
CONTENTS

<i>Acknowledgements</i>	v
<i>List of Abbreviations</i>	xiii
<i>Table of Cases</i>	xvii
<i>Table of Legislation</i>	xxiii
1. Main Features of Multi-tiered Dispute Resolution Clauses.....	1
Crisis of International Commercial Arbitration. The Role of ADR.....	2
ADR Methods in Multi-tiered Dispute Resolution Clauses	6
Consensual ADR Methods	6
Negotiations.....	6
Mediation (Conciliation).....	8
Quasi-adjudicative ADR Methods.....	12
Expert Determination	12
Dispute Boards	14
Multi-tiered Dispute Resolution Clauses in	
International Contracts.....	17
Standard Forms of Contract of International	
Professional Associations	18
<i>Fédération Internationale Des Ingénieurs-Conseils</i> (FIDIC).....	18
American Institute of Architects (AIA).....	20
Institution of Civil Engineers (ICE).....	21
Engineering Advancement Association of Japan (ENAA)	23
Standard Forms of Contract of International Organisations	23
World Bank.....	23
World Intellectual Property Organization (WIPO)	24
Model Clauses of International Arbitration Centres.....	25
International Chamber of Commerce (ICC).....	25
London Court of International Arbitration (LCIA).....	28
American Arbitration Association (AAA).....	28
Centre for Effective Dispute Resolution (CEDR)	29
UNCITRAL Model Law on International	
Commercial Conciliation.....	30
The Relevance of National Laws	31
2. Enforceability of Multi-tiered Dispute Resolution Clauses	
in Selected European Jurisdictions.....	35
England and Wales.....	38

Negotiations.....	39
Mediation.....	40
The Changing Landscape of Mediation in England.....	40
Enforceability of Mediation Clauses under	
<i>Cable & Wireless v IBM</i>	42
Stay of the Proceedings	44
Injunction	44
Damages.....	47
Enforceability of Consensual ADR Methods	
Post- <i>Cable & Wireless</i>	50
Expert Determination	54
The Meaning and Function of Expert Determination	54
Enforceability of Expert Determination Clauses.....	56
Stay of the Proceedings	56
Damages.....	59
Dismissal of a Claim	60
Contractual Time-bar in Multi-tiered Dispute	
Resolution Clauses	60
Bar to the Right and Bar to the Remedy	61
Extension of Time	62
Summary.....	64
Germany.....	64
Mediation.....	65
Mediation in German Procedural Law.....	65
Non-compliance with Mediation Clauses: Procedural	
Consequences	66
Non-compliance with Mediation Clauses: Substantive	
Consequences	72
Expert Determination (<i>Schiedsgutachten</i>).....	73
Expert Determination in the German Civil Code	73
Consequences of Breach of an Expert Determination Clause	79
Limitations on Enforceability of ADR Clauses	80
<i>Pactum de non petendo</i> and Freedom of Contract.....	81
Non-enforceability Resulting from the Wording of a Clause.....	82
Lack of Cooperation in a Consensual ADR Process.....	84
Lack of a Requisite Plea.....	85
Summary.....	86
France	87
Mediation.....	87
Mediation in French Law	87
Enforceability of Mediation Clauses	89
Means of Defence	89
<i>Defence on the Merits</i>	90
<i>Procedural Defence</i>	90

Evolving Jurisprudence of the <i>Cour de Cassation</i>	92
Substantive Effects of Mediation Clauses	98
Expert Determination (<i>Expertise-arbitrage</i>)	101
Expert Determination in the French Civil Code	101
Consequences of Breach of an Expert Determination Clause	103
<i>Fin de Non-recevoir</i> in Arbitration	104
Summary	105
Switzerland	106
Mediation and Conciliation	107
Mediation and Conciliation in Swiss Law	107
Non-compliance with Mediation Clauses: Substantive Consequences	109
Non-compliance with Mediation Clauses: Procedural Consequences	111
Lack of Jurisdiction of the Adjudicating Body	112
Inadmissibility of the Proceedings	115
Expert Determination	117
Expert Determination in Switzerland	117
Enforceability of an Expert Determination Clause	120
Summary	123
3. Comparative Conclusions	125
Key Characteristics of Multi-tiered Dispute Resolution Clauses	127
Legal Nature of ADR Clauses	127
Legal Nature of Mediation Causes	127
Legal Nature of Expert Determination Clauses	130
Scope of the Duty to Follow the Agreed ADR Process	133
Consensual ADR Methods	134
Quasi-adjudicative ADR Methods	139
Necessary Elements of Enforceable Multi-tiered Dispute Resolution Clauses	140
Mandatory Character of Pre-adjudicative ADR	140
Mediation Clauses as Elements of Enforceable Multi-tiered Dispute Resolution Mechanisms	141
Expert Determination Clauses as Elements of Enforceable Multi-tiered Dispute Resolution Mechanisms	144
Means of Enforcing Multi-tiered Dispute Resolution Clauses	146
Contractual Remedies	146
Specific Performance	147
Damages	148
Liquidated Damages	151
Dismissal of the Claim	152
Injunctive Relief	153
Procedural Consequences	154

	Inadmissibility of the Proceedings	154
	Stay of the Proceedings	156
	Refusal of Jurisdiction.....	157
	Plea of Non-compliance with an ADR Clause.....	158
	Summary.....	159
4.	Enforceability of Multi-tiered Dispute Resolution Clauses in Arbitration	161
	Enforceability in Court and Arbitration Contrasted	163
	Jurisdiction and Admissibility.....	167
	Position of National Laws	168
	ICC International Court of Arbitration	171
	Critical Evaluation of the Jurisdiction Theory.....	174
	Explicit Exclusion of Arbitral Jurisdiction	184
	Consequences of Admissibility Theory	186
	Competence to Adjudicate on Breach of an ADR Clause	187
	Separability of ADR Clauses	187
	Stay of Arbitral Proceedings	193
	Summary	194
5.	Typology of Multi-tiered Dispute Resolution Clauses.....	197
	Type of ADR.....	198
	Clauses Comprising Consensual ADR Methods.....	198
	Clauses Comprising Quasi-adjudicative ADR Methods	199
	Function of the Clause	201
	Methods Aimed at Facilitating Settlement.....	201
	Methods Fulfilling other Functions.....	202
	Consequences of Non-compliance	203
	Clauses Without a Time-bar	203
	Clauses Containing a Time-bar	205
	Clauses Prescribing a Bar to the Claim	205
	Before the Lapse of the Prescribed Time.....	206
	After the Lapse of the Prescribed Time	206
	Clauses Prescribing a Bar to the Remedy	206
	Before the Lapse of the Prescribed Time.....	207
	After the Lapse of the Prescribed Time	208
	Consequences of Non-compliance with Various Tiers of Clause 20 of the FIDIC Conditions of Contract for Construction	209
	Typology of Multi-tiered Clauses – Flowchart.....	213
6.	Drafting Enforceable Multi-tiered Dispute Resolution Clauses.....	215
	Mandatory Language.....	216

Detailed Content.....216
 Mediation and Negotiations Clauses.....216
 Expert Determination and Dispute Board Clauses218
Time-scale for Each ADR Step220
Effects of the Decision220
Consequences of Non-compliance221
Availability of Interim Measures.....222
Waiver of a Limitation Plea223
Summary.....223

Bibliography.....225
Index235