MULTI-TIER DISPUTE RESOLUTION AGREEMENTS IN CANADIAN LAW AND PRACTICE: INTERPRETING, ENFORCING, ESCAPING

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I. INTRODUCTION

Not long ago—well after the careers of today's senior counsel and judges began—commercial mediation and even arbitration were rare. Beginning in the 1980s, commercial mediation's popularity began to rise, along with that of alternative dispute resolution (ADR) processes more generally.[1] Multi-tier dispute resolution agreements (also called step, stepped, escalation, cascading, or progressive clauses) have correspondingly risen to prominence.[2] Today, there is broad agreement that commercial parties should have access to a range of different consensual and adjudicative methods of

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[*] Associate Professor, Queen's University Faculty of Law; Managing Editor, *Canadian Journal of Commercial Arbitration*. This article is an expanded, updated, and recast version of a previously published book chapter, Joshua Karton & Michelle de Haas, "Multi-Tier and Mixed-Method Dispute Resolution in Canada: From Obscurity to Prominence in a Single Generation", in Anselmo Reyes & Weixia Gu, eds, *Multi-tier Approaches to the Resolution of International Disputes: A Global and Comparative Study* (Cambridge UP, 2021) 315. I am grateful to Simon Loughlin for helpful research assistance updating that earlier paper.

[1] Pierre Bienvenu and Martin Valasek, 'Canada: Arbitration Guide: IBA Arbitration Committee' (*International Bar Association*, 2021), <https://www.ibanet.org/MediaHandler?id=5A3BA1C8-73A9-4EBD-A160-69D43D25A8FA>.

[2] Vasilis FL Pappas and George M Vlavianos, "Multiple Tiers, Multiple Risks – Multi-tier Dispute Resolution Clauses' (2018) 12:1 Disp Resol In'l 5 at 6; Bryan Duguid, "Multi-tiered Dispute Resolution: Stepping Carefully" (*Mondaq*, 20 August 2008).

dispute resolution, and indeed are entitled to mix and match them in order to best fit the characteristics of their transaction or their dispute. Dispute resolution agreements with two or more tiers, typically negotiation and/or mediation then arbitration or litigation, are now a common feature of commercial contracts. Many parties find that these combine the best features of consensual dispute resolution (efficiency, flexibility, preservation of the contractual relationship) with the hard backstop of binding adjudication by a judge or arbitrator.

Nevertheless, the case law remains sparse and Canadian courts have continued to show some discomfort when called upon to enforce multi-tier and other forms of complex dispute resolution agreements.[3] Although the consistency of court judgments has improved in recent years, misunderstandings of some core concepts and generalized confusion persist. The problem is exacerbated by ambiguously drafted multi-tier clauses seen in many commercial contracts. In short, parties continue to make easily avoidable drafting errors, and courts continue to be unsure what to do with the resulting agreements.

By multi-tier agreements, I mean any dispute resolution agreement that calls for more than one method of dispute resolution to be employed sequentially, as necessary, if the dispute remains unresolved. In this article, I will canvass the range of issues thrown up by multi-tier dispute resolution agreements. I will not consider agreements calling for med-arb, arb-med or other procedures that mix different methods of dispute resolution in a single step, since they involve distinct legal issues. Although multi-tier agreements are (or at least should be) limited only by the creativity of their drafters and the basic rules of due process and public policy, I will focus on the most common multi-tier agreements, which call for one or more consensual or otherwise non-binding stages (negotiation,

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[3] Cf J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure,* 3 edn, (Juris 2017) at 137 (observing that there is "little Canadian law as yet" on the enforceability of preconditions to arbitration, and accordingly advising parties to use as explicit language as possible to express their intentions).

mediation, neutral evaluation, or the like) and then, if the dispute remains unresolved, a binding adjudicative stage (arbitration or litigation).

In this article, I will refer to the consensual stages as the "lower" tier or tiers of the multi-tier clause and the adjudicative stage as the "higher" tier, consistent with the metaphor of multi-tier agreements as stepping or escalating "up" from more collegial, informal, and non-binding forms of dispute resolution toward increasing formality and increasing third-party involvement, culminating in binding third-party adjudication by an arbitrator or judge.

The pain points associated with multi-tier dispute resolution agreements arise most frequently in one of two situations: when a party proceeds to a higher tier without, arguably, having completed a prior stage required by the agreement; and when a party seeks to enforce an arbitral award issued following an alleged failure to complete the necessary preconditions to arbitration. In both cases, the main legal issues that arise are the enforceability of different tiers in the multi-tier agreement and the interpretation of its requirements.

Some attention will be paid to clauses that culminate in litigation, but only to the extent that they are also relevant to preconditions to arbitration. For this reason, this article does not consider the mandatory pre-litigation mediation regimes established in some provinces, except for some discussion of how court treatment of mandatory mediation may shed light on how the courts deal with mediation as a precondition to arbitration. The focus is on providing actionable guidance for lawyers drafting multi-tier agreements, seeking to enforce them against a recalcitrant counterparty, seeking to "escape" the requirements of a lower tier in order to commence arbitration immediately, or seeking to enforce an arbitral award without having previously mediated or negotiated (or whatever the lower tier of the agreement requires). At the same time, I hope

to promote consistency in judicial treatment of multi-tier agreements, which can only benefit parties, their counsel, and the courts.

