Global Arbitration Review

The Guide to Energy Arbitrations

General Editor
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Editors
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Second Edition

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Editor's Preface to the Second Edition

Economic liberalisation and technological change over the past several decades have altered the global economy profoundly. Businesses, and particularly those involved in the energy sector, have responded to reduced trade barriers and advancement of technology through international expansion, cross-border investments, partnerships and joint ventures of every description.

The move to today's 'internationality' of business and trade patterns alone would have been sufficient to jet-propel the growth of international arbitration. But when coupled with the uncertainties and distrust of 'foreign' court systems and procedures, the stage was set for a move to processes and institutions more suited to the resolution of a new world of transborder disputes.

Not surprisingly, the concept and number of international commercial arbitrations have grown enormously over the past 20 years. Bolstered by the advantages of party autonomy (particularly over access to a neutral forum and the ability to choose expert arbitrators), confidentiality, relative speed and cost effectiveness, as well as near worldwide enforceability of awards, the system is flourishing. And if a single industry sector can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor-state disputes, it must be the energy business. It is the poster boy of arbitral globalisation.

Led by oil and gas, the energy sector is marked by enormously complex, capital-intensive international deals and projects. Transactions and partnerships often are long-term in nature, and involve 'foreign' places and players. Political instability and different cultural backgrounds characterise many of the sector's investments. In short, the energy sector is a natural incubator for disputes best suited to resolution through international arbitrations.

Indeed, over the past 50 years or so, following a rash of nationalisations in North Africa, the Gulf States and in parts of Latin America, and the lesson learned in 'foreign courts', there is scarcely a major energy sector contract (whether oil, gas, electric, nuclear, wind or solar) that does not call for disputes to be resolved before an independent and neutral arbitral tribunal.

The experience and statistics of the major arbitral institutions bear out the claim that the energy sector has driven, and continues to account for, major growth in international arbitration. ICSID is illustrative, where 25 per cent of recent claims involve oil and gas or mining, with other energy sectors, such as electricity, accounting for close to a further 15 per cent.

Although much of the evidence of the energy sector's arbitral demand is anecdotal, those arbitrators who are known in the field report growing demand and a steady increase in enquiries as to availability. And having regard to the multi-faceted fallout from the oil price crash of 2014, a revival of resource nationalism (which exacerbates the natural tension between energy investors and host states), together with Russia's continuing economic difficulties and a world where sanctions imperil contractual performance, the only realistic expectation is for further reliance on arbitrators and arbitral institutions to cope with the disputes that are surfacing daily.

Another driver towards arbitration is the fact that the number of substantive players in the sector is relatively limited. These parties will invariably have multiple agreements, partnerships and joint ventures with each other at the same time, many of which are long term. These dynamics call for disputes to be resolved by decision makers who are known to and trusted by all, and whose decisions are final. The simple fact about business is that the economic uncertainty associated with an unresolved dispute overhanging a long-term partnership is often considered to be more problematic than getting to its quick and definitive resolution, even if the resolution is unfavourable in the context of the particular deal.

Against this backdrop, when Gordon Kaiser raised the question with me in the summer of 2014 of producing a book that gathered together the thinking and recent experiences of some of the leading counsel in the sector, it resonated immediately. Gordon was also more than pleased when I suggested that we might try to interest Doak Bishop as a partner in the project.

With Doak's acceptance of the challenge, we tried, in the first edition, to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by those who do business in the energy sector and by their legal and expert advisers.

Before agreeing to take on the role of general editor and devoting serious time to the project, we needed to find a publisher. Because of my longstanding relationship with Law Business Research, the publisher of Global Arbitration Review, we decided that I should discuss the concept and structure of our proposed work with David Samuels, GAR's publisher, and Richard Davey, then managing director of LBR. To our delight, the shared view was that the work could prove to be a valuable addition to the resource material now available. On the assumption that we could persuade a sufficient number of those we had provisionally identified as potential contributors, the project was under way.

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Energy Arbitration*s being seen, in time, as an essential desk-top reference work in our field. To ensure the high quality of the content, I agreed to go forward only if we could attract as contributors colleagues who were among the internationally recognised leaders in the field. Now that the book is a reality, Doak, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

The second edition of *The Guide to Energy Arbitrations* has been expanded with five new chapters. Two focus on evolving issues in price revisions in long term gas/LNG purchase agreements. There is a new chapter on the Energy Charter Treaty, another on disputes involving renewable energy and the fifth new topic deals with off-shore vessel construction disputes. The remaining chapters have all been updated to reflect developments since 2015.

For the next edition we hope to fill in important omissions, such as the contours of fair and equitable treatment; injunctions against and setting aside of awards; bribery and corruption; sovereign immunity and enforcement issues; force majeure and contractual allocations; and intellectual property and insurance disputes in the energy sector.

Without the tireless efforts of the GAR/LBR team this work never would have been completed within the very tight schedule we allowed ourselves. David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all of my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition will obviously benefit from the thoughts and suggestions of our readers, for which we will be extremely grateful, on how we might be able to improve the next edition.

J William Rowley QC
May 2017
London

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Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration

George M Vlavianos and Vasilis F L Pappas[1]

In the energy industry, multi-tier dispute resolution clauses have become commonplace, particularly in complex construction contracts, joint venture agreements and other contracts where long-term relationships are created and continuous cooperation is contemplated.[2]

Multi-tier dispute resolution clauses state that when a dispute arises, parties must undertake certain steps prior to commencing arbitration, in an attempt to amicably settle the dispute.

While there are a number of benefits to such clauses, there are also drawbacks. Moreover, some uncertainty exists as to whether such clauses are binding, whether they constitute jurisdictional conditions precedent to the commencement of arbitrations, and what the consequences of a party's failure to comply are. Indeed, there remain differing opinions among national courts with respect to the effects of non-compliance on an arbitral tribunal's jurisdiction.

