

# MULTI-TIERED CLAUSES: ICC PERSPECTIVES IN LIGHT OF THE NEW ICC ADR RULES

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This paper will review how the ICC has dealt with multi-tiered clauses in the past, and will explore changes which could occur in the future in light of the ICC's adoption of the new ICC ADR Rules.

First, it is necessary to set out the procedural background. A special feature of ICC arbitration is that, in addition to the power of ICC arbitral tribunals to rule on their own jurisdiction, the ICC International Court of Arbitration (the "ICC Court"), pursuant to Article 6.2 of the ICC Rules of Arbitration, has the power to determine, at the outset, that the arbitration cannot proceed. Article 6.2 provides, in relevant part, as follows:

...if any party raises one or more pleas concerning the existence, validity, or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility of merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

Thus, in the ICC system, there are two distinct bodies having the power to dismiss a request for arbitration: the ICC Court and the Arbitral Tribunal. The ICC Court has the power, in its administrative role, to find that it is not *prima facie* satisfied that an arbitration agreement under the ICC Rules of Arbitration may exist. In that case, it will not permit the arbitration to proceed. Alternatively, the ICC Court, also pursuant to Article 6.2 of the ICC Rules of Arbitration, can find that it is *prima facie* satisfied that an arbitration agreement may exist. In that case, it will refer the question to the arbitral tribunal which would then decide on its own jurisdiction.

When faced with a multi-tiered clause contained in the contract between the parties providing for an obligatory ADR procedure as a pre-condition to commencing arbitration, the ICC Court, upon a failure of the claimant to engage in the ADR procedure and upon the objection of the respondent, must determine

whether Article 6.2 requires it to prevent the arbitration from proceeding or whether, on the contrary, it must turn the question over to the arbitral tribunal for its decision. In the latter case, the arbitral tribunal, formed pursuant to the ICC Rules of Arbitration, would have to decide what effect to give to the multi-tiered clause.

With that background in mind, we may now review how the ICC Court and ICC arbitral tribunals have dealt with multi-tiered clauses in the past. In fact, there have been relatively few published cases in which the ICC Court or ICC arbitral tribunals have been confronted with jurisdictional issues related to multi-tiered clauses. The cases about which there is published information have dealt essentially with contractual clauses providing for prior conciliation as a pre-condition to arbitration and clauses pursuant to Clause 67 of the old FIDIC Conditions, third edition, which required the parties to refer the dispute to the supervising engineer under the contract before the matter could be submitted to arbitration.

Research has not uncovered a single published case, and certainly no recent cases, in which the ICC Court, in application of Article 6.2 of the ICC Rules of Arbitration, has decided that an arbitration cannot proceed because of a failure to comply with pre-conditions to arbitration in a multi-tiered clause. In some cases in which the ICC Court was confronted with objections concerning the failure to comply with a multi-tiered clause, it applied Article 6.2 (or its equivalent, Article 8.3, prior to the 1998 amendments to the ICC Rules of Arbitration) and found *prima facie* that an arbitration agreement may exist. In other cases, the ICC Court found that the respondent's objection did not relate to the existence, scope, or validity of the arbitration agreement, and therefore that the provisions of Article 6.2 were not applicable at all. In both of those situations, the ICC Court referred the matter to the arbitral tribunal.<sup>1</sup>

Since it is not the practice of the ICC Court to give reasons for its decisions, there is no public access to its reasoning. Nevertheless, if the ICC Court finds that an arbitration agreement may exist, it is required to refer the issue to the arbitral tribunal. In the cases in which the ICC Court applied Article 6.2 and referred the matter to the arbitral tribunal, it may be that the ICC Court did not believe that it was within its administrative role to interpret multi-tiered clauses drafted by the parties or by FIDIC, or the ICC Court may not have had a *prima facie* basis to find that there was non-compliance with the first tier of the multi-tiered clause. In the cases in which the ICC Court refused even to apply Article 6.2, it may have concluded that an objection based upon a failure to comply with the first tier of a multi-tiered clause did not involve a plea concerning the existence, validity or scope of the arbitration agreement itself (i.e., the second tier). If the ICC Court were to uphold that latter view, it would never have the power to dismiss an arbitration because of a failure to comply with the first tier of a multi-tiered clause. In any event, up to the present, such issues concerning multi-tiered clauses have been typically left for arbitral tribunals.

