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Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement

By

ALEXANDER JOLLES

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1. INTRODUCTION

Multi-tier arbitration clauses are clauses in contracts which provide for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes. Such clauses typically provide for certain steps and efforts to be taken by the parties prior to commencing arbitration. These initial steps are aimed at finding an amicable settlement of disputes in order to avoid arbitration or litigation. Typically, the initial tiers of such clauses provide for a duty to enter into negotiations, sometimes requiring the attendance of top management representatives, and/or a duty to participate in conciliation or mediation[1] processes. The last tier of such clauses provides for the adjudicatory process (arbitration), which is intended to be conducted only if the efforts taken in the initial tiers have failed.

One of the key issues is to what extent the non-adjudicatory part of these clauses, i.e. the tiers providing for negotiation and/or mediation, are mandatory and enforceable. What are the consequences if a party ignores the initial tiers and files a request for arbitration without having engaged in the provided for negotiations or mediation? Are these initial steps an enforceable condition precedent to the ensuing arbitration? And who decides this issue: arbitral tribunals or courts?

This presentation is intended to outline some of the approaches that arbitral tribunals and courts have taken in dealing with these issues, and to draw conclusions for the drafting of such clauses. The main focus is on the situation under Swiss law, with a look at some other jurisdictions.

2. SWITZERLAND

There is not much case law and literature in Switzerland on multi-tier dispute resolution clauses. The discussion has focused on whether the agreement between the parties to first negotiate and mediate before arbitrating or litigating (the initial tiers) constitutes an agreement of a procedural nature, in which case it would constitute a condition precedent to arbitration and to the procedural admissibility of the claim, or whether it is an agreement of a substantive nature, like the other contractual provisions, in which case a violation of the first-tier obligations would be treated as a breach of contract with standard remedies available under contract law, but with no adverse consequences to the arbitral tribunal's jurisdiction.

Court cases in Switzerland

The following three cases illustrate the issue. The first involved a construction contract for the building of an apartment.[2] The parties had agreed that disputes arising would be decided by the courts. However, the parties undertook that, before referring the matter to the court, they would submit it to a panel of conciliators. If the parties failed to settle the matter within 30 days after the conciliators had issued a recommendation, each party could refer the dispute to litigation.

After completion of the apartment, the claimants discovered several construction defects. The parties commenced conciliation proceedings with respect to two main defects and settled

[1] These terms are used as synonyms in this paper.

[2] Cassation Court of the Canton of Zurich on March 15, 1999, published in ZR 99 (2000) No.29.

the dispute regarding these two defects. The respondents engaged in subsequent improvement works. However, when the respondents interrupted these works, the claimants filed a claim with the Zurich District Court requesting, inter alia, the remedy of all the defects, not just the two on which the parties had settled by conciliation. The respondents maintained that the court had no jurisdiction, or, if it had, it must reject the claim. The respondents argued that the previous conciliation had dealt with only two of the defects invoked by the claimants and that, with regard to other defects, the necessary condition precedent for commencement of litigation was not met.

All judicial authorities of the Canton of Zurich dismissed the respondents' argument. The Cassation Court of the Canton of Zurich decided that a conciliation or a mediation clause was an issue regarding material contractual commitments, i.e. of substantive nature, and not of jurisdictional nature, i.e. a condition precedent to jurisdiction of the court; therefore the conciliation clause was to be distinguished from a jurisdiction or arbitration clause, which produce effects of procedural nature. According to this decision, a conciliation clause is to be treated as an agreement of purely substantive nature. Consequently, ordinary courts would, despite the existence of a conciliation clause, accept jurisdiction, even if one of the parties ignored the clause. The Cassation Court pointed out that, according to the substantive nature of the conciliation clause, its violation by one of the parties may lead to the rejection of the claim or other detrimental effects arising out of substantive law. However, on this basis a dismissal of the claim based on the fact that the conciliation tier was not fulfilled, seems only conceivable if one were to consider the beginning of a conciliation procedure as a precondition to the existence of the claim itself.[3] According to the presumption that parties will usually exclude the duty to negotiate *in natura* (especially the possibility of a claim for enforcement of this duty),[4] the sanctions for a violation of the conciliation procedure will be limited to other detrimental effects arising out of substantive law.