This chapter will explore the benefits and drawbacks of multi-tier clauses, and identify how various jurisdictions around the world have addressed whether they constitute jurisdictional conditions precedent to the commencement of arbitration. This paper will then outline considerations for transactional lawyers and parties incorporating multi-tier clauses into their agreements, and how arbitration practitioners should deal with such clauses when they encounter them.

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1 George M Vlavianos is the managing partner of Bennett Jones (Gulf) LLP and Vasilis F L Pappas is a partner of Bennett Jones LLP. The authors would like to express their gratitude to John Siddons, Jonathan McDaniel, and Stephanie Clark for all of their assistance in the preparation of this article.

2 Didem Kayali, 'Enforceability of Mutli-tiered Dispute Resolution Clauses' (2010) 27:6 Journal of International Arbitration 551 at 552.

Function, benefits and drawbacks of multi-tier dispute resolution clauses

Definition

In its simplest form, a multi-tier clause will require parties to engage in a single step prior to commencing arbitration, such as negotiations among party representatives for a defined period. In its more complex forms, a clause may require parties to undertake multiple steps prior to commencing arbitration, such as negotiation among lower-level representatives, followed by negotiation by higher-level representatives, followed by formal mediation or conciliation proceedings, all for defined periods. By including a multi-tier clause in a contract, the parties signal that efforts should be made to settle a dispute prior to arbitration, and that arbitration will only be sought as a last resort.[3]

Benefits

There are a number of benefits to multi-tier dispute resolution clauses. For example:

- they provide the parties a contractually mandated opportunity to resolve disagreements relatively inexpensively without incurring the costs and delays associated with actual arbitration proceedings;
- they provide a contractual 'cooling-off period' during which the parties can reassess and evaluate whether to strike a compromise outside of the antagonistic and contentious arbitral context, which may yield more fruitful and beneficial settlement discussions;
- they can be particularly useful in circumstances where parties have a long-term commercial relationship that they wish to preserve; and
- they may enable the parties to narrow the issues to be arbitrated, by settling those issues on which they find common ground in advance of arbitration, resulting in a more efficient and cost-effective arbitration.[4]

Drawbacks

Multi-tier clauses may also give rise to several negative effects that should be given careful consideration. Depending on the circumstances, such clauses could give rise to the following:

- pre-arbitration negotiations where the parties are entrenched in their positions and the possibility of reaching an agreement is futile can lead to an unnecessary waste of time and expense;
- the obligation to conduct pre-arbitration negotiations can impair a party's ability to secure interim measures in time-sensitive disputes by postponing the commencement of an arbitration;

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3 Nigel Blackaby et al. *Redfern and Hunter on International Arbitration* 6th ed, (Oxford: Oxford University Press, 2015) at para 2.88; Alexander Jolles, 'Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement' (2006) 72:4 Arbitration 329 at 329; Oliver Krauss, 'The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law' (2015-2016) 2:142 McGill Journal of Dispute Resolution 142 at 143; Craig Tevendale, Hannah Ambrose & Vanessa Naish, 'Mutli-tier Dispute Resolution Clauses and Arbitration' (2015) 1:31 Turk. Com. L. Rev. 31 at 32.

4 Gary Born & Marija Scekic, 'Pre-Arbitration Procedural Requirements, A Dismal Swamp' in DD Caron, *Practising Virtue: Inside International Arbitration* (Oxford: Oxford University Press, 2016) 227 at 230; Kayali, *supra* at 552-53; Krauss, *supra* at 144–145; Tevendale *supra* at 32-33.

- in particularly complex disputes, where additional claims are discovered or developed after an arbitration has commenced, multi-tier clauses can lead to objections on the ground that they were not expressly negotiated during pre-arbitration negotiations;
- multi-tier clauses can lead to objections to counterclaims made in an arbitration that were not specifically discussed and negotiated at pre-arbitration negotiations on the basis that such counterclaims were not first subject to settlement discussions; and
- where a limitation period is set to expire before the contractually mandated negotiation period, a claim can be barred.[5]

In view of the foregoing, while there are benefits to multi-tier dispute resolution clauses, they are not without risks, and could impose significant challenges depending on the nature of the claims in dispute as well as procedural concerns.

Non-compliance

A number of national courts and arbitral tribunals have found that the pre-arbitral steps in a multi-tier dispute resolution clause constitute jurisdictional conditions precedent to the commencement of arbitration. In other words, they have ruled that where a party fails to carry out the contractually mandated pre-arbitral steps, a tribunal does not have jurisdiction to hear a dispute. Accordingly, a failure to comply with the pre-arbitral steps in a multi-tier clause carries with it significant risks. If a jurisdictional objection is addressed by a tribunal early in the arbitral proceedings, the arbitration might be dismissed for lack of jurisdiction. If, on the other hand, a jurisdictional objection is addressed by a tribunal in the final award, a national court could set aside or otherwise refuse to enforce it.

The question of whether the pre-arbitral steps in a multi-tier clause constitute jurisdictional conditions precedent to arbitration is answered differently from jurisdiction to jurisdiction. Generally speaking, most national courts and arbitral tribunals have been reluctant to find that pre-arbitral steps constitute jurisdictional conditions precedent to commencing arbitration, absent clear language to that effect within the multi-tier clause. However, a number of jurisdictions appear to be more inclined to find such steps to constitute jurisdictional conditions precedent, even in the absence of clear language.[6]

In the sections that follow, we will review recent national court decisions and arbitral awards involving multi-tier dispute resolution clauses to assess the degree to which these clauses have been held to constitute jurisdictional conditions precedent to arbitration. This review is not intended to be an exhaustive comparative analysis of how courts and tribunals around the world have addressed this issue, but rather is set out solely for illustrative purposes. Following this review, advice will be provided on how to mitigate some of the potentially resulting uncertainty, in terms of drafting, and initiating arbitration pursuant to, multi-tier clauses.

