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Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence

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Multi-Tiered Dispute Resolution Clauses – Pre-Arbitral Steps – Jurisdiction – Admissibility – Threshold Jurisdiction – FIDIC Dispute Adjudication Boards (DABs) – Kompetenz Kompetenz – Institutional Rules

1. Introduction

This Paper challenges and builds on the analysis in Jan Paulsson’s seminal paper *Jurisdiction and Admissibility*¹ published in November 2005 and develops further the jurisprudential thoughts of Gary Born and Marija Šćekić in *Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’*² published in November 2015. Multi-tiered dispute resolution clauses³ are important (especially in the context of arbitration agreements in contracts dealing with international construction and infrastructure projects). Clear, cogent and compelling reasons must exist before multi-tiered dispute resolution provisions can be ignored. The lack of coherence in the treatment of such provisions is tangible and significant. A number of learned authors have already addressed the differing or inconsistent positions in the national courts and arbitral

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¹ Jan Paulsson, *Jurisdiction and Admissibility*, Global Reflections on International Law, Commerce and Dispute Resolution, Uber Amicorum in honour of Robert Briner, ICC Publishing, Publication 693, November 2005, www.iccbooks.com.

² Gary Born and Marija Šćekić, *Chapter 14: Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’* in Caron, d. David. *Practising Virtue Inside International Arbitration*. Oxford University Press, November 2015.

³ Multi-tiered dispute resolution clauses are also known as “pre-arbitration procedural requirements”, “escalation”, “multi-step” or “ADR first” clauses.

tribunals (whether in international commercial arbitration or public and private international law). A review of the literature and cases tends to the conclusion that national courts do not look at the enforceability of such multi-tiered dispute resolution provisions as a matter of “admissibility” or “jurisdiction” or “procedure”. However, such “labels” frame the jurisprudential analysis conducted by amongst others Jan Paulsson and Gary Born and Marija Ščekić. Ultimately, despite *Jurisdiction and Admissibility* and *Pre-Arbitration Procedural Requirements*. ‘A Dismal Swamp’ the lack of coherence on pre-arbitration procedures continues.

This Paper explains that the problems with pre-arbitration procedures or multi-tiered dispute resolution clauses can only be fixed properly if Institutional Rules make it express that the arbitral tribunal has jurisdiction to decide its own jurisdiction; and in so doing has the express authority to review compliance with the multi-tiered dispute resolution clause; and thus to decide if the arbitration has been commenced properly. Early determination is key. A disgruntled party is at liberty to challenge the award on jurisdiction at an early stage rather than leave open the point until post final award. Equally, a disgruntled party is at liberty to accept or concede that the arbitral tribunal has jurisdiction (and record such consent in an order or terms of reference or an agreement between the parties). Jurisdiction is binary: either the arbitral tribunal has threshold or gateway jurisdiction or it does not. The approach advanced in this Paper makes clear that the parties value the pre-arbitration procedures; the parties value arbitration (rather than litigation); and that the principle of *Kompetenz-Kompetenz* should be used to support the proposition that the arbitral tribunal has threshold jurisdiction. This does not mean that an arbitral tribunal will automatically decide that an arbitration has been properly commenced (such an approach would undermine the multi-tiered provisions). The approach in this Paper allows the arbitral tribunal freedom to decide that an earlier step has not been followed such that it does not *yet* have jurisdiction (such that the arbitration may be recommenced) or to allow the arbitration to proceed concurrently with compliance with pre-arbitral steps or to order a stay pending compliance with the pre-arbitral steps. The approach advanced in this Paper will bring coherence and reduce the scope for abuse of multi-tiered dispute resolution provisions.

Absent explicit provisions in Institutional Rules, the parties are left only with jurisprudence and normative propositions that are either not fully understood or that are not accepted by national courts. Put simply, threshold jurisdiction is vital and thus needs to be codified in Institutional Rules. Authors and commentators who assert that express mandatory pre-arbitration procedures ought to be ignored such that an arbitral tribunal assumes threshold jurisdiction have failed to convince the arbitral community and national courts; have not stopped the incoherence; provide no compelling reasons why the multi-tiered provisions

can be so readily side-stepped; and fail to explain how an arbitral tribunal gets threshold jurisdiction when the parties' agreement has expressly made such jurisdiction conditional upon compliance with earlier ADR procedures.

Multi-tiered dispute resolution clauses typically state that when a claim or dispute arises, parties must undertake escalating steps prior to commencing arbitration, in an attempt to settle their controversies amicably⁴. For example, Sub-Clause 20.4 of the FIDIC 1999 conditions includes the provision that “neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause”. It is well understood that FIDIC advocates the importance of Dispute Adjudication Boards (DABs) and the guidance notes that accompany the FIDIC forms makes clear that a notice of dissatisfaction is the gateway to arbitration. According to FIDIC, “The notice establishes the notifying Party’s right to commence arbitration at any time after a further 56 days” and if there is no notice of dissatisfaction issued within 28 days of the DAB’s decision then the decision becomes final as well as binding. Irrespective of the precise pre-arbitral steps, questions remain. For example, what happens when a party commences arbitration without having followed the prior steps expressed in the multi-tiered dispute resolution clause? What

⁴ It is widely understood that multi-tiered dispute resolution clauses are beneficial because they provide a contractual “cooling-off period” before the initiation of proceedings during which the parties can reassess and evaluate whether to compromise; they may enable the parties to narrow the issues to be arbitrated; they contain procedures appropriate for different type of claims and disputes and enable parties to resolve simpler and financially smaller problems by spending less time and money; and they enable parties to protect their further business relationship through cooperative dispute settlement procedures and amicable dispute resolution. There are also acknowledged concerns (with some referring to such provisions as “the courtesy trap”): pre-arbitration negotiations where the parties remain unyielding means that the possibility of reaching an agreement is hopeless can lead to an unnecessary delay and expense; the obligation to follow pre-arbitration steps can impair securing interim measures in time-sensitive disputes; in particularly complex construction disputes, where additional claims and/or counterclaims are raised post arbitration objections can be made on the ground that such claims or counterclaims were not expressly negotiated during the pre-arbitration steps; where a limitation period is set to expire before the contractually mandated negotiation period, a claim may be barred. In the context of admissibility of counterclaims, in *Biogaran v International Drug Development*, Cass. Com., 24 May 2017 n° 15-25.457, the French Cour de Cassation reasoned that at the time when counterclaim was made, the proceedings had already been “commenced” (as that term is defined in Article 53 of the French Code of Civil Procedure) and so it was irrelevant to the admissibility of the counterclaim whether the contract required a mediation as a condition precedent to the commencement of proceedings. The question was rather whether the contract specifically imposed a precondition to the filing of a counterclaim – and without express wording to this effect, the Court was not prepared to find that it did.

if the pre-arbitral steps in the multi-tiered dispute resolution clause constitute jurisdictional conditions precedent to arbitration? Can the arbitral tribunal assert threshold jurisdiction and hold that the pre-arbitral step deals merely with whether the dispute is ripe for adjudication? Does the failure to comply with a pre-arbitral step merely give rise to a claim for damages? These questions also raise issues of characterization. Born and Šćekić summarize characterization as follows:⁵

“...as ‘jurisdictional’ defences (on the theory that the arbitration agreement is not triggered (or formed) and does not provide an arbitral tribunal with any authority until pre-arbitration procedural requirements have been complied with, or on the theory that the parties’ consent to arbitration is subject to the fulfilment of pre-arbitration steps), ‘admissibility’ defences (on the theory that the arbitration agreement exists and provides the arbitrators with jurisdiction, but does not permit assertion of substantive claims until after specified requirements have been satisfied), or ‘procedural’ requirements (on the theory that pre-arbitration requirements merely concern the procedural conduct of the dispute resolution mechanism, but do not affect the parties’ substantive rights to be heard).”