II. INTERPRETING MULTI-TIER AGREEMENTS

For the most part, Canadian courts approach multi-tier dispute resolution agreements like they would approach any contractual terms: they are enforceable unless one of the general exceptions to enforceability applies (such as unconscionability) and they are interpreted according to the general rules of contractual interpretation. I will discuss interpretation first, since—as with single-tier arbitration agreements—most disputes associated with multi-tier agreements turn on contractual interpretation.

The main interpretive issues that arise are whether the lower tiers in a multi-tier dispute resolution process constitute mandatory preconditions to the higher tiers (often called "conditions precedent"[4]) and, if so, what constitutes fulfilment of those preconditions. These issues are determined based on the parties' intentions, so that a court or arbitral tribunal's role is primarily one of contractual interpretation.

Before discussing those requirements and some related issues, it is necessary to observe that Canadian courts simply ignore lower tiers of multi-tier clauses with surprising frequency, especially where the final tier calls for arbitration. For example, in *Uber Technologies v Heller*, the Supreme Court of Canada consistently referred to a multi-tier agreement with mediation and arbitration stages as an "arbitration clause". The mediation stage played zero role in the judgment except when it came to estimating the total cost of dispute resolution under the agreement.[5]

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[4] *Ibid* at 132-133.

[5] *Uber Technologies v Heller*, 2020 SCC 16 [*Uber*].

Uber is only the most prominent example. There are numerous cases involving multi-tier agreements that culminate in arbitration where the pre-arbitration stages are simply not addressed by the courts.[6] For the most part, these can be explained by judicial deference to arbitration and respect for arbitral competence-competence. In one particularly striking case, although the dispute resolution agreement expressly described mediation as a "condition precedent" to arbitration and the parties had not mediated, the Court nevertheless stayed litigation and referred the parties to arbitration on the basis that that arbitration clause was not void, inoperative, or incapable of being performed—without ever mentioning mediation except for once quoting the full dispute resolution clause.[7]

Possibly, these cases are holdovers from an earlier era when mediation was less well established in Canada (or were decided by judges trained in that era). If their only effect is to leave to arbitrators the decision of whether preconditions have been met, that would be a salutary outcome in the vast majority of cases. Unless one of the exceptions to competence-competence

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[6] See e.g., *NetSys Technology Group AB v Open Text Corp* [1999] CanLII 14937 (ONSC); *Cecrop Co v Kinetics Sciences Inc*, 2001 BCSC 532; *Canada (Attorney General) v Marineserve MG Inc*, 2002 NSSC 147; *Aradia Fitness Canada Inc v Dawn M Hinze Consulting*, 2008 BCSC 839; *Goel v Dhaliwal*, 2015 BCSC 2305; *Ts'Kw'Aylaxw First Nation v Graymont Western Canada Inc*, 2018 BCSC 2101; *A-Teck Appraisals Ltd. v Constandinou*, 2020 BCSC 135 *[A-Teck*].

[7] *A-Teck*, *supra* note 6 at paras 33-37. See also *Leeds Standard Condominium Corp. No. 41 v Fuller*, 2019 ONSC 3900. There, the dispute resolution agreement was an unusually complex one, with detailed specifications as to implementation of the mediation and arbitration tiers. It even provided expressly that "Where ADR is required by this Agreement, commencement and completion of such ADR in accordance with this Agreement shall be a condition precedent to the commencement of an action at law or in equity in respect of the question or matter in dispute being arbitrated." The Court nevertheless consistently referred to it as "the arbitration clause" and the mediation provisions played no role in the court's assessment of whether the dispute fell "within the scope of the arbitration clause". *Ibid* at para 34.

enunciated by the Supreme Court in *Dell v Union des consommateurs*[8] and *Uber* is met, an arbitral tribunal *should* be the first to rule on challenges to its jurisdiction, including those relating to alleged preconditions.[9]

1. *Interpretation of Multi-Tier Agreements and Arbitral Jurisdiction*

The most common category of dispute that ends up in court turns on an almost-pure question of contractual interpretation: whether a lower tier is a jurisdictional precondition to a higher tier. That is: *must* the parties complete the lower tiers before an arbitrator or court named in the final tier can have jurisdiction over the dispute? Properly labeled, the distinction is one between jurisdiction and admissibility, a distinction which is often ignored or elided by Canadian courts. They typically describe the question as whether the lower tiers are "mandatory" or are "conditions precedent" to arbitration, terms that invite confusion because they have other meanings.[10]

In practice, the jurisdiction versus admissibility question arises most often when one party commences arbitration pursuant to a multi-tier clause, and the other party argues (either to the tribunal or in a court application) that the tribunal may not hear the dispute because one or more lower tiers have not been fulfilled. If the lower tier is a jurisdictional precondition to arbitration, then the arbitrator has no jurisdiction to consider any claim subject to the arbitration agreement until the precondition is met because the parties'

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[8] *Dell v Union des consommateurs,* 2007 SCC 34.

[9] Regarding these exceptions, see *infra*, note 27 and accompanying text.