5 Kayali, *supra* at 553; Tevendale, *supra* at 34.

6 Louis Flannery and Robert Merkin, 'Emirates Trading, Good Faith and Pre-Arbitral ADR Clauses: A Jurisdictional Precondition?' (2015) 31 Arb Int'l 63 at 65-66; Born, *supra* at 228.

Recent treatment of multi-tier dispute resolution clauses by national courts

England and Wales

Historically, English courts have been reluctant to find that pre-arbitral steps in multi-tier dispute resolution clauses constitute jurisdictional conditions precedent to arbitration, absent clear language to that effect. These decisions stem primarily from the House of Lord's decision in *Walford v. Miles*, in which Lord Ackner held that a bare agreement to negotiate was unenforceable as a mere 'agreement to agree'.[7]

For example, in *Sulamerica CIA Nacional de Seguros v. Enesa Engenharia*,[8] the Court of Appeal was presented with a multi-tier clause that required that 'prior to a reference to arbitration, [the parties] will seek to have the Dispute resolved amicably by mediation', and that:

> *If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, or if either party serves written notice terminating the mediation under this clause, then either party may refer the Dispute to arbitration*.[9]

The issue presented to the Court of Appeal was whether mediation was a binding condition precedent to the commencement of arbitration. The Court held that it was not, as it did not contain clear language to that effect and did not define the obligation to mediate with sufficient certainty. In particular, the Court held that the multi-tier clause 'did not set out any defined mediation process, nor does it refer to the procedure of a specific mediation provider'. Rather, it 'contain[ed] merely an undertaking to seek to have the dispute resolved amicably by mediation' and '[n]o provision [was] made for the process by which that [was] to be undertaken'.[10] Accordingly, the court ruled that mediation was not a jurisdictional condition precedent to arbitration.[11]

Similarly, in *Tang Chung Wah & Anor v. Grant Thornton International Ltd*,[12] the contract at issue contained a multi-tier dispute resolution clause that provided that prior to commencing arbitration, the parties were required to refer disputes to conciliation for one month, after which the parties were required to refer disputes to a panel of three individuals identified in the clause. The clause made clear that until those steps were undertaken 'no party may commence any arbitration procedures in accordance with this Agreement'.[13]

The claimant in that case commenced an arbitration against the respondent without fulfilling the pre-arbitral steps, and the respondent asked the tribunal to dismiss the claim for lack of jurisdiction. The tribunal found that it had jurisdiction, so the respondent sought to have this determination set aside by the High Court (Chancery Division). Ultimately, the High Court upheld the tribunal's ruling, and held that the pre-arbitral steps in the

7 [1992] 1 All ER, at 460.

8 *Sulamerica CIA Nacional de Seguros v. Enesa Engenharia*, [2012] EWCA Civ 638.

9 Ibid at para 5.

10 Ibid at para 36.

11 Ibid.

12 [2012] EWHC 3198 (Ch).

13 Ibid at para 27.

multi-tier clause did not constitute binding conditions precedent to the commencement of arbitration, because they did not contain clear language to that effect and did not adequately specify the form in which the pre-arbitral steps should proceed. Specifically, the High Court held that the multi-tier clause did not indicate:

> *what form the process of conciliation should take (apart from the injunction that it is to be undertaken 'in amicable fashion'), . . . who is to be involved and what (if anything) they are required to do by way of participation in the process, . . . [or] what the obligation to attempt to resolve the dispute or difference requires the [conciliator] to do.*[14]

When read together, *Sulamerica* and *Tang* evidence the high threshold that English courts have historically applied when determining whether a multi-tier clause is a jurisdictional condition precedent, as well as the English courts' hesitation in enforcing pre-arbitration requirements as binding conditions precedent to the commencement of arbitration.[15]

Very recently, however, a decision from the High Court (Commercial Court) appears to challenge the English courts' reluctance in this regard. In particular, in *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited*,[16] the contract at issue contained a multi-tier clause that required the parties to negotiate for four weeks prior to commencing arbitration. The claimant commenced an arbitration against the respondent, and the respondent brought an application to the High Court seeking an order that the tribunal lacked jurisdiction on the ground that the parties had allegedly failed to negotiate as required by the multi-tier clause. In the event, and in apparent contradiction to *Sulamerica* and *Tang*, the High Court held that negotiation was a 'condition precedent to the right to refer a claim to arbitration',[17] but ultimately found that on the facts of that case, the parties had sufficiently negotiated to confer jurisdiction on the tribunal.

It remains to be seen whether the holding in *Emirates Trading* will be followed in subsequent English decisions, or whether it is a mere outlier; it is a lower court case, while *Sulamerica* is from the Court of Appeal. Further, *Emirates Trading* has been heavily criticised by international arbitration practitioners and commentators as inconsistent with English law, contrary to English public policy and at odds with the goals of international arbitration.[18] Moreover, *Emirates Trading* relied in large measure on an Australian case that is itself generally regarded as an outlier.[19]

Emirates Trading may thus be seen as an exception to the established reluctance of the English courts in finding that pre-arbitral steps in multi-tier clauses constitute jurisdictional conditions precedent to arbitration absent express language to the contrary.

14 Ibid at para 63.

15 Flannery, *supra* at 65.

16 [2014] EWHC 2014 (Comm).

17 Ibid at para 26.

18 Flannery, *supra* at 65-66 and 102-103.

19 Kayali, *supra* at 570.

The United States

In the United States, the prevailing view appears to be that pre-arbitral steps in multi-tier clauses will not constitute jurisdictional conditions precedent to the commencement of arbitration, unless the multi-tier clause at issue expressly includes language to the contrary.

For example, in the 2014 decision of *BG Group plc v. Republic of Argentina*,[20] the United States Supreme Court took the position that a failure to comply with pre-arbitral steps set out in multi-tier clauses do not deprive an arbitral tribunal of jurisdiction to adjudicate a dispute, without clear language to the contrary.