2. The Lack of Coherence Continues

The purpose of this Paper is not to set out the different approaches followed by national courts and arbitral tribunals. It is clear that various pre-arbitration procedural provisions have produced a large number of confusing and inconsistent judgements. In *Jurisdiction and Admissibility*, Jan Paulsson used the *Vekoma*⁶ case from 1995 to highlight the problems caused when the Swiss Supreme Court held that the agreement to arbitrate was subject to a condition subsequent, namely the express thirty-day limit to initiate the arbitration, and that that condition failed when the claimant neglected to initiate arbitration within thirty days after it was agreed that the difference or

⁵ Gary Born and Marija Šćekić. *Chapter 14: Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’* in Caron, d. David. *Practising Virtue Inside International Arbitration*. Oxford University Press, November 2015, at page 243.

⁶ *Transport-en Handelsmaatschappij ‘Vekoma’ B.V. v. Maran Coal Corporation*, Judgment of 17 August 1995, ASA Bulletin 1996, 673; *Revue Suisse de droit international et de droit européen* 1996, 573.

dispute could not be resolved by negotiation⁷. ICC Case No. 6276⁸ in 1990 is another early example: the arbitral tribunal held that the request for arbitration was premature because the dispute had not gone through the engineer's determination step, which would have triggered the 90-day period to commence arbitration. The arbitral tribunal was not concerned that the works had been completed and that it was too late to appoint an engineer finding instead that the pre-arbitral process was strictly binding on the parties. A comprehensive and detailed review of the cases that highlight the incoherence is contained in Gary Born and Marija Ščekić's 2015 Paper *Pre-Arbitration Procedural Requirements. 'A Dismal Swamp'*. Gary Born and Marija Ščekić recognize that many courts will uphold the validity of agreements to negotiate only where there is a reasonably clear set of substantive and procedural requirements against which a party's negotiating efforts can be meaningfully measured but focus more attention on the case law where pre-arbitration steps have been considered aspirational, directional or hortatory, stating⁹:

"A substantial body of decisions by international commercial arbitral tribunals holds that violations of pre-arbitration procedural requirements (such as violations of waiting, or 'cooling-off', periods or requirements to negotiate the resolution of disputes) are not violations of mandatory obligations. In one tribunal's words, clauses requiring efforts to reach an amicable settlement, before commencing arbitration, 'are primarily expression[s] of intention' and 'should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute' [citing ICC Case No 10256, Interim Award (12 August 2000) in Figueres

⁷ Jan Paulsson's criticism of the Swiss Supreme Court focused on the fact that the arbitral tribunal had jurisdiction and was applying its authority to assess whether the request for arbitration was admissible:

"The fundamental error of the annulment was rather that [the Swiss Supreme Court] misunderstood the nature of the challenged arbitral decision. The arbitrators had made a decision as to the *admissibility* of the claim. The parties had agreed that all disputes under their contract would be decided by this particular tribunal, and as noted the validity of the arbitration clause was not at issue. The arbitrators therefore decided the admissibility issue in the exercise of their jurisdictional authority. The Swiss court was simply not entitled to review their decision in this regard." (page 602)

⁸ ICC Case No. 6276, Partial Award of January 29, 1990. See also ICC Case No. 12739, Award, cited in Michael Bühler and Thomas H Webster, *Handbook of ICC and Arbitration* (Sweet & Maxwell 2008) 67; ICC Case No. 9977 (n 3); and ICC Case No. 9812, Final Award (2009) 20(2) ICC Ct Bull 69, 73.

⁹ Gary Born and Marija Ščekić. *Chapter 14: Pre-Arbitration Procedural Requirements. 'A Dismal Swamp'* in Caron, d. David. *Practising Virtue Inside International Arbitration*. Oxford University Press, November 2015, at page 234.

(n 2) 87]. Other awards are to the same effect [See ICC Case No 11490, Final Award (2012) XXXVII YB Comm Arb 32 (‘The provision in the arbitration clause that disputes “be settled in an amicable way” constituted no condition precedent to referral to arbitration but rather underlined the parties’ intent not to litigate disputes in court’); ICC Case No 8445, Final Award, (2001) XXVI YB Comm Arb 167; Licensor and Buyer v Manufacturer, SCC, Interim Award (17 July 1992) (1997) XXII YB Comm Arb 197.].”

The incoherence continues. This Paper cites several examples to show that the lack of coherence with multi-tiered dispute resolution clauses has still not been resolved despite the seminal papers of Jan Paulsson and Gary Born.

India

The legal character of pre-arbitration procedures is unresolved, as courts in India have taken inconsistent views by concluding that pre-arbitration procedures are mandatory or characterizing pre-arbitration steps as merely optional and non-mandatory.¹⁰ In *Demerara Distilleries*¹¹ the contract required the parties to engage in mutual discussions, followed by mediation and only on failure of mediation could arbitration be commenced. The Supreme Court of India held that objections relating to the appointment application being “premature” and the “disputes not being arbitrable” did not merit “any serious consideration”. It found that correspondence between the parties indicated that mediation would be an “empty formality” such that “the proceedings before the Company Law board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application”. In May 2018, the Supreme Court of India took a different approach in *Oriental Insurance Company*¹² where it stated that arbitration clauses are “*required to be strictly construed*”¹³.

¹⁰ Chahat Chawla, *The muddy waters of Pre-Arbitration Procedures, are they enforceable? Answers from an Indian Perspective.*, Kluwer Arbitration Blog, 9 June 2019.

¹¹ *Demerara Distilleries (P) Ltd v. Demerara Distillers Ltd.*, Supreme Court of India 24 November 2014.

¹² *Oriental Insurance Company Ltd v. M/S Narbheram Power and Steel Pvt. Ltd.*, Supreme Court of India, 2 May 2018.