The remaining remedies would be the withdrawal from the conciliation agreement combined with a claim for compensation of possible expenses,[5] which is of little financial interest, or a claim for damages resulting from breach of contract, which in most cases will be unsatisfactory, because it will be impossible to establish the extent of damage and the quantum. Therefore, the decision of the Cassation Court results in the absence of sanctions for the violation of the conciliation clause, by which such clauses become pure lip service.[6]

In contrast, the Zurich Court of Appeals took a different position in an obiter dictum contained in a later decision.[7] In this case, a respondent refused to co-operate in the appointment of an arbitrator. The respondent argued that the appointment of arbitrators was premature, because the parties had committed to engage in conciliation before commencing arbitration. Since the claimant had allegedly not participated in conciliation, a condition precedent to arbitration was not met. The court held that it was not its function to determine whether the requirements for arbitration had been met. It held that issues regarding jurisdiction were to be decided by the arbitrators and not by the court.[8] This statement was understood by commentators as an expression of the court's view that the issue of mandatory

[3] This should arise out of the contract by the means of interpretation, applying if necessary the principle of trust. Also not convinced by such solution Heiner Eiholzer: *Die Streitbeilegungsabrede* (Universität Fribourg, 1998), N.673.

[4] Eiholzer, cited above, N.552.

[5] Eiholzer, cited above, N.577 et seq.

[6] Considering this situation it appears to be useful to provide in mediation clauses for penalties in case of non-fulfilment.

[7] Decision by Zurich Court of Appeals of September 11, 2001, published in ZR 101 (2002), No.21, 77–81, especially p.78.

[8] See ZR 101 (2002), No.21, 78: "*Bei der Ernennung eines Schiedsrichters durch die richterliche Behörde i.S.v. Art. 12 KSG prüft die angerufenen Instanz neben ihrer Zuständigkeit und der Gültigkeit der Schiedsabrede auch die Frage, ob der Gesuchsgegner bei der Bestellung effektive säumig ist . . .. Daraus folgt aber nicht, dass die um Ernennung eines Schiedsrichters angerufene*

conciliation proceedings was a matter of procedural prerequisites to jurisdiction and not, as held in the earlier decision of the Court of Cassation, a matter of substantive law leaving the issue of jurisdiction unaffected.[9]

In a third decision of 2001,[10] the Court of Appeals of the Canton of Thurgau reviewed a situation in which the parties to a lease agreement had undertaken to submit disputes, prior to litigation, to the legal department of their common professional organisation (*Gastrosuisse*), which would be in charge of initiating conciliation and settlement negotiations. If no settlement could be reached, the parties would be referred to litigation. In an obiter dictum the court held that this undertaking would "unquestionably" have to be taken into consideration. In case of litigation, the claimant would first have to submit the dispute to the named legal department; otherwise the court, upon objection, would have to reject the claim as being inadmissible for failure to meet a procedural requirement.[11]

Swiss commentators

There are a number of different opinions to be found among Swiss commentators. Some authors take the view that the first-tier stage is a condition precedent to arbitral proceedings. As long as first-tier commitments have not been complied with, an arbitral tribunal has to treat the claim as procedurally inadmissible. However, arbitral tribunals may not decide on this issue *ex officio*, but only based on objection by one of the parties.[12]

A similar view holds that a violation of first-tier commitments does not exclude an arbitral tribunal's jurisdiction but that the tribunal should declare the request for arbitration as inadmissible until compliance with first-tier commitments. If the first-tier commitments can no longer be met, the tribunal should declare the claims as inadmissible with prejudice.[13] Another view confirms that a violation of first-tier commitments does not exclude an arbitral tribunal's jurisdiction but suggests that the tribunal should stay the proceedings until compliance with the first-tier commitments.[14]

Behörde (auch) die Prozessvoraussetzungen der Schiedsverfahrens prüft. Dies bleibt vielmehr dem Schiedsgericht vorbehalten, welche diese gleich den staatlichen Gerichten von Amtes wegen zu prüfen hat . . ." It is unclear whether the Court of Appeals intentionally commented on the qualification of the conciliation procedure as procedural condition precedent to the commencement of a judicial procedure, or whether this happened at random. However, it examined, and rejected, the claim based on a lack of jurisdiction within the context of qualification of a procedural condition precedent to the jurisdiction.