That case concerned a bilateral investment treaty between Argentina and the United Kingdom. The treaty contained a multi-tier dispute resolution clause that stated that prior to the commencement of an arbitration by a foreign investor, the investor was required to submit the dispute to a local court. However, the claimant commenced arbitration against Argentina without first submitting the dispute to a local court. Accordingly, Argentina applied to the arbitral tribunal to dismiss the case for lack of jurisdiction. The tribunal, however, determined that it had jurisdiction and rendered a final award. Argentina then sought to vacate the final award before the United States District Court for the District of Columbia on the basis that the tribunal did not have jurisdiction on account of the claimant's failure to comply with the pre-arbitral steps. The District Court denied Argentina's claims and confirmed the award. But Argentina appealed, and the US Court of Appeals for the District of Columbia Circuit reversed and vacated the award, holding that the arbitral tribunal lacked jurisdiction to decide the dispute.

Argentina then appealed to the Supreme Court. The Supreme Court analysed the issue by considering whether the multi-tier clause constituted a 'procedural' or a 'substantive' condition precedent to arbitration. If a procedural condition precedent, it observed that it was for the tribunal to determine whether the multi-tier clause bound the parties to carry out the pre-arbitral steps prior to commencing arbitration – in effect, then, that the tribunal had jurisdiction to determine what, if any consequences, should arise from a party's failure to comply with pre-arbitral steps. By contrast, the Supreme Court stated that if the pre-arbitral steps constituted a substantive condition precedent, it meant that it constituted a substantive limitation on a party's right to commence arbitration, and a failure to comply with such pre-arbitral steps would be a jurisdictional bar to a party's commencing arbitration.[21]

Ultimately, the Supreme Court found that the pre-arbitral steps constituted procedural conditions precedent, reversed the Court of Appeals, and found that the tribunal had jurisdiction to adjudicate the dispute between the claimant and Argentina. Important to this finding was the fact that the multi-tier clause was, in the majority's view, 'a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute'.[22] In other words, had the multi-tier clause expressly stated that it was a legally binding condition precedent to arbitration, it very likely would have been held to constitute a substantive and jurisdictional condition precedent to arbitration.

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20 *BG Group PLC v. Republic of Argentina*, 572 _ (2014) (slip op.).

21 Ibid at 8-9 and 15-17.

22 Ibid at 9.

BG Group is consistent with other cases in the United States that have held that pre-arbitral steps in multi-tier clauses do not constitute jurisdictional conditions precedent absent express language to the contrary. For example, in *Int'l Ass'n of Bridge, Structural v. EFCO Corp and Constr. Products Inc*,[23] the Court of Appeals for the Eighth Circuit was confronted with a multi-tier clause requiring that the parties undertake certain pre-arbitral procedures. The plaintiff filed suit with the District Court for the Southern District of Iowa to compel arbitration of a dispute with the defendant. The defendant, however, resisted on the ground that the plaintiff had failed to comply with the pre-arbitral steps in the multi-tier clause. The District Court agreed with the defendant, and denied the plaintiff's application to compel arbitration.

On appeal, however, the Court of Appeal reversed the District Court's findings. Like the Supreme Court in *BG Group*, it held that the pre-arbitral steps constituted procedural, not substantive, conditions precedent, and accordingly ruled that an arbitral tribunal had jurisdiction to rule on the consequences of the plaintiff's failure to comply with the pre-arbitral steps.[24] In so holding, therefore, it ruled that pre-arbitral steps in a multi-tier clause do not constitute jurisdictional conditions precedent absent language to the contrary.

BG Group and *EFCO Corp* also appear to be consistent with decisions in the United States that have ruled that pre-arbitral steps in multi-tier clauses are jurisdictional conditions precedent to arbitration. For example, in *HIM Portland LLC v. DeVita Builders Inc*,[25] the US Court of Appeals for the First Circuit was confronted with a multi-tier clause that stated that the parties were required to engage in mediation prior to arbitration, and expressly stated that such mediation was 'a condition precedent to arbitration'. In that case, therefore, the Court of Appeals ruled that mediation was a jurisdictional condition precedent to arbitration, as the contracted stated 'in the plainest possible language that mediation [was] a condition precedent to arbitration' and that it was 'difficult to imagine language which more plainly states that the parties intended to establish mediation as a condition precedent to arbitration proceedings'.[26] A similar outcome was reached on the basis of explicit 'condition precedent' language in *Ponce Roofing Inc v. Roumel Corp*.[27] In those cases the courts found that the pre-arbitral steps constituted 'substantive' conditions precedent that barred the commencement of arbitration until the steps had been fulfilled because – unlike the multi-tier clauses at issue in *BG Group* and *EFCO Corp* – the clauses expressly stated that the pre-arbitral steps were 'conditions precedent' to arbitration.

Notwithstanding the foregoing, there are a number of cases in the United States where courts have ruled that pre-arbitral steps in multi-tier clauses constitute jurisdictional conditions precedent to arbitration, even without express reference to 'condition precedent'. For example, in *Kemiron Atlantic Inc v. Aguakem International Inc*,[28] the parties did not use express language in their multi-tier dispute resolution clause, but the Court of Appeals for the Eleventh Circuit found that the pre-arbitral steps in the clause constituted jurisdictional

23 359 F.3d 954 (8th Cir. 2004).

24 Ibid at 956-957.

25 317 F 3d 41 (1st Cir 2003).

26 Ibid at 44.

27 *Ponce Roofing, Inc v. Roumel Corp*, 190 F Supp 2d 264 (DPR 2002).