¹³ *Oriental Insurance Company Ltd v. M/S Narbheram Power and Steel Pvt. Ltd.*, Supreme Court of India, 2 May 2018 at para. 24. Note too that in August 2018, in line with *Oriental Insurance Company*, in *United India Insurance Co. Ltd v. Hyundai Engineering and Construction* the Supreme Court of India found that the arbitration agreement was “hedged with a conditionality” and the non-fulfilment of the “pre-condition” rendered a dispute “non-arbitrable”. Even though the existence of an arbitration agreement was not disputed, the Court

In September 2019 Mr Justice Rajiv Shakdher sitting in the Delhi High Court delivered an important judgement. *SBS Logistics Singapore Pte Ltd v. SBS Transpole Logistics Private Limited* is a case dealing with enforcement of a final award rendered under the SIAC 2013 Rules in circumstances where one party sought to resist enforcement on the basis that the arbitral tribunal lacked jurisdiction because the amicable negotiations (that formed a step in the multi-tiered dispute resolution clause) had not been properly followed and that the reference to arbitration was not compliant with the agreed procedure set out in the loan agreement. Mr Justice Shakdher's analysis is important. The learned Judge decided that a non-compliance with an earlier step can invalidate an arbitral tribunal's jurisdiction:

“One cannot but agree with the proposition that where there are clear wordings in the agreement obtaining between parties that pre-arbitration steps are required to be taken before triggering the arbitration mechanism, a recalcitrant party cannot wriggle out of such obligation by treating such a provision as directory – it, however, does not follow that the clause would act as a noose around the neck of the party forcing it to remain engaged in negotiations even though there is no meeting ground for resolution of disputes. If such an objection is raised, the concerned tribunal is required to ascertain whether steps in that behalf were taken. In this case, an objection was taken *qua* which a decision was rendered by the arbitral tribunal on 05.09.2016.”¹⁴ [emphasis added]

Mr Justice Shakdher reviewed the facts and found that the 30 day period for negotiation should be assessed pragmatically such that the “clause cannot be construed in a fashion that keeps one party engaged in negotiations and thus delays the arbitration process if it is found in earlier confabulations between the representatives of disputants that there is no common meeting ground for the resolution of *inter se* disputes”. The Delhi High Court had held in earlier judgements that prior steps before referring a dispute to arbitration are “only directory and not mandatory”.¹⁵ In February 2017, the Bombay High Court in *S Kumar Construction Co. & Anr v. Municipal Corporation of Greater*

held that the arbitration agreement could only be “activated” or “kindled” upon the completion of the pre-conditions, and the same was “*sine qua non* for triggering the arbitration clause”.

¹⁴ *SBS Logistics Singapore Pte Ltd v. SBS Transpole Logistics Private Limited*, Delhi High Court, 16 September 2019, , at paragraph 19.4.

¹⁵ See in particular *Sikand Construction*, Delhi High Court, 27 October 1978 and *Saraswati Construction Company*, Delhi High Court, 12 September 1994, *Ravindra Kumar Verma*, Delhi High Court, 18 November 2014, and more recently *Union of India v. M/S. Baga Brothers*, Delhi High Court, 7 July 2017, *Siemens Limited and Sarvesh Security Services*, Delhi High Court, 30 January 2018.

*Bombay*¹⁶ had also found that compliance with pre-arbitration procedures was not mandatory. The same Court in *Municipal Corporation of Greater Bombay v. Atlanta Infrastructure Ltd*¹⁷, had declined to set aside an award on the ground of violation of pre-arbitral steps as it found that compliance with such steps was not mandatory. For the purposes of the substantive discussion in this Paper it is notable that in India the courts have not expressly examined the question of pre-conditions to arbitration as a choice between “admissibility” or “jurisdiction” or “procedure”. There is no evidence that the seminal papers *Jurisdiction and Admissibility* or *Pre-Arbitration Procedural Requirements*. ‘*A Dismal Swamp*’ were raised or discussed in the Courts in India. Thus, the Indian Judiciary did not examine the concept that ‘substantive admissibility’ may arise as an issue for determination *after* jurisdiction has been established or obtained by the arbitral tribunal. Jurisdiction is treated as a binary issue.

England and Wales

In *Sulamerica CIA Nacional de Seguros v. Enesa Engenharia*¹⁸ the Court of Appeal held that mediation was not a binding condition precedent to arbitration in the multi-tiered clause as it did not contain (i) clear language to that effect and (ii) did not define the obligation to mediate with sufficient certainty. The Court held that the clause “... contains merely an undertaking to seek to have the dispute resolved amicably by mediation. No provision is made for the process by which that is to be undertaken”. *Tang Chung Wah & Anor v. Grant Thornton International Ltd*¹⁹ considered a multi-tiered dispute resolution clause that provided 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”. Mr Justice Hildyard said²⁰:

¹⁶ *S Kumar Construction Co. & Anr v. Municipal Corporation of Greater Bombay*, Bombay High Court, 8 February 2017.

¹⁷ *Municipal Corporation of Greater Bombay v. Atlanta Infrastructure Ltd*, Bombay High Court, 16 December 2005.

¹⁸ *Sulamerica CIA Nacional de Seguros v. Enesa Engenharia* [2012] EWCA Civ 638; [2013] 1 WLR 102. The Court of Appeal considered a multi-tiered dispute resolution clause that required that “prior to a reference to arbitration, [the parties] will seek to have the Dispute resolved amicably by mediation”.

¹⁹ *Tang Chung Wah & Anor v. Grant Thornton International Ltd* [2012] EWHC 3198 (Ch); [2013] 1 All E.R. (Comm) 1226.

²⁰ *Ibid* at paras 59-61. Mr Justice Hildyard concluded that the clause was “too equivocal in terms of the process required and too nebulous in terms of the content of the parties’ respective

“The test [...] is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect [...] In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach. In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.”

In the 2014 case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*²¹, the contract contained a multi-tiered dispute resolution clause requiring the parties to negotiate for four weeks prior to arbitration. The Court emphasized “the overarching imperatives of upholding the agreement of commercial parties which seeks to prevent them from ‘launching into an expensive arbitration’ without first trying to reach a settlement, and the public policy argument in favour of enforcing clauses which seek to avoid the expense of litigation or arbitration”.²² The Court held that negotiation was a “condition precedent to the right to refer a claim to arbitration”.²³

obligations to be given legal effect as an enforceable condition precedent to arbitration". Specifically, the High Court held that the multi-tiered arbitration clause did not indicate:

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

²¹ *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm); [2015] 1 WLR 1145.

²² Craig Tevendale, Hannah Ambrose and Vanessa Naish, *Multi-tier Dispute Resolution Clauses and Arbitration*, *The Turkish Commercial Law review*, Vol.1, No.1, February 2015.

²³ *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) at para. 26. *Emirates Trading* was criticized 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 with some suggesting that it should 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

Sub-Clause 20.2 of the FIDIC General Conditions provides that, before being submitted to arbitration, “[d]isputes shall be adjudicated by a Dispute Adjudication Board (“DAB”) in accordance with Sub-Clause 20.4”. In addition, Sub-Clause 20.8 of the FIDIC General Conditions authorizes a party to go directly to arbitration whenever a DAB is not in place at the time a dispute arises, “whether by reason of the expiry of the DAB’s appointment or otherwise”. The words “or otherwise” could mean that a party is entitled to proceed to arbitration if a Dispute Adjudication Board (DAB) is not in place irrespective of the reason for the absence. Leading scholars disagree and suggest that allowing a party to side-step the DAB and proceed to arbitration contravenes the spirit of the FIDIC General Conditions and undermines the utility of the multi-tiered dispute resolution process²⁴.

