multi-tiered dispute resolution clauses (MTDRC)'. These clauses are being used day in and out in complex construction and engineering contracts where a lot depends on constant cooperation between the contracting parties throughout the contract.

A multi-tiered dispute resolution clause provides for a chain of dispute resolution mechanisms generally comprising negotiation, mediation, expert determination, dispute adjudication boards, and finally arbitration. Clauses like this have the benefit of resolving the dispute at an earlier stage without having to take it to the Court for adjudication or referring to arbitration. There are benefits such as cost benefits, and flexible solutions and the parties' commercial relationship is likely to survive post the resolution and there are no hard feelings. This situation can get complicated if the clauses are not complied with by one of the parties where they deliberately try to surpass and invoke the arbitration clause. Another crucial point to be noted about these clauses is the drafting. If the wordings adopted are unclear, then it can easily lead to uncertainty and unenforceability.

This article aims to provide a simplified understanding of multi-tiered dispute resolution clauses by referring to the nature of these clauses, and different opinions expressed by courts and tribunals in India. An attempt is also made to discuss the difficulties faced in the enforceability of these clauses due to improper drafting. Further, the authors suggest ways to better implement

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these clauses giving primacy to *party autonomy*. The authors also present the stance of the International Jurisdiction of *Singapore* for comparative purposes.

II. DEFINITION

Multi-tiered Dispute Resolution Clauses are synonymously also known as “escalation”, “multi-step”, and “ADR first” clauses. By these clauses, the parties have an inherent consensus that whenever a dispute arises between them, they shall resolve it by following the chain of mechanisms finalized such as negotiation, mediation, expert determination, and dispute adjudication boards before referring the dispute to arbitration. When one of the modes of resolution is unsuccessful, then the dispute escalates onto the next mode of resolution, and this is how the chain goes on until the disputes have been amicably resolved, with arbitration being the last resort.

Arbitration, as a procedure, is time taking and costly, whereas multi-tiered clauses are cost-effective and less time-consuming. These clauses enable the resolution of disputes without needing to approach any Court or refer to arbitration. Besides that, it allows the participants to continue having business relationships through this cooperative method of dispute resolution. These clauses nowadays are being widely used in commercial contracts, more specifically construction contracts. In contracts like these different disputes may arise and having a multi-step clause in place aids the parties by rendering suitable solutions for these different disputes.

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Multi-tiered dispute resolution clauses come with their own set of drawbacks. Generally, clauses for dispute resolution find their place at the bottom of the contract and are added last minute without thorough negotiation. In a situation like this, it is very much possible to find a loosely-drafted multi-step clause which due to its structure may result in them being regarded as unenforceable.

III. DIFFERENT STEPS

The term alternative dispute resolution is defined by Merriam-Webster's dictionary[1] as a 'forum or means for resolving disputes that exist outside the state or federal judicial system'. It can also be defined as a 'procedure for settling a dispute by means other than litigation'. The most famous methods are mediation, arbitration, conciliation, negotiation, and transaction. All these methods have a common principle i.e., to enable parties to find amicable solutions to their disputes outside the traditional legal/court proceedings.

As discussed above, the following methods form part of the hierarchy in multi-tiered dispute clauses:

(a) Negotiation: Negotiation as a process can be defined as a *'formal discussion between the parties to reach an agreement without third-party involvement'*. It is non-binding, the least expensive, and the least disruptive. If drafted and used effectively the dispute can be resolved in the first stage of multi-tiered dispute resolution itself.

(b) Mediation: Mediation in Cambridge Dictionary[2] has been defined as *"the process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems."* It is thus, a process in which a neutral third party *(referred to as a 'mediator')* aids parties in dispute to reach an agreement. If the parties opt for mediation as a mode of dispute resolution then they may establish their procedure or choose to comply with already existing rules formulated by institutions such as the Indian Institute of Arbitration and Mediation, and the International Chamber of Commerce.

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(c) Expert Determination: Expert determination as a process has been defined by WIPO as *"a procedure in which a dispute or difference between the parties is submitted by agreement of the parties to one or more experts who make a determination on the matter*

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[1] MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/alternative%20dispute%20resolution#:~:text=%3A%20a%20forum%20or%20means%20for,state%20or%20federal%20judicial%20system (last visited Sept. 22, 2022)

[2] CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/mediation (last visited Sept 22, 2022)

referred to them. The determination is binding unless the parties agree otherwise"[3]. One may note here that the decision rendered by expert determination is binding like that of arbitration; however, there are two differences between these methods. Firstly, the arbitrator is immune from liability arising out of negligence, whereas, an expert is not immune. Secondly, the arbitration award is enforceable, but, the enforceability of an expert decision depends on Court proceedings if the parties choose not to abide by it voluntarily.

(d) Dispute Adjudication Boards: Dispute Adjudication Boards are established under an Agreement, and are in place during the entire duration of the Agreement. Peter H.J. Chapman[4], Chartered Civil Engineer & Barrister in London, defines a dispute board as a *'job-site dispute adjudication device, typically comprising three independent and impartial persons selected by contracting parties'.* According to Chapman, the significant difference between Dispute Boards and other alternative dispute resolution techniques is that a '*dispute resolution board is appointed at the commencement of a project, and by taking regular visits to the site, is actively involved throughout construction.'* These boards are extensively used in construction and engineering contracts by the parties and are preventive and restorative.

