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# Multi-Tier Dispute Resolution Clauses in Commercial Contracts with Emphasis on the Judicial Practice of England

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## ABSTRACT

International commercial contracts increasingly employ multi-tier dispute resolution clauses that require parties to pursue sequential amicable dispute resolution mechanisms, such as negotiation, mediation, and expert determination, prior to resorting to arbitration or litigation. Despite the advantages of these clauses in reducing costs and time and preserving commercial relationships, their legal validity and enforceability face significant challenges. The most important challenge concerns determining the boundary between enforceable obligations and merely declaratory agreements, as well as the role of the principle of good faith in the implementation of such clauses. Using a descriptive-analytical method and focusing on English judicial practice, this study examines multi-tier clauses. The findings indicate that English courts have adopted a strict approach emphasizing the clarity of procedural stages, the specification of precise time limits, and the avoidance of ambiguous language. Although this approach contributes to contractual certainty, it may also lead to delay and procedural complexity. The study concludes that the effectiveness of these clauses depends on careful drafting, performance in good faith, and coordination among different legal systems.

**Keywords:** *Multi-tier clauses, dispute resolution, good faith, English judicial practice, international commercial contracts, commercial arbitration*

## Introduction

International commercial contracts have become increasingly complex and extensive in recent decades, and this complexity has naturally increased the likelihood of disputes between the parties. In this context, parties to commercial contracts seek mechanisms capable of resolving potential disputes efficiently, quickly, and cost-effectively, while simultaneously preserving their long-term commercial relationships. Multi-tiered or escalation dispute resolution clauses, which require the parties to complete successive and specified stages of amicable dispute resolution before resorting to formal dispute resolution fora such as arbitration or courts, have attracted attention as one of the effective mechanisms in this field. These clauses, which usually include stages such as direct negotiation, managerial negotiation, mediation, conciliation, or technical expert determination, are based on the assumption that many commercial disputes arise from misunderstandings or resolvable technical issues and



do not require judicial determination. Nevertheless, the legal validity and enforceability of these clauses have faced serious challenges in different legal systems, because they often contain obligations that appear vague and uncertain in nature, making it difficult to assess whether they have been complied with or breached.

One of the most important legal challenges concerning multi-tiered clauses is the role of the principle of good faith in the implementation of these clauses. Good faith, as a fundamental principle of contract law, requires the parties to act honestly, fairly, and reasonably, and to respect each other's legitimate expectations. In pre-arbitral stages such as negotiation and mediation, which are cooperative in nature and whose success depends on the parties' genuine willingness to find a common solution, the role of good faith is crucial. However, the precise definition of good faith, the determination of the scope and limits of the obligation to observe it, and the provision of objective criteria for assessing compliance with or breach of it have always involved difficulties. This difficulty has been addressed differently in various legal systems. While civil-law systems usually expressly recognize the principle of good faith in their civil codes and treat it as a general principle governing all contractual relations, common-law systems, particularly England, have adopted a more cautious approach and have refrained from recognizing a general and independent principle of good faith. This divergence of approaches has profoundly affected the manner in which courts deal with multi-tiered clauses and evaluate compliance with them.

The courts of England and Wales have adopted a distinctive and relatively strict approach in this area, which distinguishes them from many other legal systems. This approach, rooted in common-law traditions and the emphasis on contractual certainty, stresses the importance of strict compliance with contractual terms and the serious consequences of non-compliance. English courts, on the one hand, have gradually moved toward accepting the enforceability of multi-tiered clauses, but, on the other hand, have established stringent criteria for assessing the validity and enforceability of such clauses. These criteria include the specificity of pre-arbitral stages, the determination of precise time limits, clarity regarding the method of appointing a third party, and avoidance of vague and general language. The approach of English courts, shaped through a series of important judicial decisions, not only has a direct effect on commercial contracts that choose English law as the governing law, but, given England's status as one of the major centers of international commercial arbitration, also plays an important role in shaping international standards in this area. Focusing on English judicial practice, this article analytically examines multi-tiered dispute resolution clauses, the role of good faith in their implementation, and the challenges and opportunities facing this mechanism in international commercial contracts.

### **Definition and Characteristics of Multi-Tiered Clauses**

Multi-tiered dispute resolution clauses, or what are referred to in some sources as escalation or step clauses, are a contractual mechanism through which the parties to an international commercial contract agree that, in the event of a dispute, they will complete successive and specified stages for amicable and informal dispute resolution before resorting to the final dispute resolution forum, which is usually an arbitral tribunal or a court. In fact, the parties may agree to resolve their potential disputes by adopting multi-tiered dispute resolution clauses (1). These clauses are, in essence, a form of prior agreement concluded at the time of entering into the main contract and before any dispute arises between the parties, either as part of the general contractual terms or as an independent clause under the heading of "dispute resolution" or "arbitration." The main purpose of these clauses is to create a structured and orderly pathway for dispute resolution in which the parties first attempt to reach an agreement

through more informal, less costly, and faster methods, and resort to more formal and costly fora such as arbitration or courts only if those efforts fail.