[10] For a rare example of a Canadian court taking seriously the distinction between jurisdiction and admissibility and using the correct terminology, see *The United Mexican States v Burr*, 2020 ONSC 2376 at paras 140-145 (upholding a NAFTA tribunal's determination that a dispute over whether investors submitted their consent to arbitration in the appropriate form and at the appropriate time were matters of admissibility rather than jurisdiction).

consent to arbitration was conditional upon fulfilment of the precondition. Suppose, for example, that the contract provides that the parties must attempt to settle any disputes by mediation and that neither party may resort to arbitration unless they have (1) commenced mediation, (2) engaged in that mediation, and (3) at least 60 days have passed since the mediation commenced. Such language will be sufficient to establish mediation as a jurisdictional precondition to arbitration.

If, on the other hand, the parties agreed to employ other procedures prior to arbitration, but did not make them a precondition to arbitral jurisdiction, an arbitrator appointed in accordance with the arbitration agreement will still have jurisdiction over a dispute brought before them. However, the arbitrator may nevertheless rule that particular claims brought are inadmissible—are not ripe to be heard—until the lower tiers are completed. Typically, parties opt for multi-tier agreements without jurisdictional preconditions—often referred to as "non-mandatory"—when they want to follow an agreed series of dispute resolution methods but do not want to prejudice either party's ability to proceed directly to mediation or arbitration if, for example, they conclude that the initial tiers would be futile or otherwise wasteful.

The third possible interpretation that might be given to a multi-tier agreement is that the parties intended to attempt some consensual resolution of any disputes arising from their relationship, but did not intend that these should affect either jurisdiction or admissibility of claims raised in a higher tier, whether arbitration or litigation. In such cases, for example, parties might agree to seek the services of an expert evaluator, but not at the expense of their right to proceed to arbitration or litigation. In other words, the parties intended to lay out options for dispute resolution, but did not bind themselves to employ all of those options or to employ them in one particular order.

Such agreements, which might be called optional-tier dispute resolution agreements, are conceptually distinct from non-mandatory multi-tier agreements because they do not establish a hierarchy or succession of dispute resolution methods.[11] In terms of their legal effects, however, these optional-tier agreements are lumped together with other non-mandatory agreements because both categories raise issues of admissibility, not jurisdiction. Non-fulfilment of lower tiers in a non-mandatory or optional multi-tier agreement cannot deprive an arbitrator or judge of jurisdiction.

This distinction is crucially important when the decision of an arbitrator, especially one finding that the arbitrator has jurisdiction over the dispute, is challenged in court. If the satisfaction of lower tiers is a question of admissibility, or if the parties intended that lower tiers of an agreement be entirely optional, the interpretation of the agreement is a procedural matter, not jurisdictional. The arbitrator's decision is therefore entitled to deference by the court, and, if the arbitrator's decision is a preliminary one, procedures empowering a court to "decide the matter" of an arbitrator's jurisdiction are inapplicable. If, on the other hand, the lower tiers are mandatory preconditions to an arbitral tribunal having jurisdiction over any disputes within the scope of the dispute resolution agreement, then the question of whether those preconditions have been satisfied is a jurisdictional matter, on which an arbitrator's decision will receive no court deference.

Thus, the act of interpreting a multi-tier agreement includes two simultaneous interpretive acts. First, the clause must be

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[11] For example, in *Malcolm Drilling Company Inc. v The Graham-Aecon Joint Venture*, 2021 BCSC 1136, the final provision in a multi-tier agreement read as follows: "All claims, disputes or Disputed Decisions between the Corporation and the Contractor that are not resolved shall be decided by arbitration if the parties agree, or failing agreement, in a Court of competent jurisdiction within the Province of British Columbia". The Court interpreted this provision to mean that if one party commenced arbitration, the other would be bound to arbitrate, but that otherwise either party could proceed in court. *Ibid* at para 69.

interpreted to identify what the various tiers of the agreement require of the parties and what are the conditions for transitioning between tiers ("stepping up"). Second, and based on exactly the same contractual language and context, the clause must be interpreted to determine whether preconditions to arbitration are matters of admissibility or jurisdiction. To resolve both interpretive questions, the ordinary rules of contractual interpretation apply.

When interpreting multi-tier agreements, Canadian courts focus on the presence or absence of words connoting a mandatory character of lower tiers. They normally construe lower tiers as non-mandatory absent express language designating them as preconditions to arbitration or litigation.