How then have ICC arbitral tribunals dealt with jurisdictional objections based upon a failure to comply with the first tier of a multi-tiered dispute resolution clause? ICC Case No. 2138 dealt with a multi-tiered clause providing for prior conciliation followed by ICC arbitration. The Claimant filed a Request for Arbitration without attempting conciliation. The Respondent objected, and the arbitral tribunal was required to decide upon its own jurisdiction. In that case, the tribunal found that it had jurisdiction because it interpreted the clause as not requiring prior conciliation under the circumstances of the case. The clause expressly provided for conciliation in order to avoid hampering the ongoing performance of

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<sup>1</sup> See Antonias Dimolitsa, "Issues Concerning the Existence, Validity, and Effectiveness of the Arbitration Agreement," ICC Bulletin Vol. 7/No. 2 December 1996, pp. 21-22.

the contract. Under the facts of the case, that was not at issue. In so ruling, the tribunal implied, without stating so, that it might well have decided otherwise had the clause been drafted differently.

In ICC Case No. 4230, the Respondent argued that a requirement of conciliation prior to arbitration had not been respected by the Claimant. The Conciliation portion of the clause provided, in translation from the French, as follows: "...all disputes related to the present contract may be settled amicably by three conciliators, one designated by each of the parties and the third by agreement of the two parties." The tribunal found that it had jurisdiction because it interpreted the clause as not being expressly obligatory. In so doing, the tribunal implied that an expressly obligatory clause could be enforceable.

ICC arbitral tribunals have been more reluctant to find that they have jurisdiction in cases which involved clause 67 of the FIDIC Conditions. For example, in ICC Case Nos. 6276 and 6277, the arbitral tribunal found that claimant had not satisfied the prerequisite for arbitration set forth in Clause 67 and, consequently, that the Request for Arbitration was "premature." In ICC Case Nos. 6238 and 6535, the tribunal held that the contractor had not complied with Clause 67 and that the tribunal thus had no jurisdiction over the claims.<sup>2</sup>

The differing results between the conciliation and the FIDIC cases may be explainable on the basis of the nature of the relevant clauses. The FIDIC clause contained a clear, express obligation to proceed with the first tier prior to arbitration. The conciliation clauses reviewed left room for interpretation. Also, since conciliation is usually a purely voluntary procedure which either party may terminate at any time, arbitral tribunals may have been reluctant to require the parties to engage in a "useless effort."

In sum, up to the present time, it would appear from published materials that the ICC Court has not been inclined to use its administrative powers under Article 6.2 of the ICC Rules of Arbitration to dismiss arbitrations based on alleged non-compliance with the first tier of multi-tiered clauses. Arbitral tribunals have found that they lack jurisdiction in clear-cut cases, such as those under Clause 67 of the old FIDIC Conditions but appear to interpret prior conciliation agreements very narrowly.

The question now arises as to whether the adoption of the new ICC ADR Rules and accompanying suggested clauses may alter the approach of the ICC Court or ICC Arbitral Tribunals. The ICC ADR Rules entered into force as of July 1, 2001. Those Rules are designed for the use of parties who wish to settle their disputes amicably with the assistance of a third party, called the Neutral, within the institutional framework of ICC. Among the special features of those Rules is that they permit the parties themselves to choose whatever settlement technique is best suited to help them resolve their particular dispute.<sup>3</sup> Such techniques can include mediation, neutral evaluation, mini-trial, any other settlement technique or a combination of settlement techniques. If the parties do not agree upon a particular technique, the Rules provide that mediation will be used.<sup>4</sup> In addition, the Rules provide that a first discussion among the Neutral and the parties shall promptly take place in order to seek an agreement on

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<sup>2</sup> See Christopher R. Seppala, "International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract," ICC Bulletin Vol. 9/No. 2 November 1998, pp. 33-35.

<sup>3</sup> ICC ADR Rules, Article 5.1.

<sup>4</sup> ICC ADR Rules, Articles 5.2.

the settlement technique to be used and to define the specific procedure to be followed.<sup>5</sup> Under the Rules, a party may not unilaterally terminate the ADR proceedings before the discussion with the Neutral is held.<sup>6</sup> The provision making this discussion obligatory is designed to give the proceedings the maximum chance of success. It is in fact difficult for the parties to properly evaluate the full potentiality of the procedure without at least participating in a first discussion with the Neutral. This provision, while preserving the voluntary nature of ADR, does require the parties to participate in the procedure at least up to a certain point. Thus, when the parties submit to the ICC ADR Rules, they have agreed to participate in the proceedings at least through the first discussion with the Neutral.

