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на тему: "**ПРАВОВИЙ АНАЛІЗ БАГАТОРІВНЕВИХ ТА АСИМЕТРИЧНИХ ЗАСТЕРЕЖЕНЬ ПРО ВИРІШЕННЯ СПОРІВ У МІЖНАРОДНОМУ КОМЕРЦІЙНОМУ АРБІТРАЖІ: ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ ПИТАННЯ**"

"LEGAL ANALYSIS OF MULTI-TIERED AND ASYMMETRIC DISPUTE RESOLUTION CLAUSES IN INTERNATIONAL COMMERCIAL ARBITRATION: THEORETICAL AND PRACTICAL ISSUES"

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Я, Городнюк Ольга Павлівна, студентка 2 року навчання магістерської програми за спеціальністю „Право" факультету правничих наук НаУКМА, адреса електронної пошти: gorodnuk.olia@gmail.com підтверджую наступне:

- написана мною магістерська робота на тему: „Правовий аналіз багатоетапних та асиметричних застережень про вирішення спорів у міжнародному комерційному арбітражі: теоретичні та практичні питання" (англійською: „Legal analysis of multi-tiered and asymmetric dispute resolution clauses in international commercial arbitration: theoretical and practical issues") відповідає вимогам академічної доброчесності та не містить порушень, передбачених пунктами 3.1.1- 3.1.6 Положення про академічну доброчесність здобувачів НаУКМА від 07.03.2018 року, зі змістом якого ознайомлена;
- підтверджую, що надана мною електронна версія роботи є остаточною і готовою до перевірки;
- згодна на перевірку моєї роботи на відповідність критеріям академічної доброчесності у будь-який спосіб, у тому числі порівнянням змісту роботи та формуванням звіту подібності за допомогою електронної системи Unicheck;
- даю згоду на архівування моєї роботи в репозитаріях та базах даних університету для порівняння моєї та майбутніх робіт.

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INTRODUCTION

Rationale of the topic. Commercial relations are a living instrument that is being constantly developed. The parties to commercial contracts usually seek an amicable resolution of any dispute within their commercial relations. Nevertheless, each party anticipates the worst-case scenario where they will need to opt for a mandatory dispute resolution process. Arbitration became the safe harbour for commercial disputes, allowing parties to choose a suitable forum, arbitrators with particular knowledge in the relevant field, applicable rules, establish confidentiality regime, etc.

In recent years, it became a modern approach for drafters of commercial contracts to provide the parties with a chance to reach an amicable solution by one or several "soft" alternative dispute resolution procedures (negotiations, mediation, conciliation, etc.) before commencement of arbitration or litigation. To satisfy such needs of business parties, multi-tier dispute resolution clauses emerged.

Given the fact that dispute resolution clauses, similarly to any other contract provision, are also a negotiable matter, it could be more or less beneficial to a respective party depending on the bargaining power of the latter. Even more, one party could obtain an exclusive right to refer the dispute to a particular instance, e.g. arbitration. There is an evolutive tendency to use such asymmetric arbitration clauses in contracts involving parties where possessing unequal bargaining powers (for instance, loan facility between creditor and borrower).

As everything new and undeveloped, both multi-tier and asymmetric dispute resolution clauses regularly face challenges in relation to their validity, enforceability and/or binding nature. In view of their constant use on the one scale and related risks on the other, the topic of this work is of high interest and importance at this time.

Research question. This work aims to answer the research question – what the legal nature of multi-tier and asymmetric dispute resolution clauses is in the theoretical and practical plane, and what risks incorporation of such clauses cause for parties to a

commercial contract (on the example of particular jurisdictions).

Research objective. The objective of this work is to analyse the notion of asymmetric and multi-tier dispute resolution clauses from the theoretical point of view, as well as from the point of case-law in both civil law and common law jurisdictions, define the risks of incorporation of such clauses into commercial contracts, and specifics of their legal understanding in terms of validity, enforceability and/or binding nature.

Research assignments. In order to answer the research question and achieve the research objective, the following research assignments shall be resolved:

1. To analyse the theoretical view with respect to the validity and enforceability of multi-tier dispute resolution clauses, and the legal nature of pre-arbitration tiers in multi-tier dispute resolution clauses.
2. To identify the potential consequences of non-compliance with multi-tier dispute resolution clauses.
3. To analyse case-law of sampling civil law and common law jurisdictions in relation to the validity and enforceability of multi-tier dispute resolution clauses, as well as the legal nature of pre-arbitration tiers in such clauses.
4. To identify the risks of incorporation of multi-tier dispute resolution clauses into a commercial contract and propose solutions for their elimination.
5. To analyse the theoretical view with respect to the validity and enforceability of asymmetric arbitration clauses.
6. To analyse case-law of sampling civil law and common law jurisdictions in relation to the validity and enforceability of asymmetric arbitration clauses.
7. To identify the risks of incorporation of an asymmetric arbitration clause into a commercial contract and propose solutions for their elimination.

The object of the research. The object of this work is the legal notion of multi-tier and asymmetric dispute resolution clauses in international commercial contracts.

The subject matter of the research. The subject matter of this work is theoretical and practical legal approaches towards legal nature, validity and enforceability of multi-

tiered and asymmetric dispute resolution clauses in international commercial arbitration.

Methods. For the purposes of this work the following methods were applied:

(a) Method of analysis and synthesis is a crucial method that allows identifying doctrinal and practical approaches towards multi-tier and asymmetric dispute resolution clauses, as well as analysing criteria and applicable legal principles. Method of synthesis allows establishing connections between the legal approaches in different jurisdictions and applicable legal principles.

(b) Comparative method plays one of the most important roles, given that it is necessary for comparison of approaches, case facts and applicable laws in the context of multi-tier and asymmetric dispute resolution clauses. Also, the specific legal comparative method allows comparing approaches towards multi-tier and asymmetric dispute resolution clauses in different jurisdictions and find out the common and distinctive features between them.

(c) Method of systematic approach applies for analysis of the notions of multi-tier and asymmetric dispute resolution clauses in global prospective in the complex of interconnection between them.

(d) Hermeneutic method is necessary for the purposes of analysis of case-law, namely for identification of true intentions of the parties concerning multi-tier and asymmetric dispute resolution clauses.

(e) Behavioural method is appliable in its limited meaning, namely, it allows analysing an impact of parties' conduct on the validity and enforceability of multi-tier and asymmetric dispute resolution clauses.

The theoretical basis of the work. This work is based on theoretical works of scholars and practitioners in the field of international commercial arbitration, such as Prof. Born, Mr. Blackaby, Dr. Kreindler, Mr. Redfern, Mr. Hunter, Dr. Berger, Mr. Jolles, Dr. Boog, Mr. Imhoos, Prof. Dr. Voser, Mr. Draguiev, Prof. Dr. Scherer, Dr. Binder, Dr. Kayali, Mr. Kohl, Mr. Rigolet, Prof. Cremades and others.

The practical importance of the work. The theoretical legal analysis described in

this work has practical importance and may be applied as follows:

(a) Scientific application: in further theoretical works with regard to multi-tier and asymmetric dispute resolution clauses.

(b) Practical application: by legal practitioners when drafting or revising multi-tier and asymmetric dispute resolution clauses in international commercial contracts.

(c) Law enforcement application: by the courts when deciding on validity and enforceability of multi-tier and/or asymmetric arbitration clauses;

(d) Legal education application: in the education process, drafting and preparation of publications, textbooks for university students.

Structure of the work. The work consists of the following structure elements: introduction, two chapters, 6 sub-chapters, conclusions after each chapters, general conclusions and bibliographical references index. The total scope of work is 98 pages. The bibliographical references index consists of 116 items and 14 pages.

CHAPTER 1. MULTI-TIER DISPUTE RESOLUTION CLAUSES AS A LEGAL NOTION IN THEORY AND PRACTICE

In this chapter the author will analyse the legal nature of the multi-tier dispute resolution clauses which have two types of the first tier: (1) negotiations, and (2) mediation or conciliation. The author will analyse attitude towards multi-tier dispute resolution clauses on a theoretical level, as well as in case-law in both civil and common law countries; risks of incorporation of multi-tier dispute resolution clauses into commercial contracts; mandatory or non-mandatory character of pre-arbitration tiers, as well as potential consequences of non-compliance with pre-arbitration tiers of such clauses.

A multi-tier dispute resolution clause is a dispute resolution clause which provides for two or more consecutive forms of dispute resolution.[1] For instance, clauses that provide for negotiations, mediation or conciliation prior to initiation of arbitration are considered to be multi-tier arbitration clauses. Such type of clauses provides parties with the opportunity to undertake several tries to resolve a dispute.[2] Incorporation of such clauses into a contract has a lot of commercial sense given that parties to the contract are usually interested in proceeding with their business and finding an amicable solution instead of long-term and costly dispute resolution proceedings in the courts or arbitration. These clauses are relevant for long-term contractual arrangements or contracts in relation to which disputes are unavoidable.[3]

First and further pre-arbitration tiers in multi-tier dispute resolution clauses are apparently made for the sole reason of avoiding the dispute at the final tier – arbitration.[4] As evident, the multi-tier nature of the clause has a lot of benefits for commercial parties,

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[1] Berger K.P. Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration. 3rd edition. Kluwer Law International. 2015. p. 47.
[2] Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb). Kluwer Law International. 2006. Vol. 72. Issue 4. p. 329.
[3] Baizeau D. Chapter 18, Part XVI: Multi-tiered and Hybrid Arbitration Clauses / eds Arroyo M. Arbitration in Switzerland: The Practitioner's Guide. 2nd edition. Kluwer Law International. 2018. p. 2783.
[4] *ibid*. p. 2781.

because it allows them to control the dispute, keep it away from lawyers and avoid additional costs to the extent possible.[5] At the same time, multi-tier arbitration clauses still raise validity and enforcement concerns.

1.1. Doctrinal view on legal nature of multi-tier dispute resolution clauses

The primary question with regard to multi-tier dispute resolution clauses is whether pre-arbitration requirements are mandatory or advisory in nature. From the first side, the parties would not insert unnecessary language in their arbitration agreement, unless they intended to be bound by it. On the other side, the correctness of this statement depends on the wording of the clause. The interpretation will assist for the purpose of determining whether the pre-arbitration procedure was intended to be a mandatory requirement or rather general guidance for the parties. Further, in this sub-chapter 1.1, the author will analyse doctrinal views on different types of multi-tier dispute resolution clauses, opinions concerning their legal nature, as well as potential consequences of non-compliance with them.

1.1.1 Theoretical understanding of negotiations as a pre-arbitration requirement

The author will start from the widely common type of multi-tier dispute resolution clause – the one which provides for negotiations prior to arbitration. According to Prof. Born, it stipulates a "cooling-off" period for the parties to agree, which is usually accompanied by a requirement to involve management or specific company representatives into the negotiations process.[6] An appropriate assessment of the parties' intent will give a

[5] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 6.
[6] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 973.

conclusive understanding of whether the existence of the first (negotiation) tier prevents any party from submission of disputes directly to arbitration avoiding negotiations tier.

The general understanding between scholars is that multi-tier arbitration clauses with the first negotiation tier are rather advisory because of their general wording which makes the agreement to negotiate unclear and uncertain.[7] Mr. Imhoos considers that such an approach is being followed due to the risk that bad faith parties may abuse the obligation to perform such amicable settlement procedures and utilise them as dilatory tactics.[8]

The basic linguistic assessment of the wording of the pre-arbitration tier may help with the determination of the mandatory nature of a negotiations requirement. For instance, the parties expressed an intention to be bound by negotiations tier if the latter contains such words as "shall", "must" and, on the contrary, there was no such intention if the clause contains such words as "may", "can", "should".[9] Also, a pre-arbitration procedure is mandatory if a dispute resolution clause provides for precise requirements allowing to further measure a party's efforts to comply with such a first tier.[10] For instance, if the clause provides for a specific time-period of negotiations or number of negotiation sessions, or specifies which participants (management, lawyers, financial parties, engineers, etc) shall take part in the process, such characteristics will suffice to make an agreement to negotiate mandatory.[11] Additionally, Dr. Berger states that conditional wording of arbitration clause following negotiation tier (if…) is one more indication of mandatory nature of the pre-arbitration procedure.[12]

At the same time, it should be clear that the pre-arbitration negotiations procedure usually requires from the parties only an attempt to resolve the dispute. They must make a try to find a solution. The party is not required to continue negotiations if there is no

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[7] *ibid*. p. 976.
[8] Imhoos Ch. Mediation and other combined ADR clauses: Still a long way towards true recognition and enforcement by Swiss Courts? *Kluwer Mediation Blog*. 2011.
[9] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 985.
[10] *ibid*. p. 976.
[11] *ibid*. p. 977.
[12] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 5.

expectancy of their success.[13] Thus, it might be necessary for the specified parties such as management, lawyers or other representatives of the parties (as applicable) to enter into negotiations or, if necessary, negotiate within a specified period of time or until a certain moment. It would be enough for the party to listen to the opposing party's position and present its own.[14] Furthermore, in view of the recent boom of virtual dispute resolution, parties may not even leave their computers for such negotiations, unless the dispute resolution clause necessarily requires in-person presence of the parties in one place.

Logically, there is no requirement for the pre-arbitration stage to be finished by the resolution of the dispute as a result of the negotiations. On the contrary, multi-tier dispute resolution clauses are based on the assumption that dispute would not be resolved on the first tier, therefore, the second and, if necessary, third tiers exist. This, however, does not undermine the goal of the clause to avoid the latest tiers.

One more relevant question in this regard is when the parties may leave the first tier uncompleted and proceed with the following tiers. If a clause directly provides for the duration of negotiations, the answer is clear. However, there might be a situation when the term provided for in the clause is not enough and parties want to proceed with negotiations in excess of the term specified. Dr. Berger suggests that parties may simply amend the clause to the necessary extent and, therefore, avoid any risk of the clause being inflexible.[15]

If a clause does not specify any term or any other indicator which may serve for the determination of the end of negotiations, such indicator depends exclusively on the subjective impression of each party.[16] This could cause additional controversies between the parties as to whether the party, which referred the dispute to arbitration, was acting reasonably when it declared that negotiations became deadlocked.[17]

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[13] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 993.
[14] *ibid*. p. 993.
[15] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 10.
[16] *ibid*. p. 10.
[17] *ibid*. p. 10.

1.1.2 Theoretical understanding of mediation and conciliation as pre-arbitration requirements

Proceeding with the second fairly common type of multi-tier dispute resolution, some clauses provide for mediation or conciliation as a first tier. The concerns with respect to their mandatory nature are mostly the same as with clauses that set out negotiations as a pre-arbitration requirement. Basic understanding of mediation and conciliation procedures shows that both of them differ from negotiations given that they require a decision-making process to be made by the third party and usually following a certain specific procedure. Mediation and conciliation are commonly used as interchangeable terms.[18] Taking into account that both this alternative dispute resolution types stay on the same footing, which is different from negotiations,[19] for the purpose of this work, they will be analysed together.

Prof. Born provides an opinion that the mandatory nature of a pre-arbitration requirement may endanger the certainty of the final resolution and fails to provide for a standard of parties' efforts measurement.[20] Further, completion of a mediation procedure still leaves space for the parties not to finalise the settlement of the dispute.[21] At the same time, mediation is fairly more often recognised as mandatory given that it requires significant efforts of the parties, namely choice and appointment of a mediator, cooperation with him/her, etc.[22] The first tier will be a condition precedent to further tiers if the parties made it clear that such step is a binding prerequisite of a more burdensome procedure (such as litigation or arbitration).[23] Also, it may provide for a specific mediation institution or mediator, set out a time-limit for commencement of the procedure or period of time for

[18] Kayali D. Enforceability of Multi-Tiered Dispute Resolution Clauses. *Journal of International Arbitration*. Kluwer Law International. 2010. Vol. 27. Issue 6. p. 554.
[19] Carter J. H. Part I - Issues Arising from Integrated Dispute Resolution Clauses / eds Van den Berg A. J. New Horizons in International Commercial Arbitration and Beyond. *ICCA Congress Series.* Vol. 12. Kluwer Law International. ICCA & Kluwer Law International. 2005. p. 458.
[20] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 978.
[21] *ibid*. p. 987.
[22] *ibid*. p. 978.
[23] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 433.

performing mediation.[24]

Prof. Born on the basis of relevant case-law, concludes that if the clause directly states that a pre-arbitration requirement is a condition precedent, there is a higher probability that the clause will be recognised as mandatory.[25] Nevertheless, according to Mr. Jolles, an arbitral tribunal could not decide on the enforceability of the pre-arbitration clause *ex officio* (without objection from one of the parties to the proceedings).[26] Meanwhile, even when the clause contains indicators of its mandatory nature and one of the parties is challenging the jurisdiction of the tribunal based on non-compliance of the other party with pre-arbitration procedure, it may be not right for the tribunal to force parties to enter into the pre-arbitration procedure. This could be wrong from a purely practical view. Dr. Berger states that in such situations it is rather a formality than a necessity for an arbitral tribunal to force parties to enter into pre-arbitration procedure in cases where it is obvious that there would be no successful outcome.[27]

In the opinion of Dr. Kayali enforcement of multi-tiered dispute resolution clauses which provide sufficiently certain requirements with regard to a mediation tier corresponds both to the parties' autonomy and the needs of the international business community.[28]

1.1.3 The question of legal nature: substance, jurisdiction or procedure

The common issue in relation to the pre-arbitration requirements in multi-tier dispute resolution clauses is their legal nature. Three main theories in this regard are that those are of (i) substantial, (ii) jurisdictional and (iii) procedural nature. Prof. Born states

[24] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 978.
[25] *ibid*. p. 991.
[26] Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb). Kluwer Law International. 2006. Vol. 72. Issue 4. p. 331.
[27] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 14.
[28] Kayali D. Enforceability of Multi-Tiered Dispute Resolution Clauses. *Journal of International Arbitration*. Kluwer Law International. 2010. Vol. 27. Issue 6. p. 569.

that the common view excludes jurisdictional or substantive consequences and supports the generalised position that pre-arbitration requirements are the matter of procedure.[29]