The High Court in *Peterborough City Council v Enterprise Managed Services Ltd*²⁵ shared this view. *Peterborough* concerns an application by the Defendant (“EMS”) for an order to stay litigation brought by the Claimant (“the Council”) in respect of a dispute arising out of the contract dated 7 July 2011 by which EMS agreed to design, supply, install, test and commission a 1.5 MW solar energy plant on the roof of a building owned by the Council. The application was made on the ground that the contract required any dispute to be referred to adjudication by a DAB as an express precondition to litigation. The works reached completion in 2011. The Council asserted that the plant failed to achieve the required output, 55 kW, by the stipulated date so that it became entitled to the price reduction under the terms of the Contract. In January 2014 the Council sent EMS a pre-action protocol letter of claim. A mediation took place in May 2014. In August 2014 the Council served its claim form and Particulars of Claim.

The contract was based on the FIDIC General Conditions of Contract for EPC/Turnkey Projects. The Council commenced litigation relying on Sub-

arbitration absent express language to the contrary”. See Louis Flannery and Robert Merkin *Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?* in William W. Park (ed), *Arbitration International*, Oxford University Press 2015, Volume 31 Issue 1. and George M. Vlavianos and Vasili F. L. Pappas, Bennett Jones LLP, *Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration*, *The Guide to Energy Arbitrations – Second Edition*.

²⁴ Peter M. Wolrich *Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules*, published on 2 October 2002 and presented at the International Bar Association 2002 Conference in Durban, South Africa; and Christopher R. Seppälä, *Commentary on Recent ICC Arbitral Awards dealing with Dispute Adjudication Boards under FIDIC Contracts*, in ICC Dispute Resolution Bulletin 2015, No. 1, pp. 21-34, spec. at 25.

²⁵ *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC); [2015] 2 All E.R. (Comm) 423.

Clause 20.8. In this case, Sub-Clause 20.8 had been amended to provide for litigation rather than arbitration. The Council argued that the words “or otherwise” were wide enough to include a situation where a DAB was not in place because the parties had not concluded a dispute adjudication agreement with the DAB—the parties could not be under a mandatory obligation to do so. FIDIC Contracts Guide, states:

“... the first paragraph of Sub-Clause 20.2 requires a DAB to be appointed within 28 days after a Party gives notice of intention to refer a dispute to a DAB, and Sub-Clause 20.3 should resolve any failure to agree the membership of the DAB. The parties should thus comply with Sub-Clauses 20.2 and 20.3 before invoking Sub-Clause 20.8. If one party prevents a DAB becoming 'in place', it would be a breach of contract ...”

The Court held that the words “or otherwise” should be interpreted narrowly, with the effect that Sub-Clause 20.8 does not give either party “a unilateral right to opt out of the DAB process”, save in a case where the parties have agreed at the outset to appoint a standing DAB and by the time a dispute arises, the DAB has ceased to be in place, for whatever reason. This is because an ad-hoc DAB would only ever be appointed after a dispute had arisen. If this were not the case then Clauses 20.2 and 20.3 would have no application, because under those Clauses there must be a dispute before the process of appointing a DAB can commence. The decision can be reconciled with the Swiss Supreme Court Decision 4A_124/2014 (discussed below) since both Courts found that the DAB was a mandatory precondition but in *Peterborough* there was no party that was deliberately preventing the constitution of the DAB.

The jurisprudence in *Peterborough* falls into the “admissibility” category (the overall approach of the Court is questionable: it is not clear why the Court did not use its inherent case management powers and allow the litigation to proceed concurrently with the DAB process). Perhaps more importantly for the purposes of the substantive discussion in this Paper it is notable that the Courts in England have not expressly examined the question of pre-conditions to arbitration as a choice between “admissibility” or “jurisdiction” or “procedure”. There is no coherency.

Switzerland

In March 2016, the Swiss Supreme Court²⁶ for the first time ruled on the appropriate remedy or sanction for non-compliance with a multi-tiered dispute resolution clause. The three approaches considered by the Court are “no

²⁶ BGE 142 III 296. ASA Bull. 4/2016, p. 988.

remedy”; “substantive approach”; and “procedural remedy”. The “no remedy” proposition suggests that violations of express pre-arbitral tiers do not have substantive or procedural effect. This approach was suggested by Göksu.²⁷ The Swiss Supreme Court expressly rejected Göksu’s approach as it found that “the principle according to which the violation of a contractual mechanism constituting a mandatory prerequisite for arbitration must be sanctioned [can] be taken for granted”.²⁸ The Court working on the assumption that the pre-arbitral steps are mandatory rejected the notion that there is no remedy for a failure to follow the pre-arbitral step. Under the so-called “substantive approach”, the idea is that the pre-arbitral steps constitute a substantive law agreement, which in turn gives rise to substantive law remedies with no adverse effects as to the tribunal’s jurisdiction or the admissibility of the claim.²⁹ However, the Swiss Supreme Court emphasized that damages are not an adequate remedy as this “would render the obligation to resort to mediation before initiating arbitration proceedings meaningless [and] it would be difficult, if not impossible, [...] to justify the amount”³⁰. The Supreme Court concluded that the appropriate sanction should be procedural in nature and examined three potential procedural sanctions:

– The arbitral tribunal should decline jurisdiction *ratione temporis*

This would mean that the arbitral tribunal would declare that the subject-matter of the dispute was not ripe for adjudication and thus does not fall within the *temporal* scope of application of the arbitration agreement. Under this approach, pre-arbitral tiers are a strict condition precedent to initiating arbitration. The arbitral tribunal does not have jurisdiction until the parties exhaust the pre-arbitral tiers. The Supreme Court regarded the dismissal of the dispute for lack of jurisdiction as an inadequate solution (not least because it would undermine the promised efficiency in finding a quick and cost-effective dispute resolution through the use of a multi-tiered dispute resolution clause³¹).

²⁷ Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014, n. 76-79 as referred to by the Swiss Supreme Court in BGE 142 III 296 para. 2.4.4.1.

²⁸ BGE 142 III 296 at para. 2.4.4.1.

²⁹ This approach had been followed by a decision of the Kassationsgericht Zurich of 15 March 1999 as explained in Miliwoje Mitrovic, *Dealing with the Consequences of Non-Compliance with Mandatory Pre-Arbitral Requirements in Multi-Tiered Dispute Resolution Clauses. The Swiss Approach and a Look Across the Border*, in, ASA Bulletin 3/2019, at pp. 561-568.

³⁰ BGE 142 III 296 at para. 2.4.4.1.

³¹ BGE 142 III 296 at para. 2.4.4.1. The Supreme Court explained that (i) closing the proceedings would put an end to the arbitrators’ mandate with the result that the arbitral tribunal would have to be re-constituted should the conciliation process not lead to an

- The arbitral tribunal should declare the claim as temporarily inadmissible

The Supreme Court looked at the jurisprudential option that non-compliance with a pre-arbitral step could also affect the admissibility of a claim meaning that the arbitral tribunal would find the claim inadmissible “for the time being” without making a finding on its own jurisdiction (and without ending proceedings as the claim is not ripe for arbitration). However, the Supreme Court concluded that such an approach is not an adequate sanction because it is essentially the same as declining jurisdiction and triggers the same adverse effects.

- The arbitral tribunal should stay the arbitral proceedings

Commensurate with the prevailing view amongst Swiss scholars, the Supreme Court found that the most rational solution was for the arbitral tribunal to stay the arbitration in combination with setting a time limit so that the pre-arbitral step (in that case, conciliation) could take place, after which the arbitration could resume before the originally constituted arbitral tribunal. The Supreme Court found that this solution³² was the most cost and time effective. It also ruled that decisions as to the nature of the stay and the conciliation proceedings ought to be made by the arbitral tribunal rather than a national court.