(e) Arbitration: Arbitration is a dispute resolution process alternate to State or Federal Courts, where the parties consensually adopt for their dispute to be resolved by an impartial third party (*known as 'arbitrator'*). The parties have the liberty to appoint either a sole arbitrator or a three-member tribunal wherein both the parties appoint one arbitrator each and they in turn appoint the "presiding arbitrator". WIPO has defined arbitration as follows: "*Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution*

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[3] WIPO, https://www.wipo.int/amc/en/expert-determination/what-is-exp.html#:~:text=Expert%20determination%20can%20operate%20on,arbitration%2C%20mediation%20or%20court%20case.(last visited Sept. 22, 2022)
[4] FIDIC.ORG, https://www.fidic.org/sites/default/files/25%20Dispute%20Boards.pdf (September 22, 2022)

procedure instead of going to the court.[5]*"* Even though arbitration is consensual, it has its binding effect due to the legal recognition it has received because of International conventions, national arbitration laws, and institutional arbitration rules which facilitate the enforceability of both arbitration agreements as well as arbitral awards. For example, India is a signatory to New York Convention and Geneva Convention and as a reason the Foreign Awards are enforceable in India subject to certain conditions enshrined under Sections 48, and 57 of the Arbitration and Conciliation Act, 1996.

IV. DRAFTING MULTI-TIER DISPUTE RESOLUTION CLAUSES

As has already been discussed above it is not unusual to find dispute resolution clauses like these that provide different steps of dispute resolution before referring the disputes to arbitration. The enforceability of these clauses largely depends on the way they have been drafted. Some of the basic principles to be kept in mind while drafting are:

(a) The language of the clause must be clear, and unambiguous;
(b) The clause should not make use of terms like *"may"* which indicate the tier-system to be an option for the participants and not a mandatory obligation;
(c) The clause should be detailed, and define or identify the authorities (along with their occupation/ position) to whom the matter should be referred in specific tiers like negotiation, conciliation, or mediation;
(d) The clause should specify a timeline during which good faith negotiations or conciliation will be undertaken by the parties, failing which either party can refer the dispute to arbitration;

A well-drafted clause makes the job halfway easier for the Courts and is thus, the most effective solution to enable multi-tier dispute resolution clauses. Reference is made below to practical clauses which find their place in some of the commercial contracts.

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[5] WIPO, https://www.wipo.int/amc/en/arbitration/what-is-arb.html (last visited Sept. 23, 2022)

Practical Example (1):

1. DISPUTE RESOLUTION

1.1 Dispute Resolution

Any dispute, difference or controversy of whatsoever nature regarding the validity, interpretation, implementation, or the rights and obligations arising out of, or in relation to, or howsoever arising under or in relation to this Agreement between the Parties, and so notified by either Party to the other Party **("the Dispute"**) shall be subject to the dispute resolution procedure set out in this Article. It is specially clarified here that in case of any ambiguity regarding the Works, the practices existing at the time of submission of the proposal as per Good Industry Practice would prevail.

1.2 Direct discussion between Parties

The Parties agree first any Dispute that may arise between them shall be first submitted for direct discussion between the parties. For this purpose, the notice of Dispute **("the Notice of Dispute")** sent by one Party to the other Party under **Article 1.1** shall be considered an invitation for direct discussion, and it should specify a reasonable time and venue for the conducting of Negotiation proceedings. In addition, the Notice of Dispute shall specify the basis of the Dispute and the amount claimed. In the direct discussion proceedings, each Party shall be represented by their representatives/ officials or employees with sufficient knowledge and authority over the subject matter of dispute in order for the discussion to be meaningful. At the discussion proceedings, the Party that has given the Notice of Dispute shall present an offer of a settlement, which may form the starting point of discussions between the two parties during discussion proceedings.

The direct discussion meeting as stated above will be held at the Office of the Project in-charge, (Employer). The proceedings of this meeting shall be minuted by the Project in-charge, (Employer).

1.3 Arbitration or Adjudication

a. In the event that the parties are unable to resolve the Dispute through Direct discussions under **Article 1.2,** the Parties shall submit the Dispute for arbitration in accordance with Arbitration and Conciliation Act, 1996. There shall be a board of 3 (three) arbitrators of whom 1 (one) shall be appointed by the (Employer), 1 (one) shall be appointed by the (Contractor/Supplier) and the third shall be appointed by the 2 (two) arbitrators appointed as aforesaid.

b. The arbitration proceedings shall be conducted in the English language only.

c. The cost incurred on the process of the arbitration including inter alia the fees of arbitral tribunal and cost of proceedings shall be borne by the Parties in equal proportions. Each Party shall bear its own legal fees incurred as a result of any Dispute under this Article.

d. The Arbitration shall be conducted at (specified place).

e. If any dispute goes to the court of law, the jurisdiction of the court shall be the District Court (same place as above).