Structurally, multi-tiered clauses usually include two or more successive stages, each of which is more formal and binding than the preceding stage. The first stage is usually direct negotiation between the technical or legal representatives of the parties, in which the parties attempt to resolve the dispute without the intervention of a third party and in a completely informal setting. Where there is certainty regarding the parties' intention to be bound by the different stages of these clauses, competent authorities compel the parties to observe the agreed sequence (2). If negotiations at the first level are unsuccessful, the dispute is referred to the second stage, which usually involves negotiation at the managerial level or between the senior executives of the companies. The third stage often includes alternative dispute resolution methods such as mediation, conciliation, technical expert determination, or early neutral evaluation, in which a neutral third party assists the parties in reaching an agreement or provides a non-binding opinion on the dispute (3). Finally, the last stage, usually the fourth or fifth stage, is recourse to arbitration or litigation, in which a judicial or quasi-judicial authority issues a binding decision.

One of the fundamental characteristics of multi-tiered clauses is their gradual and escalatory nature. This means that the parties cannot disregard the intermediate stages and proceed directly to the final stage, unless the contractual clause expressly provides for exceptions. This feature is based on the rationale that amicable dispute resolution is not only more economically efficient, but also more desirable in terms of preserving long-term commercial relationships between the parties. In fact, multi-tiered clauses are based on the assumption that many commercial disputes arise from misunderstandings, incomplete information, or resolvable technical issues and do not require judicial determination. Accordingly, by creating multiple opportunities for dialogue and negotiation, the likelihood of amicable settlement increases.

Another characteristic of these clauses is their flexibility. Unlike simple arbitration clauses, which usually provide only one specific path for dispute resolution, multi-tiered clauses allow the parties to test different methods according to the nature of the dispute (4). For example, if the dispute is technical in nature, the parties may use technical expert determination; if the dispute arises more from misunderstanding, mediation will be more appropriate; and if the dispute is complex and legal, it may ultimately proceed directly to arbitration. This flexibility gives the parties greater control over the dispute resolution process and releases them from the rigid constraints of formal procedural rules.

Confidentiality is also one of the important characteristics of multi-tiered clauses. In the initial stages, such as negotiation and mediation, all correspondence, proposals, and documents exchanged between the parties remain confidential and cannot be used as evidence in later stages. This confidentiality allows the parties to speak more openly about the weaknesses of their positions, make settlement proposals, and explore creative solutions without fear that this information will later be used against them (3). This feature is especially important in international commercial contracts, where the parties are usually interested in protecting their trade secrets and sensitive information.

From an economic perspective, multi-tiered clauses are characterized by cost saving. Although international arbitration is faster and more flexible than ordinary litigation, it still entails significant costs, including arbitrators' fees, administrative fees of arbitral institutions, attorneys' fees, expert and witness costs, and travel and accommodation expenses. In complex cases, these costs may reach millions of dollars. By contrast, direct negotiation is almost cost-free, and mediation is also conducted at a much lower cost than arbitration. Therefore, if

the dispute is resolved at the initial stages, the parties can achieve substantial cost savings. Empirical studies have shown that approximately sixty to seventy percent of disputes entering the mediation process are successfully resolved and do not proceed to arbitration.

Another characteristic of these clauses is time saving. International arbitration, despite all its advantages, remains a time-consuming process that usually takes between one and three years. This period includes the constitution of the arbitral tribunal, exchange of submissions, hearings, presentation of witness and expert evidence, and, ultimately, issuance of the award. By contrast, negotiation and mediation usually produce results within a few weeks or months. This speed is particularly valuable in commercial contracts, where time is of great importance and delay in dispute resolution can seriously damage commercial relationships (5).

Preservation of commercial relationships is also one of the key characteristics of multi-tiered clauses. Arbitration and litigation, because of their adversarial nature, usually lead to the deterioration of relations between the parties. In these processes, each party attempts to highlight the weaknesses of the other party, present documents and evidence against it, and ultimately have one party declared the winner and the other the loser. This adversarial environment causes the parties, even after the dispute has ended, to be unable or unwilling to cooperate with each other. By contrast, amicable dispute resolution methods such as negotiation and mediation are cooperative in nature and emphasize finding a solution that satisfies the interests of both parties. This approach helps the parties preserve their commercial relationships and continue cooperation even after the dispute has been resolved.

From a legal perspective, multi-tiered clauses are contractual in nature. This means that these clauses form part of the parties' agreement and, based on the principle of party autonomy and the principle of *pacta sunt servanda*, the parties are required to comply with them. Therefore, if one party proceeds directly to arbitration without completing the prescribed stages, the other party may raise an objection based on lack of jurisdiction or non-compliance with a condition precedent (5). Judicial practice in different countries varies regarding the legal effects of non-compliance with these clauses; some countries adopt a strict approach and consider non-compliance to result in dismissal of the claim, while others adopt a more flexible approach.