Case BGE 142 III 296 and the Swiss Supreme Court’s analysis are important. The Court looked at matters of jurisdiction, admissibility and procedural breach and formed a clear normative legal proposition. Some may argue that threshold jurisdiction is binary and query how an arbitral tribunal obtains such jurisdiction when the parties have not followed or completed a mandatory pre-arbitral step. Others query whether the Court’s treatment of non-compliance with a multi-tier clause raises jurisdictional issues at all. If it goes to admissibility, it is questionable whether the award could be challenged

agreement; (ii) one could therefore question whether the same arbitrators could be appointed a second time (iii) closing the proceedings would prolong the proceedings and create additional costs and (iv) the termination of the arbitral proceedings would entail the risk of a party’s claim being time-barred as mediation or similar ADR proceedings do not interrupt limitation periods; a party might thus not have the time to go through a pre-arbitral process before the statutory limitation period expires.

³² One should keep in mind that the Swiss Supreme Court highlighted that it is doubtful that a single sanction is apt for all scenarios and, therefore, a stay of the proceedings would not necessarily be the appropriate solution for every case of non-compliance. See BGE 142 III 296 at para. 2.4.4.1 and 2.4.4.2

under Article 190(2) PIL Act.³³ The Court’s jurisprudence builds on Jan Paulsson’s *Jurisdiction and Admissibility* and adds further weight to the notion that users of international arbitration want arbitral tribunals to decide all matters including those relating to the application of the arbitration agreement. As announced by Jan Paulsson, threshold jurisdiction is powerful:

“Decisions of tribunals which do not respect jurisdictional limits may be invalidated by a controlling authority. But if parties have consented to the jurisdiction of a given tribunal, its determinations as to the admissibility of claims should be final. Mistakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of the scope for challenging awards, and frustrate the parties’ expectation that their dispute be decided by the chosen neutral tribunal.

The Swiss Courts also have a clear position on the pre-arbitral steps in the FIDIC forms of contract. Sub-Clause 20.2 in FIDIC uses the verb “shall” and eminent jurists have explained that this leaves no room for interpretation as to its obligatory nature.³⁴ The Swiss Federal Court took the same approach in its *Decision 4A_124/2014*. The material facts are simple: A dispute arose under a construction contract between a French contractor and the state-owned highway company that incorporated the 1999 FIDIC Conditions (which provided for an *ad hoc* rather than a standing DAB). In 2011, the contractor notified the owner of its intention to refer a dispute to the DAB under Clause 20. The parties tried but failed to constitute the DAB. Ultimately, in 2013, the Contractor initiated arbitration under the ICC Rules. The owner objected to the arbitral tribunal’s jurisdiction asserting that the DAB proceedings had to be completed before there could be a reference to arbitration. The arbitral tribunal issued a partial award on jurisdiction finding by majority that it had jurisdiction despite the fact that the dispute had not been previously decided by the DAB. The arbitral tribunal appears to have relied primarily on interpretation of the sub-clauses of Clause 20, in particular the use of the term “may” in Sub-Clause

³³ Marco STACHER, *Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope*, ASA Bull. 1/2020, p. 55.

³⁴ Christopher R. Seppälä, *Commentary on Recent ICC Arbitral Awards dealing with Dispute Adjudication Boards under FIDIC Contracts*, in ICC Dispute Resolution Bulletin 2015, No. 1, pp. 21-34, spec. at 29; see also Peter M. Wolrich *Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules*, published on 2 October 2002 and presented at the International Bar Association 2002 Conference in Durban, South Africa, p. 3.

20.4, to conclude that submission of a dispute to the DAB was not an absolute precondition to arbitration.³⁵

The Swiss Supreme Court,³⁶ whilst finding that Clause 20 of FIDIC creates a condition precedent to arbitration and that the DAB process is mandatory, held that the parties did not in the circumstances have to go through the procedure with an ad-hoc DAB as it would not serve the "economy of the system". On the "shall" "may" issue the Supreme Court held that the use of "shall" in Sub-Clause 20.2 ("disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 ...") led to the conclusion that the DAB proceedings were a mandatory precondition to arbitration. The use of "may" in Sub-Clause 20.4 ("either Party may refer the dispute in writing to the DAB ...") had to be read in the context of Sub-Clause 20.2, and did not qualify the mandatory nature of the precondition. The Court accepted, however, that there are exceptions to the condition precedent, and that in the case before it, the fact that no DAB proceedings had been initiated was not fatal to the arbitral tribunal's jurisdiction. This was because (i) the *raison d'être* for the introduction of the DAB in the FIDIC Conditions was to allow for resolution of disputes arising during the construction works whereas in the present case the constitution of the *ad hoc* DAB had begun after the completion of the works; (ii) the DAB was not operational even though 18 months had passed since the contractor's referral; and (iii) the owner had delayed the process of constituting the DAB. Put shortly, the Supreme Court considered that on the facts the owner forcing the DAB step would be an "abuse of rights". The Swiss Supreme Court found that a party could only rely on the mandatory nature of a pre-arbitral tier of dispute resolution if that party had played its part in conducting the pre-arbitral step.

France

French courts have generally not considered substantive means of defense when dealing with non-compliance of multi-tiered dispute resolution

³⁵ The tribunal also noted, relying on a previous decision of the Supreme Court (4A_18/2007 dated 6 June 2007), that the fact that the contract did not set out a time limit for the constitution of the DAB indicated that the DAB procedure was intended to be optional and not mandatory.

³⁶ The Supreme Court has exclusive jurisdiction for annulment requests for all international arbitration proceedings seated in Switzerland. It should be noted that the Supreme Court found that whilst the law applicable to the contract was not Swiss law, pursuant to Article 178 of the Swiss Private International Law Act ("PILA"), it should conduct its interpretation of Clause 20 of FIDIC under Swiss law, the law of the seat of the arbitration. While Article 178 PILA defines the law applicable to arbitration agreements, the Supreme Court considered that provisions dealing with pre-arbitral procedures should be interpreted under the same law as the arbitration agreement.

clauses.³⁷ Uncertainty remained as to the applicable remedy. Courts had focused on the procedural effects but the different chambers of the French *Cour de Cassation* held conflicting positions on non-compliance with a multi-tiered dispute resolution clause. In *Clinique du Morvan*³⁸, the first civil section of the court found that a multi-tiered dispute resolution clause, stated as being mandatory, could not be enforced because there were no means of defense available for sanctioning non-compliance.³⁹ However, in *Polyclinique des Fleurs*⁴⁰ the second civil section held that the claim was not admissible when filed without having first complied with the mandatory conciliation step.