Practical Example (2):

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1. LAW AND ARBITRATION

A. The provisions of this Agreement shall be governed by, and construed in accordance with Indian Law

B. (i) Any dispute, controversy, or claims arising out of or relating to this Agreement or the breach, termination, or invalidity thereof shall be settled by arbitration in accordance with provisions of the Arbitration and Conciliation Act, 1996.

(ii) If at any time during the progress of Works, **THE PARTY** feels aggrieved by any action or procedure adopted by (Employer) which in the opinion of **THE PARTY** is not in accordance with this Agreement, then **THE PARTY** shall first approach the concerned

Project in charge of (Employer) for resolution of the same, and on the failure to resolve which shall approach the Managing Director in writing, clearly specifying the item/ items of dispute for Conciliation, who shall give a decision on the issue within 24 days of receipt of the letter in writing. In the event of non-settlement of the issue even afterwards, the dispute shall be resolved as follows:

(iii)The aggrieved party shall give a notice to the opposite party in writing, specifying the items of dispute and the efforts made till then to resolve the same and the failure of the process to sort out the issues and request for initiation of Arbitration Proceedings in accordance with the Arbitration Clause of this Agreement and shall nominate an Arbitrator designate from his side.

(iv)The arbitral tribunal shall be composed of three arbitrators, the Employer shall appoint one arbitrator, **THE PARTY** shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator, who shall act as the coordinator/ Umpire. The procedure shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(v) The place of arbitration shall be 'X' and any award whether interim or final shall be made and shall be deemed for all purposes between the parties to be made, in 'X'.

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(vi)The arbitral procedure shall be conducted in the English language and any award or awards shall be rendered in English. The procedural law of the arbitration shall be the Indian Law.

The arbitration award shall be final and conclusive and binding upon the Parties, and the Parties shall be entitled (but not obliged) to enter judgment thereon in any one or more of the highest courts of jurisdiction. The parties further agree (to the maximum extent possible and allowed to them) that such enforcement shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 and neither Party shall seek to resist the

enforcement of any award in India on the basis that award is not subject to such provisions.

C. Notwithstanding anything contained in this agreement. Parties agree that:

(i) The Employer reserves the right to invoke Arbitration provisions under the Contract Agreement

(ii) In the event the Employer decides to invoke Arbitration provisions at the request of **THE PARTY**, under the Contract Agreement with **CLIENT,** all and any expenditure, or cost incurred by Employer towards Arbitration proceedings shall be reimbursed by **THE PARTY**, and **THE PARTY** agrees to give its unequivocal consent to abide by the outcome of the said Arbitration proceedings.

(iii) In the event of the initiation of arbitration proceedings under the Contract Agreement either by Employer (as brought out above) or by the **CLIENT**, at any time during the performance of the Contract, Employer reserves the right to hold up such amounts as involved in the dispute, without any interest, from any amounts due and payable to **THE PARTY** under this Agreement or any other agreement with Employer, till such time the dispute is completely resolved with the **CLIENT**.

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V. ENFORCEABILITY

Even though these clauses are widely used in commercial contracts (more specifically complex construction contracts) there exist differences of opinion between arbitration tribunals, courts, experts, etc. For comparison purposes, reference is made to the international regime of *Singapore.*

(a) Arbitration regime in Singapore *vis-a-vis* tiered dispute resolution clause: Before deliberating about the enforceability of the multi-tiered dispute resolution clause in the International Jurisdiction of Singapore, it is equally important to understand the

legislations that govern arbitration in general. The three main legislations that govern both domestic and international arbitration in Singapore are International Arbitration Act (IAA), The Arbitration Act (AA), and The Arbitration (International Investment Disputes) Act[6].

International Arbitration Act (IAA) gives effect to the Model Law on International Commercial Arbitration **(the Model Law)** adopted by UNCITRAL **(United Nations Commission on International Trade Law)** and also gives recognition to foreign arbitral awards by incorporating the **New York Convention.** On the other hand, the Arbitration Act (AA) deals with arbitrations that are not international and gives supervisory powers to Singapore Courts when compared to IAA like discretion to grant a stay of the arbitral award. The Arbitration (International Investment Disputes) Act concerns itself with the United Nations Convention on Settlement of Disputes between States and Nationals of other States. In short, it can be termed an 'inter-state dispute resolution law'.

On arbitrability of disputes, a similarity can be noted here i.e., like various other common law jurisdictions, matrimonial and criminal issues are not considered arbitrable. Furthermore, the Singapore Court of Appeal in a leading case has observed that 'matters relating to insolvency are non-arbitrable'[7].