Another characteristic of multi-tiered clauses is their adaptability to different types of contracts and industries. These clauses were initially used mainly in international construction contracts, particularly FIDIC contracts, in which temporary dispute resolution boards or dispute adjudication boards were provided for. Today, however, these clauses are used in a wide range of contracts, including oil and gas contracts, information technology contracts, joint venture agreements, agency and distribution agreements, and even intellectual property contracts. This adaptability demonstrates the flexibility and efficiency of this mechanism (6).

Finally, the complexity of multi-tiered clauses should be noted. Drafting these clauses requires a high degree of legal precision and skill, because all details of the various stages, time limits, responsibilities of the parties, method of appointing a mediator or expert, consequences of non-compliance, and conditions for moving to the next stage must be specified precisely and without ambiguity (4). Any ambiguity or defect in drafting may lead to new disputes regarding the interpretation of the dispute resolution clause itself and, consequently, undermine the main purpose of facilitating dispute resolution. For this reason, in recent years, reputable international arbitral institutions such as the International Chamber of Commerce, the London Court of International Arbitration, and the United Nations Commission on International Trade Law have published model clauses that may be used as templates for drafting multi-tiered clauses.

## Good Faith and Its Role in Different Stages of Multi-Tiered Clauses

Good faith is a concept whose precise and comprehensive definition in international law and domestic legal systems faces challenges. At the general level, good faith means honest, fair, and reasonable conduct that is consistent with ethical principles and the legitimate expectations of the other party. This concept has two essential dimensions: a subjective dimension and an objective dimension. The subjective dimension of good faith refers to a person's internal intention and state of mind and requires that the person act honestly and without intent to deceive or abuse. The objective dimension of good faith, which is more important in contract law, refers to a person's external and observable conduct and requires that the person act in accordance with the reasonable and fair standards expected of a contracting party in similar circumstances. In contract law, the objective dimension of good faith usually receives greater attention, because internal intention is difficult to prove, and what matters in practice is the parties' actual conduct and its conformity with reasonable standards.

Good faith occupies different positions in different legal systems. In civil-law systems, which are organized on the basis of civil codes, the principle of good faith is usually expressly recognized in civil codes and regarded as a general principle governing all contractual relationships (7). For example, Article 242 of the German Civil Code provides that the debtor must perform its obligation in the manner required by good faith, taking customary practice into account. Likewise, Article 1104 of the French Civil Code, as amended in 2016, expressly provides that contracts must be negotiated, formed, and performed in good faith. In common-law systems, particularly in England, the approach to good faith has traditionally been more cautious. English courts have historically refrained from recognizing a general and independent principle of good faith in contract law and have preferred, instead of relying on a general and vague principle, to refer to specific and defined rules such as the prohibition of deception, the prohibition of abuse of rights, and implied obligations. Nevertheless, in recent decades, particularly in the context of complex and long-term commercial contracts, English courts have gradually moved toward recognizing the role of good faith in the interpretation and performance of contracts, although still cautiously and within limited parameters.

In international trade law, the principle of good faith is widely accepted. Good faith, as one of the fundamental and general principles of international law, expresses the necessity of fairness, honesty, and reasonableness in international relations; it is a principle that safeguards the legitimate and reasonable interests and expectations of the parties to such relations and is particularly relevant as a requirement in the settlement of international disputes. Certain rules of international law, including *pacta sunt servanda*, estoppel, acquiescence, abuse of rights, and the conduct of negotiations, are founded on good faith (8). Article 7 of the United Nations Convention on Contracts for the International Sale of Goods provides that, in interpreting the Convention, regard is to be had to its international character, the need to promote uniformity in its application, and the observance of good faith in international trade. Similarly, the UNIDROIT Principles of International Commercial Contracts, one of the most important soft-law sources of international contract law, expressly provide in Article 1.7 that each party must act in accordance with good faith and fair dealing in international trade and that the parties may not exclude or limit this obligation (4). This broad acceptance of the principle of good faith in international trade law demonstrates its fundamental importance in facilitating international commercial relations and creating mutual trust between parties from different countries and legal systems.

The principle of good faith plays a role in all stages of implementing multi-tiered clauses, from the drafting and formulation of the clause to the pre-arbitral stages and even the arbitration or judicial proceedings stage. At the stage of drafting a multi-tiered clause, good faith requires the parties to formulate a clause that is genuinely enforceable and practicable and whose purpose is the real resolution of disputes, rather than the creation of procedural obstacles to the other party's access to justice. A multi-tiered clause designed in such a way as to be practically unenforceable or disproportionately favorable to one party may indicate a lack of good faith at the drafting stage. Good faith also requires the parties, when drafting the clause, to state clearly and transparently which stages must be completed, how long each stage will last, and what conditions are necessary for transition from one stage to the next. Ambiguity and lack of transparency in drafting the clause may lead to further disputes and be inconsistent with the principle of good faith.