In practice, for a requirement of mediation or negotiation to be enforceable as a precondition to arbitration or litigation—much less a particular feature of that mediation or negotiation, such as the personal participation of the parties' CEOs—the contract must employ words with an unequivocally mandatory meaning. Words such as "shall" or "must" (as opposed to "may" or "can") are crucial to establishing a mandatory precondition.[12] Thus, although they rarely use the labels, courts treat the satisfaction of lower tiers as matters of admissibility, unless the language clearly demonstrates that they are jurisdictional preconditions. This approach is consistent with the prevailing

[12] See, e.g., *Canadian Ground Water Association v Canadian Geoexchange Coalition* 2010 QCCS 2597 (the Court reads "may" as meaning that the parties have the option to mediate, but that mediation is not mandatory unless a party actually initiates it) [*Canadian Ground Water*]. See also *Suncor Energy Products Inc v Howe-Baker Engineers Ltd*, 2010 ABQB 310 [*Suncor*]; *Advanced Construction Techniques Ltd v OHL Construction Canada*, 2013 ONSC 7505 [*Advanced Construction*]; *A.G. Clark Holdings Ltd. v HOOPP Realty Inc.*, 2013 ABCA 101; *PQ Licensing SA v LPQ Central Canada Inc*, 2018 ONCA 331 [*PQ Licensing*].

rule in England,[13] as well as in common law jurisdictions that, like Canada, have adopted the UNCITRAL Model Law on International Commercial Arbitration as their international arbitration legislation.[14]

For example, in *Cityscape v Vanbots*, the contract stipulated mediation and consultation processes prior to arbitration. These lower tiers were held merely to provide expeditious options for resolving disputes. The applicant therefore was not barred from initiating arbitration despite that fact that neither consultations nor mediation had taken place.[15] The Court observed that arbitration clauses are to be given a "large, liberal and remedial" interpretation in order to vindicate the parties' intention to arbitrate any unresolved disputes.[16] Moreover, the Court held, the broad language submitting to arbitration all disputes concerning "the interpretation, application or administration of the contract" demonstrated the parties' intention to have access to arbitration, unrestricted by the other methods of dispute resolution mentioned in the contract.[17]

The Court's characterization is dubious, given that parties typically use such broad language in order to avoid uncertainty

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[13] See, e.g., *NWA and others v NVF and others [2021] EWHC 2666 (Comm)*; *Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm)*.

[14] See, e.g., *C v D* [2022] HKCA 729; *T v B* [2021] HKCFI 3645 (both finding that lower tiers raised questions of admissibility, not jurisdiction); *International Research Corp PLC* v *Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55 at para 54 (finding that lower tiers constituted jurisdictional preconditions because, "the language of cl 37.2 was clear – it set out in mandatory fashion and with specificity the personnel from the respondent's side who were required to meet with Datamat's designees as part of a series of steps that were to precede the commencement of arbitration").

[15] *Cityscape Richmond Corp v Vanbots Construction Corp*, [2001] OJ No 638, 8 CLR (3d) 196 at para 21 [*Cityscape*].

[16] *Ibid* at para 19.

[17] *Ibid* at paras 21-23, 32.

about which disputes are within the *subject matter scope* of an arbitral tribunal's jurisdiction. Nevertheless, the Court's holding is indicative of the prevalent—and largely positive—attitude among Canadian courts that if the parties to a commercial contract agree to submit disputes among them to arbitration, they likely intend to have recourse to arbitration to decide all unresolved disputes between them. Such an attitude is consistent with both the realities of contract negotiation and the pro-access to justice and pro-arbitration policies of Canadian courts (policies that may be in tension with each other[18]).

Parties that conclude to a multi-tier agreement most likely do so by incorporating a standard clause, whether particular to their firm or in widespread use in their industry sector. They likely do not negotiate such terms minutely, or appreciate the potential consequences of failure to follow the agreed procedure. Most such parties would have their expectations dashed if they later discover that they cannot proceed to arbitration (or worse, that an arbitral award already issued in their favour cannot be enforced), solely on the ground that their Deputy CEO attended a mediation session rather than their CEO, as stipulated in their agreement.

Similarly, in *Canadian Ground Water v Canadian Geoexchange Coalition*, section 10.2 of the parties' contract stipulated that the parties should first seek to resolve disputes by negotiation but that if negotiations failed to yield a resolution, "either party may request that a mediator be appointed".[19] Section 10.3 provided that if a mediator was not appointed or the dispute was not resolved within twenty-one days after a request for mediation, either party could refer the

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[18] As in *Uber*, where the Supreme Court invalidated a dispute resolution agreement whose costly processes were seen as inhibiting access to justice.

[19] *Canadian Ground Water*, *supra* note 12 at para 4.

dispute to arbitration.[20] The Court read these provisions as providing an *option* to mediate. If one party exercised that option, both parties had to wait at least twenty-one days before proceeding to arbitration. But where there had been no request for mediation, a party could initiate arbitration at any time.[21]

Cases where mediation or negotiation was held to be a mandatory precondition to arbitration or litigation all involve language clearly expressing such an intention. In *PQ Licensing v LPQ Central*, the dispute resolution clause provided that, "before resorting to arbitration, litigation or any other dispute resolution procedure … [the parties] will first attempt in good faith to settle the dispute or claim by non-binding mediation".[22] The Court found that arbitration did not become an "appropriate" remedy until the precondition of mediation had been satisfied.[23]

The same result can be seen in *Suncor v Howe-Baker*, where the agreement stated that "if the parties are unable to resolve the dispute by mediation … then the dispute shall be finally resolved by arbitration".[24] The Court held that arbitration could be invoked only after mediation had been attempted and had failed to resolve the dispute.[25] Where the wording is vague or

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[20] *Ibid*.

[21] *Ibid* at para 14.

[22] *PQ Licensing*, *supra* note 12 at para 9.

[23] *Ibid* at para 47.