[9] Nathalie Voser, "Enforcement of Multi-tiered Dispute Resolution Clauses by National Courts and Arbitral Tribunals—the Civil Law Approach", report given at IBA Conference in Durban 2002, Committee D Session on Multi-tiered Dispute Resolution Clauses.

[10] Decision of April 23, 2001 by Court of Appeals, Canton of Thurgau; reported in ASA Bulletin 2003 pp.418–420.

[11] "*Die vertragliche Verpflichtung der Parteien, eine Streitsache vor Einleitung der Klage dem Rechtsdienst Gastrosuisse zu unterbreiten, ist im Rahmen der materiellen Beurteilung von Streitigkeiten aus dem Vertragsverhältnis zwischen der Rekurrentin und der Rekursgegnerin fraglos zu berücksichtigen: Im Fall einer Aberkennungsklage nach Art. 83 Abs. 2 SchKG müsste sich die Klägerin vor Einleitung des Prozesses an diesen Rechtsdienst wenden, andernfalls das ordentliche Gericht die Klage auf Einrede hin wegen Fehlens einer Prozessvoraussetzung als zurzeit unbegründet abweisen würde . . .*"

[12] Rüede and Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht* (2nd edn, 1993), p.27; Karl Heinz Schwab/Gerhard Walter, *Schiedsgerichtsbarkeit*, (7th revised edn, 2005).

[13] Werner Wenger, Kommentar zu Artikel 186 IPRG N 20(e), in *Kommentar zum Schweizerischen Privatrecht*, Basel, 1996).

[14] Nathalie Voser, Sanktionen bei Nichterfüllung einer Schlichtungsklausel", case note decision of March 15, 1999 of the Zurich Court of Cassation, ZR 99 (2000) No.29; *ASA Bulletin* 2002, pp.376–381.

In contrast, some authors argue that the failure to comply with the mediation commitment is irrelevant to the issue of admissibility. They treat this failure as a breach of contract with the consequences provided for in contract law (e.g. damages), but with no adverse effect on the admissibility of the claim.[15] Supporters of this view argue that requirements for admissibility of court action are a matter of public law (procedural law), aimed at ensuring the proper conduct of litigation. In contrast, agreements for pre-litigation negotiation and/or conciliation are private agreements to be treated like any other private contract. If these agreements were treated as conditions precedent to litigation or arbitration, they could result in a party being entirely excluded from access to an adjudicatory body (court or arbitral tribunal) depending on the parties' definition of the condition precedent and the circumstances under which these conditions can be met or obstructed.[16]

3. COURT CASES IN GERMANY

For the purpose of illustration, two German cases are of interest. In a decision of the German Federal Supreme Court (*Bundesgerichtshof*) of 1998,[17] the court held that a clause, under which the parties had agreed to attempt to resolve disputes arising out of a contract by settlement negotiations before commencing court proceedings, was valid under German law and that, in general, any claim brought against one of the parties by the other before the courts would be inadmissible if the settlement negotiations had not been commenced and completed. The court confirmed that, if the parties agreed on a mandatory settlement clause, both parties were obliged to co-operate in carrying out the settlement negotiations. An action brought before the courts prior to completion of an agreed settlement procedure was inadmissible.[18]

This decision was in line with an earlier decision of the same court, in which the parties had agreed, in the context of a purchase agreement regarding the take-over of a veterinarian practice, that in case of dispute the parties would first present their controversy to their local professional organisation (*Landestierärztekammer*) for conciliation prior to commencing litigation. The claimant failed to do so and argued that in the circumstances conciliation was a futile exercise, given that the respondent had shown no willingness to settle the matter in earlier negotiations. The court held that such pre-litigation conciliation clauses are valid and must be respected by the parties and the courts. Thus, as long as a party invoking the pre-trial conciliation clause had a legitimate interest in conciliation, the courts had to treat an action filed prior to the agreed conciliation as inadmissible (without prejudice) (*unzulässig*), but not as unfounded (with prejudice) (*unbegründet*).[19]