Treatment of pre-arbitration requirements as an issue of substantive nature raises a lot of questions. For instance, Mr. Jolles considers that remedies for a breach of a substantive contract are too harsh or, alternatively, unsatisfactory to constitute consequences of pre-arbitration procedure violation.[30] For instance, such a typical substantive remedy as damages would be unsatisfactory in view of the impossibility to calculate their amount incurred by violation of pre-arbitration procedures.[31] Meanwhile, the remedy of termination of a contract would be too severe.[32] Moreover, in case of application of the latter remedy, the very purpose of pre-arbitration procedures would be lost. Termination has always been considered a remedy of last resort for the severe or even fundamental violation of the contract. The non-breaching party is usually required within the dispute resolution procedure to prove the breach in order to terminate the contract. Should we treat the violation of a pre-arbitration procedure as an issue of substance, the mere violation of this procedure would allow a party to easily escape the contract. Mr. Mitrovic concludes that treatment of pre-arbitration procedures as a matter of substance would end up leaving violation of multi-tier dispute resolution clauses penalty-free.[33]

Pre-arbitration procedures may sometimes be considered as "condition precedent" and constitute, as called by Prof. Born, "jurisdictional bar" to arbitration.[34] In the opinion of Prof. Cremades, the question of whether a pre-arbitration requirement is a valid condition precedent to arbitration is a question of jurisdiction and should be decided by the tribunal under the competence-competence principle.[35] Since the interpretation of an arbitration

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[29] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 975.
[30] Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb). Kluwer Law International. 2006. Vol. 72. Issue 4. p. 336.
[31] *ibid*. p. 336.
[32] *ibid*. p. 336.
[33] Mitrovic M. 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 / eds Scherer M. *ASA Bulletin*. Association Suisse de l'Arbitrage. Kluwer Law International. 2019. Vol. 37. Issue 3. p. 562.
[34] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 988.
[35] Cremades B. M. Multi-tiered Dispute Resolution Clauses. *CPR Institute for Dispute Resolution*. 2004. p. 9.

clause is a matter of arbitral tribunal rather than a domestic court,[36] the tribunal under the competence-competence principle is authorised to determine its own jurisdiction and decide the case where such jurisdiction is challenged by one of the parties.[37] That said, if the pre-arbitration procedure in the opinion of the tribunal is mandatory, the tribunal does not have jurisdiction unless condition precedent is satisfied. As summarised by Prof. Born on the basis of jurisprudence analysed by him, sometimes such conditions precedent are considered not as pre-requisites to arbitration but as defective provisions which make a party unable to validly initiate arbitral proceedings at all.[38]

Since parties agreed to arbitrate, their dispute may not be referred to the court and, therefore, this makes the arbitration their only way to obtain appropriate adjudication of the dispute and final and binding award. Should the pre-arbitration procedure be mandatory, it will prevent a party from the exercise of its procedural rights before an arbitral tribunal. While criticising the jurisdictional approach, Mr. Jolles stated that it is hard to believe that parties would exclude the jurisdiction of state courts in favour of arbitration but will make tribunal's jurisdiction conditional on pre-arbitration requirements, while failure to comply with such conditions will allow parties to escape from their commitment to arbitrate.[39] This opinion has a point and, therefore, there is no surprise that the approach of treating pre-arbitration procedures in multi-tier dispute resolution clauses as a matter of jurisdiction is no longer supported by the majority of scholars.[40]

Supporters of the procedural approach towards the nature of pre-arbitration requirements with reference to supporting case-law emphasise the main aim of such procedures, namely, the efficiency of the dispute resolution proceeding.[41] Considering this

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[36] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 975.
[37] Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb). Kluwer Law International. 2006. Vol. 72. Issue 4. p. 335.
[38] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 990.
[39] Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb). Kluwer Law International. 2006. Vol. 72. Issue 4. p. 335.
[40] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 975.
[41] *ibid*. p. 991.

feature, a treatment of pre-arbitration requirements as a precondition to get access to arbitration, in view of Prof. Born, would cause additional inconveniences for the parties, namely additional costs and delays which parties cannot be intending at the time of the contract conclusion.[42]

Nevertheless, when possible delays and additional costs are on one scale, one should consider parties will to be on the other scale. The freedom to decide on appliable dispute resolution procedures falls within the scope of the parties' autonomy. A tribunal, in turn, should respect the parties will and give force to the parties' intentions set out in the contractual dispute resolution clause. It is a commonly known feature of arbitration that the parties are free to agree on set of conditions in the arbitration clause, for instance, that the arbitrator should have specific knowledge or education, etc. The appointment of such an arbitrator might also cause additional costs however tribunal will in no way question the parties' decision.

1.1.4 Sanctions for violation of pre-arbitration procedure

Depending on the approach followed in relation to the jurisdictional, procedural or substantive nature of the pre-arbitration procedure, there are several types of sanctions discussed between the scholars for the multi-tier dispute resolution clause's violation.

In the opinion of several scholars, violation of pre-arbitration requirements should have consequences under the substantive part of the contract, e.g. termination of contract or compensation for damages. As discussed in sub-chapter 1.1.3 above and supported by Mr. Kohl and Mr. Rigolet, those approaches are impractical.[43] As stated above, the amount of damages would be impossible to calculate or substantiate. Although the contract may provide for a specific amount of fines or liquidated damages for violation of a multi-tier

[42] *ibid*. p. 992.
[43] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 439.

dispute resolution clause, again, the purpose of a multi-tier dispute resolution clause would not be achieved by these means. This is because the primary idea of the parties entering into a multi-tier dispute resolution clause was to prevent any party from initiating the latest tier (arbitration or litigation) without passing the first tiers – so called disputes' filtering.[44] Damages or termination of a contract will not in any way help to reach that goal.

Another remedy that is opened by the substantive approach is specific performance.[45] However, in the case of multi-tier dispute resolution clauses, it would mean going around in a circle. In the situation where a claimant started arbitration in violation of the pre-arbitration procedure, a respondent would have a right to ask the tribunal for an injunction to force a claimant to enter into a first-tier procedure in accordance with a multi-tier dispute resolution clause.[46] As correctly pointed out by Mr. Mecar, this would require a respondent to enter into an arbitration (also in violation of the clause) to ask the tribunal to force a claimant to enter into a pre-arbitration procedure due to violation of the same procedure.[47] In the meantime, the arbitration may still proceed in parallel with an attempt to reach an amicable settlement.[48]

Additionally, it is hard to imagine that tribunal may force a party to take part in negotiations which are generally considered to be the means of dispute resolution based on free will. In this regard, Mr. Jarrosson made an interesting comparison which in translation of Mr. Mitrovic is worded as follows "you can bring a horse to water, but you cannot make it drink".[49] Consequently, the remedies for violation of the substantive contract do not suit for violation of a multi-tier dispute resolution clause.

Should we follow the jurisdictional approach towards the nature of the pre-

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[44] Mecar M. Enforceability of multi-tiered clauses leading to arbitration: master thesis, Central European University, Budapest. 2015. p. 41.
[45] *ibid*. p. 39.
[46] *ibid.* p. 39.
[47] *ibid*. p. 39.
[48] *ibid*. p. 40.
[49] Mitrovic M. 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 / eds Scherer M. *ASA Bulletin*. Association Suisse de l'Arbitrage. Kluwer Law International. 2019. Vol. 37. Issue 3. p. 571 (footnote No. 69).

arbitration procedures in multi-tier dispute resolution clauses, the sole consequence would be the absence of jurisdiction of a tribunal to decide the case. As discussed in 1.1.3 above, this approach has its grounds, but it is no longer supported by the majority of practitioners and scholars. Considering the legal nature of pre-arbitration procedures as a procedural issue, a tribunal can dismiss, consider the arbitration request inadmissible or stay the proceeding until the parties comply with pre-arbitration requirements.[50] Should the tribunal dismiss the claim as premature, given that pre-arbitration requirements are not satisfied, it should close the proceeding and after completion of the pre-arbitration procedure, parties should appoint another tribunal.[51] This is not only time-consuming but also requires additional expenses for payment of arbitration fees.[52]

In turn, stay of the proceeding is one of the practically suitable consequences of referring the dispute directly to litigation or arbitration omitting the first tier (negotiations, mediation, conciliation, etc). The proceeding should be stayed to provide the parties with an opportunity to comply with the dispute resolution clause in a contract and pass the pre-arbitration (or pre-litigation) procedures specified therein.[53] Afterwards, if no resolution is reached within pre-arbitration procedures (or the time for dispute resolution by negotiations, mediation or conciliation expired), the parties can proceed with the final binding dispute resolution step. Mr. Mecar made an important warning in this regard, that approach supporting stay of the proceeding is a valid option unless the parties agreed otherwise in their contract.[54] However, Mr. Mitrovic emphasises that there are scholars who

[50] Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb). Kluwer Law International. 2006. Vol. 72. Issue 4. p. 331.
[51] Mecar M. Enforceability of multi-tiered clauses leading to arbitration: master thesis, Central European University, Budapest. 2015. p. 44.
[52] *ibid*. p. 44.
[53] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 436.
[54] Mecar M. Enforceability of multi-tiered clauses leading to arbitration: master thesis, Central European University, Budapest. 2015. p. 45.

disagree with the opinion that stay of the proceeding is the most appropriate remedy.[55] Mr. Mitrovic provides an example of such scholar opinion and shows that in relation to mediation as pre-arbitration requirement Mr. Göksu stated that stay of the proceedings means forcing parties to enter into procedure which is doomed to fail.[56]

Another possible sanction supported by scholars for refusal to comply with the pre-arbitration procedure is a loss of the right to recover procedural costs. As suggested by Mr. Kohl and Mr. Rigolet, the court or tribunal may take into account that a claimant failed to resort to the pre-arbitration procedure before filing a claim to a court or a tribunal, when deciding on the amount of procedural costs to be borne by such a claimant.[57]

The situation is more complicated when a party violates an agreed first-tier procedure and moves to the second tier (litigation or arbitration) due to the bad faith behaviour of the other party. For instance, such other party may ignore or otherwise sabotage compliance of the first party with first-tier procedures. For such situations, Dr. Berger emphasises the applicability of principles of good faith and estoppel.[58] Dr. Berger even advises recording the proceeding in order to further show in a court or before a tribunal its honest efforts to comply with a first tier in the manner provided for in the dispute resolution clause.[59] This is a particularly fair approach given that such a bad faith party should not be allowed to ask for a stay of proceeding in the arbitration relying on non-compliance with the pre-arbitration procedure that it personally disrupted.[60] Also, as Dr. Berger interpreted the opinion of Prof. Dr. Voser, a tribunal should not allow an impediment of arbitration initiation by the party which consistently showed that a pre-

[55] Mitrovic M. 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 / eds Scherer M. *ASA Bulletin*. Association Suisse de l'Arbitrage. Kluwer Law International. 2019. Vol. 37. Issue 3. p. 567.
[56] *ibid*. p. 567.
[57] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 438.
[58] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 15.
[59] *ibid*, p. 16.
[60] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 438.

arbitration procedure is insufficient and unimportant.[61]

1.2 Multi-tier dispute resolution clauses in global jurisprudence

For the purposes of this work, there is a need to analyse court practice with regard to multi-tier dispute resolution clauses. For such analysis to be objective and diversified, the sample of jurisdictions will consist of three common law countries (United States of America, United Kingdom and Singapore) and three civil law countries (Switzerland, France and Ukraine).

1.2.1 Legal analysis of negotiations as pre-arbitration procedure from the prospective of case-law

Despite the fact that all of the negotiations, mediation and conciliation are types of alternative dispute resolution usually used as a first tier in multi-tier dispute resolution clauses, there is a particular difference in treatment of their legal nature and their enforceability in different jurisdictions. Therefore, case-law in relation to multi-tier dispute resolution clauses containing (1) negotiations, and (2) mediation or conciliation will be analysed separately, starting from the negotiations tier.

(a) United States of America

In Candid Prod., Inc. v. Int'l Skating Union case US District Court for the Southern District of New York dealt with two contracts which had an identical clause stipulating the right of first refusal.[62] The clause required the parties to enter into good faith negotiations to agree on terms and conditions of the extension of such a right.[63] Despite the fact that

[61] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 15-16.
[62] Candid Productions v. International Skating Union, 530 F. Supp. 1330, 1337 (S.D.N.Y. 1982). § I.
[63] *ibid.* § I.

neither contract contained a multi-tier dispute resolution clause, this case is important in view of impact on the treatment of negotiations as first tier in multi-tier dispute resolution clauses. In particular, the court stated: "an agreement to negotiate in good faith is amorphous and nebulous" because, inter alia, "…the intent of the parties can only be fathomed by conjecture".[64]

Contrary to the court's decision in Candid Prod., Inc. v. Int'l Skating Union case, in 1994 Supreme Court of Connecticut confirmed that the arbitral award was correctly vacated on the basis of failure to comply with mandatory negotiations session before arbitration.[65] In White v. Kampner case the dispute resolution clause provided that parties should enter into no less than two sessions of negotiations prior to referring a dispute to arbitration.[66] In the case at hand, the dispute resolution clause did not simply mention negotiations in good faith but provided for certain criterion which allowed to determine the end of such negotiations (two negotiations sessions),[67] and this may explain the decision of the court.

In Villasenor v. Community Child Care case the dispute resolution clause provided that disputes shall be resolved by arbitration if the parties cannot resolve them by good faith discussion and negotiation.[68] In 2018 the US court considered it sufficient to constitute a pre-requisite for arbitration which, as acknowledged by defendant itself, was not complied with.[69]

Thus, jurisprudence of US courts does not follow one common and consistent approach in each case of multi-tier dispute resolution clauses. Depending on the wording of the clause and the parties' intent concerning its application, the courts may either enforce the clause and declare the negotiations procedure as mandatory, or treat it as simply advisory non-binding provision which provides for the mere guidance for the parties.

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[64] *ibid.* § II.
[65] White v. Kampner, 641 A.2d 1381, 1387 (Conn. 1994). § I.
[66] *ibid.* § I.
[67] *ibid.* § I.
[68] Villasenor v. Community Child Care Council of St. Clara County, Inc., 2018 WL 1806628, at *3 (N.D. Cal.). § III. p. 3.
[69] *ibid.* § III. p. 4.

(b) United Kingdom

In 2002 English High Court in Cable & Wireless case pointed out that, generally, the mere undertaking to negotiate is uncertain due to insufficiency of "objective criteria to decide whether one or both parties were in compliance or breach of such a provision", as it was cited by Mr. Redfern and Mr. Hunter.[70] The clause in that particular case contained a three-tier dispute resolution system requiring parties to firstly negotiate in good faith on the senior level, secondly, to resolve a dispute through an alternative dispute resolution procedure which the Centre for Dispute Resolution should recommend to the parties and (even if the latter procedure is still pending) initiate litigation.[71] In terms of negotiations, the clause specifically provided that the dispute shall be resolved by the respective senior executives of the parties to an agreement.[72] Also, the court acknowledged that a negotiation requirement might have certain binding force if it contains "a sufficiently certain and definable minimum duty of participation".[73] The negotiations were not an issue further in this case, given that parties in fact entered into the negotiations procedure but failed to agree.[74] However, the court also proceeded with the analysis of the second tier concerning which will be elaborated in sub-chapter 1.2.2(b) below.

Further in 2012 English High Court in Wah v. Grant Thornton Int'l Ltd case set out a test defining the mandatory nature of the pre-arbitration stage. Firstly, there must be a commitment of the parties to enter into a pre-arbitration process that is "sufficiently certain and unequivocal".[75] Secondly, such commitment shall provide certain steps to be followed by the parties and enable objective determination (1) to which extent the parties shall participate in such pre-arbitration process after its commencement, and (2) at which point

[70] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 2.90. p. 101.
[71] Cable & Wireless Plc v IBM United Kingdom Ltd. [2002] EWHC 2059 (Comm) (11.10.2002).
[72] *ibid.*
[73] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 2.90. p. 101.
[74] Kayali D. Enforceability of Multi-Tiered Dispute Resolution Clauses. *Journal of International Arbitration*. Kluwer Law International. 2010. Vol. 27. Issue 6. p. 565-566.
[75] Tang Chung Wah & Anor v. Grant Thornton International Ltd case [2012] EWHC 3198 (Ch); [2013] 1 All E.R. (Comm) 1226. § 60.

and in what way such pre-arbitration process shall terminate.[76]

In 2014 English High Court in Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd case even stated that a reference to a friendly discussion is enough to constitute a binding requirement. The court considered it sufficient that the clause specified the time-limit, namely it allowed parties to refer a dispute to arbitration if there is no amicable solution "for a continuous period of 4 (four) weeks".[77] This specification could have impacted on the decision of the court. The court acknowledged that both litigation and arbitration are expensive procedures and took into account the emerging trend towards enforcing such pre-litigation or pre-arbitration requirements allowing parties to resolve a dispute amicably before initiating more expensive procedures.[78]

The jurisprudence of English courts shows that multi-tier dispute resolution clauses are generally enforceable. However, for a pre-arbitration tier to be mandatory, the parties should specifically indicate so in the wording of the clause, or impliedly agree on its binding nature. Implied consent to a mandatory pre-arbitration procedure may be expressed by inclusion of time-limits for the duration of negotiations, as well as other specific rules making negotiations tier more certain.

(c) Singapore

At first, Singapore courts were reluctant to agree on the enforceability of negotiations clauses and refused to recognise them as clauses setting out a mandatory pre-arbitration procedure. This was mainly because of the view (previously expressed in other judgements analysed by the court) that a negotiation agreement is the same as agreement to agree and, therefore, does not have binding force.[79] This view was expressed in 2010 in Sundercan Ltd and another v Salzman Anthony David case decided by Singapore High

[76] *ibid.* § 60.
[77] *ibid.* § 3.
[78] Lal H., Casey B., et al. Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence / eds Matthias Scherer. *ASA Bulletin.* Kluwer Law International. Kluwer Law International. 2020. Vol. 38. Issue 4. p. 803.
[79] Lee S. Agreement to Negotiate in Good Faith. *Singapore International Arbitration Blog.* 2012.

Court in view of the uncertainly of such negotiation requirements.[80]

However, the view has changed in 2012 because of HSBC Institutional Trust case. This case did not particularly concern multi-tier dispute resolution clauses. The case concerns the contract between landlord and tenant which required them to make a good faith attempt to agree on the prevailing market rent.[81] Basically, the question before the court was whether this provision is enforceable, or it is a mere agreement to agree. The Singapore Court of Appeal ruled in favour of the enforceability of negotiations in good faith and confirmed their binding nature stating that those obligations to negotiate constitute a part of a contractual duty of the parties to cooperate.[82] In the opinion of Ms. Lees, negotiations in good faith entail fair dealing and acting fairly and honestly, as well as paying due regard to the other party's legitimate interests.[83] HSBC Institutional Trust case created a good precedent confirming that negotiation clauses are enforceable which further evolved in the enforcement of the same within multi-tier dispute resolution clauses.