28 290 F 3d 1287 (11th Cir 2002).

conditions precedent to arbitration.[29] Similarly, in *Red Hook Meat Corp v. Bogopa-Columbia Inc*, the Supreme Court of New York likewise held that pre-arbitral steps in a multi-tier clause constituted jurisdictional conditions precedent even though the clause did not use the term 'condition precedent' or any other mandatory phrase.[30]

Thus, while the prevailing view adopted by the United States Supreme Court and other Courts of Appeal appears to be that pre-arbitral steps in multi-tier clauses do not constitute jurisdictional conditions precedent absent clear language to that effect, a number of other cases have held otherwise. Accordingly, it remains to be seen how US courts will deal with this issue in the future.

Switzerland

In Switzerland as well, the prevailing view appears to be that a failure to comply with a pre-arbitral step in a multi-tier dispute resolution clause does not deprive an arbitral tribunal of jurisdiction to adjudicate a dispute.

In a recent Swiss First Civil Law Court decision from March 2016,[31] two companies, X and Y, entered into a series of contracts that contained multi-tier dispute resolution clauses requiring the parties to undertake conciliation proceedings prior to arbitration. Following the emergence of a dispute, Y submitted a demand for conciliation. Before the conciliation was formally terminated, however, Y commenced arbitration proceedings. While X participated in the appointment of the arbitral tribunal, it objected to its jurisdiction owing to Y's failure to comply with the contracts' pre-arbitral steps. Following an exchange of briefs, the tribunal rendered a partial award confirming its jurisdiction. X challenged the tribunal's decision at the Swiss Court and argued, among other things, that the tribunal wrongly accepted jurisdiction, its jurisdiction should be terminated, and Y's claim should be rejected.

The Swiss Court accepted that the multi-tier clause required the parties to engage in conciliation prior to commencing arbitration. However, it refused to terminate the tribunal's jurisdiction or to reject Y's claim. Rather, it held that terminating the tribunal's jurisdiction 'is certainly not the most appropriate solution' as doing so would require that another tribunal be constituted following conciliation proceedings, accomplishing little more than prolonging the proceedings and creating additional costs.[32] Further, it observed that in other circumstances, such a finding could lead to unduly punitive results, particularly in circumstances where a limitation period had expired following the commencement of an arbitration.[33]

Accordingly, the Swiss Court found that the most sensible solution was simply to stay the arbitration so that the conciliation proceedings could take place, after which the arbitration could resume before the originally constituted tribunal. The Court further ruled that decisions as to the nature of the stay and the conciliation proceedings should be deferred to the tribunal, which had overall jurisdiction over the dispute.[34]

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29 Ibid at 1291.

30 *Red Hook Meat Corp v. Bogopa-Columbia*, Inc, 31 Misc 3d 814 at 819 (NY Sup Ct 2011).

31 4A_628/2015 of March 16, 2016. English translation available through Swiss International Arbitration Decisions http://www.swissarbitrationdecisions.com/

32 Ibid at 19.

33 Ibid.

34 Ibid at 20.

Therefore, the Court effectively ruled that a pre-arbitral step in a multi-tier dispute resolution clause did not constitute a jurisdictional condition precedent, and that a failure to comply with such a pre-arbitral step would not deprive a tribunal of jurisdiction. However, it did make clear that parties to multi-tier dispute resolution clauses should generally be required to abide by pre-arbitral steps in multi-tier dispute resolution clauses.[35]

Singapore

A recent court decision from Singapore indicates that Singaporean courts may be prepared to attach significant jurisdictional consequences to the failure to satisfy the pre-arbitral requirements of a multi-tier dispute resolution clause. In particular, in the 2013 decision *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another*,[36] the Singapore Court of Appeal ruled that strict compliance with multi-tier dispute resolution clauses is a binding precondition to arbitration, the non-compliance with which can deprive a tribunal of its jurisdiction.

In that case, the parties in dispute had entered into several contracts related to the supply of technology services. One of the agreements contained a multi-tier dispute resolution clause requiring disputes to be escalated through several negotiation discussions among representatives of increasing seniority from each party prior to the commencement of arbitration. A payment dispute arose between the parties, which was the subject of several meetings, although these meetings did not strictly satisfy the requirements of the multi-tier clause.

The claimant filed a notice of arbitration with the Singapore International Arbitration Centre against the respondent, and the respondent raised a preliminary objection to the tribunal's jurisdiction on the basis of, among other things, the claimant's failure to satisfy fully the pre-arbitral steps set out in the multi-tier clause. The tribunal, however, dismissed the objection by way of a preliminary award on jurisdiction. The respondent then applied to the Singapore High Court to set aside the tribunal's award on jurisdiction, which denied the respondent's application. The respondent then appealed to the Court of Appeal, seeking an order for the tribunal's award on jurisdiction to be set aside.

The Court of Appeal held that the pre-arbitral steps in the multi-tier clause were binding conditions precedent to the commencement of arbitration and had to be observed. The Court of Appeal further held that '[g]iven that the preconditions for arbitration . . . had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate . . . could not be invoked', and that '[t]he Tribunal therefore did not have jurisdiction over [the respondent] and its dispute with [the claimant]'.[37]

Thus, it would appear that Singaporean courts are not only prepared to enforce multi-tier dispute resolution clauses, but are also prepared to attach significant jurisdictional consequences in the event such clauses are not complied with. Nevertheless, it is noteworthy that the Court of Appeal in *Lufthansa Systems* observed that there were a number of other grounds on which the tribunal's jurisdiction should have been rejected. Accordingly, it remains to be seen whether a Singapore court in the future will be prepared

35 Ibid at 13.

36 [2013] SGCA 55.

37 Ibid at para 63.

to terminate an arbitration or set aside an award solely on the basis of a failure to comply with a multi-tier clause.

Australia

In Australia, it appears that pre-arbitral steps in multi-tier clauses are generally considered to be enforceable and binding on the parties, but it is unclear whether they constitute jurisdictional conditions precedent to arbitration.