On enforceability of multi-tiered dispute resolution clauses, a reference is made to the landmark decision in *International Research Corp PLC vs. Lufthansa Systems Asia Pacific Pvt. Ltd and anr*[8]. The Court of Appeal, in this case, upheld the 'mandatory' nature of these clauses by observing '*that if the steps of negotiating or mediating are pre-conditions to arbitration, and those steps are not taken by the parties, a tribunal will lack*

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[6] Ashish Chugh, Danitza Hon and James Kwong, *Baker McKenzie International Arbitration Yearbook 2021-2022-Singapore*, A BLOG BY BAKER MCKENZIE (Dec 7, 2022, 4:30 P.M), https://bakermckenzie-globalarbitrationnews-wordpress.onistaged.com/2022/01/01/baker-mckenzie-international-arbitration-yearbook-2021-2022-singapore/

[7] Larsen Oil and Gas Pte Ltd vs. Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore), [2011] 3 SLR 414.

[8] [2014]1 SLR 130

jurisdiction to determine the dispute[9]*'*. The Singapore Court of Appeal further applied the principles laid out by them in another decision *HSBC Institutional Trust Services (Singapore) Ltd vs. Toshin Development Singapore Pte Ltd*[10] (**"Toshin"**). The disputed question in *Toshin* was about the validity and enforceability of an express term obliging parties to 'negotiate in good faith'. The appellant contested the clause to be uncertain and unenforceable, whereas, the Court of Appeal disagreed and held that the *'said obligation was certain and capable of being enforced*'. It made a note of some requirements such as: '*(i) duty of parties to act honestly; (ii) duty to observe accepted commercial standards of fair dealing in performance of identified obligations inclusive of duty to act fairly, having regard to legitimate interests of the other party.'* The Court of Appeal further opined that '*the choice made by contracting parties on how they wanted to resolve potential differences between them should be respected, and Courts should not be overly concerned with the inability of the law to compel parties to negotiate in good faith to reach a mutually acceptable outcome'*.

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The Singapore Court of Appeal in another case[11] has ruled on the enforceability of 'Interim Measures' in a multi-tier dispute resolution clause. In this case, the parties' relationship was governed by the principles of Conditions of Contract prescribed by the International Federation of Consulting Engineers (commonly known as FIDIC, an acronym for the French name Fédération Internationale des Ingénieurs-Conseils). During the project disputes arose between the parties and as per the dispute resolution clause, the disputes were referred to the Dispute Adjudication Board (DAB) according to *clause 20* of the Conditions of Contract. As per the said clause, if a party fails to comply with the decision of the Board, then the other party without prejudice to any other rights it may have can refer the dispute to Arbitration. The Appellant accepted all the decisions rendered except Decision No. 3 which required the appellant to pay the amount determined by DAB to Respondent, and on continuous failure to pay the said amount, Respondent commenced arbitration under *clause 20*. The Court while deciding on the

[9]MORGAN LEWIS STAMFORD https://www.morganlewis.com/-/media/files/publication/marketing-material/supplemental-info/mlstamford_arbitrationsingapore_june15.ashx, (last visited Dec. 7, 2022)
[10] [2012] SGCA 48
[11] PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2015] SGCA 30

liability of the Appellant and enforceability of interim award observed that: "*Interim award only dealt with the Appellant's obligation to pay adjudicated sum and comply with DAB decision no. 3 following provisions of the contract. More importantly, if the final award on merits is rendered in favour of the appellant it would not alter the Interim Award or render it any less final even though it would alter the financial effects that flow from the interim award. This however did not affect the Appellant's rights to have merits of dispute reviewed in arbitration'.*

The Court of Appeal also elaborated on different kinds of awards that may be rendered by an arbitral tribunal such as interim awards and provisional awards. It stated that an interim award is rendered by a 'tribunal during the proceedings and disposes of a preliminary issue or claim before adjudication of all other issues referred to arbitration'. On the other hand, a provisional award is one which the 'Tribunal issues to protect one party from incurring any damage during the course of proceedings'.

Thus, for *Singapore,* from the perusal of the above-mentioned case laws, it is aptly clear that the parties must first attempt to resolve their disputes through tiered steps before they can commence arbitration. After inserting a multi-tiered dispute resolution clause in their contract the parties must ensure they comply with these pre-conditions and that they do not render them onerous. For example, in *Lufthansa (supra)* the dispute resolution clause prescribed the dispute to be escalated via three committees comprising senior officials viz., Respondent's Director-Customer Sales, its Managing Director, etc. before it could be referred to arbitration. There were some meetings between the parties; however, there was no attempt from the parties to abide by the procedure laid down under their contract for the commencement of the arbitration. Alas, the Court of Appeal as a consequence held that the tribunal's jurisdiction in this scenario is ousted.

(b) Arbitration regime in India *vis-a-vis* tiered dispute resolution clause: As discussed at the beginning itself the Arbitration and Conciliation Act, 1996 ("**the Act"**) governs domestic and international arbitrations in India. For understanding the enforceability of multi-

tiered dispute resolution clauses in India reference is made to different opinions of Courts in India.