Following the modern approach supporting the enforcement of negotiation obligations, the Singapore Court of Appeal in International Research Corp v. Lufthansa Systems case reiterated that the agreement of the parties to negotiate in good faith should be respected.[84] In view of the court, the clause was of a sufficient certainty, given that it specified representatives of the parties which should take part in negotiations (on several levels), as well as identified the goal of negotiations.[85] The court considered the negotiations tier to be a condition precedent to arbitration and, therefore, stated that jurisdiction of an arbitral tribunal is not crystalised until such condition is fulfilled.[86] Consequently, the Singapore court followed a jurisdictional approach towards consequences of non-

[80] *ibid*.
[81] HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd - [2012] SGCA 48. § 6. p. 2.
[82] Multi-Tiered Dispute Resolution Clauses. IBA Litigation Committee. 2015. p. 172.
[83] Lees A. J. The Enforceability of Negotiation and Mediation Clauses in Hong Kong and Singapore. *Asian Dispute Review*. Hong Kong International Arbitration Centre (HKIAC). 2015. Vol. 17. Issue 1. p. 18.
[84] International Research Corporation Plc v Lufthansa Systems Asia Pacific Pte Ltd and another [2012] SGHC 226.
[85] Lees A. J. The Enforceability of Negotiation and Mediation Clauses in Hong Kong and Singapore. *Asian Dispute Review*. Hong Kong International Arbitration Centre (HKIAC). 2015. Vol. 17. Issue 1. p. 18.
[86] International Research Corporation Plc v Lufthansa Systems Asia Pacific Pte Ltd and another [2012] SGHC 226. § 100, 105. pp. 28-29.

compliance with pre-arbitration procedures, meaning that an arbitral tribunal lacks jurisdiction until a pre-arbitration procedure is satisfied.

To summarise, jurisprudence in Singapore shows the tendency towards enforcing multi-tier dispute resolution clauses. Singapore courts pay significant attention to pre-arbitration procedures in view of the general principle of good faith.

(d) Switzerland

Jurisprudence in regard to multi-tier dispute resolution clauses containing negotiations as a first tier in Switzerland is not well-developed.[87] The majority of publicly available cases concern conciliation and mediation as a tier of such clauses and such type of multi-tier dispute resolution clauses will be further analysed in sub-chapter 1.2.2(d) below.

Nevertheless, Swiss courts touched the issue of negotiations as a pre-arbitration procedure in several cases. In 2001 the Swiss Court of Appeals decided the case in which the multi-tier dispute resolution clause provided for (1) referring the dispute to Gastrosuisse legal service for the performance of negotiations, (2) if no settlement is reached, the parties may resort to ordinary process in the court.[88] Also, the clause stated that, in principle, courts have jurisdiction to decide the dispute but the parties can submit an existing dispute to arbitration (applies only to a limited number of issues).[89] In that case, the court stated that a contractual obligation to submit a dispute to the Gastrosuisse legal service prior to the initiation of the lawsuit must be taken into account in the substantive assessment of disputes.[90] If the first-tier procedure is not satisfied, the court would normally dismiss the claim as currently unfounded.[91] According to the analysis of this case by Mr. Mecar, this

[87] Multi-Tiered Dispute Resolution Clauses. IBA Litigation Committee. 2015. p. 202.
[88] Not indicated v. Not indicated, Obergericht des Kantons Thurgau, 23.04.2001. *ASA Bulletin.* Association Suisse de l'Arbitrage. Kluwer Law International 2003. Vol. 21. Issue 2. § 2(a). pp. 418-419. Here and further the translation of the source is performed by the author of this master thesis.
[89] *ibid.* § 2(b). p. 419.
[90] *ibid.* § 2(c). p. 419.
[91] *ibid.* § 2(c). p. 419.

case is a derogation from the generally accepted view that stay of the proceeding is a relevant consequence of a violation of the first-tier procedure stipulated by multi-tier dispute resolution clauses.[92]

In 2014 the Swiss Federal Tribunal analysed the dispute in relation to the multi-tier dispute resolution clause which provided for the resolution of any dispute by (1) a dispute adjudication board, (2) negotiations and, finally, (3) arbitration.[93] The clause clearly stated that arbitration shall not be commenced until the following cumulative conditions are satisfied: (1) adjudicatory board renders its decision, and (2) one of the parties provides notice of dissatisfaction with such decision containing reference to the clause, reasons of dissatisfaction and matter of the dispute.[94] The negotiations clause provided clear time-limits, namely, it allowed parties to commence arbitration upon the termination of a 56-days period after the day on which the party circulated a notice of dissatisfaction.[95] This procedure applies even if no attempt of amicable settlement has been made.[96] In this regard, even in the literal interpretation of the wording, it is obvious that parties did not intend the negotiations procedure to be a mandatory pre-requisite for arbitration. The tribunal paid significant attention to the wording of the clause and followed a well-agreed position that the word "shall" indicates the mandatory nature of the pre-arbitration procedure.[97] The tribunal decided that there is no need to depart from the literal interpretation of the wording if there is no sufficient reason to believe that it does not correspond to parties' will.[98]

Consequently, in absence of developed jurisprudence, it is unclear which way Swiss jurisprudence will follow in the future. So war, in the determination of mandatory or non-mandatory nature of negotiations tier in multi-tier dispute resolution clauses, Swiss courts

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[92] Mecar M. Enforceability of multi-tiered clauses leading to arbitration: master thesis, Central European University, Budapest. 2015. p. 46.
[93] BGer. 4A_124/2014 dated 07.07.2014. §Ab. Here and further the translation of the source is performed by the author of this master thesis.
[94] *ibid.* §Ab.
[95] *ibid.* §Ab.
[96] *ibid.* §Ab.
[97] Multi-Tiered Dispute Resolution Clauses. IBA Litigation Committee. 2015. p. 202.
[98] BGer. 4A_124/2014 dated 07.07.2014. § 3.4.1.

are focused on the interpretation of the clause itself and deriving of parties intentions out of such clause.

(e) France

Until 2012 French courts did not develop any consistent jurisprudence specifically in relation to validity and enforceability of multi-tier dispute resolution clauses where the first tier is a negotiations procedure. In this respect, two decisions of Polyclinique des Fleurs case and Clinique de Morvan which dealt with conciliation as a first tier served as a guidance for multi-tier dispute resolution clauses in general. These two decisions, which will be further analysed in sub-chapter 1.2.2(e), were far from clear guidance in the issue at stake.

The resolution of this dilemma was proposed in 2012 by the decision of the Cour de cassation which stated that clause setting out an amicable settlement is enforceable.[99] In the case at hand, Séribo was challenging the award rendered by China International Economic and Trade Arbitration Commission (CIETAC) in favour of Hainan Yangpu Xindadao Industrial Co Ltd.[100] The dispute resolution clause in the contract provided for (1) "concertation amicale" (amicable settlement) of all the disputes in relation to the execution of the contract; (2) if not resolved by amicable means, the disputes were to be referred to CIETAC "pour mener une médiation et un arbitrage" (for mediation and arbitration); and, finally, if parties fail to reach an agreement by means of the second tier, (3) the dispute shall be resolved by arbitration by the International Chamber of Commerce (ICC) with seat in Paris.[101] The translation of Chinese version of the clause provided for (1) an "s'efforceront de trouver une solution à l'amiable" (endeavour to find amicable solution) and, failing to reach an amicable solution, (2) settlement by CIETAC and (3) ICC

[99] Decision of the Cour de cassation, civile, Chambre civile 1, no. 11-10.347 dated 28.03.2012. Here and further the translation of the source is performed by the author of this master thesis.
[100] *ibid.*
[101] *ibid.*

arbitration in Paris.[102]

Séribo was claiming that the award of CIETAC contradicts international public policy and, before initiating arbitration, Hainan Yangpu Xindadao Industrial Co Ltd should have made an attempt to amicably resolve the dispute.[103] The court emphasised that such provision of the dispute resolution clause does not constitute a ground for inadmissibility of claim, as well as it does not undermine the arbitration tribunal's jurisdiction to decide the dispute, since the first (amicable settlement) tier was not worded as a mandatory precondition to arbitration.[104] The court, therefore, concluded that there is no need to investigate whether the award contradicts international public policy.[105]

The conclusion of the court in Hainan Yangpu v Séribo case provides a clear understanding that without particular wording indicating parties' intent to make an amicable settlement procedure mandatory, the court is unlikely to conclude that such pre-arbitration procedure is a condition precedent to arbitration.

Further, in 2014 the Cour de cassation in Medissimo v. Logica case dealt with a dispute resolution clause which provided for "règlement amiable" (amicable settlement) as a first tier of the dispute resolution, and litigation as a second tier.[106] Medissimo ignored the first tier and directly sued Logica to the court for damages, while Logica was claiming that claim is inadmissible until the first tier is complied with.[107] The wording of the clause also did not provide any evidence that parties' intended to make this step mandatory.[108] Therefore, the court emphasised the absence of clear criteria for an amicable settlement, which indicates its non-mandatory nature.[109]

The Cour de cassation in Knappe Composites v. Art Métal case analysed dispute

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[102] *ibid.*
[103] *ibid.*
[104] *ibid.*
[105] *ibid.*
[106] Decision of the Cour de cassation, civile, Chambre commerciale, no. 12-27.004 dated 29.04.2014. Here and further the translation of the source is performed by the author of this master thesis.
[107] *ibid.*
[108] *ibid.*
[109] *ibid.*

resolution clause which provided for "en oeuvre d'une consultation préalable pour examiner l'opportunité de soumettre leur différend à un arbitrage", meaning that the parties shall consult each other in order to determine whether it is advisable to submit their dispute to arbitration.[110] Such kind of reference to consultations applies only when parties are deciding whether to initiate arbitration or not.[111] In the opinion of the court, this does not suffice for mandatory pre-arbitration proceeding.[112]

In view of the recent practice, the multi-tier dispute resolution clauses are generally enforceable, and the negotiations tier might be mandatory if its wording is sufficiently clear. There must be certain indicators of its mandatory nature to the end that the court could conclude that parties meant to create a pre-condition for arbitration.

(f) Ukraine

In 2002 the issue of pre-litigation proceedings was discussed and analysed on the level of Constitutional Court of Ukraine.[113] The court stated that mandatory negotiation or similar proceedings undermine right of access to justice given that the party would be prevented from submitting the case to the court.[114]

There are two important considerations in this respect. Firstly, the court analysed the statutory provisions of Ukrainian procedural legislation which established that non-compliance with mandatory pre-litigation procedures is a ground to leave a lawsuit without consideration.[115] The court concluded that establishment of mandatory negotiations or similar proceeding in the law or in the agreement between the parties should not limit the jurisdiction of the court.[116]

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[110] Decision of the Cour de cassation, civile, Chambre civile 3, no. 13-10.833 dated 29.01.2014. Here and further the translation of the source is performed by the author of this master thesis.
[111] Multi-Tiered Dispute Resolution Clauses. IBA Litigation Committee. 2015. p. 81.
[112] Decision of the Cour de cassation, civile, Chambre civile 3, no. 13-10.833 dated 29.01.2014. Here and further the translation of the source is performed by the author of this master thesis.
[113] Рішення Конституційного суду України від 09.07.2002 р. у справі № 1-2/2002. Here and further the translation of the source is performed by the author of this master thesis.
[114] *ibid.*
[115] *ibid.*
[116] *ibid.*

Secondly, the court in this decision did not analyse the same in relation to jurisdiction of arbitral tribunal. The issue at hand is that the right to refer the dispute to the court is guaranteed in the Constitution of Ukraine. Given that right of access to justice should be respected in arbitration as well and given the fact that courts usually follow the same case-law in relation to both pre-arbitration and pre-litigation requirements, the findings of the court in that case may be applied to pre-arbitration requirements by analogy.

However, in its further jurisprudence Ukrainian courts did not mirror Constitutional Court of Ukraine conclusions to pre-arbitration requirements. In 2008 the Supreme Court of Ukraine decided the case on annulment of the arbitration award which was not in accordance with the arbitration agreement.[117] The parties agreed on multi-tier dispute resolution clause which provided for negotiations as the first tier.[118] The Supreme Court of Ukraine upheld the position of previous instances and stated that negotiations are a precondition for arbitration and, given that no evidence of compliance with pre-arbitration requirement were provided, the award should be annulled.[119]

The very same approach was followed by the Supreme Specialised Court of Ukraine for Civil and Criminal Cases in 2013.[120] Similarly, the Supreme Specialised Court of Ukraine for Civil and Criminal Cases in 2014 returned the case for new consideration because the courts of the previous instances did not take into account that parties agreed to negotiate prior to commencement of arbitration.[121] As a result, the courts should have analysed the issue of mandatory pre-arbitration stage in new proceedings.[122]

In 2020 the Kyiv Appellate Court in Case No. 824/230/19 dealt with the contract which contained multi-tier dispute resolution clause which provided for (1) negotiations

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[117] Ухвала Колегії суддів судової палати у цивільних справах Верховного Суду України від 20.02.2008 р. у справі № 6-18634св07. Here and further the translation of the source is performed by the author of this master thesis.
[118] *ibid.*
[119] *ibid.*
[120] Ухвала Колегії суддів судової палати у цивільних справах Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 10.07.2013 р. у справі № 6-12483св13. Here and further the translation of the source is performed by the author of this master thesis.
[121] *ibid.*
[122] *ibid.*

and, if the dispute is not resolved by negotiations, (2) arbitration.[123] One of the parties was challenging an award and claimed that it was rendered by the arbitral tribunal in violation of arbitration procedure agreed between the parties because negotiations procedure was not performed prior to such arbitration.[124]

The court rejected such claims and made two considerations in this regard. First, the court stated that negotiations do not constitute part of the arbitration procedure and, therefore, in case of non-compliance with negotiations party cannot claim that award was rendered in violation of the arbitration procedure.[125]

Second, the court took into account that party challenging an award did not make any objections to initiation of arbitration and any objections to the jurisdiction of the tribunal within the proceeding.[126] In view of the court, by its inactivity, the challenging party waived its right to claim non-compliance with negotiations procedure.[127] The Supreme Court reconfirmed this position and supported decision of the Kyiv Appellate Court.[128]

Consequently, Ukrainian courts usually do not pay attention to the specific wording of a multi-tier arbitration clause and do not seek for indicators of its mandatory nature. Instead, it appears that Ukrainian courts consider multi-tier dispute resolution clauses enforceable and pre-arbitration tier as mandatory by default.

The latest jurisprudence shows that Ukrainian courts also estop challenging party from claiming violation of pre-arbitration procedure if such party did not try to enforce such procedure on earlier stages.

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[123] Ухвала Київського апеляційного суду від 02.03.2020 р. у справі № 824/230/19. Here and further the translation of the source is performed by the author of this master thesis.
[124] *ibid.*
[125] *ibid.*
[126] *ibid.*
[127] *ibid.*
[128] Постанова Верховного Суду від 03.09.2020 р. у справі № 824/230/19. Here and further the translation of the source is performed by the author of this master thesis.

1.2.2 Legal analysis of mediation and conciliation as pre-arbitration procedures from the prospective of case-law

(a) United States of America

In HIM Portland v. DeVito Builders case the US court dealt with a dispute resolution clause which provided for three tiers: architect, mediation and arbitration, where mediation was called "a condition precedent to arbitration or the institution of legal or equitable proceedings by either party".[129] The United States Court of Appeals rendered a decision by which it upheld the validity of the clause and its mandatory nature.[130] The court decided that obligation to arbitrate cannot be triggered until mediation is performed,[131] even though no party expressed its wish to refer their dispute to mediation.[132]

That said, US courts pay particular attention to certainty of the clause. In Fluor Enters case, the court considered it sufficient that the clause contained the reference to a particular mediation rules and specified time limits to declare that such provision is of mandatory nature.[133] In Kemiron Atlantic v Aguakem Int'l case, the multi-tier dispute resolution clause provided for (1) amicable settlement between the parties, (2) mediation and (3) arbitration.[134] The court considered that parties intended arbitration to be triggered last after non-satisfaction by previous procedures and, therefore, made mediation as a condition precedent to arbitration.[135]

Another interesting question in relation to the enforceability of multi-tier dispute resolution clauses is their impact on counterclaims. The issue was discussed in 2010 in Vanum Construction v Magnum Block case.[136] The dispute resolution clause provided that

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[129] Decision of the United States Court of Appeals, First Circuit dated 17.01.2003 in Him Portland LLC v. Devito Builders INC case.
[130] *ibid*.
[131] *ibid*.
[132] File D.J. United States: multi-step dispute resolution clauses. Mediation Committee Newsletter. IBA Legal Practice Division. 2007. p. 34.
[133] *ibid.* pp. 33, 36.
[134] *ibid*. p. 35.
[135] *ibid*. p. 35.
[136] Decision of the Court of Appeals of Kansas dated 10.12.2010 in Vanum Construction Company, Inc. v Magnum Block, L.L.C., No. 103,385.

any claim is "subject to mediation as a condition precedent to arbitration or the institution […] [of] legal or equitable proceedings by either party".[137] The clause even anticipated that mediation may be started simultaneously with arbitration and, in that case, arbitration shall be stayed for 60 days in order to make an attempt of dispute resolution by mediation.[138] The wording of the clause is clear in terms of mandatory nature of pre-arbitration requirement given that it specifically called mediation a condition precedent, specified time-period and provided for stay of arbitration in favour of mediation. At the same time, the question of counterclaim remains unresolved.

When Vanum started litigation, Magnum decide to submit a counterclaim.[139] However, Vanum alleged that such counterclaim cannot be filed because of non-compliance with a "condition precedent" to such a counterclaim.[140] Vanum requested the court to decide whether Magnum's failure to start (or initiate) mediation before filing a counterclaim constitutes violation of the contract.[141] Magnum referred to a plain wording of the clause which stated that mediation is a condition precedent to "institution" of the proceeding and not to filing a claim within existing proceeding.[142] The court supported this view and stated that it appears from the wording of the clause that an obligation to make an attempt to mediate before start of the legal proceeding is placed on claimant (according to the party initiating the litigation).[143]

US courts are pretty serios with respect to mandatory nature of the multi-tier dispute resolution clauses when it comes to mediation or conciliation as the first tier. The centre of attention of the courts is definiteness of the clause, namely specified time-period, procedural rules and other peculiarities.[144] This also applies to the US courts' approach

[137] *ibid.*
[138] *ibid.*
[139] *ibid.*
[140] *ibid.*
[141] *ibid.*
[142] *ibid.*
[143] *ibid.*
[144] File D.J. United States: multi-step dispute resolution clauses. Mediation Committee Newsletter. IBA Legal Practice Division. 2007. p. 34.

towards counterclaims. The US courts will analyse the wording of the clause and give effect to the common sense and intentions of the parties. Without specific wording pre-litigation or pre-arbitration requirements would not apply to filing a counterclaim.