For example, in *United Group Rail Services Ltd v. Rail Corp New South Wales*,[38] the contract at issue contained a multi-tier clause that required that disputes be referred to party representatives to 'meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference' prior to arbitration.[39]

The issue before the New South Wales Court of Appeal was whether the requirement for negotiation in the multi-tier clause was enforceable and binding on the parties. After reviewing the history of legal scholarship on the subject – including English case law – the Court of Appeal found that the requirement for negotiation was enforceable.[40]

However, it is not clear from the Court of Appeal's determination whether the Court of Appeal would be of the view that the negotiation requirement was not only enforceable, but also a jurisdictional condition precedent to arbitration – that is to say, that a failure to comply with the negotiation requirement would result in the termination of a tribunal's jurisdiction, or the set-aside of an arbitral award for lack of jurisdiction. It should also be noted that *United Group Rail* has been characterised by academic commentators as an outlier that stands against the Australian courts' predominant view that agreements to negotiate are too uncertain to be enforceable as they do not create binding obligations.[41] Accordingly, it remains to be seen how Australian law develops on this subject.

Treatment of multi-tier dispute resolution clauses by arbitral tribunals

Arbitral tribunals have demonstrated a general reluctance to choosing a course of action that would bar the commencement of an arbitration or deprive a tribunal of jurisdiction where a party has failed to fulfil the pre-arbitral steps in a multi-tier clause.[42]

For example, *Ethyl Corporation v. Canada*[43] was commenced under Chapter Eleven of the North American Free Trade Agreement (NAFTA). Article 1120 of NAFTA required that a foreign investor could only commence an arbitration 'provided that six months have elapsed since the events giving rise to a claim'. In that case, a US investor commenced an arbitration against Canada with respect to a measure that was in the process of being enacted more than six months prior to the commencement of the arbitration, but which only took legal effect within six months prior to the commencement of the arbitration. Accordingly, Canada objected to the jurisdiction of the tribunal on the ground that the claimant failed to wait the full six months required by Article 1120 prior to commencing arbitration.

38 [2009] NSWCA 177.

39 Ibid at para 15.

40 Ibid at para 81.

41 Kayali, *supra* at 570.

42 Gary Born, *International Commercial Arbitration* 2nd ed (Kluwer Law International, 2014) at 923-24.

43 *Ethyl Corp v. Gov't of Canada*, in NAFTA Award on Jurisdiction (24 June 1998), 38 Int'l Legal Mat 708.

While acknowledging that Canada was technically correct, and that the claimant had jumped the gun when it commenced the arbitration, the tribunal rejected Canada's objection to its jurisdiction. To begin, it held that if it were to rule that it did not have jurisdiction, such a determination would be inconsistent with the object and purpose of NAFTA, which 'would not be best served by a rule absolutely mandating a six-month respite following the final effectiveness of a measure until the investor may proceed to arbitration'.[44] Further, the tribunal held that 'no purpose would be served by any further suspension of Claimant's right to proceed'.[45] In particular, the tribunal ruled that because the measure took legal effect within the six months of the date on which the arbitration was commenced, '[i]t is not doubted that today Claimant could resubmit the very claim advanced here' and that 'a dismissal of the claim at this juncture would [therefore] disserve, rather than serve, the object and purpose of NAFTA'.[46] In other words, the tribunal held that little purpose would be served by dismissing the arbitration for lack of jurisdiction, other than to cause wasted time and expense. Accordingly, the tribunal held that the claimant's failure to satisfy Article 1120 of NAFTA should not 'be interpreted to deprive this Tribunal of jurisdiction'. However, it ruled that because claimant did fail to comply with Article 1120, claimant should bear all costs associated with the jurisdictional proceedings.[47]

Similarly, *Salini Costruttori v. Morocco*[48] involved a bilateral investment treaty between Italy and Morocco that contained a multi-tier clause requiring that all disputes 'should, if possible, be resolved amicably' and that a dispute could only be referred to arbitration if it 'cannot be resolved in an amicable manner within six months of the date of the request [for amicable settlement]'.[49] In that case, two Italian investors commenced an arbitration against Morocco, and Morocco objected to the tribunal's jurisdiction on the ground that the investors failed to comply with the pre-arbitral steps of the multi-tier clause. In particular, Morocco alleged that the investors had failed to seek to negotiate the dispute within the six months pre-dating the commencement of the arbitration with the necessary governmental authorities. In response, the investors pointed to a number of letters and memoranda they had sent to various branches of the Moroccan government generally referring to the dispute.

The tribunal ultimately rejected Morocco's application to dismiss the case for lack of jurisdiction. In particular, the tribunal observed that:

> *The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimant actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute.*[50]

44 Ibid at para 83.

45 Ibid at para 84.

46 Ibid at para 85.

47 Ibid at para 88.

48 *Salini Costruttori v. Morocco*, Decision on Jurisdiction ICSID Case No. ARB/00/4 (23 July 2001).

49 Ibid at para 15.

50 Ibid at para 19.

Because the investors had issued correspondence and memoranda that generally referred to the dispute to Moroccan government authorities, the tribunal concluded that they 'constitute[d] a written request aimed toward the amicable settlement of the dispute and satisf[ied] the requirement set out in the Bilateral Treaty'.[51] In so holding, the tribunal demonstrated a reluctance to interpret strictly the pre-arbitral steps in the multi-tier clause as binding conditions precedent to arbitration to avoid the termination of the arbitration.

Likewise, in an ICC case from 2001,[52] the contract at issue required that the parties undertake efforts to negotiate disputes prior to submitting them to arbitration. In that case, the claimant commenced an arbitration against the respondent without making any effort to negotiate, and the respondent consequently challenged the jurisdiction of the tribunal. In its defence, the claimant contended that negotiations would have been futile and urged the tribunal to accept jurisdiction.