At the stage of implementing a multi-tiered clause, particularly in pre-arbitral stages such as negotiation and mediation, the role of good faith is vital. Negotiation and mediation, unlike arbitration or judicial proceedings, which are adversarial in nature, are cooperation-based processes whose success depends on the parties' genuine willingness to find a common solution. Good faith at these stages means that the parties must participate in the process honestly and seriously, share relevant and necessary information with each other, consider the other party's proposals with an open and fair mind, and genuinely attempt to reach an amicable solution (9). Conduct such as failing to attend negotiation or mediation sessions, refusing to provide necessary information, making unreasonable and unrealistic proposals merely to prolong the process, or stating in advance that there is no willingness to settle all indicate a lack of good faith and may lead to the failure of the pre-arbitral stages.

One of the most important issues in this area is determining the scope and limits of the obligation of good faith in negotiations. Does good faith mean that the parties must necessarily reach an agreement? Is a party that, after participating in negotiation or mediation, concludes that settlement is not in its interest and decides to resort to arbitration or court in breach of the principle of good faith? The answer to these questions is negative. Good faith does not mean an obligation to reach agreement; rather, it means an obligation to make a genuine and honest effort to reach agreement. Each party has the right to protect its own interests and, if it believes that the other party's proposals are unfair or not in its interest, to refuse to accept them. What good faith requires is that the parties enter the process with an open mind and willingness to compromise, not that they have already decided in advance that they will not settle under any circumstances. Good faith also requires the parties not to abuse the pre-arbitral stages as a tool to delay proceedings or obtain information from the other party without any genuine intention to resolve the dispute.

In judicial and arbitral practice, courts and arbitral tribunals use various criteria to assess compliance with good faith in the pre-arbitral stages. Some of these criteria are as follows: Have the parties attended negotiation or mediation sessions? Did the representatives present at these sessions have sufficient authority to make decisions? Did the parties share relevant information and documents? Were the proposals made reasonable and realistic? Did the parties respond to the other party's proposals? How much time was devoted to the negotiation or mediation process? (4). These criteria help courts and arbitral tribunals determine whether the parties genuinely participated in the pre-arbitral stages in good faith or merely completed formalities (7). Where it is established that one party participated in the pre-arbitral stages without good faith or refused to participate in them, the court or arbitral tribunal may take this conduct into account in deciding on the costs of the proceedings or even in assessing the merits of the dispute.

## Judicial Practice in England and Wales

The courts of England and Wales have adopted a distinctive and relatively strict approach to multi-tiered dispute resolution clauses, which distinguishes them from many other legal systems. This approach, rooted in common-law traditions and the emphasis on contractual certainty, stresses the importance of strict compliance with contractual terms and the serious consequences of non-compliance. Understanding this approach is crucial for parties to international commercial contracts that choose English law as the governing law or may be subject to proceedings before English courts. The approach of English courts has been shaped over recent decades through a series of important judicial decisions that have established specific principles and criteria for assessing the validity and enforceability of multi-tiered clauses.

### *Historical Evolution of the Approach of English Courts*

The approach of English courts to multi-tiered clauses has evolved over time, and this evolution can be divided into several distinct stages. In the middle decades of the twentieth century, English courts viewed multi-tiered dispute resolution clauses, especially clauses that made negotiation or mediation mandatory before arbitration or litigation, with skepticism and distrust. This skepticism arose from fundamental concerns about the certainty and enforceability of these clauses. Courts considered obligations to negotiate or mediate to be highly vague and indeterminate and believed that no objective criteria could be established for assessing compliance with or breach of such obligations. In early cases, this concern led to the rejection of the validity of many multi-tiered clauses, and courts usually treated them as unenforceable agreements or merely as statements of the parties' intention.

An important turning point in the evolution of this approach was the judgment of the House of Lords in *Walford v. Miles* in 1992. In that case, the House of Lords expressly held that an obligation to negotiate in good faith is unenforceable because such an obligation lacks the necessary certainty and because no specific criteria exist for determining whether the parties have negotiated in good faith. Lord Ackner emphasized in his judgment that the concept of good faith in negotiations is highly vague and conflicts with the principle of the parties' freedom to terminate negotiations. This judgment had a profound effect on the approach of English courts to multi-tiered clauses and, for many years, operated as the main obstacle to the enforcement of clauses requiring negotiation in good faith.

However, in the 1990s and 2000s, with the expansion of the use of alternative dispute resolution methods and the increasing complexity of international commercial contracts, English courts gradually moderated their approach and drew a more precise distinction between different types of multi-tiered clauses. Courts began to accept that not all multi-tiered clauses are necessarily vague and unenforceable and that some of these clauses, particularly those that are well drafted and provide specific criteria for compliance, may be enforceable. This development gradually led to the formation of the strict but differentiated approach that characterizes English courts today.

### *Basic Principles of the Strict Approach*

The strict approach of English courts is based on several basic principles that have been repeated and reinforced in numerous judicial decisions. The first principle is the emphasis on the certainty and specificity of the clause. English courts consider that, for a multi-tiered clause to be enforceable, it must be sufficiently specific and certain to enable the court to determine whether the parties have complied with it. This certainty requires the clause to

clearly identify the pre-arbitral stages, set time limits, and provide objective criteria for assessing compliance with each stage. Clauses that are vague, general, or lacking in necessary detail are usually rejected by English courts as unenforceable.