(b) United Kingdom

English High Court in Sulamérica case stated that the clause cannot be enforced because of the absence of clear requirements concerning mediation procedure.[145] The clause simply provided that in case the dispute arises, prior to submitting such dispute to arbitration, the parties undertake to seek its resolution amicably by mediation.[146] The court paid attention to the absence of specific conditions in relation to the appointment of a mediator, mediation procedure and even obligation to enter into negotiations.[147] Also, the dispute resolution clause provided that mediation may be terminated by either party by circulating a 90 days' notice, and arbitration may start if one of the parties fails to enter into mediation procedure or simple refuses to comply with it.[148] Obviously, parties were free to avoid compliance with such clause. Given that no wording indicating the mandatory nature of the mediation, nor specific procedure of such process was specified, such clause is merely an obligation to make an attempt of the dispute resolution and not a mandatory pre-arbitration procedure.[149]

In Cable & Wireless case, as discussed in sub-chapter 1.2.1(b) above, the contract in question before the court contained a three-tier dispute resolution clause which provided for (1) negotiations, (2) alternative dispute resolution procedure which has to be determined by the Centre for Dispute Resolution, and (3) litigation.[150] Concerning the second tier, the

[145] Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ 638. §§ 33-34.
[146] *ibid.* § 5.
[147] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 2.91, p. 101.
[148] Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ 638. § 5.
[149] Lal H., Casey B., et al. Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence / eds Matthias Scherer. *ASA Bulletin.* Kluwer Law International. Kluwer Law International. 2020. Vol. 38. Issue 4. p. 803.
[150] Cable & Wireless Plc v IBM United Kingdom Ltd. [2002] EWHC 2059 (Comm) (11.10.2002).

Centre for Dispute Resolution recommended resolving the dispute by way of mediation.[151] However, one of the parties refused to follow such recommendation and started litigation.[152] The court considered mediation to be mandatory, even though the clause stated that the second tier (even pending) does not prevent the party from initiating the third tier.[153] The court was persuaded by reference the Centre for Dispute Resolution and the alternative dispute resolution procedure chosen by it for the parties, which are more than the mere attempt to amicably settle the dispute but constitute "engagements of sufficient certainty".[154] This was sufficient for the court to exercise its discretion and adjourn the proceeding.

Similarly to question of counterclaim as discussed in relation to US jurisprudence above, English courts were also requested to decide whether there is an obligation of the parties to comply with pre-litigation or pre-arbitration requirements before filing any new claims within commenced proceeding. This was particularly interesting question with respect to the claims which were not decided in the course of first-tier procedures. In 2016 the issue was brought before English High Court in Connect Plus (M25) v Highways England Company case. The dispute resolution clause provided that the dispute shall be first referred to the Network Board.[155] In the case at hand, the Network Board decided to appoint an expert for resolution of the disputes.[156] Further, Connect Plus disagreed with the decisions of the expert and decided to challenge them.[157]

Within the court proceeding it was emphasised that certain claims were not decided by the expert at all and, therefore, Highways England Company asked the court to strike them out on the ground of absence of court jurisdiction to decide on them.[158] The court made several important considerations for the purposes of this analysis. Firstly, it is a matter

[151] *ibid.*
[152] *ibid.*
[153] *ibid.*
[154] *ibid.*
[155] Connect Plus (M25) Ltd v Highways England Company Ltd [2018] EWHC 140 (TCC) (31.01.2018). § 9.
[156] *ibid.* § 9.
[157] *ibid.* § 3.
[158] *ibid.* § 4.

of courts' discretion whether to stay the court proceeding to provide the parties with an opportunity to comply with pre-litigation procedures.[159] Secondly, due to the facts of the case and interrelation between claims which were analysed by the expert and those which were not, the court decided not to stay the proceeding.[160] Thirdly, otherwise (if no such factual circumstances exist) English courts would decide on the contrary and stay the proceeding.[161] Ms. Peter states that it is evident from the text of the decision that the regular approach of English courts is to stay the proceeding and provide the parties with an opportunity of the dispute resolution in compliance with their dispute resolution clause.[162]

Consequently, mediation or conciliation tiers are more likely to be enforced by English courts. In any event, to conclude that a multi-tier dispute resolution clause is enforceable and mandatory, the courts will seek specific indicators of mandatory nature in the clause itself, as well as give regard to the certainty and clarity of such clause. Should the parties fail to follow a pre-arbitration or pre-litigation procedure stipulated in a multi-tier dispute resolution clause, English courts usually stay the proceeding and give the parties time to follow the contractually agreed procedure. Therefore, the sanction for non-compliance with the first tier of multi-tier dispute resolution clauses is jurisdictional in nature. The same approach applies to the submission of "new" claims or counterclaims in the already commenced proceeding.

(c) Singapore

When deciding on multi-tier dispute resolution clauses having mediation as a second tier, Singapore courts mostly rely on the decision of English and Australian courts.[163] In International Research Corporation v Lufthansa Systems Asia Pacific case the

[159] *ibid.* § 21(c).
[160] *ibid.* § 62.
[161] *ibid.* § 72.
[162] Peter N. Escalation Clauses – Where Do They Leave the Counterclaimant? *Kluwer Arbitration Blog.* 2017.
[163] Carter J. H. Part I - Issues Arising from Integrated Dispute Resolution Clauses / eds Van den Berg A. J. New Horizons in International Commercial Arbitration and Beyond. *ICCA Congress Series.* Vol. 12. Kluwer Law International. ICCA & Kluwer Law International. 2005. p. 461.

parties entered into an agreement containing a multi-tier dispute resolution clause which required parties to refer their dispute to several consecutive committees construed by several representatives of the parties (Director Customer Relations, Managing Director, etc.).[164]

The parties called such procedure "mediation" and stated that dispute which cannot be settled within this procedure shall be finally resolved in arbitration.[165] Singapore High Court enforced the clause.[166] The Singapore Appellate Court upheld the decision and stated that the high court is correct in its conclusions because the wording of the clause indicates that "mediation" requirements are conditions precedent to arbitration.[167]

To conclude, mediation and conciliation did not have such criticism with respect of their mandatory nature in Singapore as negotiations in good faith. Singapore courts will analyse the wording of the clause in order to find out whether it constitute a condition precedent to arbitration. If yes, the clause will be enforced, and pre-arbitration procedure will be deemed as mandatory.

(d) Switzerland

Starting from the Swiss case-law, it should be said that the position of civil law jurisdiction developed interestingly. In 1999 the Zurich Court of Cassation decided the case where the contract contained a multi-tier dispute resolution clause providing for conciliation as a first tier.[168] The court stated that violation of a multi-tier dispute resolution clause is a purely substantive question, and it has neither jurisdictional nor procedural consequences.[169] According to the analysis of this case performed by Prof. Dr. Voser, the court basically stated that remedy for violation of pre-arbitration procedure shall be the

[164] International Research Corporation Plc v Lufthansa Systems Asia Pacific Pte Ltd and another [2012] SGHC 226. § 8.
[165] *ibid.* § 9.
[166] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 2.92, p. 102.
[167] International Research Corporation Plc v Lufthansa Systems Asia Pacific Pte Ltd and another [2013] SGCA 55. § 54.
[168] Voser N. Note - Kassationsgericht Zürich, 15 März 1999. *ASA Bulletin.* Association Suisse de l'Arbitrage. Kluwer Law International. 2002. Vol. 20. Issue 2. p. 376.
[169] *ibid*. p. 376

same as for violation of substantive part of the contract or, in other words, that it all comes down to damages.[170] Prof. Dr. Voser also pointed out that in the meaning of Swiss Law, damages are the difference between the value prior to the time when a damage occurred and afterwards, therefore, the non-breaching party will not be able to calculate or prove any damages.[171]

In that case, the court decided to uphold the validity and enforceability of multi-tier dispute resolution clauses. At the same time, the court proposes the same view as supporters of the substantive nature of the multi-tier dispute resolution clauses which was discussed in detail in sub-chapters 1.1.3 and 1.1.4 above. The conclusion concerning this is basically the same, meaning that the court deprives a non-breaching party of the real remedies for the breach of a multi-tier dispute resolution clause and releases a breaching party from any liability. The author fully agrees with the opinion of Dr. Berger that it is hard to reconcile the decision of the Zurich Court of Cassation with the general sense and purpose of multi-tier dispute resolution clauses.[172]

Further Swiss jurisprudence moved to the support of the opinion that pre-arbitration procedures such as mediation and conciliation are advisory in nature. According to Dr. Boog, in 2007 in one of the cases which was further referred to the Swiss courts, the arbitral tribunal stated that conciliation procedure provided for in the dispute resolution clause is not binding since there is no obligation to enter into it.[173] In particular, the dispute resolution clause provided for an arbitration if the dispute cannot be resolved in an amicable way (including by way of conciliation under the rules of the WIPO).[174] At the same time, the last sentence of the clause stated that ongoing conciliation shall not be deemed as a factor preventing from initiation of arbitration.[175]

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[170] *ibid*. p. 377
[171] *ibid.* p. 377
[172] Berger K.P. Law and Practice of Escalation Clauses / eds Park W.W *Arbitration International*. Oxford University Press. 2006. Vol. 22. Issue 1. p. 7.
[173] Boog Ch. How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court. *ASA Bulletin.* Association Suisse de l'Arbitrage. Kluwer Law International. 2008. Vol. 26. Issue 1. p. 104.
[174] *ibid.* p. 104.
[175] *ibid*. p. 104

The Swiss Federal Supreme Court upheld the position of the arbitral tribunal, gave regard to the last sentence of the dispute resolution clause and stated that the clause did not even provide for the duration of the pre-arbitration procedure to constitute a mandatory requirement.[176] Further, the Swiss Federal Supreme Court pointed out that the conduct of the party challenging the arbitral tribunal's jurisdiction did not show its treatment of such conciliation procedure as mandatory.[177] In other words, the court estopped the party from challenging the arbitral tribunal's jurisdiction based on non-compliance of the other party with mandatory pre-arbitration procedures because the challenging party itself did not believe in the binding nature of the clause.

In 2011 Swiss Federal Tribunal decided X GmbH v Y Sàrl case (BGer 4A_46/2011) with two relevant clauses involved. The first one required appointment of "un expert neutre" (a neutral expert) to decide disputes concerning the non-conformity of the supplies and services.[178] The second clause provided for "une tentative de conciliation" (an attempt of conciliation) and, in case of failure of the latter, the parties may refer their dispute to arbitration.[179] The court stated that, firstly, the dispute was purely legal and technical questions were not an issue, therefore, there was no need to appoint a neutral expert who is qualified exclusively in technical questions.[180] Secondly, the court recognised that reference to an amicable settlement in the dispute resolution clause is unclear because it does not give any certainty whether such an attempt is a precondition necessary for "la recevabilité de la procédure arbitrale" (the admissibility of the arbitral proceedings).[181] Moreover, the parties already held a meeting in Geneva (despite the fact that it was not official) which can be deemed as an attempt to negotiate the dispute.[182]

Further, in 2016 the attitude towards the nature of pre-arbitration has changed in

[176] *ibid*. p. 105
[177] *ibid*. p. 105
[178] BGer 4A_46/2011 dated 16.05.2011. § 3.1.1. Here and further the translation of the source is performed by the author of this master thesis.
[179] *ibid.* § 3.1.1.
[180] *ibid.* § 3.1.1.
[181] *ibid.* § 3.5.2.
[182] *ibid.* § 3.5.2.

view of the decision of the Swiss Supreme Court No. 4A_628/2015. In the contract at stake, dispute resolution clause provided for "an attempt at conciliation in application of the ADR Rules (Alternative Disputes Resolution) of the International Chamber of Commerce (ICC)" prior to initiation arbitration.[183] The parties entered into the conciliation proceeding and, when the latter was still pending, one of the parties decided to start arbitration.[184] The arbitral tribunal analysed the multi-tier dispute resolution clause and concluded that conciliation procedure is mandatory.[185]

In is worth mentioning that the tribunal disregarded the absence of any specific time limit for conciliation procedure in the clause.[186] Further, it was found that parties already made an attempt for conciliation (d'une tentative de conciliation, as required under the clause) and, what is even more important, the clause did not require them to finish the conciliation procedure.[187] Therefore, the arbitral tribunal confirmed its jurisdiction to decide the case.[188]

When the appeal was filed to the Swiss courts, the Swiss Supreme Court decided that such a pre-arbitration procedure is mandatory and non-compliance with it causes lack of a tribunal's jurisdiction.[189] This conclusion was made based on the interpretation of the dispute resolution clause itself and the rules to which such clause referred.[190]

The court summarised that the parties intended conciliation to be a pre-requisite of arbitration and planned to perform this pre-arbitration process within the structured institutional framework offered by ADR Rules established by the ICC.[191] Should we follow the interpretation of an "attempt to conciliate" proposed by the arbitral tribunal and supported by the respondent in the case in question, it would create an unexpected result.

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[183] X. Ltd v. Y. S.p.A., Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_628/2015 (142 III 296), 16.03.2016. *ASA Bulletin*. Association Suisse de l'Arbitrage. Kluwer Law International 2016. Vol. 34. Issue 4. § A. p. 989. Here and further the translation of the source is performed by the author of this master thesis.
[184] *ibid.* § A. p. 990.
[185] *ibid.* § 2.1.1. p. 994.
[186] *ibid.* § 2.1.1. p. 994.
[187] *ibid.* § 2.1.1. p. 995.
[188] *ibid.* § 1.1. p. 992.
[189] *ibid.*
[190] *ibid.*
[191] *ibid.* § 2.4.2. p. 1003.

Basically, it would mean that any party taking part in conciliation is entitled to proceed with arbitration or litigation (depending on the terms of the clause) after 1 day of conciliation.[192] In the opinion of the court, this result is contrary to the parties' intention, which initially decided to follow all stages of conciliation according to the agreed institutional framework before submitting the case to arbitration.[193]

To conclude, Swiss courts will definitely enforce the clause the wording of which contains clear references to the rules of mediation or conciliation or states the time-limits or other indicators of its mandatory nature. It is important to stress that Swiss courts pay significant attention to the intentions of the parties and regularly analyse both the dispute resolution clause and the parties' behaviour in view of the good faith principle. This allows finding out whether a particular party believes in the mandatory nature of mediation or conciliation, and helps to define the parties' true intentions.

(e) France

In 2000 2nd civil section of the Cour de cassation was deciding Polyclinique des Fleurs case where multi-tier dispute resolution clause in contract between a doctor and private hospital provided for conciliation as a first stage of the procedure.[194] The dispute resolution clause in the contract provided for a conciliation procedure prior to initiation of litigation.[195]

Polyclinique des Fleurs argued that non-compliance with conciliation step, whatever the terms are, cannot constitute a cause of inadmissibility of legal action.[196] The second argument was that the question before the court is nullity of the contract, while the clause provided for conciliation with regard to the disputes relating to the execution, interpretation or termination of the contract, without evoking the questioning of its very

[192] *ibid.* § 2.4.1. p. 1002.
[193] *ibid.* § 2.4.2. p. 1003.
[194] Decision of the Cour de Cassation, Chambre civile 2, no. 98-17.827 dated 06.07.2000. Here and further the translation of the source is performed by the author of this master thesis.
[195] *ibid.*
[196] *ibid.*

validity.[197] The court took into account that parties directly agreed to submit their disputes to two conciliators prior to initiation of litigation and concluded that non-compliance by Polyclinique des Fleurs with pre-litigation steps renders its claim inadmissible.[198]

In 2001 the 1st civil section of the Cour de cassation decided on the contrary. The court analysed multi-tier dispute resolution clause providing for amicable settlement of the dispute prior to filing a claim to the court.[199] However, the obligation of attempt to resolve the dispute amicably was not accompanied by specific conditions of implementation of such dispute resolution mechanism.[200] In view of that the court concluded that clause is not a mandatory conciliation procedure and shall not constitute a precondition to litigation, thus the plea for inadmissibility was rejected.[201]

The subject matters of the abovementioned disputes, their factual background, as and dispute resolution clauses were pretty similar.[202] However, the decisions are contradictory. Apparently, two conflicting decisions in similar circumstances provided no clarity for French practitioners. The crucial moment in French jurisprudence was the decision in Poiré v. Tripier case. In that case the parties set out in their agreement that prior to any legal proceeding any dispute between the parties shall be resolved by conciliators (each party appoints one), except for the case when both parties agreed to a single conciliator.[203]

The court stated that it cannot prohibit parties to perform legal action, but it can declare the claim inadmissible and, therefore, defer the reference to the court until the end of conciliation.[204] It also emphasised that generally such provisions should be enforced if the parties clearly indicated their will for first-tier procedure to be mandatory.[205] Poiré v.

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[197] *ibid.*
[198] *ibid.*
[199] Decision of the Cour de cassation, civile, Chambre commerciale, no. 12-27.004 dated 29.04.2014. Here and further the translation of the source is performed by the author of this master thesis.
[200] *ibid.*
[201] *ibid.*
[202] Multi-Tiered Dispute Resolution Clauses. IBA Litigation Committee. 2015. p. 79
[203] Decision of the Cour de Cassation, Chambre mixte, no. 00-19.423 00-19.424 dated 14.02.2003. Here and further the translation of the source is performed by the author of this master thesis.
[204] *ibid.*
[205] *ibid.*

Tripier case was a landmark case which started French tendency to upholding multi-tier dispute resolution clauses if they are drafted in unambiguous and sufficiently clear and certain manner.[206] It should be noted that this rule is rather general and might be changed due to the specific facts of the case, wording of the clause and parties' conduct.