[24] *Suncor*, *supra* note 12 at para 53.

[25] *Ibid*. Similar language was also decisive in *Jakobsen v Wear Vision Capital Inc*, 2005 BCCA 147 at para 3 [*Jakobsen*]; *Yukon Energy Corp v Chant Construction Co*, 2007 YKSC 22 at paras 25-27 [*Yukon Energy*]; *Advanced Construction*, *supra* note 13 at para 179; *3289444 Nova Scotia Ltd v RW Armstrong & Associates Inc*, 2016 NSSC 330 at paras 9, 40 [*3289444 Nova Scotia*].

ambiguous, the courts will view arbitration or litigation as unconstrained by any listed prerequisites.[26]

As mentioned above, Canadian courts' practice of interpreting lower tiers as non-mandatory fits the likely intentions of commercial parties who include multi-tier dispute resolution clauses in their contracts. Most such parties intend to attempt quick and amicable means to resolve any disputes, but do not want to prevent themselves from resorting expeditiously to arbitration or litigation once a dispute arises. If parties do want to bind themselves to completing the lower tiers of an agreement before an arbitrator or judge will have jurisdiction over a dispute, it is essential to use mandatory language to the effect that the parties "shall" mediate or "must" appoint an expert valuator (or the like). For the avoidance of doubt, it is also good practice, in drafting the highest tier of a multi-tier agreement, to also state expressly that only those disputes that remain unresolved by the lower tiers may be submitted to arbitration or litigation.

2. *Interpretation of Multi-Tier Agreements and Deference to Arbitrators*

When a court is called upon to interpret a multi-tier dispute resolution agreement that culminates in arbitration, the outcome turns not only on the way the court itself would interpret the contractual terms but also on the degree of deference it will accord to the arbitral tribunal. Whether any such deference is owed depends on the procedural context in which the agreement comes before a court: when the tribunal has not yet had an opportunity to rule on its jurisdiction (in which case the court action will be asked to issue a stay of litigation), when the tribunal has issued its final award (in which case the court action will be for set-aside or enforcement of the award), or when the tribunal has ruled on its jurisdiction as a

[26] See e.g., *Cityscape*, *supra* note 15 at paras 19-21.

preliminary matter (in which case the court action will be an application to the court to "decide the matter" of the tribunal's jurisdiction). These will be discussed in turn.

A. *Stay Applications and Competence-Competence*

If an arbitral tribunal has not yet determined whether it has jurisdiction over a dispute, courts will not normally intervene until after the tribunal has had an opportunity to rule on its jurisdiction, including whether any preconditions to arbitration have been met. This is an expression of the competence-competence principle, which is subject only to limited exceptions.[27] Accordingly, if a dispute arises as to the satisfaction of preconditions to arbitration, and the tribunal has not yet issued an award or decided on its jurisdiction as a preliminary matter, courts will normally stay any related litigation.

This occurred in *Yukon Energy v Chant Construction*, where the Court dismissed an application for a stay of litigation in favour of arbitration, reasoning that "whether the non-fulfillment of the preliminary steps in the dispute resolution process is a bar to arbitration … is a matter to be determined by the arbitral tribunal and not this Court".[28] Similarly, in *Nordion v Life Technologies*, the parties had agreed to mediation followed by arbitration, but it was disputed whether mediation constituted a mandatory precondition to arbitration. Since none

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[27] Three exceptions to competence-competence have been recognised in Canada. The first two, introduced by the Supreme Court in *Dell*, *supra* note 8 at para 43, and affirmed in *Seidel v Telus*, 2011 SCC 15 at paras 28-31, provide that a court may decide jurisdictional questions itself, without referring them first to arbitration, if the dispute raises pure questions of law or questions of mixed fact and law that require only superficial consideration of the evidence in the record. The Supreme Court added a third exception in *Uber*: a court may refuse to stay litigation and determine the tribunal's jurisdiction itself unconscionable, such that 'there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator'. *Uber*, *supra* note 5 at para 44.

[28] *Yukon Energy*, *supra* note 25 at para 27.

of the exceptions to competence-competence applied, the Court stayed litigation to allow the tribunal to consider all issues related to its jurisdiction.[29]

The same is true in cases where the question arises whether a dispute is within the scope of the multi-tier agreement. In *Clayworth v Octaform Systems*, an employment contract contained a multi-tier clause with negotiation, mediation, and arbitration tiers.[30] Clayworth initiated dispute resolution under the clause for wrongful termination. However, Octaform then made separate claims in court, citing a contractual carve-out from the dispute resolution agreement that the parties could apply to a "court of competent jurisdiction" for injunctive and other equitable remedies. Clayworth sought a stay of proceedings, which was granted by the BC Court of Appeal. Citing the "general rule" that any claim for which there is an "arguable case" for arbitral jurisdiction must be stayed,[31] the Court allowed only the claims for injunctive relief to proceed in court, since these were *inarguably* within the ambit of the carve-out.[32] The existence of pre-arbitration tiers in the parties' dispute resolution agreement was insufficient to displace this general rule; it was up to the arbitrator to rule in the first instance on their own jurisdiction, including the impact of any preconditions.