Annexed to the ADR Rules are four alternative ICC ADR suggested clauses which may be inserted by parties in their contracts. The first clause is purely optional. The second clause requires the parties to consider submitting the dispute to ADR. The third clause obligates the parties to submit any disputes arising in connection with their contract to the ICC ADR Rules, but contains no second-tier dispute resolution provision which would apply if the ADR proceedings do not resolve the dispute. The fourth clause, which is of interest to us here, is a genuine multi-tiered clause. That clause reads as follows:

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

As can be seen, this clause contains a clear and express obligation of the parties to submit to the ICC ADR Rules any dispute arising in connection with their contract, as a pre-condition to commencing an ICC Arbitration. In addition, it provides an objective and automatic mechanism for determining when the first-tier obligation has been met. Any time a Request for ADR has been filed and 45 days have run from the date of filing the Request, any party may commence arbitration proceedings if the dispute has not been settled by that time. Of course, the parties are free to extend the 45-day period in writing if they so desire.

Let us assume the following facts: A contract between the parties contains the above quoted multi-tiered clause. The Claimant files a request for arbitration and fails to comply with the clause's requirement to submit the dispute in the first instance to proceedings under the ICC ADR Rules. Naturally, if the Respondent raises no objection in its Answer or agrees to the arbitration proceedings, the first tier of the clause will presumably be considered to have been waived. Let us assume however, that the Respondent objects to the filing of the Request for Arbitration, claiming that there is no operative arbitration agreement because the conditions of the first tier of the multi-tiered clause have not been met. The Respondent may also specifically request that the ICC Court determine that the arbitration cannot proceed in application of Article 6.2 of the ICC Rules of Arbitration. Respondent could argue that, in light of ICC's own clause and the objective fact entirely within the knowledge of ICC that no request for ADR

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<sup>5</sup> ICC ADR Rules, Article 5.1.

<sup>6</sup> ICC ADR Rules, Article 6.1(b).

has been filed and that 45 days have not run, the ICC Court should find that it is not *prima facie* satisfied that an arbitration agreement under the ICC Rules of Arbitration may then exist. The Respondent could conclude by asking the ICC Court to dismiss the arbitration, requesting that the arbitral tribunal do so if, for whatever reason, the ICC Court does not.

No published sources indicate that the situation described above has come before the ICC Court so far. Since the ICC Court does not issue advisory opinions or indicate in advance of a real case what its position would be on a particular issue, we cannot know what the ICC Court would do in this case. However, it is clear from the ICC Rules of Arbitration and the past cases discussed above, that the ICC Court would have two basic options:

- It could find that Article 6.2 does not apply at all on the grounds that Respondent's objection does not relate to the existence, scope, or validity of the arbitration agreement itself but only concerns compliance with a pre-condition to arbitration. In that case, it would allow the arbitration to proceed in abstraction of Respondent's objection.
- In the alternative, the ICC Court could find that Article 6.2 does apply on the grounds that Respondent's objection does go to the scope or existence of the arbitration agreement. It could reason that, given the failure to comply with ICC's first tier, there is an issue as to whether an arbitration agreement now applies or now exists. In that event, the ICC Court will have two further options:
  - The ICC Court could determine pursuant to Article 6.2 that it is satisfied that an arbitration agreement may exist and send the objection to the Arbitral Tribunal.
  - In the alternative, the ICC Court could determine that it is not *prima facie* satisfied that an arbitration agreement may exist. In that case, it would inform the parties that the arbitration cannot proceed.

What considerations might lead the ICC Court to decide between those last two options? In refusing to dismiss the Arbitration, the ICC Court might consider that issues concerning pre-conditions to arbitration are not within the scope of its administrative role. It may be influenced by the fact that it has no significant history of dismissing arbitrations under Article 6.2 in connection with non-compliance with the first tier of a multi-tiered clause. Reference could be made to the ICC Court's experience with Clause 67 of the old FIDIC Conditions. Moreover, as we have pointed out, any time that an arbitration agreement may exist, the issue is for the arbitral tribunal to decide. Only when the ICC Court is satisfied that no arbitration agreement could exist under the ICC Rules of Arbitration will it determine that the arbitration cannot proceed.