The second principle is the distinction between substantive conditions and procedural conditions. English courts usually regard multi-tiered clauses as procedural conditions or conditions precedent to access to arbitration or litigation, rather than substantive conditions affecting the parties' basic rights and obligations. This distinction is important, because breach of procedural conditions usually leads to dismissal of the claim or a stay of proceedings so that the defaulting party has an opportunity to comply with the clause, whereas breach of substantive conditions may give rise to liability in damages. English courts usually tend to interpret multi-tiered clauses as procedural conditions unless the parties' express intention indicates otherwise.

The third principle is the emphasis on strict and complete compliance with the clause. English courts usually adopt a strict approach in assessing compliance with multi-tiered clauses and expect the parties to complete all stages prescribed in the clause fully and in good faith. Formal or merely procedural compliance lacking seriousness and genuine effort to resolve the dispute is usually not accepted as sufficient compliance. Courts look for evidence showing that the parties genuinely attempted to reach agreement through the pre-arbitral stages, rather than merely going through the motions in order to proceed to arbitration or litigation.

The fourth principle is the emphasis on the importance of the timing of an objection to non-compliance with the clause. English courts consider that a party alleging that the opposing party has failed to comply with a multi-tiered clause must object to such non-compliance at the earliest possible opportunity. Delay in objecting, or participation in arbitral or judicial proceedings without objecting to non-compliance with the clause, may be treated as a waiver of the right to object. This principle emphasizes the importance of prompt and decisive action in protecting contractual rights, and parties are expected to defend their rights actively and in a timely manner.

The fifth principle is the restrictive interpretation of the obligation to negotiate in good faith. As demonstrated in *Walford v. Miles*, English courts are highly cautious regarding obligations to negotiate in good faith and usually regard such obligations as unenforceable unless they are drafted in a manner that provides objective and specific criteria for assessing compliance. Nevertheless, courts have accepted that an obligation to complete a specified process, such as mediation or expert determination, may be enforceable even if it contains an element of negotiation, because such processes provide more objective criteria for assessing compliance.

### *Key Judicial Decisions and Their Analysis*

The strict approach of English courts has crystallized in a series of important judicial decisions, each of which has helped shape and refine the principles governing multi-tiered clauses. One of the most important of these decisions is the judgment of the Court of Appeal of England in *Cable & Wireless plc v. IBM United Kingdom Ltd* in 2002. In that case, the contract between the parties contained a clause requiring disputes first to be resolved through a multi-tiered dispute resolution process involving negotiation at different managerial levels and then mediation. *Cable & Wireless* brought proceedings directly before the court without completing these stages, and *IBM* objected on the basis of non-compliance with the multi-tiered clause. The Court of Appeal held that the multi-tiered clause in that case was sufficiently certain and enforceable and that *Cable & Wireless* was required to complete the prescribed stages before bringing proceedings before the court. This decision was a turning point in the approach

of English courts, because it showed that multi-tiered clauses, if well drafted, can be enforceable and that courts are prepared to require compliance with them.

In *Cable & Wireless*, Judge Colman set out important criteria for assessing the enforceability of multi-tiered clauses. He emphasized that, for a multi-tiered clause to be enforceable, it must have three essential characteristics: first, it must be sufficiently certain to allow the court to determine what steps are required for compliance; second, it must be clear when the obligation to complete the pre-arbitral stages ends and when the parties may proceed to arbitration or litigation; and third, it must be clear what consequences follow from non-compliance with the clause (10). These criteria have become standard criteria for assessing multi-tiered clauses under English law and have been repeatedly referred to in subsequent decisions.

Another important case is *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* in 2014, which was heard by the High Court of England. In that case, the contract contained a clause requiring disputes first to be resolved through amicable discussions, and only if such discussions failed could the parties proceed to arbitration. Emirates Trading commenced arbitration directly without completing the negotiation stage, and Prime Mineral objected on the ground of non-compliance with the multi-tiered clause. The arbitral tribunal held that it lacked jurisdiction over the dispute because the multi-tiered clause had not been complied with. This decision was upheld by the High Court of England. Judge Popplewell emphasized in his judgment that multi-tiered clauses, even if they include an obligation to negotiate, may be enforceable provided that they are sufficiently certain and provide objective criteria for assessing compliance. He also emphasized that non-compliance with a multi-tiered clause may lead to lack of jurisdiction of the arbitral tribunal, rather than merely a stay of proceedings (10).

This judgment was highly significant because it showed that English courts are prepared to attach serious consequences to non-compliance with multi-tiered clauses and to treat such clauses as conditions precedent to the jurisdiction of the arbitral tribunal. This approach differs from the approach of some other legal systems, which consider non-compliance with multi-tiered clauses merely as a curable procedural defect, and it demonstrates the greater strictness of English courts in this area.