An analogous issue arose in *Knowcharge v NB Innovation.* Knowcharge initiated litigation, and opposed the defendants' motion for a stay on the ground that the dispute resolution clause in the contract applied only to disputes "involving any of

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[29] *Nordion Inc v Life Technologies Inc*, 2015 ONSC 99 at para 71. See also *Leeds Standard Condominium Corp No 41 v Fuller* 2019 ONSC 3900 at para 14.

[30] *Clayworth v Octaform Systems Inc.*, 2020 BCCA 117.

[31] *Ibid* at para 21. Some courts refer instead to a "*prima facie* case" for arbitral jurisdiction.

[32] *Ibid* at para 55.

the shareholders", and it was not a shareholder.[33] The Court stayed litigation and referred the parties to the dispute resolution mechanism in the contract, which called for mediation as a mandatory precondition to arbitration. If a party initiated arbitration, it would be up to the arbitrator to decide whether the preconditions had been met. There was at least a *prima facie* case sufficient for an arbitrator to conclude that the dispute resolution agreement applied, since the dispute *involved* shareholders, even if it was not *between* shareholders.[34]

In *Conrad McIntrye Garage v Savoie*, the respondent argued that the claimant had exceeded a time limit stipulated in the multi-tier dispute resolution agreement. The Court stayed litigation and referred the parties to arbitration, observing that it was "reluctant to deal with issues that may go to the jurisdiction of the arbitrator" and citing section 17(1) of the New Brunswick *Arbitration Act*, which expresses the competence-competence principle.[35]

These judgments display an admirable judicial respect for competence-competence, and for the narrow exceptions to it recognized in *Dell* and *Uber*. However, parties should be aware that if one of those exceptions applies, courts will refuse to grant a stay of litigation regardless of the presence of the multi-tier character of the clause. For example, in *Uber* itself, the Supreme Court refused to stay litigation because it found the two-tier dispute resolution agreement as a whole to be unconscionable; it neither referred the parties to arbitration directly nor to the mediation that they had agreed would proceed arbitration.[36]

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[33] *Knowcharge v NB Innovation et al.,* 2018 NBQB 181.

[34] *Ibid* at para 24.

[35] *Conrad McIntrye Garage v Savoie*, 2014 NBQB 1 at para 15.

[36] *Uber*, supra note 5.

B. *Set-Aside and Enforcement Actions*

If the parties arbitrate pursuant to a multi-tier agreement, and the tribunal issues an award—whether a partial award on jurisdiction alone or a final award that includes a determination on jurisdiction—the prevailing party may seek to enforce that award and the other party may seek to have it set aside. Arbitral awards are subject to setting-aside proceedings in the seat of arbitration and to enforcement proceedings elsewhere. Under the domestic and international arbitration legislation of the federal government and all provinces and territories, lack of jurisdiction is a ground for setting aside of awards issued in the same jurisdiction and for non-enforcement of awards issued elsewhere.

In set-aside and enforcement proceedings, the court owes no deference to the tribunal and decides jurisdictional matters *de novo*.[37] Accordingly, if the tribunal issued its award in part based on a finding that initial steps in a multi-tier agreement were not mandatory preconditions to arbitration, or that those steps were satisfied, that decision will be reviewable without deference by the courts.[38]

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[37] See, e.g., *The United Mexican States v Cargill Inc.*, 2011 ONCA 622. On the importance of distinguishing between set-aside proceedings and appeals, in particular as to the standard of review, see J. Brian Casey, "Setting Aside: Excess of Jurisdiction or Error of Law? – A Second Kick at the Can" (2020) 1:1 Can J Comm Arb 37.

[38] Partly for the sake of my own sanity and that of the reader, I leave aside the question of appeals from arbitral awards. The standard of review on appeal from domestic arbitral awards, which was put into question by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and remains unresolved, should be irrelevant for present purposes. *Vavilov* does not apply to set-aside applications, nor to applications for a court to decide the matter of a tribunal's jurisdiction following a preliminary decision by the tribunal—the judicial proceedings in which a tribunal's decision on jurisdiction is

Nevertheless, Canadian courts appear hesitant to reconsider arbitrators' determinations that preconditions to arbitration have been met, consistently characterising the satisfaction of preconditions as a procedural rather than a jurisdictional matter. Effectively—without saying so and perhaps without ever actually considering the matter—Canadian courts appear to consider the satisfaction of preconditions to be a procedural matter relating to admissibility, not a question of jurisdiction.[39]

For example, in *Dominican Republic v Geci Española*, the prevailing party, Geci, sought homologation of the award in Québec, the seat of arbitration, and the Dominican Republic sought annulment.[40] One of the grounds for annulment raised was a failure to conciliate prior to arbitration, which was argued to be a mandatory precondition to arbitration. The Court did not even consider the contractual language in rejecting this argument; the arbitrator had held that the parties had exhausted the conciliation requirement under the contract, and the "court shall not revisit the merits of this finding when the homologation-annulment of the Award is sought".[41]

Similarly, in *Consolidated Contractors v Ambatovy*, the arbitrator held that he had jurisdiction on the ground that the (uncompleted) lower tiers of a dispute resolution agreement

typically considered. See, e.g., *lululemon athletica canada inc. v Industrial Color Productions Inc*., 2021 BCCA 428 at para 44-46.