The tribunal rejected the respondent's application and asserted jurisdiction over the dispute. It relied in large measure on its finding that there would have been little prospect of settlement had they carried out negotiations prior to arbitration. In particular, the tribunal stated:

> *The arbitrators are of the opinion that a clause calling for attempts to settle a dispute amicably are primarily expression of intention, and must be viewed in the light of the circumstances. They should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute.*
>
> *Accordingly, the arbitrators have determined that there was no obligation on the claimant to carry out further efforts to find an amicable solution, and that the commencement of these arbitration proceedings was neither premature nor improper.*[53]

In view of the above cases, it appears that arbitral tribunals are generally reluctant to find that pre-arbitral steps in multi-tier dispute resolution clauses are jurisdictional conditions precedent to the commencement of arbitration, particularly where doing so would have the effect of terminating an arbitration or otherwise depriving a tribunal of jurisdiction.

Practical guidelines

The determination of whether the pre-arbitral steps in a multi-tier dispute resolution clause constitute jurisdictional conditions precedent can have very serious consequences.

For example, if a claimant commences an arbitration without complying with the pre-arbitral steps in a multi-tier clause, and a limitation period expires while the arbitration is pending, a finding that the pre-arbitral steps constituted a jurisdictional condition precedent can result in the arbitration being dismissed and the claimant being time-barred from pursuing its claims.

Similarly, if a claimant fails to carry out pre-arbitral steps in a multi-tier clause and successfully obtains a final award against the respondent, a determination by a national court after the conclusion of the arbitration that the pre-arbitral steps constituted jurisdictional

51 Ibid.

52 ICC Case No. 8445, Final Award, XXVI Y.B. Comm. Arb. 167 (2001).

53 Ibid at 169.

conditions precedent could result in the award being set aside or otherwise not enforced for lack of jurisdiction.

There are a number of considerations both transactional lawyers and arbitration practitioners need to bear in mind when confronted with such multi-tier clauses.

Practical guidelines for transactional lawyers

Given the mixed views among national courts and arbitral tribunals on whether multi-tier clauses constitute jurisdictional conditions precedent to the commencement of arbitration, careful consideration should be given to whether they should be included in an arbitration clause at all. Often, commercial parties in the energy industry will request that they be included to maximise the likelihood of reaching a settlement prior to arbitration. However, the risks associated with such clauses should be clearly explained, as well as the reality that there is nothing to prevent commercial parties from seeking to negotiate a settlement – or, indeed, to agree to participate in a formal mediation or conciliation process – at any time, regardless of whether the parties' dispute resolution clause formally requires the parties to do so. As a result, transactional lawyers should carefully assess with their clients whether a multi-tier dispute resolution clause is necessary or desired.[54]

To the extent a multi-tier clause is desired and the parties wish for the pre-arbitral steps in the clause to constitute jurisdictional conditions precedent, transactional lawyers should ensure the following are considered:

- The multi-tier clause should expressly and unequivocally state that the pre-arbitral steps are conditions precedent to the commencement of arbitration, and that arbitration may not be commenced until such time as they have been fulfilled.
- The pre-arbitral steps should be described in detail, with clear, unequivocal, and determinate language to ensure that they can be followed and enforced.

  For instance, where the parties wish to incorporate a requirement that the parties negotiate prior to commencing arbitration, they should avoid simply stating that the parties must negotiate prior to arbitration. Rather, the clause should specify precisely what the parties' obligations are. For example, the clause should specify: (1) the precise period over which the parties must negotiate prior to commencing arbitration; (2) what event triggers the commencement of the negotiation period (e.g., the issuance of a notice); (3) what party representatives must participate in the negotiations (e.g., the parties' chief executive officers); (4) how the negotiations are to take place (e.g., in person, by telephone conference or otherwise); (5) how many negotiation sessions are required; and (6) a clear event that triggers the termination of the negotiation requirement (e.g., the expiration of the negotiation period).

  Similarly, where the parties wish to incorporate a requirement that formal mediation or conciliation proceedings take place prior to arbitration, they should again avoid simply stating that mediation or conciliation is required prior to arbitration. Rather, they should specify: (1) the precise period in which the parties will be required to mediate or conciliate; (2) an institution before which mediation or conciliation is to

54 Jason File, 'United States: multi-step dispute resolution clauses' IBA Legal Practice Division Mediation Committee Newsletter (July 2007) 33 at 35.

take place; (3) the mediation or conciliation rules that will apply; (4) how the parties will commence mediation or conciliation; (5) what party representatives are required to participate; (6) how many sessions are required; and (7) a clear event that triggers the termination of the mediation or conciliation.

Lastly, whether the parties incorporate negotiation, mediation or conciliation as a pre-arbitral condition precedent, they should also avoid using indeterminate statements that require the parties to negotiate, mediate or conciliate 'genuinely' or in 'good faith', for example, to avoid either party being able to assert that while its counterpart may have participated in negotiation, mediation or conciliation sessions as required, it did not do so genuinely or in good faith, to pre-empt the commencement of an arbitration.

- Where the parties wish to incorporate multiple tiers of pre-arbitral steps (e.g., negotiation among low-level representatives, followed by negotiation among higher-level representatives, followed by mediation or conciliation), the transition between the different tiers must be outlined in sufficient detail so that the sequence of procedures can be clearly followed and enforced.

Finally, if the parties wish to include the possibility of holding pre-arbitration discussions without elevating them to binding jurisdictional conditions precedent, the simplest way to accomplish this would be to state that they are not conditions precedent to the commencement of arbitration. Further, the parties should avoid any mandatory language that could be interpreted as making the pre-arbitral steps conditions precedent to arbitration such as 'shall' or 'must', and instead use permissive verbs such as 'can' and 'may'.

Practical considerations before initiating arbitration

When advising a party contemplating arbitration, careful attention should be paid to whether there is a multi-tier clause in the parties' agreement that will need to be satisfied prior to serving a notice of arbitration. Failure to do so may result in an objection from the opposing party that the tribunal has not been appropriately vested with jurisdiction, an allegation which may result in the termination of the arbitration or, at worst, lead to the set-aside or non-enforcement of an award after it has been delivered.