Another case that was important in the development of the approach of English courts was *NB Three Shipping Ltd v. Harebell Shipping Ltd* in 2004. In that case, the contract contained a clause requiring disputes first to be referred to a joint committee of directors and only, if no agreement was reached in the committee, allowing the parties to proceed to arbitration. One of the parties commenced arbitration directly without referring the dispute to the joint committee. The Commercial Court of England held that the multi-tiered clause in that case was enforceable and that the defaulting party was required to refer the dispute to the joint committee before proceeding to arbitration. Judge Morison emphasized that the clause was sufficiently certain because the process of referral to the joint committee and the criteria for decision-making in that process had been clearly defined (11). This judgment showed that English courts may consider even relatively simple multi-tiered clauses enforceable, provided that they are sufficiently certain.

Another important case is *Wah*, also known as *Alan Tang, v. Grant Thornton International Ltd* in 2012, which was heard by the Court of Appeal of England. In that case, the contract contained a clause requiring disputes first to be resolved through mediation. One of the parties brought proceedings directly before the court without attempting mediation. The Court of Appeal held that the mediation clause was enforceable and that the claim should be stayed until the parties made a serious attempt at mediation. Judge Rix emphasized in his judgment that the mediation clause was sufficiently certain because mediation is a recognized and standard process for which specific

criteria of implementation exist. He also emphasized that courts should respect mediation clauses and require the parties to make a serious attempt at mediation before resorting to the court (11). This judgment showed that English courts are increasingly prepared to enforce mediation clauses and require parties to comply with their contractual obligations in this regard.

### *Criteria for Assessing Enforceability*

On the basis of the above judicial decisions and other related decisions, specific criteria can be extracted for assessing the enforceability of multi-tiered clauses under English law. The first criterion is the specificity of the pre-arbitral stages. The clause must clearly specify which stages must be completed before recourse to arbitration or litigation. These stages may include direct negotiation, managerial negotiation, mediation, conciliation, technical expert determination, or a combination of these methods. The more precisely the stages are defined, the more likely it is that the court will consider the clause enforceable.

The second criterion is the determination of specific time limits. The clause must set specific time limits for each stage or at least provide a mechanism for determining those time limits. Time limits help courts determine whether the parties have fully completed the stages and when they may proceed to arbitration or litigation (10). Clauses that lack specific time limits may be considered unenforceable because of uncertainty. The third criterion is clarity regarding the method of appointing the third party. If the clause includes stages such as mediation, conciliation, or expert determination that require a third party, the method of appointing that third party must be clearly specified. This may include naming a specific person or institution, or establishing a mechanism for selection, such as agreement of the parties or appointment by a specified institution (11). Clauses that do not specify the method of appointing the third party may be regarded as unenforceable because of uncertainty.

The fourth criterion is clarity regarding the consequences of non-compliance. Although courts may determine the consequences of non-compliance on the basis of interpretation of the clause and the parties' intention, it is preferable for the clause expressly to specify the consequences of non-compliance. These consequences may include dismissal of the claim, stay of proceedings, lack of jurisdiction of the arbitral tribunal, or liability in damages. Specification of the consequences contributes to the certainty and predictability of the clause. The fifth criterion is avoidance of vague and general language. The clause should avoid using vague and general expressions such as "reasonable efforts," "negotiation in good faith," or "efforts to reach amicable settlement" without precisely defining these concepts. If such expressions are used, they should be accompanied by objective and measurable criteria enabling the court to determine whether these obligations have been complied with. The sixth criterion is compatibility with the principles of English law. The clause must not conflict with fundamental principles of English law, such as the right of access to justice. Clauses that unreasonably restrict access to arbitration or litigation or create unreasonable delays may be deemed unenforceable because of conflict with public policy.

### *Challenges and Criticisms of the Strict Approach*

Although the strict approach of English courts has advantages, it also faces challenges and criticisms. One of the main criticisms is that this approach may lead to unnecessary delays in dispute resolution. When one party objects to non-compliance with a multi-tiered clause, the court or arbitral tribunal must first examine this objection and determine whether the clause has in fact not been complied with. This preliminary examination may be time-consuming and lead to delay in addressing the merits of the dispute (12). In some cases, parties may use this

objection as a delaying tactic to postpone the resolution of the dispute. This concern is particularly important in commercial disputes that require rapid resolution.

Another criticism is that the strict approach may lead to complexity and additional costs. The parties must devote significant resources to proving compliance or non-compliance with the multi-tiered clause, including the presentation of documents and evidence relating to negotiations, correspondence, and efforts made to resolve the dispute. This can increase legal costs and operate contrary to one of the main objectives of multi-tiered clauses, namely cost saving (13). In addition, the complexity of assessing compliance with the clause may lead to greater uncertainty and reduced predictability, which is undesirable for parties to international commercial contracts.