[39] *The United Mexican States v Burr*, *supra* note 10 at paras 140-145.

[40] *Government of the Dominican Republic v Geci Española*, 2017 QCCS 2619.

[41] *Ibid* at para 55. The Court also observed that the Dominican Republic had never raised the satisfaction of the conciliation precondition during the arbitration, even though the parties had been expressly invited to comment on the manner in which the requirements of the dispute resolution clause had been satisfied. Accordingly, the Dominican Republic was "foreclosed" from raising the issue at the homologation-annulment proceeding. *Ibid* at paras 56-57.

were not mandatory preconditions to arbitration.[42] The claimant applied to the courts in Ontario, the seat of arbitration, to set aside the award.[43] The Ontario Court of Appeal held that procedural issues relating to arbitral proceedings were "preeminently matters for the arbitrators to decide and the court must view the determination with deference".[44] Accordingly, the Court declined to reconsider the arbitrator's finding that the lower tiers of the dispute resolution process were not preconditions to arbitral jurisdiction, and upheld the award.[45]

Courts across the provinces have consistently deferred to arbitrators' interpretations of arbitration agreements on this basis, whether tribunals have found that they have jurisdiction[46] or that they lack it.[47] If the issue of preconditions was considered by an arbitral tribunal and the tribunal concluded that it had jurisdiction, courts are unlikely to revisit the issue, much less come to an opposite conclusion.

C. *Applications to a Court to "Decide the Matter" of Arbitral Jurisdiction*

Questions about the extent of court deference to arbitral determinations also arise in a procedurally distinct context, under statutory provisions permitting a court to "decide the matter" of a tribunal's jurisdiction following a preliminary

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[42] *Consolidated Contractors Group SAL (Offshore) v Ambatovy Minerals SA*, 2017 ONCA 939 at para 43 [*Ambatovy*].

[43] *Ibid* at para 34.

[44] *Ibid* at para 43.

[45] *Ibid*.

[46] See e.g., *Canadian Ground Water*, *supra* note 12; *PQ Licensing*, *supra* note 12.

[47] See e.g., *Jakobsen*, *supra* note 25.

determination by the tribunal. In all the provinces and territories and under federal law, court proceedings arising from cross-border commercial disputes are subject to the International Commercial Arbitration Acts, which incorporate the UNCITRAL Model Law on International Commercial Arbitration. Article 16(3) of the Model Law provides that, if a tribunal rules "as a preliminary question that it has jurisdiction", a party may request the appropriate court in the seat of arbitration to "decide the matter". In the domestic arbitration legislation of several provinces, after a tribunal has ruled on its jurisdiction as a preliminary question, a party may apply to a court to "decide the matter", regardless of whether the tribunal ruled that it did or did not have jurisdiction.[48]

There is little case law interpreting these "decide the matter" provisions, and the degree of deference owed is not well-settled. Two trial courts that recently considered the issue both held, albeit on different reasoning, that jurisdiction in "decide the matter" proceedings should be determined by the court *de novo* without deference to the tribunal's decision.[49]

However, a quandary arises that was not explored in these two cases, since neither involved a multi-tier agreement. The problem is that if an arbitral tribunal decides that it has jurisdiction because the lower tiers were non-mandatory, the issue is one of admissibility, not jurisdiction, on which a court should defer to an arbitrator's prior decision, thus contradicting the notion of *de novo* review in "decide the matter" proceedings. Moreover, as discussed above, Canadian courts typically construe lower tiers as non-mandatory absent express language to the contrary, again indicating that such disputes should presumptively be seen as relating to admissibility rather than

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[48] See, e.g., Ontario *Arbitration Act*, SO 1991, c 17, s 17(8); BC *Arbitration Act*, SBC 2020, c 2, s 23(7); Alberta *Arbitration Act*, RSA 2000, c A-48, s 17(9).

[49] *The Russian Federation v Luxtona Ltd.*, 2021 ONSC 4604 (which is under appeal as of the time of writing and could be overturned on this point); *Saskatchewan v Capitol Steel Corporation*, 2021 SKQB 224.

jurisdiction, which might imply that "decide the matter" review is unavailable in such cases.

There is a snake-swallowing-its-own-tail quality to these cases. The determination of whether satisfaction of preconditions is an issue of admissibility or jurisdiction itself turns on the interpretation of the arbitration agreement, so the court cannot decide whether it may review a tribunal's decision on jurisdiction *de novo* without independently interpreting the same contractual language the arbitrator must have interpreted to reach a decision on jurisdiction.

This problem arises only for positive jurisdictional decisions by arbitrators, which are the only kind reviewable in "decide the matter" proceedings under the international acts. For domestic arbitration statutes that permit "decide the matter" review of arbitrators' negative jurisdictional decisions, there is no conflict as to the standard of review, since an arbitrator could only conclude that they have no jurisdiction due to non-fulfilment of preconditions to arbitration if they have first found that the preconditions were mandatory. Thus, the issue is unambiguously one of jurisdiction.