To minimise the risk of objections arising from an alleged failure to comply with a multi-tier clause, counsel should undertake the following steps, to the extent applicable:

- Counsel should ensure that the parties have carefully performed all steps required by the multi-tier clause prior to commencing arbitration.
- Counsel should carefully document the commencement, performance and completion of all pre-arbitral steps required by the multi-tier clause so that there is a clear documentary record of the parties' compliance.
- Prior to commencing the pre-arbitral steps, counsel should ensure that all limitation periods or time considerations have been taken into account, and that ample time is provided for the pre-arbitral steps to be carried out to avoid any time-bar or prescription issues.
- Prior to commencing the pre-arbitral steps, counsel should review the claims that will be advanced in the arbitration, with expert assistance if necessary, to ensure that all claims that will be made form part of the pre-arbitral negotiations, mediation or conciliation, and written notice should be provided of all such claims prior to commencing

the pre-arbitral procedure. This will prevent a counterparty from asserting that specific claims made in the arbitration were not previously raised as required by the multi-tier clause to challenge a tribunal's jurisdiction. If insufficient time is available for counsel to undertake this prior to commencing the pre-arbitral steps, the disputes at issue should be framed as broadly as possible in the party's notice and during the negotiations, mediation or conciliation to ensure that all claims raised in the arbitration can be linked back to the pre-arbitration discussions.

- In the event that the respondent is served with notice of the commencement of the pre-arbitral steps by the claimant and the respondent anticipates it will advance counterclaims in a future arbitration, the respondent should ensure that all potential counterclaims form part of the pre-arbitral negotiations, mediation or conciliation and that written notice of them is provided so that the claimant cannot seek to have such counterclaims dismissed for lack of jurisdiction. Ideally, the respondent should review the counterclaims that will be advanced in the arbitration, with expert assistance if necessary, to ensure that all such counterclaims specifically form part of the pre-arbitral procedure. But, if insufficient time is available, the counterclaims should be framed as broadly as possible to ensure that all counterclaims raised in the arbitration can be linked back to the pre-arbitration discussions.

Conclusion

Given the collaborative nature of the energy industry, parties and joint ventures to energy-related contracts may be inclined to include a multi-tier clause into their agreements to avoid the cost of arbitration and to minimise any upset to the parties' ongoing relationship that would result from escalated proceedings. Despite the benefits that flow from such clauses, however, consideration must be given to whether a multi-tier clause warrants inclusion in an agreement, particularly if both parties are sophisticated, as is often the case in the energy industry, and are likely to engage in settlement negotiations irrespective of the presence of a multi-tier clause.

The assessment of whether to include a multi-tier clause in an agreement must take into account the risks that may arise from the failure to comply with such a clause. While most national courts and arbitral tribunals have generally shown a reluctance to finding multi-tier clauses as jurisdictional conditions precedent to arbitration, there is a risk that a failure to comply with them may have jurisdictional consequences. Accordingly, multi-tier clauses should not be treated as boiler-plate provisions whose inclusion in an arbitration agreement can be treated as an afterthought. Nor should multi-tier clauses be ignored in the lead-up to an arbitration. Rather, given their potentially very serious ramifications, counsel should pay careful attention to multi-tier clauses, and fully apprise their clients of the implications of not complying with them.

Appendix 1

About the Authors

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George Vlavianos is the managing partner of Bennett Jones (Gulf) LLP, which carries on the practice of law in Doha, Qatar, in association with Bennett Jones LLP.

Leader of the firm's arbitration practice, George practises in the area of dispute resolution and construction law. He has also acted for owners, contractors and engineers in a wide range of construction disputes, from civil to industrial. In addition, he has broad experience with insurance claims arising out of large industrial construction projects.

George represents major industrial clients in complex multiparty litigation and is involved in both domestic and international mediation and arbitration with respect to significant commercial disputes. He has considerable international arbitration experience as counsel under the world's leading arbitration rules, including UNCITRAL and ICC, and occasionally sits as an arbitrator. George also has extensive experience with construction lien disputes, particularly in the oil and gas context.

George is a registered practitioner with the DIFC courts in Dubai. He has also appeared before all levels of court in Alberta, Canada, including the Alberta Court of Appeal.

George is a Fellow of the Canadian College of Construction Lawyers (CCCL) and a member of the Congress of Fellows of the Center for International Legal Studies. He is also a member of the London Court of International Arbitration. George is admitted to the Panel of International Commercial Arbitrators of the ICC National Committee of the Canadian Chamber of Commerce. He is ranked by Chambers in the fields of dispute resolution and construction law.

George is also fluent in English, French and Greek. He has a working knowledge of German and a basic knowledge of Arabic.

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Vasilis Pappas' practice focuses on international commercial arbitration and investor–state arbitration, with a particular emphasis on construction disputes.

Vasilis represents multinational companies all over the world in complex commercial disputes in a diverse range of sectors, including, oil and gas, mining, banking, insurance, telecommunications and pharmaceuticals. He has acted as arbitration counsel under the world's leading international arbitration rule systems including ICC, LCIA, UNCITRAL, ICDR and AAA, and as litigation counsel before the courts of the United States and Canada. Vasilis also represents sovereign states and multinational companies worldwide in investor–state disputes under NAFTA Chapter 11, the ICSID Convention, and other bilateral and multilateral investment treaties.

Prior to joining Bennett Jones, Vasilis practised for eight years in New York City with a leading international law firm. He also practised with the Government of Canada's Department of Foreign Affairs and International Trade, representing Canada in investor–state arbitrations and investment treaty negotiations.

Vasilis now works out of Bennett Jones' Calgary and Doha offices. He is an adjunct professor at the University of Calgary's Faculty of Law in the field of international commercial arbitration, and is on the Canadian roster of arbitrators of the ICC International Court of Arbitration. He also publishes and speaks regularly on topics pertaining to international commercial arbitration and investor–state arbitration.

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