The third criticism concerns the restrictive interpretation of the obligation to negotiate in good faith. Some critics believe that the approach of English courts in rejecting the enforceability of obligations to negotiate in good faith is overly restrictive and differs from the approach of many other legal systems, particularly civil-law systems in continental Europe, which recognize the principle of good faith as a fundamental principle of contract law. This difference may lead to a lack of harmony in international practice and create difficulties for parties to international commercial contracts who come from different legal systems.

However, defenders of the strict approach argue that it has significant advantages. First, this approach contributes to certainty and predictability, because the parties know that if they draft their multi-tiered clause properly, courts will enforce it. This certainty encourages parties to draft their clauses more carefully and avoid vague and general language. Second, this approach contributes to respect for the principle of party autonomy and the binding force of contractual terms, because courts respect and enforce the parties' agreements. Third, this approach may help reduce disputes, because the parties know that, if they fail to comply with a multi-tiered clause, they may face serious consequences, and this creates an incentive to make a serious effort at the pre-arbitral stages (14).

### *The Effect of the Civil Procedure Rules*

One important factor in the evolution of the approach of English courts to multi-tiered clauses was the reform of the Civil Procedure Rules, or CPR, in 1999. These reforms, known as the Woolf reforms, primarily aimed to reduce costs and accelerate the resolution of civil claims. One of the key elements of these reforms was the encouragement of parties to use alternative dispute resolution methods before resorting to court. The CPR gives courts the power to require parties, before proceedings continue, to attempt to reach agreement through mediation or other ADR methods. Courts may also consider the conduct of the parties in attempting to resolve the dispute through ADR when determining litigation costs.

These reforms had a significant impact on the approach of English courts to multi-tiered clauses. Courts became increasingly prepared to enforce multi-tiered clauses and require parties to comply with their contractual obligations regarding the use of ADR methods. This approach is consistent with the general philosophy of the CPR, which emphasizes reducing costs and accelerating dispute resolution. Courts also began to use their powers to stay proceedings until the parties had made serious efforts at mediation or other ADR methods. This approach showed that English courts not only respect multi-tiered clauses but also actively support the use of ADR methods.

One important decision in this regard is *Halsey v. Milton Keynes General NHS Trust* in 2004, which was heard by the Court of Appeal of England. In that case, the Court of Appeal established general principles for determining when a court may order a party that has refused mediation to pay litigation costs. The Court of Appeal emphasized

that courts cannot compel parties to mediate because doing so would conflict with the right of access to justice, but they may take the parties' conduct regarding mediation into account when determining litigation costs (11). This judgment showed that English courts have adopted a balanced approach that both respects the right of access to justice and encourages the use of ADR methods.

### *The Role of the Timing of Objection*

One important aspect of the strict approach of English courts is the emphasis on the importance of the timing of an objection to non-compliance with a multi-tiered clause. English courts consider that a party alleging that the other party has failed to comply with a multi-tiered clause must object to such non-compliance at the earliest possible opportunity. Delay in objecting, or participation in arbitral or judicial proceedings without objecting to non-compliance with the clause, may be regarded as waiver or estoppel.

In English law, waiver means the voluntary relinquishment of a right. If a party that has the right to object to non-compliance with a multi-tiered clause demonstrates by its conduct that it has waived this right, it can no longer subsequently object to the non-compliance (15). For example, if a party that knows the other party has failed to comply with the multi-tiered clause participates in arbitral proceedings without objection and addresses the merits of the dispute, the court or arbitral tribunal may find that this party has waived its right to object. Estoppel is a related concept of great importance in English law. Estoppel means being prevented from relying on conduct that contradicts one's previous conduct. If a party, through its conduct, creates a reasonable expectation in the other party that it has waived its right to object, and the other party acts on that expectation, the first party cannot subsequently rely on that right. For example, if a party that knows the other party has failed to comply with the multi-tiered clause informs the other party that it wishes to continue the arbitral proceedings, and the other party incurs substantial costs on the basis of that information, the first party may be estopped from objecting to non-compliance with the clause.

English courts have emphasized the importance of the timing of objections in numerous decisions. In *Thyssen Inc v. Calypso Shipping Corporation SA* in 2000, the Court of Appeal of England held that a party that had not objected to non-compliance with a multi-tiered clause and had participated in arbitral proceedings could no longer subsequently rely on that non-compliance. Judge Clarke emphasized that parties must object to non-compliance with the clause at the earliest possible opportunity and that delay in objecting may be treated as waiver. This decision showed that English courts expect parties to defend their rights actively and in a timely manner and to avoid delaying tactics.

### *Exceptions and Instances of Flexibility*

Despite the generally strict approach, English courts have shown flexibility in some cases and have accepted exceptions. One such exception concerns cases in which compliance with the multi-tiered clause is practically impossible or futile. For example, if one party expressly states that it is unwilling to participate in negotiation or mediation, or if it is clear that there is no possibility of agreement, the court may find that requiring compliance with the multi-tiered clause is futile and may allow the other party to proceed directly to arbitration or litigation. Another exception concerns cases in which delay in resorting to arbitration or litigation may cause serious harm to one party's rights (16). For example, if one party needs urgent interim measures, such as an injunction or protective measures, the court may allow that party to apply to the court or arbitral tribunal without full compliance with the

multi-tiered clause. This exception is based on the principles of proportionality and necessity and shows that English courts are prepared to show flexibility where strict compliance with the clause could undermine justice.