The decision of the “Chambre mixte”⁴¹ of the *Cour de Cassation* in *Poiré v. Tripier*⁴² clarified the position. The court upheld the decision of the appellate judges who had denied the claim on the merits by finding it not admissible “at this stage” of the proceedings (“*en l’état*”) as a mandatory conciliation step had to be complied with. The “at this stage” language by the Court of Appeal did not prejudice the claimant’s right to reiterate proceedings in due course. Therefore, the Court concluded that inadmissibility of the claim is the preferred sanction. The main question, which the court had to answer, was whether the grounds for the defense of inadmissibility (“*fin de non-recevoir*”) need to be

³⁷ See Charles Jarrosson, *La sanction du non-respect d'une clause instituant un préliminaire obligatoire de conciliation ou de médiation*, note following the July 6 decision of the second civil section of the French *Cour de Cassation* (Cass. civ. 2e) and the January 23 and March 6, 2001 decisions of the first civil section of the French *Cour de Cassation* (Cass. 1e civ.), 2001(3) Rev. arb. 749. Further, early cases addressing the nature of multi-tiered dispute resolution clauses have focused on the available means of defense under French Civil Procedural law (“les moyens de défense”). Under French Procedural Law, defendants may rely on three means of defense under Title V of the French Code of Civil Procedure (“CCP”): Firstly, Chapter 1 and particularly Art. 71 CCP provides for the defense on the merits (“les defenses au fond”); Second, a defendant may raise a procedural plea as per Chapter 2 and Article 73 CCP (“les exceptions de procédure”) and dispute the jurisdiction of the judge (Section 1) or put forward that the dispute has already been referred to another judge (*lis pendens*) (Section 2); and Third, the defendant may object using a plea of inadmissibility as per Art. 122 CCP (“*fin de non-recevoir*”).

³⁸ *Clinique du Morvan*, Cass. Civ. 1re, 23 January 2001, no. 98-18679.

³⁹ This ruling was criticized by French Scholars. See in particular Charles Jarrosson, *La sanction du non-respect d'une clause instituant un préliminaire obligatoire de conciliation ou de médiation*, note following the July 6 decision of Cass. civ. 2e and the January 23 and March 6, 2001 decisions of Cass. 1e civ., 2001(3) Rev. arb. 749.

⁴⁰ *Polyclinique des Fleurs*, Cass. Civ. 2e, 6 July 2000, no. 98-17.827.

⁴¹ i.e. a panel of the *Cour de Cassation* judges from each sections of the *Cour de Cassation* and chaired by the presiding judge of the Court and accordingly prevailing over the earlier dissenting decisions rendered by separate sections of the Court (as explained more fully by Patrick Bernard in Presentation of France in the “Multi-Tiered Dispute Resolution Clauses”, IBA Litigation Committee, October, 1, 2015).

⁴² *Poiré v. Tripier*, Cass. ch. mixte, 14 February 2003, no. 00-19423 00-19424.

stipulated in statutory law or whether parties are competent to contractually agree such matters. The court reasoned that the French legislator did not intend to list the grounds for inadmissibility exclusively in Art. 122 CCP.

The decisions that followed *Poiré v. Tripier* acknowledged the same rule but clarity on the mandatory nature of the multi-tiered provision: The clause should be in writing in the contract and cannot be inferred from model contracts even if these are commonly used in trade⁴³; the escalation clause should provide for mandatory and not optional conciliation or mediation⁴⁴; the multi-tiered dispute resolution clause should provide for a detailed procedure with unequivocal wording as to its mandatory nature.⁴⁵ In *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*⁴⁶ the Cour d'appel de Paris did not annul an award where the appellant asserted that the arbitral tribunal had no jurisdiction because a pre-arbitral tier was not completed. Instead, the court held that the failure to complete the pre-arbitral tier is not a matter of jurisdiction (“*exceptions de procédure*”) but admissibility of the claim. In 2016⁴⁷ in *Société Vijay Construction Ltd. V. Société Eastern European Engineering Ltd* the Cour d'appel de Paris re-affirmed this reasoning. Some may argue that threshold jurisdiction is binary and query how an arbitral tribunal obtains such jurisdiction when the parties have not followed or completed a mandatory pre-arbitral step. Standing back a little, it is clear that

⁴³ *Clinique du Golfe v. Le Gall*, Cass. Civ. 1re, 6 May 2003, no. 01-01291. This decision was criticized as authors commented that these model contracts were commonly used in the medical profession and should be read as a narrow interpretation of the *Poiré v. Tripier* case.

⁴⁴ See in particular, *Placoplâtre v. SA Eiffage TP*, Cass. Civ. 1re, 6 February 2007, no. 05-17573 where it found that a “consultation” which on the face of the clause appeared limited to deciding whether or not to resort to arbitration, could not be equated to a mandatory “conciliation”. See similarly, *Knappe Composites v. Art Métal*, Cass. Civ. 3e, 29 January 2014 n°13-10833.

⁴⁵ See in particular *Medissimo v. Logica*, 29 April 2014, Cass. Com, no. 12-27.004. See also, a decision of 24 May 2017 (*Biogaran V. International Drug Development*, Cass. Com. no. 15-25.457), in which the Cour de Cassation emphasized that generally drafted clauses will only oblige the parties to perform initial procedures prior to the commencement of adjudicatory dispute resolution. Specifically, the court held that absent clear wording to the contrary, a multi-tiered dispute resolution requiring the parties to engage in pre-adjudicatory mediation will not lead a court to declare counterclaims as inadmissible where the counterclaimant had not first submitted them to mediation and where the adjudicatory proceedings have already been commenced. See more recently Cour de Cassation, 11 July 2019 no. 18-13-460.

⁴⁶ *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, 4 March 2004, Cour d’appel de Paris.

⁴⁷ *Société Vijay Construction Ltd. V. Société Eastern European Engineering Ltd.*, 28 June 2016, Cour d’appel de Paris, n° 15/03504.

the court's jurisprudence correlates in part with Jan Paulsson's propositions as discussed in *Jurisdiction and Admissibility*.

3. The Evolution in the Jurisprudence

This Paper asserts that a cursory review of decisions dealing with the effect or enforceability of multi-tiered dispute resolution provisions tends to a conclusion that there is a lack of coherence and thus an unpredictability about the legal significance of pre-arbitral steps. Multi-tiered dispute resolution provisions are popular. Drafting committees of various standards forms strive to ensure both that the pre-arbitral steps are mandatory and that there is a direct link to threshold jurisdiction. There is a delta between what the users of arbitration are doing and what leading arbitral jurists assert ought to happen with multi-tiered dispute resolution clauses. This Paper suggests that whilst the normative propositions advanced by leading arbitral jurists (supporting or developing the "admissibility" option) may offer pragmatic solutions they cannot bring coherence until Institutional Rules are amended to make it explicit that arbitral tribunals have jurisdiction to decide all issues related to the arbitration agreement *and* the authority to make orders commensurate with the admissibility option.

Jan Paulsson in *Jurisdiction and Admissibility*⁴⁸ published in November 2005 was troubled not only about the fact that arbitral tribunals and courts fused jurisdiction with admissibility (causing inconsistent decisions) but also about the fact that mandatory pre-arbitral steps could 'block' threshold jurisdiction of the arbitral tribunal. On the latter, Paulsson mediated this jurisprudential hurdle citing policy:

"... Once it is established that the parties have consented to the jurisdiction of a particular tribunal, there is a powerful policy reason—given the multiplicity of fora which might otherwise come into play internationally, with hugely different practical outcomes—to recognize its authority to dispose conclusively of other threshold issues..."