In *Simpark Infrastructure Pvt. Ltd vs. Jaipur Municipal Corporation*[12], Rajasthan High Court had to deal with the issue of complying with the 'condition precedent for appointment of arbitrator'. The Dispute between *Simpark* and *JMC* arose out of the Development Agreement signed between them for the 'construction of multi-level parking and commercial projects'. As per the agreement, *JMC* was obligated to deliver peaceful possession of the construction site free from all encumbrances to the applicant (*Simpark*). The process of delivering the possession kept on delaying and this led to the invocation of arbitration by *Simpark* ('clause 16.3'). Subsequently, an application for interim measures under *Section 9* of the Arbitration and Conciliation Act, 1996, was filed and the same was allowed in favour of the applicant and against the Respondent (*JMC*). The Respondent, on the other hand, filed objections stating that this application is premature and that the applicant has not taken recourse to amicable settlement procedure under 'clauses 16.1 & 16.2' which are condition precedent for appointment of the arbitrator. The applicant contended that the mere presence of a clause dealing with amicable settlement through conciliation does not act as a restraint for the appointment of an arbitrator. The High Court while deciding this issue observed as follows: "*Where an agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed. In the present case, Clause 16.1 for amicable settlement to resolve the dispute in accordance with the procedure set forth in Clause 16.2, is a condition precedent for invoking Clause 16.3 for appointment of an Arbitral Tribunal consisting of three Arbitrators out of the panel of five possible Arbitrators made out by the Authority, has not been followed, therefore, the present arbitration application is premature.*" Rajasthan High Court, thus holding the clause to be 'mandatory', dismissed the petition filed by the applicant (*Simpark*).

[12] 2013 (3) RLW 2133 (Raj)

The Delhi High Court expressed a contrary opinion in the case of *JK Technosoft vs. Ramesh Sambamoorthy*[13] where the High Court echoed the law laid down by its co-ordinate bench in *Ravindra Kumar Verma vs. BPTP Ltd*[14]. The High Court gave two main reasons in this case for not regarding multi-tiered dispute resolution clauses as 'mandatory'. "The *first reason* given by the Court is that if the arbitration clause is read as mandatory with respect to the prior requirement to be complied with before invoking the arbitration clause it would result in serious and grave prejudice to a party who is seeking to invoke arbitration because the time consumed in conciliation proceedings is not excluded from limitation aspect, thus, this would amount to the bar of limitation restricting either parties right to refer the dispute for arbitration after limitation has expired. Therefore, if the precondition of mutual discussion is treated as mandatory, valuable rights will get extinguished. The *Second reason* given by the High Court is *Section 77* of the Arbitration and Conciliation Act, 1996. This section of the law states that in spite of conciliation proceedings going on, the existence of the same will not prevent any of the parties to exercise their rights as per the law when either of the parties considers it necessary for preserving their rights. Thus, placing heavy reliance on this reasoning given in *Ravindra Kumar (supra)*, the Court dismissed the petition and regarded multi-tiered clauses to be *'directory'* in nature".

Strikingly distinct from the opinion expressed by Delhi High Court in *JK Technosoft (supra)*, the Hon'ble Supreme Court of India while dealing with the aspect of *'computation of limitation vis-a-vis time spent for exhausting pre-arbitral steps'* carved out a beneficial interpretation of law stating that the *'time spent in pre-arbitral steps shall be excluded from the period of limitation.*[15]*'* The Apex Court in the said judgment observed as follows: "*Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases, the entire negotiation history between the parties must be*

[13] 2017 SCC OnLine Del 10813
[14] 2015 (147) DRJ 175
[15] Geo Miller and Co. Pvt. Ltd vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd, (2020) 14 SCC 643.

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specifically pleaded and placed on record. The Court upon careful consideration of such history must find out what was the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim". [Para 28]

"*Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period of time to refer the dispute to arbitration merely on account of the respondent's representations and reminders to the respondent in the meanwhile."* [Para 29]

The conjoint reading of both the paras above explains the ratio laid down by the Supreme Court which is that *'in cases where the claimant has not asserted its claim on accrual of a right, the period of limitation stands excluded till reaching a "breaking point", but not otherwise'*. Further, for sustaining a claim for suspension of limitation period on account of good faith negotiations the claimant will have to 'specifically plead and place the record of negotiation history before the Court'. Therefore, though, the judgment distinguishes between the claimant who asserts his claim and who does not, it is possible for the Courts to read down this finding in the future to avoid situations where a claimant is discouraged from participating in good faith negotiations/ mediations with fear of the limitation period running out. A classic example of expanding the ambit of the law laid down by the Supreme Court of India, in this case, is the recent ruling by Delhi High Court. The High Court *(decided on 31-01-2022)* observed that *'time spent in mediation*

would be excluded for the purpose of calculating period of limitation for invoking arbitration'[16].