The third exception concerns cases in which the conduct of the parties shows that they have implicitly waived compliance with the multi-tiered clause. For example, if both parties participate in arbitral proceedings without objection and address the merits of the dispute, the court or arbitral tribunal may find that the parties have implicitly agreed to waive compliance with the multi-tiered clause (17). This exception is based on the principle of party autonomy and shows that courts also respect the parties' implied agreements.

### *The Effect of the English Approach on International Practice*

The strict approach of English courts to multi-tiered clauses has had a significant effect on international practice. England, as one of the major centers of international commercial arbitration, plays an important role in shaping international standards in this field. Many international commercial contracts choose English law as the governing law or designate London as the seat of arbitration, and, as a result, the approach of English courts has a direct effect on these contracts.

The strict approach of English courts gives parties to international contracts an incentive to draft their multi-tiered clauses more carefully and avoid vague and general language. This has contributed to improving the quality of multi-tiered clauses in international contracts and has led to greater certainty and predictability. The approach of English courts has also influenced other legal systems, and some countries have adopted similar approaches. Nevertheless, significant differences remain between the English approach and the approach of certain other legal systems, particularly civil-law systems in continental Europe. These differences may lead to a lack of harmony in international practice and may be challenging for parties to international commercial contracts who come from different legal systems.

### **Conclusion**

The examination of multi-tiered dispute resolution clauses in international commercial contracts and the analysis of English judicial practice show that this contractual mechanism, despite the significant advantages it offers, including cost and time savings, preservation of commercial relationships, and flexibility in the dispute resolution process, faces complex legal challenges rooted in the inherent nature of these clauses and in the fundamental differences among legal systems. The principal challenge is determining the boundary between enforceable obligations and merely declaratory agreements. Multi-tiered clauses often include obligations that appear vague and uncertain in nature, such as the obligation to negotiate in good faith or to make reasonable efforts to resolve a dispute amicably. English courts, by adopting a strict but differentiated approach, have attempted to establish specific criteria for assessing the enforceability of these clauses. These criteria, which include specificity of the stages, determination of time limits, clarity regarding the method of appointing a third party, and avoidance of vague language, contribute to certainty and predictability and encourage parties to draft their clauses more carefully. Nevertheless, this strict approach may lead to unnecessary delays, additional complexity, and higher costs, thereby operating contrary to one of the main objectives of multi-tiered clauses.

The role of the principle of good faith in the implementation of multi-tiered clauses is another key issue requiring particular attention. Good faith, as a fundamental principle of contract law, plays a role in all stages of the implementation of multi-tiered clauses, from drafting to performance, and the success of pre-arbitral stages such

as negotiation and mediation depends on the parties' genuine willingness to act in good faith. Nevertheless, the precise definition of good faith and the determination of the scope and limits of the obligation to observe it have always involved difficulty. English courts, with their cautious approach to obligations to negotiate in good faith, rooted in the judgment of the House of Lords in *Walford v. Miles*, have emphasized that an obligation to negotiate in good faith, standing alone, lacks the necessary certainty and is unenforceable unless accompanied by objective and specific criteria. This approach, although conducive to certainty, differs from the approach of many other legal systems, especially civil-law systems, which recognize the principle of good faith as a general and independent principle. This difference may lead to lack of harmony in international practice and create challenges for parties to international commercial contracts who come from different legal systems. Therefore, it is essential that, when drafting multi-tiered clauses, parties take account of differences among legal systems and formulate their clauses in a manner that is enforceable in the legal system governing the contract.

Finally, it may be concluded that multi-tiered dispute resolution clauses are a valuable tool for resolving international commercial disputes, but their success depends on precise drafting, performance in good faith, and acceptance by judicial and arbitral authorities. The strict approach of English courts, despite the criticisms directed at it, has contributed to improving the quality of multi-tiered clauses and increasing certainty in this area. However, for these clauses to operate effectively at the international level, greater coordination among different legal systems, the development of international standards for drafting and implementing these clauses, and broader acceptance of the role of good faith in contract law are required. International arbitral institutions, by publishing model clauses and practical guidelines, can assist parties in drafting effective and enforceable multi-tiered clauses. Courts and arbitral tribunals, by adopting a balanced approach that takes both certainty and flexibility into account, can also help achieve the main objectives of these clauses, namely the rapid, cost-effective, and amicable resolution of disputes. Ultimately, the success of multi-tiered clauses depends not only on the legal framework but also on commercial cult

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### **Authors' Contributions**

All authors equally contributed to this study.

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The authors of this article declared no conflict of interest.

### **Ethical Considerations**

All ethical principles were adhered in conducting and writing this article.

### **Transparency of Data**

In accordance with the principles of transparency and open research, we declare that all data and materials used in this study are available upon request.

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