Another interesting case, which followed approach of Poiré v. Tripier case was Biogaran v International Drug Development case.[207] The dispute resolution clause in that case provided that any dispute shall be (i) settled amicably, (ii) if no amicable settlement is reached within 60 days from the first notification of the dispute, then it may be referred to mediation by single mediator appointed by both parties, and (iii) if mediation is unsuccessful within 60 days, the dispute shall be finally resolved by the competent Paris court.[208]

The pre-litigation procedures did not raise any concerns in relation to their enforceability. In that case both negotiations tier and mediation tier were unsuccessful and, therefore, Biogaran started litigation, while International Drug Development filed a counterclaim. This case important in relation to the counterclaim issue, because Biogaran was arguing that International Drug Development should have complied with all pre-litigation procedures before filing a counterclaim because the issue of counterclaim was not decided neither during negotiation not during mediation procedures.[209] Therefore, Biogaran argued that the counterclaim is inadmissible.[210] The Supreme Court stated that pre-litigation procedures shall be complied before initiation of the court proceeding, but this does not apply to filing a claim within already initiated proceeding.[211] Therefore, in the opinion of the court, International Drug Development had a full right to file a counterclaim given that Biogaran already started litigation.[212]

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[206] Peter N. Escalation Clauses – Where Do They Leave the Counterclaimant? *Kluwer Arbitration Blog.* 2017.
[207] Decision of the Cour de cassation, civile, Chambre commerciale, no. 15-25.457, 24.05.2017. Here and further the translation of the source is performed by the author of this master thesis.
[208] *ibid.*
[209] *ibid.*
[210] *ibid.*
[211] *ibid.*
[212] *ibid.*

Consequently, recent jurisprudence shows that French courts support enforceability of multi-tier dispute resolution clauses, consider mediation and conciliation as binding pre-arbitration or pre-litigation procedures if those are sufficiently certain, and agreed that such first-tier procedures is not required to be complied with for filling a counterclaim in already existing proceeding.

(f) Ukraine

Given that Ukrainian jurisprudence with respect to multi-tier dispute resolution clauses is not well-developed, there are no specific cases with regard to mediation or conciliation as pre-arbitration procedures in multi-tier dispute resolution clauses. Mediation agreements are not legally binding and enforceable in Ukraine, despite the fact that they are regularly used and enforceable as a matter of contract.[213]

Currently, mediation does not prevent parties from referring their dispute to the court.[214] Apparently mediation in Ukraine is treated as another alternative dispute resolution clause that is similar to a negotiation procedure. Therefore, conclusions made by Ukrainian courts with regard to the legal nature of negotiations as pre-arbitration procedure analysed in sub-chapter 1.2.1(f) above may be also relevant with regard to multi-tier dispute resolution clauses containing mediation as a first tier.

It is important to stress that Ukrainian courts generally recognise pre-arbitration procedures as mandatory without specific regard to the wording of the clause or interpretation of the parties intent. Given that mediation and conciliation require even more sufficient efforts of the parties than negotiations do, it allows the author to conclude that in case of mediation or conciliation first tier of dispute resolution clause, Ukrainian courts will follow the same approach.

[213] Droug O., Sukmanova O., Koltok O. The Dispute Resolution Review: Ukraine. Sayenko Kharenko. / eds Taylor D. The Dispute Resolution Review - 13th Edition. 2021.
[214] International Mediation Guide. 2nd edition. Clifford Chance LLP. Global Mediation Group. 2016. p. 99

1.2.3 International Chamber of Commerce position with regard to multi-tier dispute resolution clauses

As an alternative to the decisions of the courts in different jurisdictions, it is relevant to analyse an International Chamber of Commerce (ICC) practice concerning multi-tier dispute resolution clauses. Despite the fact that ICC decisions are not binding for other arbitral tribunals and courts to follow, ICC jurisprudence may serve as a guidance for national courts in finding a solution in complex cases involving arbitration questions.

In relation to the negotiation tier ICC developed consistent jurisprudence. According to Ms. Figueres, in 1990 in ICC case No. 6276 the tribunal dealt with a multi-tier dispute resolution clause providing for friendly amicable resolution and, if the dispute is not resolved, a dispute shall be referred to an engineer.[215] The last tier of this clause provided for arbitration.[216] The tribunal did not doubt the validity or enforceability of the clause, while the main concern with the first tier was in determination by the tribunal whether the parties complied with the first tier or not.[217]

The tribunal considered the first tier to be uncertain, given that there were no objective criteria for determination of compliance with that clause.[218] Nevertheless, on the basis of the available facts and evidence, the tribunal reached the conclusion that parties made a reciprocal attempt to negotiate, namely claimant awaited three years before starting arbitration, made several requests to start negotiations, meanwhile defendant made a request to the Court of Accounts in order to pay the amounts due.[219] Despite the fact that all these attempts were not successful, the tribunal considered those actions as enough evidence to show parties' will to negotiate and to satisfy the first tier of the dispute resolution clause.[220]

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[215] ICC case No. 6276, Partial Award dated 29.01.1990. Figueres D.J. Multi-Tiered Dispute Resolution Clauses in ICC Arbitration. *ICC Bulletin*. 2003. p. 76.
[216] *ibid*. p. 76.
[217] *ibid*. p. 77.
[218] *ibid*. p. 77.
[219] *ibid*. p. 77.
[220] *ibid*. p. 77.

Similarly to ICC case No. 6276, as reported by Mr. Jolles, in 1997 in ICC case No. 8462 the tribunal dealt with the dispute resolution clause which set out two tiers: (1) negotiations and, if no settlement is reached within 30 days, (2) arbitration.[221] The issue was again not in the enforceability or binding nature of the clause, but with regard to compliance with the pre-arbitration procedure.[222] One of the parties argued that it was not properly notified about issues to be arbitrated and, therefore, did not have a reasonable opportunity to reach an amicable solution with the other party.[223] The tribunal was not persuaded by this argument and decided that the pre-arbitration procedure was satisfied.[224] In any event, according to Mr. Oetiker and Mr. Walz who referred to the decision in ICC case No. 7422, it is a burden of the party challenging compliance with multi-tier dispute resolution clause to prove that pre-arbitration requirements were not satisfied.[225]

The ICC case No. 11490 was comprehensively analysed by Prof. Born. The contract contained a multi-tier dispute resolution clause providing for two tiers: (1) amicable settlement of the disputes, and (2) arbitration.[226] One of the parties was claiming that amicable settlement shall be treated as a condition precedent to the arbitration.[227] However, after careful analysis of the clause, the arbitral tribunal decided that the wording of the clause evidences no parties' intention to create a condition precedent.[228] The parties were rather interested in avoiding a dispute resolution through litigation.[229]

With regard to mediation and conciliation tiers in multi-tier dispute resolution clauses, ICC considers such requirements as advisory, otherwise, compliance with them

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[221] ICC case No. 8462, Final Award dated 27.01.1997. Jolles A. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Chartered Institute of Arbitrators (CIArb), Kluwer Law International 2006. Vol. 72. Issue 4. p. 334.
[222] *ibid*. p. 334.
[223] *ibid*. p. 334.
[224] *ibid*. p. 334.
[225] ICC case No. 7422, Interim Award dated 28.06.1996. Oetiker Ch., Walz C. Non-Compliance with Multi-Tier Dispute Resolution Clauses in Switzerland. / eds Scherer M. *ASA Bulletin,* Association Suisse de l'Arbitrage, Kluwer Law International 2017. Vol. 35. Issue 4. p. 882.
[226] ICC Case No. 11490, Final Award, 2012. Born G.B. International Commercial Arbitration, 3rd edition. Kluwer Law International. 2021. p. 990.
[227] *ibid*. p. 990.
[228] *ibid*. p. 990.
[229] *ibid*. p. 994.

will put additional hardship on the parties and potentially delay the final resolution of the dispute.[230] In ICC case No. 8073, reported by Ms. Figueres, the tribunal confirmed this view.[231] In 1995 the arbitral tribunal decided the case where the contractual dispute resolution clause provided for the conciliation before submission of a dispute to arbitration.[232] The tribunal emphasised that the clause would be by default treated as having advisory nature unless parties expressly provided otherwise, which was not the case in the said dispute.[233] In ICC case No. 4230 analysed by Mr. Wolrich, the tribunal dealt with a dispute resolution clause similar to the one analysed in ICC case No. 8073.[234] Again, the tribunal gave regard to the wording of the clause which stated that disputes may be settled in an amicable way by three conciliators.[235] The tribunal considered that this wording is not expressly obligatory.[236] In the opinion of Mr. Wolrich, by doing this, the tribunal impliedly ruled that clauses containing express obligatory wording may be considered enforceable by ICC.[237]

In Empresa Nacional de Telecomunicaciones v. IBM de Colombia SA case the ICC tribunal went even further and stated that a pre-arbitration procedure shall not be treated as mandatory, otherwise, it will limit parties' access to justice.[238] The tribunal emphasised that administration of justice is a fundamental right.[239] In view of the tribunal, the right of access to justice may only be limited by the legislator by passing a relevant law.[240] Consequently, ICC considers that it is not for parties to impose any precondition which may prevent any party from access to justice through arbitration.

ICC tribunals always pay regard to the intentions of the parties and the wording of

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[230] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 981.
[231] ICC case No. 8073, Final Award dated 27.11.1995. Figueres D.J. Multi-Tiered Dispute Resolution Clauses in ICC Arbitration. *ICC Bulletin.* 2003. p. 81
[232] *ibid*. p. 81.
[233] *ibid*. p. 81.
[234] ICC case No. 4230. Wolrich P.M. Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules. 2002. p. 3
[235] Wolrich, p. 3.
[236] *ibid*. p. 3.
[237] *ibid*. p. 3.
[238] Empresa Nacional de Telecomunicaciones (Telecom, En Liquidación) v. IBM de Colombia S.A., Award dated 17.11.2004. Jaramillo E. Z. A contribution by the ITA Board of Reporters. Kluwer Law International.
[239] *ibid.*
[240] *ibid.*

the clause. In ICC case No. 10256, the tribunal analysed a three-tier dispute resolution clause where the first tier required mutual discussion in good faith, the second tier provided for mediation by an expert and, if no resolution is reached, the third tier provided for arbitration.[241] The respondent alleged that mutual discussion and mediation were prerequisites for arbitration.[242] The tribunal disagreed with the respondent and stated that the word "may" in reference to mediation indicated the permissive wording of that clause and, therefore, it is an option for the parties and not an obligation.[243] The tribunal also emphasised that wording before the arbitration clause ("…if the dispute is not resolved…") with reference to pre-arbitration procedures does not indicate the binding nature of such procedures.[244] In view of the tribunal, this wording applies only when parties elected to start dispute resolution through pre-arbitration procedures.[245] However, it in no way bind parties to enter into such pre-arbitration procedures.[246]

As emphasised by Prof. Born, following this approach, in the award in ICC Case No. 12739, the tribunal arrived at a different conclusion and dismissed the claim because the claimant did not comply with pre-arbitration steps.[247] When wording of the clause is clear and sufficiently certain, the tribunal will most likely decide that such a clause must create a condition for the initiation of the arbitration as it was in ICC case No. 14667.[248] This approach implies that sufficiently certain and clear pre-arbitration procedure constitutes a condition precedent to arbitration and prevents parties from direct initiation of the arbitration without satisfaction of the pre-arbitration procedure.

It is important to stress that ICC tribunals additionally consider the parties' behaviour as an important factor for the determination of the legal nature of a multi-tier

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[241] ICC Case No. 10256, Interim Award dated 08.12.2000. *ICC International Court of Arbitration Bulletin*. Vol. 14, No. 1. 2003. pp. 87-88.
[242] *ibid.* p. 88.
[243] *ibid.* p. 88.
[244] *ibid.* p. 88.
[245] *ibid.* p. 88.
[246] *ibid.* p. 88.
[247] ICC Case No. 12739, Award, 2008. Born G.B. International Commercial Arbitration, 3rd edition. Kluwer Law International 2021. p. 983.
[248] ICC Case No. 14667, Award, 2015. Born G.B. International Commercial Arbitration, 3rd edition. Kluwer Law International. 2021. p. 983.

dispute resolution clause. For instance, in ICC case No. 16155 the tribunal decided that it is important to interpret the dispute resolution clause and account for the facts of the case, reasons why the pre-arbitration procedure was not complied with.[249] This is crucial for situations when a respondent (according to the role of the party in an arbitration proceeding) was unwilling or unable to comply with a pre-arbitration procedure and, therefore, a claimant had no other option than to violate a multi-tier dispute resolution clause and refer the dispute directly to the arbitration.[250] A similar situation occurred in ICC case No. 16115. Respondent did not take part in the appointment of the dispute resolution board, necessary to unable the pre-arbitration dispute resolution under the contract.[251] Afterwards, the respondent claimed that failure to establish the dispute resolution board prevents the claimant from submission of the dispute to arbitration.[252] The tribunal decided that it is fair to reject the respondent's allegations concerning violation of the pre-arbitration procedure by the claimant because the respondent failed to exercise diligence or even express interest in the appointment of the board.[253]

Further, the tribunal in ICC case No. 16155 supported the well-recognised position that the nature of and compliance with multi-tier dispute resolution clause are matters of procedure[254]and not jurisdiction or substance as sometimes alleged by scholars and practitioners. The tribunal defined that the consequence of non-compliance with pre-arbitration procedures might be an inadmissibility of the claim.[255] As noted by Mr. Kohl and Mr. Rigolet, the same approach is followed by the tribunals in ICC case No. 16765,

[249] ICC case No. 16155, Interim Award. *ICC Dispute Resolution Bulletin*. 2015. No. 1. p. 71.
[250] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 437.
[251] ICC case No. 16155, Interim Award. *ICC Dispute Resolution Bulletin*. 2015. No. 1. p. 71.
[252] *ibid.*
[253] *ibid.*
[254] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 441.
[255] Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 441.

ICC case No. 18505 and ICC case No. 19581.[256]

Another important issue with regard to multi-tier dispute resolution clauses (notwithstanding its type) is the admissibility of counterclaims. This issue was raised in ICC case No. 16765 and still remains controversial.[257] It is clear from ICC case No. 16765 that the tribunal will uphold the parties' will if the parties directly decided this issue in their dispute resolution clause.[258] However, if there is no express indication in the dispute resolution clause or, as sometimes happens, one of the parties is bringing a counterclaim that is not directly connected with the existing dispute, the admissibility of the counterclaim is at the risk.[259]

In the opinion of the author, in such circumstances, tribunals should always bear in mind that a multi-tier dispute resolution clause (notwithstanding its type and wording) is usually incorporated into commercial contracts for the purpose of efficient dispute resolution. Inadmissibility of the counterclaim will mean that party will be required to start pre-arbitration proceeding separately from ongoing arbitration and, if unsuccessful, create parallel or additional proceeding. This proceeding might potentially be joined with the initial proceeding or, in the worst-case scenario, create the risk of conflicting awards. Surely, each case is unique, and abovementioned risks do not apply to each and every case but nevertheless should be analysed by the tribunal in view of efficiency.

To summarise, ICC is reluctant to recognise negotiations, mediation and conciliation as mandatory per se. If the wording of the clause is uncertain and does not indicate a clear parties' will to make the pre-arbitration procedure mandatory, the tribunal will treat it no more than advisory. However, when the clause specifies that the pre-arbitration procedure is a condition precedent or, at least, contains indications to this regard, it could be deemed as a binding prerequisite to arbitration.

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[256] *ibid*. p. 441.
[257] ICC case No. 16765, 2015. Kohl B., Rigolet A. Multi-tiered resolution clauses: use them all if you can't choose one / eds De Meulemeester D., Berlingin M., et al. *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*. Kluwer Law International. Wolters Kluwer. 2019. p. 434.
[258] *ibid*. p. 434.
[259] *ibid*. p. 434.

The issue of counterclaims in dispute resolved under multi-tier dispute resolution clauses is unclear. To be on the safe side, the parties should directly indicate the destiny of such claims in their multi-tier dispute resolution clause. Also, the parties should take care of their behaviour because it will be accountable by the tribunal when deciding on the mandatory nature of the clause and satisfaction of pre-arbitration requirements.

1.3 Conclusions to Chapter 1

Analysis of theoretical approaches towards multi-tier dispute resolution clauses made in Chapter 1 shows that doctrinal views concerning multi-tier dispute resolution clauses having negotiations, mediation or conciliation as a first tier are moving towards consistent support of enforcement of such provisions. Concerning the mandatory nature of such first-tier procedures, there is no unanimous decision. However, it is clear that the wording of the clause and express statement of parties' intentions to be bound by such pre-arbitration or pre-litigation procedure will shift the balance in favour of mandatory nature.

From the practical perspective in view of the case-law analysed in Chapter 1, it is clear that in both civil and common law jurisdictions wording of the clause plays a significant role. As discussed above, the words "should" and "must", clear time-limits of the pre-arbitration or pre-litigation procedures' duration, choice of specific rules applicable indicate that parties intended to make such clause mandatory. Mediation and conciliation clauses are more likely to be regarded as binding than "amicable settlement", "good faith discussion", negotiation clauses, etc. Also, the clause may even directly state that compliance with the first tier is a precondition, prerequisite or condition precedent to arbitration or litigation. On the other hand, in several jurisdictions (as discussed concerning Singapore and Ukraine above) even an unclear clause simply referring to amicable settlement might be recognised as mandatory. From the practical point of view, it should be taken into account by drafters of the relevant clauses, because if the parties do not want such procedure to be mandatory, it is better to explicitly state it in the clause itself to avoid

any ambiguity.

As follows from the analysis in Chapter 1, general principles which apply in arbitration as such are also relevant for the analysis of multi-tier dispute resolution clauses. The principles of good faith and estoppel are generally used by the courts to consider whether a party challenging compliance with a multi-tier dispute resolution clause truly believes in its mandatory nature. Such a party will not be successful in its challenge if a violation of a multi-tier dispute resolution clause was made due to misconduct of the latter. For instance, when one of the parties ignores requests of the other party to enter into negotiations or mediation in accordance with a multi-tier dispute resolution clause, it is fair for such other party to omit the negotiations or mediation stage and bring the claim directly to arbitration or litigation. The bad faith party will be estopped from claiming the other party's violation of a multi-tier dispute resolution clause in such a case.

CHAPTER 2: ASYMMETRIC DISPUTE RESOLUTION CLAUSES AS LEGAL NOTION IN THEORY AND PRACTICE

Asymmetric dispute resolution clauses provide one party with the right to choose the forum (choose between litigation and arbitration or between courts of several jurisdictions), while the other party has only the right to follow one dispute resolution option.[260] The other forum is available for the weaker party only the stronger party has chosen it.[261] Regardless of the construction, such clauses have the same consequences as the consequences of the regular dispute resolution clauses once they are triggered.[262] In other words, asymmetric dispute resolution clauses have an impact on the choice of forum only. Once this choice is made, the procedure does not substantially differ from the one followed under symmetric dispute resolution clauses.