Those seeking to undermine jurisdiction of the arbitral tribunal may argue that there is no compelling basis for policy to override the parties' freely negotiated express terms or that the 'consent to the jurisdiction of a particular tribunal' is conditional (namely upon the pre-arbitral steps being followed). Further, Paulsson does not address jurisdiction or admissibility where a

⁴⁸ Jan Paulsson, *Jurisdiction and Admissibility*, Global Reflections on International Law, Commerce and Dispute Resolution, Uber Amicorum in honour of Robert Briner, ICC Publishing, Publication 693 November 2005, www.iccbooks.com.

contract contains an express clause that precludes threshold jurisdiction unless prior pre-arbitral steps have been satisfied. Paulsson supplements or fortifies his position on jurisdiction relying on Professor Rau stating:

“In his ground-breaking and comprehensive analysis of whether judges or arbitrators should make the ultimate decision when it comes to challenges to arbitral authority, Professor Rau suggests the following focal point. Since the fundamental question is whether the parties have consented to arbitral authority, he reasons, we should not rely on labels or metaphors, but rather enquire whether in a given case the parties should reasonably be considered to have intended that contentions regarding any particular issue, including threshold problems which might preclude consideration of the merits, should be decided conclusively by the arbitrators...”

This Paper shares Professor Rau’s thinking but advocates pushing the point further such that arbitral rules codify the parties’ agreement that the arbitral tribunal has jurisdiction to consider its own jurisdiction and to apply admissibility if so desired. To leave threshold jurisdiction to policy and academic reasoning is an unnecessary risk. As Paulsson recognized, a dominant feature of international arbitration is that jurisdictional decisions of arbitral tribunals are reviewable and if the arbitral rules make express provision as advocated in this Paper then the bases for a controlling authority to challenge threshold jurisdiction and its application reduces significantly.

Gary Born and Marija Ščekić in *Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’*⁴⁹ published in November 2015 develop the jurisprudence in Jan Paulsson’s paper. Born and Ščekić take a robust view that even if a pre-arbitral step is mandatory it does not control threshold jurisdiction and that the arbitral tribunal can address compliance with pre-arbitral steps as matters of admissibility of claims. Born and Ščekić’s theory is clear:

“... disputes and uncertainties arising from pre-arbitration procedural requirements argue decisively for treating requirements to negotiate or conciliate as invalid or unenforceable in many cases; that such agreements should, even when valid, generally be treated as non-mandatory and aspirational, rather than mandatory, absent clear language to the contrary; and that even valid, mandatory pre-arbitration procedural requirements should not ordinarily constitute jurisdictional bars to the initiation of arbitral proceedings, but should

⁴⁹ Gary Born and Marija Ščekić, *Chapter 14: Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’* in Caron, d. David. *Practising Virtue Inside International Arbitration*. Oxford University Press, November 2015.

instead be regarded as matters of admissibility or procedure, that are capable of cure and whose breach does not ordinarily preclude resort to arbitration. For many of the same reasons, disputes about the validity and effects of pre-arbitration procedural requirements should, in principle, be matters for the arbitral tribunal to decide, like other procedural aspects of the arbitration, subject to only very limited judicial review in subsequent annulment proceedings.⁵⁰

The words “even valid, mandatory pre-arbitration procedural requirements should not ordinarily constitute jurisdictional bars to the initiation of arbitral proceedings, but should instead be regarded as matters of admissibility or procedure, that are capable of cure and whose breach does not ordinarily preclude resort to arbitration” are provocative and raise questions. When *would* a mandatory pre-arbitration procedural requirement constitute a jurisdictional bar to the initiation of arbitral proceedings? Why can express mandatory pre-arbitral steps be so readily ignored? If threshold jurisdiction is binary how does an arbitral tribunal obtain threshold jurisdiction when the parties have agreed expressly that the arbitral tribunal only gets threshold jurisdiction once all the conditions precedent to arbitration have been satisfied?

Born and Ščekić provide a comprehensive analysis of the incoherence created by arbitral and judicial treatment of pre-arbitral steps and appear to view “pre-arbitral steps” as a potential nuisance or distraction with significant inefficiencies:

“... non-compliance with mandatory pre-arbitration procedures can subject the non-complying party to claims of breach of contract and, potentially, bar the party from commencing arbitral proceedings or asserting its claims in those proceedings; indeed, non-compliance with mandatory pre-arbitration procedural requirements can expose an otherwise valid arbitral award to annulment or non-recognition ...

A substantial body of decisions by international commercial arbitral tribunals holds that violations of pre-arbitration procedural requirements (such as violations of waiting, or ‘cooling-off’, periods or requirements to negotiate the resolution of disputes) are not violations of mandatory obligations. In one tribunal’s words, clauses requiring efforts to reach an amicable settlement, before commencing arbitration, ‘are primarily expression[s] of intention’ and ‘should not be applied to oblige the parties to engage in fruitless

⁵⁰ Gary Born and Marija Ščekić, *Chapter 14: Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’* in Caron, d. David. *Practising Virtue Inside International Arbitration*. Oxford University Press, November 2015.

negotiations or to delay an orderly resolution of the dispute'. Other awards are to the same effect⁵¹."

"Treating a negotiation, mediation, or local litigation requirement as a condition precedent to arbitration, which bars access to arbitral remedies, imposes disproportionate costs and delays on the entire dispute resolution process, which reasonable parties cannot generally be assumed to have intended absent very explicit language requiring this result.⁵²"

"... that parties can be assumed to desire a single, centralized forum (a 'one-stop shop') for resolution of their disputes, particularly those regarding the procedural aspects of their dispute resolution mechanism. Fragmenting resolution of procedural issues between (potentially two or more) national courts and the arbitral tribunal produces the risk of multiple proceedings, inconsistent decisions, judicial interference in the arbitral process, and the like..."

The more objective, efficient, and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism. Ultimately, the proper analysis is one of interpreting the parties' intentions, with the presumptive rule being that parties intend compliance with pre-arbitration procedures to be for arbitral, not judicial, determination: absent very clear and unequivocal language requiring a contrary result, questions of compliance with contractual procedural requirements should be submitted to the arbitrators, subject to only the generally deferential standard of judicial review applicable to other decisions by the arbitral tribunal⁵³."

This Paper shares Born and Ščekić's views on efficiency; the presumption that parties that elect for arbitration in their agreements must prefer arbitral tribunals resolving all issues related to the arbitration agreement; and on the need for coherence. However, this Paper deviates and advocates commensurate with the foregoing that Institutional Rules must be amended to address threshold jurisdiction. Influence by a normative proposition is

⁵¹ Gary Born and Marija Ščekić, *Chapter 14: Pre-Arbitration Procedural Requirements. 'A Dismal Swamp'* in Caron, d. David. *Practising Virtue Inside International Arbitration*. Oxford University Press, November 2015. pp 234.

⁵² *Ibid* pp 250.

⁵³ *Ibid* pp 259.

persuasive but the evidence demonstrates continuing incoherence⁵⁴ such that the jurisprudential remedy needs to evolve.