The Supreme Court once again in the case of *Centrotrade Minerals vs. Hindustan Copper*[17] enforced a foreign award and upheld the validity of the two-tier arbitration clause. The contract between *Centrotrade* and *HCL* was for the delivery of the 15,500 DMT of copper concentrate to *HCL*. Disputes arose post-delivery about the dry weight of the concentrate and *Centrotrade* invoked the arbitration clause. The contract consisted of a two-tiered arbitration clause according to which the first arbitration was in India, wherein the unsatisfied party could appeal through the second arbitration to be conducted by ICC in London. *Centrotrade* aggrieved by nil Award preferred appeal in London. While the proceedings were ongoing and pending, *HCL* applied to Rajasthan District Court challenging the arbitration clause and seeking an anti-arbitration injunction against *Centrotrade*. The District Court refused to interfere, however, the State High Court granted an ex-parte stay order in *HCL's* favour which was vacated by the Supreme Court in 2001. Subsequently, a monetary award was passed in favour of *Centrotrade* through the ICC arbitration in London. An application for its enforcement was filed before Calcutta High Court which was allowed due to no challenge proceedings made by *HCL*. Later in appeal, the order was vacated by a division bench on the basis that the ICC award cannot be treated as a foreign award and that both arbitrations in India and London have concurrent jurisdiction. Awards were deemed to be 'mutually destructive'. The matter then came before a division bench of the Supreme Court consisting of Justice SB Sinha and Justice Chatterjee. The former disagreed stating that such a two-tiered arbitration was violative of public policy, whereas, the latter came to a finding that the clause is enforceable (*referred to as Centrotrade 1*[18]). Due to this difference of opinion matter was again referred to a *three-judge bench*[19] of the Supreme Court, which ruled that *parties are free to enter into an agreement that provides for non-statutory remedies so that their disputes can be resolved without resorting to court procedures. It also observed*

[16] Alstom Systems India Pvt Ltd vs. Zillion Infraprojects Pvt Ltd
[17] 2020 SCC OnLine SC 479
[18] (2006) 11 SCC 245
[19] (2017) 2 SCC 228.

that the act does not prohibit a two-tier system nor does it exclude party autonomy, and thus there could be no difficulty in honouring party autonomy and accepting their agreement (referred to as Centrotrade 2).

After the clause was held to be enforceable, it again came before another three-judge bench. *HCL* contended that it was "unable to present its case" before ICC, London and that despite the ex-parte stay, the arbitrator proceeded with the arbitration. Also alleged that it was prevented from participating in arbitration due to intervening factors like 9/11 and no extension was given. On the other hand, *Centrotrade* argued that there was no denial of natural justice. The Bench while dealing with this issue concluded that *'ample opportunity was given to HCL to come before the arbitrator but HCL refused to do so. It noted that the arbitrator was extremely fair and kept their jurisdictional objections alive. It also noted that if a party failed to take necessary steps within given timelines, the arbitrator could not be faulted for having denied a party opportunity of being heard' (referred to as Centrotrade 3).* The Court thus, found that there was no denial of opportunity, no breach of injustice. Thus, the foreign Award passed in 2001 was made enforceable in India after 19 years and the two-tier arbitration clause was held to be valid in nature.

In the case of *Lite Bite Foods Pvt. Ltd vs. Airports Authority of India (decided on 08-06-2022), clause 18* was the concerned clause. According to this clause whenever a dispute or difference arose between the parties it is to be referred to a Dispute Resolution Committee (DRC) set up by the Airports Authority. If the dispute remains unresolved within 45 days then it may be referred to arbitration by appointing a sole arbitrator (to be appointed by the Tender Accepting Authority/ Airports Authority) irrespective of the arbitrator being their employee. The award of the arbitrator was not supposed to be challenged. It could be seen from the record that the moment dispute arose, the petitioner wrote a letter to the authority to appoint one retired High Court Judge as sole arbitrator, and the respondent authority objected to the same stating that it is impermissible under *Clause 18*, and as such the petitioner has to first approach DRC. In short, the controversy

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before Gujarat High Court[20] was whether such recourse was permissible or not. The Court while deciding the issue observed as follows: "*A close perusal of condition no.18 which is unequivocally accepted for which the petitioner is bound to follow is firstly requiring the petitioner to approach the Dispute Resolution Committee (DRC) setup at Airports with a written application and then if the dispute is not resolved within 45 days then the question would come up for referring the matter to the sole arbitrator to be appointed by the Tender Inviting Authority. So the question of appointment of an arbitrator would come at a later stage and not before approaching DRC. Now for approaching DRC, terms are clearly set up and certain steps to be taken by the petitioner and this condition was very much prevailing right from day one when the petitioner entered into the contract and as such, without complying with the requirement of approaching DRC, the petitioner cannot avoid the steps and directly request for appointment of an independent arbitrator and if this be entertained it would be allowing the petitioner to circumvent the process of terms which are clearly deduced in writing and well accepted by the petitioner. The Court in absence of challenge to these terms being arbitrary or unconstitutional cannot allow the parties to circumvent the terms which are well accepted and emphasized and as such, the Court is of the considered opinion that the question of appointing an independent arbitrator in this background fact would not be safe to be answered and if the same would tantamount to allow the parties to go and flout the terms which are specifically understood to be complied with, the Court cannot be a party to such kind of strategic move of the petitioner in the absence of any challenge.*" Thus, the petition filed was dismissed as 'devoid of merits'.