Nevertheless, there are grounds upon which the ICC Court could decide to dismiss the arbitration pursuant to Article 6.2 under the facts we have described above. In the situation under discussion, the multi-tiered clause was drafted by the ICC itself, and the ICC is in the best position to know what it means. It contains a clear, express obligation to submit the dispute to the ICC ADR Rules, and, by the clear agreement of the parties, no arbitration can occur until that obligation is satisfied. Furthermore, it is within the ICC's own knowledge whether or not the objective conditions for satisfying the first tier have been met. The ICC Court can know itself whether a Request for ADR has been filed and whether or not

45 days have elapsed after such filing. Of course, for confidentiality purposes, the ICC Court's knowledge should be limited to whether or not a Request for ADR has been filed and on what date. In any case, these objective conditions are automatic and require little or no interpretation. In addition the ICC ADR Rules, as we have seen, do not allow a party to unilaterally terminate the ADR proceedings until after the first discussion with the Neutral. This means that the agreement to submit the dispute to the ICC ADR Rules is not totally voluntary but requires engaging in the proceedings up to a certain point. The first tier of the multi-tiered clause is thus not an empty agreement which can be voluntarily avoided at any time by one party. That fact contributes to the obligatory nature of the first tier. Finally, the ICC Court could distinguish the FIDIC-type situation from the present case. In the FIDIC situation the ICC Court was called upon to apply a clause which the ICC did not draft, and the circumstances surrounding the fulfillment or non-fulfillment of the conditions for satisfying the first tier of the FIDIC clause were not within the ICC Court's knowledge. These considerations could lead the ICC Court to be *prima facie* satisfied that no arbitration agreement can currently exist.

It should also be pointed out that if the ICC Court were to decide to allow the arbitration to proceed and transfer Respondent's objection to the Arbitral Tribunal, the Tribunal might well decide that it has no jurisdiction for many of the same reasons described above.

In sum, the ICC Court will be faced with an important issue when the situation we have described first comes before it. In my own personal view, and not in any way speaking for the ICC, the ICC Court should seriously consider dismissing the arbitration in the situation we have described. In doing so, the ICC Court would give full weight to the ICC's own multi-tiered clause. In addition, it would be giving strong support to the parties' agreement as set out in the clause. After a dismissal of the arbitration by the ICC Court, the ICC ADR Secretariat could encourage the parties to take full advantage of the possibilities of ADR pursuant to the first tier in order to resolve their dispute in a rapid and inexpensive manner.

Indeed, if the parties were to know when negotiating their dispute resolution clause that the ICC Court will systematically send such issues of non-compliance to the Arbitral Tribunal, they may be discouraged from using the multi-tiered clause as potentially adding additional time and expense. On the contrary, if the parties know that non-compliance with the first tier will lead to a quick dismissal of an attempt to commence arbitration at the level of the ICC Court, parties will be encouraged to comply with their own agreement rather than waste time and money trying to avoid it.

For these policy considerations, in addition to the legal analysis set out above, I do believe that the ICC Court should determine that the arbitration cannot proceed in the specific situation under discussion. However, that decision is for the ICC Court, and no one can pre-judge what it will do.

Now, of course, special situations may arise, and the actual facts may not correspond to the straightforward example we have been dealing with. In some cases Claimant may argue that the multi-tiered clause was amended, waived, or revoked. Claimant may argue that the multi-tiered clause is not applicable to the dispute submitted in the request for arbitration (e.g., it may be argued that the dispute arises under a separate contract that does not contain the multi-tiered clause or that, in light of the contractual provisions, the multi-tiered clause only applies to certain kinds of disputes under the contract). In addition, the parties may modify the ICC suggested multi-tiered clause in ways that raise interpretive issues. For example, the parties could provide that arbitration may be commenced after the parties have made a good faith attempt to settle their dispute pursuant to the ICC ADR Rules, rather than

using the automatic and objective conditions of the filing of a Request for ADR and the lapse of 45 days. In all of those and in similar circumstances which we can imagine it is probable that the ICC Court would allow the arbitration to proceed and would leave such matters for the decision of the Arbitral Tribunal.

One lesson which can be learned from the above examples is that, in order to maximize the chances that the ICC Court will dismiss an arbitration when there is a failure to comply with ICC's suggested multi-tiered clause and thereby give the fullest weight to the first-tier agreement, the parties should stick closely to the text of the suggested multi-tiered clause and should avoid any modifications which could require interpretation. In any case, since the conditions for satisfying the first tier are not very onerous, potential claimants would be well advised to respect the conditions of the multi-tiered clause in order to avoid having to confront the issues raised here, either before the ICC Court or the Arbitral Tribunal.

Of course, we will have to wait and see what the ICC Court will do when these issues are presented to it. In my own opinion, a finding by the Court that the arbitration cannot proceed in appropriate cases of non-compliance with the first-tier of ICC's multi-tiered clause would be consistent with the agreement of the parties, would encourage the use of ADR and would lead to the most efficient implementation of the multi-tiered clause. If the ICC Court does not make such a finding, ICC arbitral tribunals could accomplish some of these objectives, although much less efficiently, by deciding that they have no jurisdiction when a party has not complied with the first tier of the suggested ICC ADR multi-tiered clause over the objection of the other party.

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