4. ENGLAND AND THE UNITED STATES

There are several well-known articles on the enforceability of multi-tier arbitration clauses under common law. This paper will not restate them but, for the sake of comparison, briefly summarise the present situation. Based on a number of authorities, it can be surmised that US state and federal courts are willing to recognise public policy favouring alternative dispute resolution. The courts are willing to enforce properly crafted mandatory mediation clauses.[20] United States courts have granted preliminary injunctions when a party has not first participated in mediation pursuant to a multi-tier clause. Courts have also granted motions to compel and accompanying requests to stay court proceedings under multi-tiered dispute

[15] Fridolin Walther, "E-confidence in e-commerce durch Alternative Dispute Resolution", *AJP/PJA*; 7/2001, p.762; Eiholzer, cited above, p.176 et seq.
[16] Eiholzer, cited above, pp.183 and 185.
[17] BGH decision of November 18, 1998: VIII ZR 344/97.
[18] Decision BGH, reported in (1999) *Neue Juristische Wochenschrift*, Heft 9, pp.647–648.
[19] Decision BGH, reported in (1984) *Neue Juristische Wochenschrift*, Heft 12, pp.669–670.
[20] Robert N. Dobbings, "The Layered Dispute Resolution Clause: from Boilerplate to Business Opportunity" (2005) *Hastings Business Law Journal*.

resolution clauses. A court has vacated an arbitration award because of a party's failure to satisfy participation in the mandatory negotiation sessions as provided in the contract prior to commencing arbitration.[21]

In England, the courts did not generally recognise agreements to negotiate, which were seen as agreements to agree to terms not finalised. This has changed in recent years, in particular in connection with the *Channel Tunnel* case, where Lord Mustill said[22]:

> "Those who make agreements for the resolution of disputes must show good cause for departing from them.... Having promised to take their complaints to the experts and if necessary to the arbitrators, this is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purposes is to my way of thinking quite beside the point."

An arbitral tribunal applying English law will decline jurisdiction where a contractual provision expressly states that determinate procedures are a condition precedent to arbitration, until they have been followed. But non-determinative procedures, e.g. negotiation or mediation, would be considered unenforceable and not constituting a condition precedent to the tribunal assuming jurisdiction.[23]

5. ICC CASES

In several ICC arbitrations over the last decade, tribunals have dealt with the issue of multi-tier arbitration clauses.[24] In the matter 6276,[25] the parties had agreed that prior to arbitration they would first resort to amicable settlement and then submit the dispute to an engineer for review. The engineer would render a decision. If a party was dissatisfied, it could refer to arbitration within 90 days of the engineer's decision. The tribunal found sufficient indications in the dossier to warrant the conclusion that the claimant had made genuine efforts with a view to an amicable settlement. All the attempts failed, for which reason the first condition was met. With respect to the second condition, the claimant maintained that because of the completion of the operations and the final receipt of the work it was too late to request the appointment of an engineer. The claimant also claimed that it had been dispensed from this contractual prerequisite by the defendant's failure to notify it in writing of the name of the engineer authorised to discharge that pre-arbitral function. The tribunal rejected both arguments. It held that the procedure before the engineer had been agreed upon voluntarily and was determined by precise rules and time limits mutually determined by the parties. There were strict modalities of substance and form (time limits, report, etc.), which had been voluntarily made in great detail. This pre-arbitral process was strictly binding on the parties and governed their conduct before resorting to arbitration. For this reason, the tribunal concluded that the claim had not satisfied the prerequisite of the first and second tiers and therefore considered the request for arbitration premature: the request for arbitration "is certainly not impossible for the future, [but] is at present premature".

In contrast, an arbitral tribunal rejected the defence of a respondent who argued that the claimant would have been under an obligation to enter into settlement negotiations prior

[21] Kathleen Scanlon, Country report for US, in "Enforcement of Multi-tiered Dispute Resolution Clauses", *IBA Newsletter of Committee D (Arbitration and ADR)*, Vol.6 No.2, October 2001.

[22] Bernardo M. Cremades, cited below, p.11.

[23] Philip Naughton Q.C., Country report for England in "Enforcement of Multi-tiered Dispute Resolution Clauses", *IBA Newsletter of Committee D (Arbitration and ADR)*, Vol.6 No.2, October 2001.

[24] See report in (2003) 14 *ICC International Court of Arbitration Bulletin*, No.1; Bernardo M. Cremades, "Multi-tiered Dispute Resolution Clauses" (CPR Institute for Dispute Resolution, 2004).