The recent judicial precedents reflect that India has followed the general rule of interpretation wherein weightage was given to *party autonomy,* however, the Courts in India in certain circumstances also waived the requirement and regarded these clauses as 'non-mandatory':

(a) The Delhi High Court[21] in a case while interpreting the arbitration clause has observed that the said clause was nothing but an *"empty formality"*. Concerned clauses dealing

[20] INDIAN KANOON, https://indiankanoon.org/doc/73537576/ (last visited Jan. 5, 2023)
[21] Siemens Ltd vs. Jindal India Thermal Power Ltd, 2018 SCC OnLine Del 7158

with the arbitration in this respective case were *Clause 11* and *Clause 14* according to which 'no procedure for amicable settlement was prescribed *per se*. All it said was that *the parties hereto shall endeavor to resolve amicably between themselves all disputes arising in connection with this work order. If the disputes remain unresolved within thirty (30) days of the matter being raised by either party, then either party may refer the dispute for settlement by arbitration.*' The High Court referred to various precedents relied on by both the parties and concluded as follows: "*Clauses 11 and 14 of the agreements between the parties merely state that the parties shall endeavor to resolve amicably all disputes. It provides a period of 30 days for trying to resolve the said disputes. Other than that no specific procedure is prescribed as to how the parties are to try and resolve the disputes. As per the judgment of the learned Single Judge of this Court in the above case of Ravinder Kumar Verma vs. BPTP Ltd., the procedure for amicable settlement as provided in said clauses 11 and 14 of the Agreement would be merely directory and in case of failure of petitioner to abide by those terms, no fault could be found in the act of the petitioner in invoking the arbitration clause and filing the present petition."* [Para 19].

(b) In another case of *Rajiv Vyas vs. Johnwin s/o. George Manavalan*[22], High Court of Bombay permitted '*simultaneous conciliation during the pendency of an application for appointment of arbitrator*'. *Clause 14* of the shareholders' agreement provided for good-faith negotiations, conciliation, and arbitration. According to this the parties in dispute must first attempt to resolve their disputes through good faith negotiations. If the resolution is not possible within thirty (30) days after the date of receipt of the Dispute Notice, such Dispute shall be referred to conciliation. If both good faith negotiations and conciliation have not been able to resolve the dispute, then it shall be referred to arbitration. The Court rejected reliance placed on *Tulip Hotels Pvt. Ltd and anr vs. Trade Wings Ltd and ors,* by the Respondent stating that the same is not relevant. It further noted that: "*The counsel for the applicant, has agreed to refer the matter in the first instance to a conciliator in accordance with provisions of the said Act. I see no reason why then the cumbersome procedure suggested by Mr. Jagtiani ought to be followed*

[22] 2010 (6) Mh.L.J 483

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namely, rejecting this application under Section 11, leaving the parties to refer the matter to a conciliator, and in the event of the same being unsuccessful and the parties not resolving the disputes before the conciliator requiring the applicant to make a fresh application under Section 11. This merely leads to multiplicity of proceedings with no benefit whatsoever for the parties. In my opinion, the correct procedure which would meet the ends of justice would be to make an order under Section 11 but subject to the parties complying with any conditions precedent thereto including first referring the disputes to the conciliator as provided in the agreement. This course would satisfy all the terms and conditions of the arbitration agreement contained in clause 14 of the Shareholders Agreement." [Para 7] The Court, thus, refused to regard non-compliance of pre-arbitral steps as a bar to instituting application for appointment of the arbitrator and observed that the proceedings could run parallelly.

(c) In the case of *Techman Shelter Pvt. Ltd vs. Vinay Chaudhary*[23], the Delhi High Court has observed as follows: "*Even if the arbitration is agreed to be preceded by mediation, the fact remains that the parties have agreed to arbitration. Once such an agreement exists, the Court would be empowered under Section 9 and any party entitled to relief under Section 9 would be entitled to approach the Court. Merely because the parties had agreed to precede arbitration with mediation cannot prohibit the remedies available to them in law and the clause in the agreement prohibiting the parties from approaching the Court before mediation is found to be against the public policy. The interim measures to which a party may be entitled to may become infructuous if the filing of the petition under Section 9 has to be deferred during mediation. The parties had not agreed to any time schedule also for mediation."* [Para 9].

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Therefore, a perusal of the instances mentioned above puts forth that the scene about the enforceability of multi-tiered dispute resolution clauses in India is no longer hazy but something which can be briefly classified into two: (1) Courts conducting an in-depth analysis of the Contract and upholding 'party autonomy' (2) Courts waiving the clause if it is in the shape of a

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[23] 2009 SCC OnLine Del 2808

'mere formality' and, abiding by the same renders no 'fruitful solution'. This approach balances both the aspects of party autonomy as well as efficient dispute resolution.

VI. Applicability of Doctrine of Good Faith to MTDRC

When a party enters into a contract, it makes choices among opportunities and commits resources to the choices made; in doing so, it creates expectations in its contracting partner. The Multi-Tiered Dispute Resolution Clause is an obligation of the parties to the contract. Circumventing this clause will result in a willful violation of the terms of the contract. *The doctrine of good faith is an embodiment of the basic principle of contract law – the protection of reasonable expectations. Good faith is the relation between the express terms of the contract and the obligation of good faith*. The doctrine of good faith generally applies to the performance and enforcement of contracts, including dispute resolution clauses. In the context of a multi-tier dispute resolution clause, the doctrine of good faith would require all parties to act honestly and fairly in the negotiation, execution, and performance of the contract, including the dispute resolution process outlined in the clause.