4. The Institutional Rules Must Be Amended to Address Jurisdiction, Admissibility and Procedure

The thesis in this Paper is grounded on the following propositions:

- Users of arbitration desire to ensure access to prompt, binding and neutral means of resolving their disputes. Treating pre-arbitral steps (such as negotiation, mediation, or local litigation) as a condition precedent to arbitration, which bars access to arbitral remedies, imposes disproportionate costs and delays on the entire dispute resolution process, which reasonable parties cannot generally be assumed to have intended absent explicit clear language requiring this result.
- Users of arbitration prefer a single arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism rather than for judicial determination subject to only the generally deferential standard of judicial review applicable to all other decisions by the arbitral tribunal⁵⁵.
- International arbitration agreements ought to be construed as a matter of procedural law and in line with the New York Convention expansively and resolve any doubts in favour of encompassing disputes within the parties' agreement to arbitrate. Those who make

⁵⁴ A fact accepted by Born and Ščekić who state at pp 245 of *Pre-Arbitration Procedural Requirements*. 'A Dismal Swamp':

Both arbitral awards and other authorities have reached divergent conclusions regarding the proper characterization of pre-arbitration procedural requirements. Some authorities have held that such requirements involve issues of 'admissibility', rather than 'jurisdiction'. Other authorities have held that pre-arbitration procedural requirements are 'jurisdictional', and that non-compliance with such requirements precludes the proper initiation of an arbitration. A third line of authority has declined to characterize pre-arbitration procedural requirements as involving either admissibility, jurisdiction, or procedural issues—holding instead that such requirements are mandatory ones that must be complied with (as discussed below), while adopting pragmatic approaches to the remedies for violation of such requirements.

⁵⁵ For example in *Howsam v Dean Witter Reynolds*; 537 US 79; 84-85 (2002) the United States Supreme Court found that certain procedural issues such as allegations of waiver or delay should be decided by the arbitrator as well as issues such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate.

agreements for the resolution of disputes must show good cause for departing from them⁵⁶.

- Issues on enforceability or interpretation of multi-tiered dispute resolution clauses, and consequent threshold jurisdiction, under the principle of *Kompetenz-Kompetenz*, are in the first instance decided by the arbitral tribunal⁵⁷.
- The early determination of jurisdictional issues is sensible⁵⁸ and also mitigates risks at the Final Award stage; allows the parties to agree and thus expressly accept the arbitral tribunal's jurisdiction; and allows a disgruntled party to elect to expressly reserve its position whilst participating in the arbitration and/or to challenge the arbitral tribunal's decision at an interim stage.

The concept that the arbitral tribunal is the most desirable forum is not new. Born and Šcekić articulate perfectly the well understood view: “Fragmenting resolution of procedural issues between (potentially two or more) national courts and the arbitral tribunal produces the risk of multiple proceedings, inconsistent decisions, judicial interference in the arbitral process, and the like. At the same time, arbitral tribunals ordinarily have greater experience with the procedural setting of the parties’ dispute, and the commercial (or investment) context in which pre-arbitration procedures occur, than a national court. Likewise, the parties’ interests in expedition and finality are better served by limiting the scope of judicial review of arbitral decisions regarding compliance with pre-arbitration procedural requirements”. What is less clear is why Institutional Rules have not addressed the problems generated by multi-tiered dispute resolution clauses. There appears to be no compelling reason why Institutional Rules should not be amended to make express provision

⁵⁶ This resonates with Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and Others* [1993] 2 WLR 262, [1993] 1 All ER 664, [1993] AC 334 who said:

“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 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 beside the point”.

⁵⁷ Whilst *Kompetenz-Kompetenz* is said to be a “central tenet of international arbitration” (see the International Law Association, *International Commercial Arbitration: Report for the Biennial Conference in Washington D.C.*; 1.6 (2014)) not all countries endorse it. Countries that have adopted the UNCITRAL Model Law permit arbitrators in most instances to decide the issue of an arbitration agreement’s validity, including their own jurisdiction (either as a preliminary issue or in a final award) (see UNCITRAL Model Law art. 16(3)).

⁵⁸ As is well understood, under many laws if a party does not challenge jurisdiction at the beginning of the arbitration, it may lose the right to object. See for example, English Arbitration Act 1996 at Section 31; Cour d’Appel de Paris in *SA Caisse Federale de Credit Mutuel du Nord de la France v Banque Delubac et Compagnie* 2001 Revue d’Arbitrage 918.

for all matters with respect to multi-tiered dispute resolution provisions to be addressed by the arbitral tribunal including dealing with questions of admissibility of claims; stays and other procedural issues. There is little evidence that such issues have been discussed by Institutions leading to the inference that Institutions may feel that giving tribunals jurisdiction to decide their own jurisdiction is sufficient. It is not. For example the admissibility issue raised by Jan Paulsson is not addressed and the power to order pre-arbitral steps be concluded in parallel with the arbitration is not addressed. Amendment of Institutional Rules would set the ‘default’ from which parties can derogate; remove or reduce uncertainty; increase coherence; and give effect to parties’ desires with respect to the overall choice to use arbitration.

The precise amendments to the various Institutional Rules is out with the scope of this Paper. For example, the 2016 SIAC Rules 2016 could be readily adjusted. It is suggested that Rules 28 and 29 be adjusted including as follows:

Rule 28: Jurisdiction of the Tribunal

...

28.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections or procedural issues with respect to the existence, validity or scope of the arbitration agreement and pre-arbitral steps (if any) and shall have the power to stay the arbitration pending compliance or completion with pre-arbitral steps (if any) or allow the arbitration to proceed concurrently with compliance or completion with pre-arbitral steps (if any). An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void. [Possible amendments shown in underline]

5. Conclusion

The lack of coherence in the treatment of multi-tiered dispute resolution provisions is not in dispute. Incoherence is unfair on those who expressly agree to mandatory pre-arbitral steps. Threshold jurisdiction is binary and so Institutional Rules need to make it explicit that an arbitral tribunal has jurisdiction to decide its own jurisdiction and more importantly that it has the power to assess and order the full array of options on “substantive

admissibility”. Explicit jurisdiction given in expansive terms not only reduces challenge from national courts but will bring coherence.

Hamish LAL, Brendan CASEY, Josephine KAIDING, Léa DEFRANCHI, *Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence*

Summary

This Paper challenges and builds on the analysis in Jan Paulsson’s seminal paper *Jurisdiction and Admissibility* published in November 2005 and develops further the jurisprudential thoughts of Gary Born and Marija Šcekić in *Pre-Arbitration Procedural Requirements. ‘A Dismal Swamp’* published in November 2015. Multi-tiered dispute resolution or pre-arbitral clauses are important (especially in international construction and infrastructure projects). What happens when a Party commences arbitration without having followed the pre-arbitral steps? Threshold or gateway jurisdiction whereby the arbitral tribunal is explicitly provided with jurisdiction to determine its own jurisdiction (including whether any multi-tiered provisions have been complied with) is vital and thus must be codified in arbitral Institutional Rules. The notion that express mandatory pre-arbitration procedures can be ignored such that an arbitral tribunal assumes threshold jurisdiction has not stopped the incoherence and provides no compelling reason why the multi-tiered provisions can be so readily side-stepped. Institutional Rules need to fulfil the demands and deal more fully with threshold jurisdiction by making it explicit that an arbitral tribunal has jurisdiction to decide its own jurisdiction and more importantly that it has the power to assess and order the full array of options on ‘substantive admissibility’.