[25] ICC case No. 6276, Partial Award of January 29, 1990.

to commencing arbitration, due to a "loyalty clause" in their contract.[26] The tribunal held that the arbitrators should not evaluate the parties' conduct in respect of their confidential negotiations and incidentally observed that, since there was a dispute as to whether the requirements of the loyalty clause were fulfilled, the claimant would at any rate be entitled to have the question of its applicability decided by the arbitrators.

In ICC case 8462,[27] the tribunal reviewed the issue from the point of view of jurisdiction. The arbitration clause contained a first tier of negotiation. If after 30 days no settlement could be reached, the parties could resort to arbitration. When the claimant filed a request for arbitration, the respondent challenged the tribunal's jurisdiction on the ground that the claimant had failed to notify the respondent about the precise issues to be arbitrated, for which reason the respondent had no opportunity to find an amicable solution. The tribunal held that there were enough indications to conclude that the claimant had made efforts to comply with the first-tier negotiation obligation, and therefore it had jurisdiction over the matter.

In ICC case 9977,[28] a sole arbitrator had to decide whether the parties had met their first-tier obligation to first submit the controversy "to senior management representatives of the parties who will attempt to reach an amicable settlement within fourteen calendar days after submission". The parties did indeed hold several settlement meetings on a management level. However, the respondent argued that on the claimant's side these meetings were only attended by its legal representatives, not by a member of senior management. The arbitrator found that there were prior management contacts between the parties and held:

> "Nevertheless, a prior mandatory process of communication between the parties in conflict cannot be understood as a process wherein a formal description of its contents (such as description of the representatives, timing provisions, formal encounters) is of the essence. A prior process ... rather implies an attitude and behavior of the parties inspired in a true and honest purpose of reaching an agreement. Henceforth, if one of the parties considers in good faith that its counterpart is not authentically committed to foster the possibilities of settling the dispute, for instance because of the quality of this representative, it is expected that the former would express so during the process."

The arbitrator considered the respondent's allegation objecting to the characteristics of the claimant's representative to be a post-factual argument that should have been raised at the time of the negotiations. For this reason, the challenge was dismissed.

Finally, in ICC case 10256,[29] the tribunal held that the word "may" in a three-tier clause, which provided as the second tier that the parties may refer the dispute to an expert for consideration, was a non-binding term providing that the reference of the dispute to an expert was permissive not mandatory. Under these circumstances

> "[e]ither party is free to refer the dispute to arbitration ... whether or not there have been good faith mutual discussions ... or a reference to mediation by an expert".

6. ASSESSMENT AND CONCLUSIONS

Courts and arbitrators have adopted different approaches in dealing with multi-tier dispute resolution clauses. In many cases, the focus was less on issues of doctrine and strict legal concepts than on finding pragmatic solutions to individual situations. The following conclusions can be drawn.

[26] ICC case No.7422, Interim Award of June 28, 1996.
[27] ICC case No.8462; Final Award of January 27, 1997.
[28] ICC case No.9977; Final Award of June 22, 1999.
[29] ICC case No.10256, Interim Award of August 12, 2000.

Who decides on whether pre-arbitration requirements have been met?

There seems to be a consensus that, if there is a valid arbitration agreement, this issue is to be decided by the arbitrators.[30] This result corresponds to the principle of *Kompetenz-Kompetenz*. The dispute whether pre-arbitration requirements have been met is a dispute arising out of, or in connection with, the agreement containing the arbitration clause, for which reason the issue has to be decided by the arbitrators. This finding also answers the question of who should be in charge of ordering specific performance of a mediation obligation, to the extent that specific performance is available under the applicable law. Because there is an arbitration clause, such an order is to be rendered by the tribunal, not by the courts. Whether such orders would be available by way of preliminary measures from state courts, is an open issue. Against it is that such an order would not be of preliminary or interim nature, but would be a final decision on a contractual obligation, which would stand in conflict with the arbitration clause if rendered by a state court.

Does failure to satisfy negotiation or mediation requirements affect the tribunal's jurisdiction?