This means that the parties should use the dispute resolution process in a genuine effort to resolve disputes, not just as a formality or delay tactic. They should also participate in the process in good faith, by providing any requested information or attending any meetings or hearings in a timely and cooperative manner.

If a party is found to have acted in bad faith in the dispute resolution process, this may be considered a breach of contract and could potentially result in the enforcement of the clause being waived or delayed.

VII. SUGGESTION

Before closing the article the authors would like to part with suggesting ways to better implement a tiered dispute resolution system in India. The suggestions are divided into three subheads.

(i) To the Bar: The wording of the multi-tiered dispute resolution clauses is very crucial for its enforceability. Therefore, while drafting these clauses special attention is to be given unlike

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adding it at the last moment. Each clause should clearly define the steps or tiers of the dispute resolution process including the order in which they should be followed. Attention shall be devoted to even details like 'time limits' for each step in the process, such as the time frame for submitting a claim or requesting mediation. Exhausting the steps should be 'mandatory' and not optional. The use of words like 'may' should be avoided. The transition from one step to another should be as smooth as possible (For Example: If the dispute cannot be solved by way of Negotiation within 15 days, the dispute shall be submitted to mediation). The clause should include a provision for binding arbitration or a final and binding decision by a third-party expert in the event that the dispute cannot be resolved through the initial steps. Should also consider including a provision for confidential treatment of any information shared during the dispute resolution process. The draftsman (advocate(s)) must make sure that the clause is easily understood by all parties and that any language used is clearly defined in the contract. If parties are from different countries, should consider including a choice of law and forum selection clause specifying the governing law and jurisdiction for resolving disputes.

(ii) To the Bench: By analyzing the aforementioned cases, it could be argued that the opinion of the Courts has been divided between regarding it (*multi-tiered dispute resolution clause)* as 'mandatory' and/ or 'directory', according to the circumstances of the case. For this, the authors here would like to draw attention to the case of Geo Miller (*supra),* and JK Technosoft *(supra).* In the former, the Hon'ble Supreme Court of India while dealing with the issue of enforceability has carved out a *'beneficial exception',* whereas in the latter the Hon'ble Delhi High Court while dealing with the same issue regarded it as 'directory' owing to the aspect of limitation and Section 77 of the Arbitration and Conciliation Act. It is the interpretation of the Hon'ble Apex Court of India which is a welcome step and helps in the advancement of effective dispute resolution in India without having to resort to the commencement of the arbitration. The lower courts in India should follow in pursuit of this ruling to help better implement and preserve cordial business relationships.

(iii) To the Legislature: Some statutes contain these provisions such as the Code of Civil Procedure, and Arbitration and Conciliation Act, however, there is no standalone legislation for Mediation or multi-tier dispute resolution in India. India however has recently introduced the

Mediation Bill (*in Rajya Sabha,* December 2021) and the bill aims to promote, encourage, and facilitate mediation, especially institutional mediation, to resolve disputes, commercial and otherwise. The Bill further proposes mandatory mediation before litigation. At the same time, it safeguards the rights of litigants to approach competent adjudicatory forums/courts for urgent relief. The mediation process will be confidential and immunity is provided against its disclosure in certain cases. The outcome of the mediation process in the form of a Mediation Settlement Agreement (MSA) will be legally enforceable and can be registered with the State/district/taluk legal authorities within 90 days to ensure authenticated records of the settlement. The Bill establishes the Mediation Council of India and also provides for community mediation.

Since India is a signatory to the Singapore Convention on Mediation (formally the United Nations Convention on International Settlement Agreements Resulting from Mediation), it is appropriate to enact a law governing domestic and international mediation, and also there is a dire need to make the process of 'mediation' binding.

VIII. CONCLUSION

By now we are clear that a multi-tier dispute resolution clause provides for a sequence through which the dispute escalates if not solved by any of the initially mentioned steps. Problems occur concerning its enforceability when the clause is not properly drafted and either of the parties tries to derail from the path agreed upon by them in the agreement. Thus, enforceability is highly contingent on factors like the effective drafting of specific terms of the contract, and the intention of the parties *(consensus-ad idem).* When the parties agree on a multi-tier dispute resolution clause they expect each tier to be legally enforceable, however, in India, 'mediation' as a step lacks the force of Law. The Mediation Bill is yet to take the shape of enforceable Law and there is a dire need to make even mediation 'binding'. Proper enforcement of this clause can provide a cost-effective and efficient means of resolving disputes. Parties should consult with legal counsel to ensure that the clause is legally binding and enforceable in their jurisdiction. Overall, a multi-tier dispute resolution clause can be a valuable tool for resolving disputes and preserving future business relationships, but the parties should take care to ensure that it is properly crafted and enforceable.

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