The whole idea and reason for the existence of such clauses are that a party with stronger bargaining power might need certain flexibility in terms of enforcement of its rights.[263] We are living in a world where assets of the commercial parties are located in different jurisdictions, therefore, counteragents of such commercial parties are interested in ensuring successful enforcement of their rights and collection of debts in the relevant jurisdiction.[264] To make sure that a stronger party will be capable to receive compensation at the expense of the weaker party's assets, such a stronger party prefers to have several options of the forum.

Therefore, banks and financial institutions that are usually the lenders under the contracts with commercial parties are often the ones insisting on the inclusion of

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[260] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 994.
[261] *ibid*. p. 994.
[262] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 23.
[263] Ashford P. Is an Asymmetric Disputes Clause Valid and Enforceable? / eds Stavros Brekoulakis. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.* Kluwer Law International. 2020. Vol. 86. Issue 3. p. 348.
[264] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 19.

asymmetric dispute resolution clauses into their contracts.[265] For banks and financial institutions, such provisions became rather standard.[266]

2.1 Doctrinal view on asymmetric dispute resolution clauses

The right to choose the forum given to one of the parties may be compared to the right to make the first move in chess (right to play white). Generally, playing white means starting the game, while its outcome depends on the proficiency of the player and strategic thinking within the game. A part of chess practitioners believes that the right of the first move has no impact on the outcome of the game. Nevertheless, there are a lot of practitioners who believe that such a first-move right constitute an undue advantage given to the player.

Similarly, the international legal community reached no consensus concerning the validity of asymmetric dispute resolution clauses. There are two dramatically different positions in this respect. The developed concerns and positions raised on the doctrinal revel will be further analysed. Usually, the party challenging the validity of the arbitration clause shall be the first to defend its arguments before a tribunal. The analysis in this sub-chapter 2.1 will be developed in the same way and start from the position challenging the validity of asymmetric dispute resolution clauses.

2.1.1 Opponents' view on asymmetric dispute resolution clauses' validity

The principle of equal treatment of the parties is the cornerstone of the arguments of opponents of asymmetric dispute resolution clauses' validity. Article 18 of the

[265] *ibid*. p. 21.
[266] Merrett L. The future enforcement of asymmetric jurisdiction agreements. International & Comparative Law Quarterly I.C.L.Q. 2018. 67(1). p. 3.

UNCITRAL Model Law,[267] as well as Article V(1)(b) New York Convention[268]establishes, inter alia, the fundamental principle that parties should be given a full opportunity of presenting their case. This principle is often referred to as the right to a fair trial.[269] The concept of the full opportunity to present a party's case as a part of due process in UNCITRAL Model Law is relatively connected to the one expressed in Article 6 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[270] That is why in relation to asymmetric dispute resolution clauses both doctrine and case-law, especially in civil law countries, refers to equal treatment under Article 6 ECHR as well.

One can argue that the principle of equal treatment applies not only to the arbitration proceeding itself but also covers the pre-arbitration stage. This idea derives from the interpretation of preparatory works concerning Article 18 of the UNCITRAL Model Law which stipulates that parties should be treated with equality.[271] During the drafting process, the Working Group required to amend the proposed text in order to reflect that the idea that the principle of equal treatment should be taken into account not only by an arbitral tribunal but also by the parties when setting out any rules of the procedure.[272] That said, the intention was to apply this principle to both arbitration proceedings and the procedural agreements concluded between the parties.[273] Article 18 was even separated from Article 19 which deals specifically with the conduct of the proceeding and moved to the beginning of the chapter.[274] At the same time, Article 18 of the UNCITRAL Model Law is located in Chapter

[267] UNCITRAL Model Law on International Commercial Arbitration. The United Nations Documents. A/40/17. dated 21.06.1985.
[268] Convention on the recognition and enforcement of foreign arbitral awards: Convention dated 10.06.1958. New York.
[269] Binder P. International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions. 2nd edition. 2005. § 5–008
[270] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 10.57
[271] UNCITRAL Model Law on International Commercial Arbitration. The United Nations Documents. A/40/17. dated 21.06.1985.
[272] Report of the Working Group on International Contract Practices on the Work of its Seventh Session. The United Nations Documents. A/CN.9/246, dated 06.03.1984, § 62.
[273] Holtzmann H. M., Neuhaus J. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary. Kluwer Law International. 1989. p. 550.
[274] Binder P. International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions. 2nd edition. 2005. § 5-005.

5 having the heading "Conduct of Arbitral Proceedings".[275] This may create an assumption that this principle applies only to the cases provided for in that chapter.[276] Dr. Binder with reference to the statements of the Working Group pointed out that the assumption is incorrect since, inter alia, this principle should be observed not only by the arbitral tribunal but also by the parties.[277]

Following the idea discussed above, it is clear that parties lay down the rules of the procedure prior to initiation of the arbitration proceeding. Therefore, one can interpret the abovementioned statement of the Working Group as a refusal to treat the principle of equal treatment as exclusively procedural. On the contrary, such an approach suggests that the principle of equal treatment also covers jurisdictional issues, *e.g.* choice of forum. Following such logic, if at the stage of choice of forum parties are not sufficiently equal, this would mean a violation of the principle of equal treatment. In the opinion of the author, this approach is incorrect. As will be further elaborated in sub-chapter 2.1.2 below, the proponents of the validity of asymmetric dispute resolution clauses developed convincing arguments to rebut it.

Another aspect is that an asymmetric dispute resolution clause creates a potential risk that the weaker party will be unable to properly present its case. In this respect, one more reference should be made. Article II(3) New York Convention states that the court should stay the proceeding upon request of one of the parties if there is a valid arbitration agreement between them.[278] Thus, when the weaker party exercises its right to initiate court proceedings, the stronger party may freely intervene, and request a stay of the proceedings under Article II(3) New York Convention in order to benefit from arbitration.[279] In such a case, the right to initiate litigation loses its value without the party having a chance to obtain

[275] UNCITRAL Model Law on International Commercial Arbitration. The United Nations Documents. A/40/17. dated 21.06.1985.
[276] Binder P. International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions. 2nd edition. 2005. § 5-006.
[277] *ibid*. § 5-006.
[278] Convention on the recognition and enforcement of foreign arbitral awards: Convention dated 10.06.1958. New York.
[279] Perényiová J. Unilateral option arbitration clauses in commercial arbitration: LL.M. short thesis, Central European University, Budapest. 2014. p. 8.

a court judgment.[280] It should be noted that this situation could potentially occur even when arbitration is commenced by the stronger party after the commencement of litigation by the other party. A stronger party could at any moment invoke its unilateral right to initiate arbitration and, therefore, create a parallel proceeding concerning the same subject matter. Consequently, the right of the weaker party to litigate is fully dependent on the stronger party's will. Given the pro-arbitration approach which is usually followed by the courts in different jurisdictions, as well as the applicability of Article II(3) New York Convention, it is highly likely that courts will stay the proceeding in such circumstances. Following such logic, an asymmetric dispute resolution clause gives much more than just a right to refer its dispute to a suitable forum.

Furthermore, Dr. Kreindler emphasises that a stay of proceedings is even possible in case arbitration has not been previously commenced.[281] Stay of the proceedings in absence of an ongoing or at least initiated arbitration proceeding creates a risk that the stronger party will not initiate arbitration in the future. This is not a far-fetched risk because according to UNCITRAL Secretariat Guide to the New York Convention, a court when staying the proceedings cannot compel parties to arbitrate.[282]

Another argument against the validity of asymmetric dispute resolution clauses concerns only asymmetric dispute resolution clauses incorporated into the contracts of adhesion or standard form contracts. From the doctrinal point of view, this argument was analysed mainly in relation to German jurisprudence. Mr. Ustinov provided such an example since the German Civil Code states that provisions of standard form contract which cause unreasonable disadvantage of one of the parties are ineffective.[283] Although this work does not provide an analysis of German jurisprudence concerning asymmetric dispute

[280] Malyuta P. Compatibility of Unilateral Option Clauses with the European Convention on Human Rights. *University College London Journal of Law and Jurisprudence*. 2019. 8(1). Article 2. p. 22.
[281] Kreindler R.H. Arbitral forum shopping /eds Cremades B.M., Lew J.D.M. Parallel State and Arbitral Procedures in International Arbitration. ICC Publishing, Paris. 2005. p. 179.
[282] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New York : United Nations, 2016. § 63. p. 59.
[283] Ustinov I. Unilateral Arbitration Clauses: Legal Validity: master thesis, Tilburg University, Tilburg. 2016. p. 25.

resolution clauses, this is still a valid concern that potentially may be brought by the opponents of asymmetric dispute resolution clauses' validity. The difference in treatment of asymmetric dispute resolution clauses in regular contracts and standard form contracts or contracts of adhesion is coherent because standard form contracts or contracts of adhesion are not properly negotiated. It is impossible to interpret such provision from the point of parties' intentions and true will. According to Ms. Perényiová, non-negotiated contracts raise suspicion in the EU.[284] Standard form contracts and contracts of adhesion provide a "take it or leave it" option for the weaker party. Nevertheless, it is still a valid choice which party may accept or reject relying on the freedom of contract.

Indeed, the party insisting on an asymmetric dispute resolution clause will surely have the advantage to bring the other party to the forum of its choice. As elaborated above, this is true even if the other party already started proceeding in the forum available to it under the contract. The only real concern which seems to be reasonable is that the other party may waste money and time to start proceeding. German courts cure such "defect" by imposing on the stronger party an obligation to avoid extra costs on the weaker party's side.[285]

It should be clear that the court may apply such a measure only for fairness and justice. In any event, such a "defect" is not a ground for invalidation of the clause. Unless there was any kind of coercion or fraud, the party's will to enter into such kind of an asymmetric dispute resolution clause and principle of party autonomy must prevail. Moreover, an asymmetric dispute resolution clause still does not influence on equal treatment of the parties within the proceedings, notwithstanding which party started it. All procedural rights of the weaker party that are necessary for it to properly present its case will be protected by an arbitral tribunal in any forum.

To conclude, the opponents of asymmetric dispute resolution clauses' validity are

[284] Perényiová J. Unilateral option arbitration clauses in commercial arbitration: LL.M. short thesis, Central European University, Budapest. 2014. p. 19.
[285] *ibid*. p. 20.

mainly concerned about the potential violations of equal treatment of the parties, unbalanced rights of the parties due to possible interruptions of the stronger party and stay of the proceedings, and the consequent inability of the weaker party to properly present its case.

2.1.2 Arguments in favour of asymmetric dispute resolution clauses' validity

In their argumentation, the proponents of asymmetric dispute resolution clauses' validity significantly rely on the principle of party autonomy. The principle of party autonomy is the cornerstone of international arbitration which safeguards the parties' freedom.[286] Indeed, this principle is not absolute, but it can only be limited by the mandatory laws or public policy of a country.[287] Being the masters of arbitration agreement parties enjoy the widest autonomy to regulate their dispute resolution procedure in any suitable way, and are free to explicitly provide a particular manner of dispute resolution in their contract. By determination of specific procedure, parties declare their unwillingness to follow regular procedures determined by statute.[288]

The proponents of asymmetric dispute resolution clauses' validity were analysing all existing concerns with regard to their effect. For instance, when it comes to mutuality, it was stated that this requirement does not entail identical rights and remedies for all parties to a contract.[289] Obligation to mirror parties' rights to make the contractual provision valid would make the whole negotiations process a useless time burner. The whole idea of negotiations is to receive beneficial provisions in the contract. Therefore, in the opinion of Mr. Nesbitt once the mutual intent of the parties to execute an asymmetric dispute

[286] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 6.07.
[287] *ibid.* § 6.14.
[288] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 42.
[289] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 870.

resolution agreement is established, the courts should recognise and enforce it.[290]

Finally, there are a lot of references to equal treatment as a ground for invalidation of asymmetric dispute resolution clauses. For instance, as discussed above Article 18 of the UNCITRAL Model Law as well as Article V(1)(b) New York Convention establish the principle that parties shall be treated with equality and given full opportunity to present their case.[291] Still, despite the great importance of the principle and its worldwide acknowledgement, there is no precise determination of the extent and limits of procedural equality.[292]

In the opinion of proponents of asymmetric dispute resolution clauses' validity, such a principle has nothing to do with the choice of forum. As stressed by Prof. Kurkela and Mr. Turunen, the principle is exclusively procedural in nature and does not relate to jurisdictional matters.[293] Put differently, parties must be treated equally from the commencement and until the termination of arbitral proceedings.[294] The question of choice of forum, in turn, arises only before commencement of the arbitral proceeding. Moreover, it is a common practice to conclude commercial contracts, under which parties have unequal rights and duties.[295]

The opponents of the validity of dispute resolution clauses must be misguided by the drafting history of the UNCITRAL Model Law and specifically Article 18 UNCITRAL Model Law dealing with procedural equality. As discussed in sub-chapter 2.1.1 above, the Working Group stated that the principle of equal treatment "should be observed not only

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[290] Nesbitt S., Quinlan H. The Status and Operation of Unilateral or Optional Arbitration Clauses / eds Park W.W. Arbitration International. Oxford University Press. 2006. Vol. 22. Issue 1. p. 148.
[291] UNCITRAL Model Law on International Commercial Arbitration. The United Nations Documents. A/40/17. dated 21.06.1985; Convention on the recognition and enforcement of foreign arbitral awards: Convention dated 10.06.1958. New York.
[292] Ashford P. Is an Asymmetric Disputes Clause Valid and Enforceable? / eds Stavros Brekoulakis. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.* Kluwer Law International. 2020. Vol. 86. Issue 3. p. 348
[293] Kurkela M.S., Turunen S., Conflict Management Institute (COMI) Due process in international commercial arbitration. 2nd edition. Oxford University Press. 2010. p. 37.
[294] Nassar Y. Are Unilateral Option Clauses Valid? *Kluwer Arbitration Blog*. 2018.
[295] Kurkela M.S., Turunen S., Conflict Management Institute (COMI) Due process in international commercial arbitration. 2nd edition. Oxford University Press. 2010. p. 71.

by the arbitral tribunal but also by the parties when laying down any rules of procedure".[296] In the opinion of the author, the statement "when laying down any rules of procedure" should not be interpreted as extending the principle of parties' equality to the drafting stage of the dispute resolution clause or to the choice of forum stage.

The parties definitely shall pay attention to this principle when deciding on the procedural matters, however, it still relates to the rules of procedure being commenced (number of arbitrators appointed by each of the parties, time-limits for each of the parties, etc). It still does not apply to the right of one of the parties to choose the most appropriate forum. The parties effectively can by mistake construe asymmetric dispute resolution clause in such a way that will further violate equal treatment.

This appears to be true when one of the parties has a worse position even after the commencement of the arbitration.[297] For instance, when clause causes the situation when the procedure of appointment of arbitrators is extremely favourable for only one of the parties.[298] However, in such a case, the dispute resolution clause is invalid not because of its asymmetry. The procedural inequality will take place in such a case and, thus, it clearly would be a violation of the principle of equal treatment.

When it comes to the concerns with respect to the stay of the proceeding, interruption of litigation by the initiation of arbitration and existence of asymmetric dispute resolution clauses in contracts of adhesion as discussed in sub-chapter 2.1.1 above, there is no specific analysis in this regard by the proponents of asymmetric dispute resolution clauses' validity. Apparently, practitioners consider these concerns to be covered by the principle of party autonomy. Once the valid agreement is concluded, the parties shall bargain for the consequences.

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[296] Report of the Working Group on International Contract Practices on the Work of its Seventh Session. The United Nations Documents. A/CN.9/246, dated 06.03.1984. § 62.
[297] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 34.
[298] *ibid*. p. 34.

2.2. Asymmetric dispute resolution clauses: case-law

For the purposes of this work, the analysis of case-law concerning asymmetric dispute resolution clauses will follow a similar approach as followed in Chapter 1 above concerning multi-tier dispute resolution clauses. The sample of jurisdictions will consist of three common law countries (United States of America, United Kingdom and Singapore) and three civil law countries (France, Russia and Ukraine).

2.2.1 United States of America

US courts jurisprudence is far from setting out a clear consistent approach. Some of the court decisions show that US courts support the validity of asymmetric arbitration agreements in both old and recent decisions. At the same time, some of the courts support the old-fashioned findings on lack of mutuality, unconscionability and sufficiency of consideration for an arbitration clause to be enforceable.

Some of the courts referred to asymmetric dispute resolution clauses as unconscionable. For instance, in Arnold v. United Companies Lending Corp. case, the dispute resolution clause provided both parties with the right to arbitrate and reserved the lender's right to refer to the court with regard to any actions in connection with the collection of the debt, foreclosure proceedings, etc.[299] The court called the arbitration clause a "rabbits and foxes situation" with reference to a similar statement in Miller case, held it unconscionable and declared it void and unenforceable.[300]

The doctrine of mutuality of obligations is another ground for the US court to invalidate an asymmetric dispute resolution clause. According to Ms. Perényiová, it is considered to be archaic but still reappears in the court decisions in some states.[301] In 2012

[299] Arnold v. United Companies Lending Corp., 511 S.E.2d 854, 861 (W.Va. 1998). § I.
[300] *ibid.* § B.
[301] Perényiová J. Unilateral option arbitration clauses in commercial arbitration: LL.M. short thesis, Central European University, Budapest. 2014. p. 35.

in Independence County v. City of Clarksville, the court affirmed the decision of the circuit court that an arbitration agreement that suffers from lack of mutuality is unenforceable.[302] The court stated that the right of one of the parties to arbitrate and receive judicial relief made the arbitration clause non-mutual and, thus, invalid because the other party only had the right to arbitrate.[303]

Sometimes parties arguing invalidity of asymmetric dispute resolution clauses are even trying to combine several grounds, for instance, they ask the US court to declare that absence of mutuality of obligations leads to unconscionability of an arbitration agreement. In 1983 in Willis Flooring, Inc. v. Howard S. Lease Constr. Co. case, the court was deciding on the validity of the arbitration clause which provided one party with sole discretion to refer disputes to arbitration.[304] The court stated that there is no such requirement as "mutuality" and emphasised that it does not consider it unconscionable to provide only one party with the right to choose the forum.[305] However, according to Prof. Born, in 2012 in Lopez v. Ace Cash Express, Inc. case decided on the contrary and stated that asymmetry in arbitration agreement means lack of mutuality and, therefore, it is substantively unconscionable.[306] Further, the doctrine of mutuality was fully rejected and, therefore, does not have any place in modern US contract law.[307] Nevertheless, it sometimes continues to appear US courts' decisions invalidating asymmetric dispute resolution clauses.[308]

The absence of consideration is another possible argument in favour of the invalidation of asymmetric dispute resolution clauses. The US courts comparatively early starter analysing this issue and even the oldest cases are often cited and followed in the recent jurisprudence. In 1988 in Sablosky v. Edward S. Gordon Co case which is one of the

[302] Decision of the Supreme Court of Arkansas dated 19.01.2012 in Independence County v. City of Clarksville, No. 11–268.
[303] *ibid.*
[304] Decision of the Superior Court, Third Judicial District dated 07.01.1983 in Willis Flooring, Inc. v. Howard S. Lease Constr. Co., No. 6736.
[305] *ibid.*
[306] Born G.B. International Commercial Arbitration. 3rd edition. Kluwer Law International. 2021. p. 935 (footnote No. 1435).
[307] Perényiová J. Unilateral option arbitration clauses in commercial arbitration: LL.M. short thesis, Central European University, Budapest. 2014. p. 37.
[308] *ibid*. p. 37.

most cited cases in this regard the arbitration clause stated that any dispute shall "be submitted to arbitration before the American Arbitration Association or the Real Estate Board of New York, Inc. (at the Company's election)".[309] The employer argued that such arbitration agreement lacks mutuality, but the court decided that consideration is sufficient for the agreement to be enforceable and not mutuality of obligations.[310] The court set out a standard that asymmetric dispute resolution clauses are valid and enforceable if they are supported by consideration (even from the main contract).