There are conflicting views but the answer should be no, unless the parties have explicitly provided that a failure to comply with the pre-arbitral stages excludes the tribunal's jurisdiction. The tribunal's jurisdiction describes its authority to decide a dispute. By the arbitration agreement, the parties mutually granted this authority to a tribunal and excluded state courts. To argue that this choice is contingent on certain pre-arbitral steps would imply that failure to take them would allow a party to withdraw from its commitment to arbitrate. It is hard to imagine that parties made their agreement to exclude state courts in favour of arbitration *contingent* on compliance with pre-arbitral negotiation and/or conciliation, in the sense that, if one party had known that the other would not engage in the agreed pre-arbitral steps, it would have preferred to submit the dispute to litigation rather than to arbitration. This hardly corresponds with the parties' intention. Thus, the question whether the parties had complied with agreed settlement procedures should not be seen as affecting the authority (jurisdiction) of the parties' ultimate decision-making body.

Article 13 of the UNCITRAL Model Law seems to be based on the same conclusion:

> "Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specific period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for the party, in its opinion, to preserve the right. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings."

"Such an undertaking shall be given effect by the arbitral tribunal" suggests that the tribunal has jurisdiction and should make use of its authority to enforce the pre-arbitral steps. Also, if one were to consider the pre-arbitral steps as conditions precedent to the arbitrators' jurisdiction (as opposed to conditions precedent to the admissibility of the request for arbitration), this could create difficulties in connection with the potential necessity of preliminary measures prior to completion of the pre-arbitral steps and could have an adverse effect on the question of *lis pendens* and the interruption of limitation periods. In any event, the issue of whether a multi-tiered dispute resolution clause raises a valid condition precedent to the tribunal's authority to decide on the matter is a question of jurisdiction, which under the principle of *Kompetenz-Kompetenz* is to be decided by the tribunal itself.

[30] e.g. Decision by Zurich Court of Appeals of November 9, 2001, published in ZR 101 (2002), No.21, 77–81; Bernardo M. Cremades, cited above, p.7 et seq.

Should the failure to satisfy a contractual pre-arbitration requirement be treated as a procedural matter or as a substantive law matter?

In most of the cases mentioned, the issue was treated as a matter of admissibility, which is a procedural approach. This way of resolving the issue seems to satisfy the parties' expectations better than the substantive law approach. When parties agree on a binding multi-tier dispute resolution mechanism, they expect that a tribunal seized with the matter at a premature stage would decline to review the case prior to the initial steps having been complied with by the parties.

If the issue were treated as a matter of substantive (material) contract law, the consequences of non-compliance would be either unsatisfactory or unreasonably harsh. If non-compliance with pre-arbitral steps were treated as a breach of contract, the classical legal remedy would be damages. This result would be unsatisfactory, because the party incurring the damage would be unable to establish the quantum of damage. Other remedies for breach of contract are the withdrawal from a contract and, possibly, a dismissal of the claim by the arbitrators with prejudice. This result would be unreasonably harsh for the violation of a duty which by its nature relates to the mechanism of dispute resolution rather than to the validity of contractual claims.

It is noteworthy that in many of the ICC cases, the arbitrators treated the request for arbitration as inadmissible at the time (without prejudice), and did not treat the claim as invalid or unfounded.

Under what conditions should a tribunal consider a request for arbitration inadmissible?

A tribunal should consider a request for arbitration inadmissible if the parties agreed in a binding and unequivocal manner to first engage in other steps to resolve their dispute (negotiation, mediation, etc.). It must be clear from the wording of the agreement that this is not merely a permissive or non-mandatory provision. Secondly, the commitment should be limited in time and the tier mechanism should be defined to precisely determine the stage at which the efforts will be considered exhausted and the pre-arbitral requirements satisfied. Both of these requirements are necessary to ensure that a party is not precluded from access to court or arbitration for an indeterminate period of time. In case of doubt, a tribunal should hold in favour of admissibility. In other words, the effectiveness or ineffectiveness of a multi-tier clause will depend on whether or not there is a doubt about the parties' intention to resolve the dispute by arbitration if the settlement process fails.

In case of inadmissibility, should arbitrators stay or close the proceedings?

If a tribunal considers a request for arbitration inadmissible, the question arises whether the proceedings should be closed or stayed. If one treats a binding first-tier commitment as a condition precedent to arbitration, the obvious consequence would be to close the proceedings (without prejudice). This solution is hardly in the parties' interests. It would bring the arbitrators' mandate to an end and the tribunal would have to be reconstituted if the parties were unsuccessful in returning to the conciliation stage. If the conciliation failed, the parties would have to reappoint the tribunal, which would raise the issue whether the previous arbitrators were still eligible. Also, closing the proceedings would mean that the matter was no longer pending at law (no *lis pendens*).[31] This could have adverse effects on

[31] The rules on Swiss domestic arbitration determine that when the arbitration clause or the institutional rules to which the clause refers provide for a conciliation procedure, the commencement of this procedure will be treated as the commencement of the arbitral proceedings (Art.13.2 of the Swiss Concordat on Arbitration). However, in Swiss contract law, commencement of conciliation proceedings only interrupts contractual limitation and

the suspension or interruption of limitation periods arising from substantive law (statutes of limitation). Therefore, a stay of the proceedings appears to be the preferable solution. While it is true that commenced and pending arbitration may add unwelcome pressure in first-tier negotiation or conciliation (the fact that the arbitral tribunal has already been constituted and is waiting to proceed will loom over the parties' efforts to find a settlement), the advantages of a suspension rather than a termination of the arbitral proceedings prevail, unless the parties had clearly agreed on other consequences in their dispute resolution clause. In the procedural order of stay, arbitrators should, however, clearly define the conditions under which the proceedings will be resumed and determine a deadline for the parties to complete the first-tier steps. Tribunals must avoid an obstructive party precluding the other party from access to an adjudicatory body (arbitrators or courts).

7. OTHER ISSUES IN CONNECTION WITH MULTI-TIER CLAUSES

There are several other issues arising in connection with multi-tier dispute resolution clauses, which cannot be dealt with in this short presentation. For the sake of completeness, they are summarised as follows:

Interim relief, preliminary measures

What is the effect of pre-arbitral requirements on the need for preliminary measures and interim relief?

Involvement of arbitrators in first-tier phase

To what extent may facilitators, mediators and arbitrators participate in the various tiers? Would a facilitator or mediator involved in the first-tier phase be acceptable as arbitrator in the second-tier phase, or would his or her independence and impartiality be affected by the earlier involvement?

Confidentiality of information from first-tier

To what extent is information exchanged between the parties in the first-tier stage admissible in the succeeding arbitration? Could a party object to the disclosure of material information in the arbitration on the ground that this information was obtained by the other party in the course of first-tier confidential settlement negotiation or mediation?

Suspension of limitation periods

Is the commencement of first-tier negotiations or mediation sufficient to meet deadlines of limitation periods? How can a party prevent limitation periods expiring during the time of the pre-arbitral steps?

Penalty payments in case of non-compliance

Is it permissible to secure compliance with pre-arbitral commitments by way of contractual penalty payments?

prescription periods if the requirement to first conciliate is binding and if the dispute resolution agreement or the applicable institutional rules provide for a deadline to proceed with the arbitration in case of unsuccessful conciliation (Lalive, Poudret and Reymond, *Le Droit de L'Arbitrage*, Lausanne, 1989), Art.13.2 N e). While this rule is not explicitly mentioned in the Swiss rules on *international* arbitration, some authors are of the view that it applies by analogy to international arbitration in Switzerland (Poudret and Besson, *Droit Comparé de l'Arbitrage International* (2002), p.516).

Remedies in case of breach of contract

If non-compliance with contractual pre-arbitral requirements is treated as a breach of contract, what are the remedies? Could a party withdraw from the contract? Could a party withdraw from the arbitration agreement? Could a party claim damages, and if so, in what amount?

Counterclaims

Are counterclaims subject to the pre-arbitral settlement mechanism? If a respondent raises the counterclaim only after the arbitration has been commenced, does this counterclaim need to go through the first steps of the multi-tier process?

Violation of non-mandatory settlement processes

Does the violation of non-mandatory pre-arbitral steps have any effect on the arbitration? Should arbitrators take a party's failure to comply with non-binding first-tier steps into consideration when deciding on the assessment of costs and party compensation?

Despite the many issues arising in connection with multi-tier arbitration clauses, court and arbitral practice shows that these clauses are being treated as relevant by arbitrators and judges and that requests for arbitrations filed in violation of such clauses are usually held inadmissible, provided that there is no doubt about the parties' intention that their agreement to the settlement process was binding.