In Stevens/Leinweber/Sullens, Inc. v. Holm Development and Management, Inc case the Court of Appeals of Arizona came to a dramatically different conclusion. The contract at stake contained a standard arbitration clause for construction contracts with reference to the Construction industry Arbitration Rules of the American Arbitration Association.[311] However, the parties also executed an addendum granting Holm with unilateral right to choose either arbitration or litigation with any court of competent jurisdiction.[312] The court considered that such addendum provides only a unilateral option to arbitrate which is not a mutual obligation to refer disputes to arbitration.[313] Moreover, in the opinion of the court, nothing evidences that such beneficial rights of Holm were supported by consideration.[314] The reason for such conclusion is that arbitration agreement under separability doctrine is separable from the entire agreement and Holm, therefore, is not allowed to "borrow consideration from the principal contract to support the arbitration provision".[315]

As we can see, the court relied on the separability doctrine to argue that arbitration clause requires separate consideration. However, this doctrine is appliable in cases where

[309] Sablosky v. Edward S. Gordon Company, Inc., 139 A.D.2d 416, (N.Y. App. Div. 1988).
[310] *ibid.*
[311] Stevens/Leinweber/Sullens, Inc. v. Holm Development & Management, Inc., 165 Ariz. 25, 795 P.2d 1308 (1990).
[312] *ibid.*
[313] *ibid.*
[314] *ibid.*
[315] *ibid.*

an arbitration clause survives invalidation of the main contract.[316] Contrary to this rule, the court applied this doctrine as a defence.[317] It should be stressed that the consideration requirement applies to the entire agreement as such and not to each separate clause.[318] Therefore, consideration is not required to be present in relation to each and every benefit the party has under the agreement, as well as to the asymmetric dispute resolution clause. The interpretation proposed in Stevens/Leinweber/Sullens, Inc. v. Holm Development and Management, Inc case was further rejected by US courts and the position provided in Sablosky v. Edward S. Gordon Co case became prevailing again. In Doctor's Assocs. Case the US court referred back to Sablosky v. Edward S. Gordon Co case and stated that consideration for the entire agreement is sufficient.[319] The court reconfirmed that arbitration agreement is indeed separate from "void or voidable provisions of a contract — not that they are independent contracts".[320]

Given the analysis of the US approach towards asymmetric dispute resolution clauses above, two types of cases should be separated: cases between commercial entities and cases with the involvement of a private individual. US courts have a lot of jurisprudence invalidating asymmetric dispute resolution clauses on the basis of unconscionability or lack of mutuality, but the majority of them are cases involving private individuals. Employment and consumer contracts are a priory imbalanced.[321] The whole idea of mutuality and unconscionability is in fact based on the view that asymmetric arbitration clause favours the one which is already a stronger party (employer, etc.) in comparison to the weaker party (employee or another private individual). No doubt the standard of review in such cases is higher because of combination of applicable commercial laws and human right rules.

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[316] Redfern A., Hunter M., Blackaby N. et al. Redfern and Hunter on International Arbitration. 6th edition. Oxford: Oxford University Press, 2015. § 2.90. p. 116.
[317] Perényiová J. Unilateral option arbitration clauses in commercial arbitration: LL.M. short thesis, Central European University, Budapest. 2014. p. 38.
[318] *ibid*. p. 37.
[319] Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 453 (2nd Cir. 1995). § C.1.
[320] *ibid.* § C.1.
[321] Perényiová J. Unilateral option arbitration clauses in commercial arbitration: LL.M. short thesis, Central European University, Budapest. 2014. p. 32.

2.2.2 United Kingdom

The approach of English courts towards asymmetric arbitration clauses was consistently developed from the very first cases on this matter and is based on full respect of party autonomy. One of the most cited cases by the proponents of validity asymmetric arbitration clauses is NB Three Shipping case decided by England and Wales High Court (Commercial Court). The Harebell (owners of the vessels) concluded charter parties and NB Three Shipping acted as a charterer, while the dispute resolution clause provided that both parties have the right to bring a claim to the English courts and only Harebell has the right to refer a dispute to arbitration.[322] When NB Three Shipping invoked the dispute resolution clause and started litigation, Harebell initiated arbitration and asked the court to order a stay of the proceeding pending arbitration.[323]

The court gave a lot of value to the commercial sense of the clause rather than to formal requirements and emphasised that the clause was meant to give "better" rights to the owners than to the charterers.[324] The court not only confirmed the validity of the asymmetric arbitration clause but also stated that Harebell should not be deprived of its beneficial option to choose arbitration just because NB Three Shipping was "jumping the starting gun" by bringing the claim to the English court.[325] Also, the refusal to uphold the will of the parties embodied in the dispute resolution clause would be, in the view of the court, contrary to parties' autonomy to choose the forum.[326]

The decision in the NB Three Shipping case nevertheless raises particular concern. Following the logic of the court, NB Three Shipping's right to initiate litigation was influenced by Harebell's right to refer a dispute to arbitration. If such approach is correct, then asymmetric arbitration clause not only provides one party with the right to choose the

[322] NB Three Shipping Ltd. v. Harebell Shipping Ltd. [2004] EWHC, [2004] Arbitration Law Reports and Review 495.
[323] *ibid.* § 5.
[324] *ibid.* § 11.
[325] *ibid.* § 11.
[326] *ibid.* § 12.

forum but also prevent the other party to bring a claim into the other forum and intervene in the already existing proceeding initiated by the other party. The court did not analyse the case from this side.

The approach expressed by the court in the NB Three Shipping case was further consistently followed by English courts in relation to asymmetric arbitration clauses. In Law Debenture Trust case the English court dealt with an asymmetric dispute resolution clause which provided both parties with the right to refer any dispute to arbitration but only one party had an option to litigate.[327] The court reconfirmed earlier expressed position, upheld the validity of the clause and refused to stay litigation pending arbitration.[328] In response to the argument that there is an imbalance in rights due to the asymmetric nature of the clause, the court stated that the clause only provides an additional benefit to one of the parties which is a common feature for a lot of contractual provisions.[329]

In the analysed decisions English courts are not formal in their analysis and they are rather guided by commercial sense than by the strict legal rules. Indeed, an arbitration clause is also a regular contractual clause that is negotiated similarly to any other clause in the contract. It is a natural consequence of negotiations that a party which has greater bargaining power can negotiate better conditions for itself even in the arbitration clause. Therefore, claiming an imbalance of the rights on the ground of basically own failure to negotiate better terms of its own party is nonsense. However, the question of legal nature (procedural or jurisdictional), as well as the correlation of an asymmetric arbitration clause with the principle of equal treatment remains open, given that no party raised and, consequently, no court addressed it.

The line set out by the English court in the NB Three Shipping case was followed notwithstanding the type of the asymmetric dispute resolution clause. In 2014 English High Court was deciding the Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd case where

[327] Keyes M., Marshall B. A. Jurisdiction agreements: exclusive, optional and asymmetrical. Journal of Private International Law. 2015. Vol. 11(3). p. 30.
[328] *ibid*. p. 30.
[329] *ibid*. p. 30.

the contract contained an asymmetric dispute resolution clause which provided for the exclusive jurisdiction of the English courts to decide any dispute referred to it by either party.[330] Additionally, the clause stated that it is "for the benefit of the Lender only" and it does not prevent the lender from initiating a proceeding in any other court of any jurisdiction.[331] The court disregarded the argument of the borrower related to "access to justice" under Article 6 of the ECHR because it clearly requires equal access to justice within the chosen forum but does not extend to the choice of the forum itself.[332]

In 2017 in Commerzbank AG v. Pauline Shipping case the English court again upheld the asymmetric dispute resolution clause similar to the clause in Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd case.[333] Also, the court analysed the correlation of its wording with the provisions of Brussels 1 Recast[334] and the Hague Convention[335]on exclusivity of jurisdiction. Despite the clause provides for an "exclusive jurisdiction of the English courts" one of the parties argued that the clause should be analysed in full and the existence of the bank's option to refer a dispute to any other court makes an asymmetric dispute resolution clause an "antithesis of agreements conferring exclusive jurisdiction".[336] The court disagreed with such position and with reference to the latest ECJ jurisprudence stated that asymmetric dispute resolution clauses should be treated as exclusive jurisdiction clauses even if when the bank files a claim the jurisdiction could differ from the one stipulated as exclusive in the clause.[337]

In the two latest decisions, the English courts dealt with asymmetric dispute resolution clauses which provided for litigation only and did not have recourse to arbitration. In any event, both cases set the default rule of validity of asymmetric dispute

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[330] Ashford P. Is an Asymmetric Disputes Clause Valid and Enforceable? / eds Stavros Brekoulakis. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.* Kluwer Law International. 2020. Vol. 86. Issue 3. p. 358.
[331] *ibid*. p. 358.
[332] *ibid*. p. 358.
[333] Commerzbank AG v Liquimar Tankers Management Inc [2017] EWHC 161. § 9.
[334] *ibid*. §§ 23-35.
[335] *ibid*. §§ 36-39.
[336] *ibid*. § 57.
[337] *ibid*. §§ 68, 70.

resolution clauses and still may be applied to the cases where one of the options is arbitration. English courts often give due regard to the party autonomy principle and, therefore, developed consistent jurisprudence upholding the validity of the asymmetric dispute resolution clauses.

2.2.3 Singapore

In 2008 the Singapore High Court decided the Sembawang case, in which the dispute resolution clause provided for the right of both parties to arbitrate but additionally provided one of the parties (the main contractor) with the right to start litigation.[338] When the main contractor initiated litigation, the subcontractor exercised its right to file a counterclaim.[339] However, the main contractor demanded to stay the counterclaim relying on the existence of the arbitration agreement between the parties in which the subcontractor does not have a right to initiate litigation.[340] Apparently, the idea behind the main contractor's actions was that the counterclaim will undermine the main contractor's benefit of the sole right to initiate litigation.

The stay of the counterclaim is practically possible under the Singapore International Arbitration Act[341] containing provisions which are similar to Article II(3) New York Convention stating that if there is a valid arbitration agreement, the court should stay the proceedings upon request of one of the parties. The court found the existence of a valid arbitration agreement a sufficient reason to stay the counterclaim and gave regard to the asymmetric right of the main contractor to litigate.[342]

This decision is rather controversial. On the one hand, the court did not find that the asymmetric nature of the dispute resolution clause renders it invalid. On the other hand, the

[338] Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd. [2008] SGHC 229. § 7.
[339] *ibid.* §§ 1,7.
[340] *ibid.* § 7.
[341] *ibid.* § 59.
[342] *ibid.* § 59.

subcontractor's right to file a counterclaim appears to be illusory. First of all, the right to bring a claim is a procedural right while the right of choice of forum is jurisdictional. Therefore, once the litigation is commenced by the main contractor, the subcontractor shall enjoy all procedural rights in equal to the main contractor manner. Singapore is also a model law country and has the same understanding of equal treatment in the arbitral proceeding.[343] In the opinion of the author, the court in the Sembawang case misinterpreted the asymmetric dispute resolution clause as the clause of procedural nature entitling to deprive one of the parties of its procedural rights which is a clear violation of the principle of equal treatment in the meaning of the model law.

The most famous in Singapore jurisprudence on the relevant topic and the first case where the Singapore Court of Appeal expressly confirmed the validity of asymmetric arbitration clauses is Dyna-Jet Pte Ltd v. Wilson Taylor Asia Pacific Pte Ltd.[344] The arbitration clause at stake provided for arbitration upon the choice of Dyna-Jet.[345] Firstly, one of the parties argued that this provision is not an arbitration agreement at all. The reasoning for this position was that this clause provides only one party with discretion to decide whether to submit a dispute to arbitration or not, thus this clause (i) lacks mutuality and (ii) becomes an arbitration agreement only when such party actually refers the dispute to arbitration.[346]

The Singapore High Court declined both arguments and stated that the most important issue for an arbitration agreement to be valid is consent, notwithstanding in which way (conditional or unconditional) it is given by the parties.[347] The court also analysed the relevant case-law (not only in Singapore jurisdiction but also globally, especially relying on English courts jurisprudence). Given regard to the modern approaches and relevant analysis of the arbitration agreement itself, the court upheld the validity of the asymmetric

[343] Cheung K. Unilateral Option Clauses to Arbitration: The Debate Continues. *Kluwer Arbitration Blog*. 2020.
[344] International arbitration report. Norton Rose Fulbright LLP. Issue 9. 2017. p. 25.
[345] Dyna-Jet Pte Ltd v. Wilson Taylor Asia Pacific Pte Ltd. [2016] SGHC 238. § 47. p. 17.
[346] *ibid*. § 55. pp. 19-20.
[347] *ibid*. § 37. p. 13.

arbitration clause. At the stage of appeal, the position did not change. Both lack of mutuality and the optional nature of the arbitration clause did not suffice for the Court of Appeal to invalidate the arbitration agreement.[348]

To conclude on Singapore case-law, the strong reliance on English courts' jurisprudence and latest highly cited decision of Dyna-Jet shows that Singapore courts support validity of asymmetric dispute resolution clauses. At the same time, the situation Sembawang case should be taken into account because it evidences that Singapore courts do not have single opinion of legal nature of such clauses and their impact on counterclaims. Incorrect position in this regard might unbalance procedural rights of the parties and lead to abuse of rights by the stronger party in which favour the clause places an asymmetry.

2.2.4 France

French jurisprudence follows its own unique approach towards asymmetric dispute resolution clauses which is different from the one which is usually being followed. In 2012 in the most famous Rothschild case, the French Cour de Cassation invalidated the asymmetric arbitration clause on the ground that it is based on a "potestative condition". Also, the court stated that the clause contradicts the object and purpose of Article 23 of the Brussels I Regulation (in terms of prorogation rules).[349]

Asymmetric dispute resolutions clauses providing the bank with an option to choose the forum are often incorporated in commercial contracts, given that a bank usually takes more risks and the bank should have an option to receive a decision in any country where the debtor has assets.[350] The dispute resolution clause in the case at hand provided for the exclusive jurisdiction of Luxemburg courts, but the bank also has an option the Courts of

[348] Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd. [2017] SGCA 32. § 13. pp. 5-6.
[349] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 30.
[350] McDonald D. Asymmetric Jurisdiction Clause in Ship Finance Agreement Upheld. 2021. p. 1.

the client's domicile or any other court of competent jurisdiction".[351] At that point, Article 1174 of the French Civil Code prohibited the conclusion of the contractual provisions which refer to the potestative condition, meaning that the performance of the contract is dependent on the action of the party or event which is in its power.[352] In this regard, it should be noted that the French Civil Code was revised, amended and redrafted in 2016, specifically to delete old-fashioned language which appears there from 1804, including provisions on "potestativé".[353]

In relation to EU law, the court stated that the asymmetric dispute resolution clause at hand is contrary to Article 23 of the Brussels I Regulation. Prof. Dr. Scherer in her analysis of the case emphasised that the court referred to the wording of the said Article which states that choice of jurisdiction shall be exclusive however omitted one important part of this provision, namely "unless otherwise agreed by the parties".[354] This provision expressly refers to the parties' will and fully complies with the principle of party autonomy, while the conclusion of the court is a simple misinterpretation.

The last reason for invalidation of the asymmetric dispute resolution clause at hand named by the court was its ending stating that the bank may choose "any other court of competent jurisdiction". Some of the practitioners argued that this clause could cover any court in the world, while the others stated that it is limited by the word "competent" and, therefore, it is broad enough to cover jurisdictions connected with the case.[355] In any event, the court referred to a lack of certainty in this clause and, therefore, rendered it invalid.[356] However, as rightly stated by Prof. Dr. Scherer, no particular analysis of "competent" wording in the clause and its impact on the legal certainty of the clause was made.[357]

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[351] Scherer M. The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses? *Kluwer Arbitration Blog.* 2013.
[352] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 29.
[353] Merrett L. The future enforcement of asymmetric jurisdiction agreements. International & Comparative Law Quarterly I.C.L.Q. 2018. 67(1). p. 9.
[354] Scherer M. The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses? *Kluwer Arbitration Blog.* 2013.
[355] *ibid.*
[356] *ibid.*
[357] *ibid.*

In 2015 French courts deviated from invalidation of asymmetric arbitration clauses on the ground of "potestative condition". In Société Danne v Crédit Suisse the French Cour de Cassation analysed a clause similar to the one in Rothschild case. The clause provided for the exclusive jurisdiction of Zurich courts, however, the bank also had a unilateral right to refer a dispute to "any other competent court".[358] At the same time, similarly to the Rothschild case, there was no particular clarity whether the court took into account the "competent" wording of the clause and interpreted it as providing jurisdiction to any court or, on the contrary, only to a "competent" court.[359] The court did not rely on potestativity and stated that it lacks legal certainty and predictability because it is not based on objective elements.[360] In this regard, the court based its conclusion on Article 23 of the Lugano Convention which is a verbatim of Article 23 of the Brussels I Regulation of which conclusions in the Rothschild case were made.[361] This case generally supports the position stated in the Rothschild case, however, it already deviated from the application of potestativity doctrine.

Further in 2015, in Apple v eBizcuss, the dispute resolution clause in the contract provided for a jurisdiction of the courts of the Republic of Ireland, however, Apple also had a right to refer a dispute to the courts of the Reseller's seat or to the jurisdiction where Apple suffered harm.[362] The French court did not apply the potestativity doctrine and followed the approach provided for in the Société Danne v Crédit Suisse case. In the opinion of the French court, the wording of the clause was sufficiently clear to determine the relevant jurisdictions to which Apple may refer its disputes and, therefore, upheld the validity of the asymmetric dispute resolution clause.[363] This case reconfirmed that asymmetric arbitration

[358] Marolleau L. Unilateral (or asymmetrical) jurisdiction clauses: Where does the Cour de Cassation (French Supreme Court) stand? 2015.
[359] Merrett L. The future enforcement of asymmetric jurisdiction agreements. International & Comparative Law Quarterly I.C.L.Q. 2018. 67(1). p. 7.
[360] Draguiev D. French Court of Cassation Confirms Invalidity of Unilateral (Asymmetrical) Jurisdiction Clauses. *Kluwer Arbitration Blog*. 2015.
[361] Marolleau L. Unilateral (or asymmetrical) jurisdiction clauses: Where does the Cour de Cassation (French Supreme Court) stand? 2015.
[362] Merrett L. The future enforcement of asymmetric jurisdiction agreements. International & Comparative Law Quarterly I.C.L.Q. 2018. 67(1). p. 7.
[363] *ibid*. p. 7.

clauses are not invalid by default.

In 2017 another departure from the French approach was made in the Commerzbank AG v Liquimar Tankers Management Inc. case.[364] The clause at hand provided both parties with the right to refer disputes to the English courts and, at the same time, only the bank had the right to refer the dispute to any court of competent jurisdiction.[365] The Commercial Chamber of the Supreme Court finally confirmed the validity of such asymmetric arbitration clauses.[366]

As evidenced from the sequence of the case-law above, France moved from the application of the internal old-fashioned doctrine of potestativity to the final confirmation of asymmetric dispute resolution clauses' validity. The latter is now consistently followed by the French courts.

2.2.5 Russia

Generally, Russian courts were tolerable to the issue with asymmetric arbitration clauses and upheld validity, especially in cases, where one of the parties is a financial institution being the party bearing financial risks.[367] The year 2012 was crucial not only in France. In 2012 Russian approach towards asymmetric arbitration clauses set the whole arbitration community alight. In the Sony Ericsson case, the Supreme Arbitrazh Court of the Russian Federation declared an asymmetric dispute resolution clause invalid.[368]

The clause in the contract provided for arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, but also incorporated a carve-out for Sony Ericsson saying that such clause does not restrict its rights refer to "a court of

[364] Szekely A. Asymmetric jurisdiction clauses: now valid again? 2017.
[365] McDonald D. Asymmetric Jurisdiction Clause in Ship Finance Agreement Upheld. 2021. p. 1.
[366] Szekely A. Asymmetric jurisdiction clauses: now valid again? 2017.
[367] Gridasov A., Dolotova M. Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion. *Kluwer Arbitration Blog.* 2019.
[368] Постановление Президиума Высшего Арбитражного Суда Российской Федерации № 1831/12 от 19.06.2012. Here and further the translation of the source is performed by the author of this master thesis.

a competent jurisdiction a claim for recovery of debts for supplied Products".[369] That said both parties agree to refer their dispute to arbitration and only Sony Ericsson has a right to refer disputes to the courts in cases of recovery of debts for supplied goods.[370]

The Russian court decided that the clause contradicts the principle of equal treatment and Article 6 of the ECHR.[371] The court stated that the clause should be invalid because it deprives one of the parties of its basic civil law right of access to justice since the clause deprives it of the right to refer the dispute to the competent court.[372] The court did not just invalidate the clause but adapted the clause so as to provide the other party with the same right to refer disputes to the court.[373]

It worth mentioning that this decision is highly criticised for improper interpretation and application of the principle of equal treatment. In the opinion of Mr. Draguiev, asymmetric arbitration clauses provide the party with an opportunity to commence either arbitration or litigation or otherwise, as the case may be, and does not have any impact on the equality of the parties within the commenced proceeding.[374]

Mr. Nassar argued that the Russian court based its conclusion on the misinterpretation of the principle of fair trial and failed to consider that this principle applies to equal footing before a specific forum, but does not apply to the choice of forum.[375] Mr. Ustinov emphasised that even in its argumentation the court mainly referred to the jurisprudence on equal treatment which deals with specific procedural issues such as an inability of an imprisoned person to attend an oral hearing, and not jurisdictional such as choice of forum.[376]

The issue with the case is that it is not a standard asymmetric arbitration clause that

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[369] *ibid.*
[370] *ibid.*
[371] *ibid.*
[372] *ibid.*
[373] *ibid.*
[374] Draguiev D. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. Journal of International Arbitration 31. 2014. No. 1. p. 35.
[375] Nassar Y. Are Unilateral Option Clauses Valid? *Kluwer Arbitration Blog*. 2018. § 4.
[376] Ustinov I. Unilateral Arbitration Clauses: Legal Validity: master thesis, Tilburg University, Tilburg. 2016. p. 34.

appears to be analysed in different jurisdictions. Here, both parties have a right to arbitrate but only one party has the right to file a claim to the court, while generally, asymmetric arbitration clauses provide vice versa. The court also forgot to take into account that it is a standard practice that by choosing arbitration parties agree to deprive themselves of the jurisdiction of the courts. It is a natural consequence of the incorporation of the arbitration clause in the contract. Asymmetry in terms of choice of court by one of the parties is clearly a benefit for one party but this does not mean that it deprives the other party of the opportunity to properly present its case.

On the contrary, such a right of the party will still be ensured during the arbitration proceeding which it may commence upon its will. The author fully agrees with the position that the choice of forum is a matter of jurisdiction and equal treatment is a matter of procedure, which the Russian court, unfortunately, did not take into account. The Russian court apparently was not aware of the analysis in the Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd case of the relevance of Article 6 ECHR to the question of asymmetry or simply did not take it into account. The opinion of the English court in Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd case that Article 6 ECHR does not apply to the choice of the forum but applies only to access to justice within the chosen forum, as discussed in sub-chapter 2.2.2 above, could have approached Russian court to at least doubt its conclusions. Furthermore, in the opinion of the author, the court intervened in the party autonomy by adaptation of the dispute resolution clause. The parties freely agreed to enter into an asymmetric dispute resolution clause, but no party agree to enter into mirrored dispute resolution clause.

This issue was further elaborated on in the Piramida case. In 2015 the Supreme Court of the Russian Federation was deciding the case concerning supply contract and suretyship contract in which dispute resolution clauses provided for the jurisdiction of Russian arbitration court or arbitral tribunal upon the choice of a claimant.[377] The court

[377] Определение Верховного Суда Российской Федерации от 27.05.2015 по делу № 310-ЭС14-5919. p. 6. Here and further the translation of the source is performed by the author of this master thesis.

referred to the Sony Ericsson case and agreed that generally asymmetric dispute resolution clauses are invalid.[378] However, the court considered that this rule does not apply to this case because there is no asymmetry of the dispute resolution clause at hand.[379] Reference to "claimant" in the dispute resolution clause means that any party may choose between two options and chose a relevant forum in which case after submission of the dispute it will be called "claimant".[380] Although the court did not in any way elaborate on the issue of invalidity of asymmetric dispute resolution clauses and simply agreed with the decision in the Sony Ericsson case, it was correct in its conclusion that in the case at hand no asymmetry is present in the dispute resolution clause.

Further, in 2016 in the Emerging Markets Structured Products B.V. v Zhilindustriya LLC case, again reconfirmed the position of the court in the Sony Ericsson case stating that the asymmetric dispute resolution clause is invalid, given that only one party has the right to choose between arbitration and litigation.[381] Again, no specific analysis of the validity of asymmetric dispute resolution clauses was provided by the court. The only difference is that the court did not render the clause invalid in part of asymmetry but held that the clause is invalid in full.[382]

The latest input in this regard was the Decree of the Presidium of the Supreme Court of the Russian Federation No. 53 dated 10 December 2019.[383] The Presidium did not change the approach followed by the Supreme Arbitrazh Court of the Russian Federation 7 years before the Decree. That said, the Presidium stated that clause which provides only one party with the right to refer the dispute to the court, such clause is invalid in part of asymmetry towards one of the parties and, therefore, it shall be treated as both parties have the same

[378] *ibid.* pp. 6-7.
[379] *ibid.* p. 7.
[380] *ibid.* p. 7.
[381] Usoskin S. Arbitration and Cross-Border Litigation in Russia. Double Bridge Law Digest. Issue No. 4. 2016. p. 2.
[382] Gridasov A., Dolotova M. Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion. *Kluwer Arbitration Blog.* 2019. § 19.
[383] Постановление Пленума ВС РФ от 10.12.2019 г. №53 "О выполнении судами Российской Федерации функций содействия и контроля в отношении третейского разбирательства, международного коммерческого арбитража". § 24. Here and further the translation of the source is performed by the author of this master thesis.

right to refer disputes to any forum provided for in the dispute resolution clause.[384]

Summarising, Russian courts consider asymmetric arbitration clauses to be invalid on the basis of violation of parties' equality and right to access to justice. This approach is far uncommon for the majority of jurisdictions and highly criticised. At the same time, it is consistently followed by Russian courts through the years and was again reconfirmed by the Presidium of the Supreme Court of the Russian Federation. As of now, there is no sign that such an approach will change in the nearest future.

2.2.6 Ukraine

Kyiv Commercial Court of Appeal in 2011 decided Case No. 16/033-11 concerning the contract that contained the asymmetric arbitration clause.[385] The clause provided both parties with the right to arbitrate and, additionally, only one party (the claimant in the case) with the right to refer disputes to the Ukrainian commercial courts.[386]

The court upheld the validity of the asymmetric arbitration clause. However, this conclusion was only based on the belief of the court that the respondent also had the same right under Ukrainian law.[387] For this, the Ukrainian court referred to general provisions of Ukrainian law on the right of commercial parties to defend their rights in commercial courts in Ukraine.[388] The court did not take into account the fact that the parties agreed to arbitrate and the respondent under arbitration clause was deprived of its right to refer disputes to the commercial courts of Ukraine.

In 2012 Lviv Commercial Court of Appeal analysed the issue of the validity of asymmetric dispute resolution clause. The financial leasing agreement provided for arbitration which in no way restricts the right of the leasing company to refer disputes to

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[384] *ibid.* § 24.
[385] Постанова Київського апеляційного суду від 29.06.2011 р. у справі № 16/033-11. Here and further the translation of the source is performed by the author of this master thesis.
[386] *ibid.*
[387] *ibid.*
[388] *ibid.*

the courts of any competent jurisdiction.[389] The court analysed the provisions of the Constitution of Ukraine, Civil Code of Ukraine, as well as Commercial Procedural Code of Ukraine which state that each person may refer disputes to the court to restore justice and, together with the provisions of the contract, this formed a basis for the court to conclude that asymmetric arbitration clause is valid.

In 2013 in the same case, the Supreme Commercial Court of Ukraine reconfirmed this position.[390] The Ukrainian Supreme Commercial Court did not provide any deep analyses and mainly referred to the same legislative acts as the court of appeal did.[391] The only important reference in the decision of the Supreme Court is that it took into account provisions of Ukrainian law giving effect to the principle of party autonomy and freedom of contract. These two principles are extremely important in the analysis of asymmetric arbitration clauses in terms of their validity.

In 2016 Ukrainian courts were deciding the case № 924/1165/15 where the parties entered into the contract containing a dispute resolution clause providing both parties with the right to arbitrate and only one party had the right to refer disputes to any court of the relevant jurisdiction.[392] At the stage of appeal, the appellant was claiming that the fundamental right of equal treatment and equality under the law is violated because of the asymmetric arbitration clause.[393] In its findings, the court of appeal simply referred to Article 12(2) of the Commercial Procedural Code of Ukraine which at that point of time contained the rule that "the consent of the parties to arbitrate cannot be considered as a waiver of the right to file a claim to the commercial court to protect the right or legally protected interest".[394] On the basis of this the court concluded that under both the arbitration

[389] Постанова Львівського апеляційного господарського суду від 19.12.12 р. у справі № 3/5027/496/2011. Here and further the translation of the source is performed by the author of this master thesis.
[390] Постанова Вищого господарського суду України від 06.03.2013 р. у справі № 3/5027/496/2011. Here and further the translation of the source is performed by the author of this master thesis.
[391] *ibid.*
[392] Рішення Господарського суду Хмельницької Області від 28.09.2015 у справі № 924/1165/15. Here and further the translation of the source is performed by the author of this master thesis.
[393] Постанова Рівненського апеляційного господарського суду від 13.01.2016 у справі № 924/1165/15. Here and further the translation of the source is performed by the author of this master thesis.
[394] *ibid.*

clause in the contract and Article 12(2) of the Commercial Procedural Code of Ukraine, the claimant in the case had the right to refer the dispute to the Ukrainian court. This rule no longer exists in the Commercial Procedural Code of Ukraine. Unfortunately, the court did not even analyse the issue of equal treatment, therefore, Ukrainian jurisprudence does not have an answer to that.

Consequently, Ukraine is mainly consistent in upholding asymmetric dispute resolution clauses. Given the changes to the commercial legislation and pro-arbitration approach of the latest legislative acts, it is still questionable whether Ukraine will be further upholding this position.

2.3 Conclusions to Chapter 2

Both the latest theoretical approaches and case-law developments show that the international arbitration community is moving towards consistent recognition of validity and enforceability of asymmetric dispute resolution clauses.

Party autonomy is increasingly considered as a crucial principle allowing parties to apply their bargaining power, receive beneficial provisions in their contracts and include asymmetric dispute resolution clauses into their contracts if needed. One of the main arguments against the validity of asymmetric dispute resolution clauses was the principle of equality of the parties. However, the leading opinion in this regard is that equal treatment is a purely procedural principle that applies only to equality of the parties within arbitration (litigation) procedure and does not lead to invalidation of the clause if one of the parties is entitled to choose the forum.

As this work shows, civil law counties were more reluctant to uphold the validity of asymmetric dispute resolution clauses. At the same time, the recent years' practice shows that attitude towards asymmetric dispute resolution clauses is not really based on the legal system. Civil law countries were just slow in the development of a favourable approach but after all moved towards consistency (except for Russia, of course).

Particular disclaimers should be made with regard to the US and Russian jurisprudence. The case of the US is complicated in view of the diversified court system where not each state follows the latest developments in progressive case-law made by the courts of other states. However, in disputes with regard to business relations between legal entities the risk of invalidation of asymmetric dispute resolution clause in the US is moving to zero. This issue is mainly challenged in cases with private individuals.

Russia in turn creates an unfavourable environment for asymmetric dispute resolution clauses by its consistent recent jurisprudence which favours invalidation of asymmetric dispute resolution clauses notwithstanding their nature, type or impact on parties' rights and obligations within future arbitration or litigation. Drafting of dispute resolution clauses that potentially might require enforcement in Russia should be done with all due care and taking into account future risks.

CONCLUSIONS

The analysis performed in this work allows concluding that theoretical views concerning both multi-tier and asymmetric dispute resolution clauses are divided into the majority opinions and minority dissenting opinions. With regard to multi-tier dispute resolution clauses, the majority opinions may be summarised as follows:

(1) multi-tier dispute resolution clauses are valid and enforceable;

(2) pre-arbitration procedure set out in such clauses are generally advisory in nature, if the wording of the clause or the interpretation of the parties' intentions do not indicate on the contrary;

(3) pre-arbitration requirements are a matter of procedure;

(4) non-compliance with pre-arbitration procedures should not undermine jurisdiction of the tribunal or trigger remedies under the substantive contract; and

(5) behaviour of the challenging party must show its efforts and interest in compliance with the pre-arbitration procedure.

The majority of theoretical approaches towards asymmetric dispute resolution clauses may be summarised as follows:

(1) asymmetric dispute resolution clauses are valid and enforceable;

(2) parties' right to choose the forum is not required to be mirrored and asymmetric right of one party does not require consideration to the other party for such right;

(3) principle of party autonomy justifies the execution of asymmetric dispute resolution clauses;

(4) asymmetric dispute resolution clauses do not violate the principle of equal treatment because it is procedural in nature and does not apply to the choice of forum;

(5) asymmetric dispute resolution clauses allow the stronger party to exercise its unilateral option to arbitrate and stay the court proceeding initiated by the weaker party.

Given that even scholars did not form a fully consistent approach towards the nature of such clauses, it is hard to expect the latter from the courts in different jurisdictions.

Therefore, the party willing to include a multi-tier or asymmetric dispute resolution clause in their contract shall make a careful inquiry with respect to the most recent applicable case-law. The case-law analysed in this work allows identifying the appliable risks and forming the advice list for drafters of asymmetric and multi-tier dispute resolution clauses.

First, and probably, the most obvious advice for both types of clauses is careful drafting. Both asymmetric and multi-tier dispute resolution clauses are a deviation from standard symmetric one-tier dispute resolution clauses. Therefore, their suitability for a particular contract, consequences of their application and workable wording shall be ensured at the early stage of drafting. If parties do not have the resources to hire legal consultants who can draft enforceable dispute resolution clause, it is better to use boilerplate clauses suggested by arbitral institution chosen by the parties. It will decrease the risk that the clause will not be workable.

Secondly, the clause shall accurately reflect the parties' intentions. For example, if parties are willing to make the first tier of the multi-tier dispute resolution clause mandatory, they should avoid uncertain (permissive or advisory) wording and such words as "may" or "can".

Thirdly, the clause should be drafted bearing in mind possible countries of its enforcement. For instance, if a future award will most likely be enforced in Russia (e.g. the counteragent in the contract is a Russian corporation that does not have any assets in any other country), it is better to avoid asymmetric wording of the clause. If there are multiple possible places of enforcement the risk of incorporation of asymmetric dispute resolution clause is lower because a party may seek enforcement in the country supporting validity of such clauses.

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