Provincial legislatures have made clear that all positive preliminary jurisdictional decisions by tribunals are subject to immediate court review. It would be incoherent for courts to adopt a different degree of deference when a jurisdictional objection arises from failure to observe mandatory preconditions in a multi-tier agreement and when it arises from some other defect in jurisdiction, especially since objecting parties often raise multiple grounds of objection to arbitral jurisdiction.

It pains me to suggest that courts should ever ignore the distinction between admissibility and jurisdiction. However, I can only conclude that they should do so in the narrow context of "decide the matter" proceedings. If the legislatures intended

courts to apply *de novo* review for "decide the matter" applications, absent express language to the contrary they must have intended that standard to apply in all such proceedings. Still, the same interpretive standards should apply in these contexts as others, and lower tiers of a multi-tier agreement should be construed as non-mandatory (such that alleged failure to satisfy preconditions does not deprive an arbitrator of jurisdiction) unless the contractual language explicitly indicates otherwise.

III. ENFORCING MULTI-TIER AGREEMENTS

Multi-tier agreements are contracts, and as a general matter are enforceable in the same way and to the same extent as any other contract. If the highest tier of a multi-tier agreement calls for arbitration, that part of the agreement should be enforced (or refused enforcement) in the same way as a single-tier arbitration agreement. Equally, if the highest tier calls for litigation, it should be treated like any other forum selection agreement. What makes enforcement of multi-tier agreements distinct is the potential for jurisdictional preconditions to arbitration or litigation.

Attempts to enforce multi-tier agreements are made in one of two situations: to stay or enjoin litigation or arbitration commenced allegedly without completion of the lower tiers, or to enforce an arbitral award issued despite an objection that preconditions to arbitration were not met. Thus, when one speaks of enforcing a multi-tier agreement, in practice this normally means insisting, either before or after the fact, that an uncompleted lower tier of the agreement is mandatory. The decisive questions to be asked in any enforcement proceeding relating to a multi-tier agreement are: (1) whether the lower tiers of the agreement are jurisdictional preconditions to the upper tiers and, if so, (2) whether the requirements of the lower tiers were in fact satisfied to the extent required by the agreement. I address these questions in the following subsection, after which I describe the interaction between multi-tier agreements and two other sets of rules that affect

enforceability of contracts: those dealing with contractual certainty or definiteness, and those dealing with limitation periods.

1. *Enforcement in General*

Most issues relating to the enforcement of multi-tier agreements turn on the interpretive issue described above: whether the lower tiers of the agreement are jurisdictional preconditions to the upper tiers. If a court finds that those lower tiers are non-mandatory, then it creates no violation to allow whatever action has already been commenced to continue. In such situations, courts will decline to stay litigation, decline to enjoy arbitration, or generally decline to obstruct ongoing proceedings.

If, on the other hand, a court finds that mandatory preconditions to arbitration or litigation have not been fulfilled, it will stay litigation or arbitration and direct the parties to resolve their dispute as set out in the lower tiers of their multi-tier agreement. Courts will not order specific performance of, for example, agreements to negotiate or mediate due to the difficulty of supervising compliance; instead, the remedy is to prevent access to the upper tier dispute resolution procedures so long as the lower tiers remain unfulfilled.

If a multi-tier agreement including mandatory lower tiers culminates in arbitration, and arbitration has already been commenced, enforcing the multi-tier agreement may mean enjoining the arbitration from proceeding further or setting aside or refusing to enforce any award that has been issued. This remedy has the greatest impact on parties, forcing them to "go back to square one" after having spent significant time and money on dispute resolution. Courts should grant it only when they are convinced that the parties intended to impose mandatory jurisdictional preconditions to arbitration, which the arbitrator failed to respect.

Aside from interpretation, the main issue in enforcing multi-tier agreements is whether the lower tiers were in fact completed. In general, courts do not require perfect compliance with contractual specifications. Reasonable attempts to comply with lower tiers appear to suffice, although the outcome depends on the specificity with which the agreement describes the required procedures.

In *Morin-Houde v Costisella*, the agreement called for mediation as a mandatory precondition to arbitration.[50] The claimant initiated arbitration and the respondent argued that the mediation precondition had not been fulfilled. It was undisputed that no mediation process had occurred. However, the Court found that the claimant had offered to submit the dispute to mediation but the respondent had refused; on these facts, there was "no doubt that the claimant had satisfied the requirements of the arbitration clause by offering to mediate with the respondent, which is proven to have failed".[51]

By contrast, where the parties set out their intended proceedings in detail, Canadian courts are more apt to hold them to their bargain. In *Comren Contracting v Bouygues*, a construction subcontract not only established multiple stages of dispute resolution, but also set clear time limits and other criteria governing when parties could proceed to the next stage.[52] The dispute resolution agreement provided that Comren, the subcontractor, could send Bouygues, the main contractor, a written notice of dispute, and Bouygues was then required to send a notice of reply. If the parties could not resolve

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[50] *Dre Catherine Morin-Houde Dentiste inc. c Dre Marie-Ève Costisella inc.*, 2021 QCCS 4109.

[51] *Ibid* at para 65 (author's translation). The Court may also have based its decision on an estoppel-type doctrine discussed below in Part IV, since it went on to say that the respondent "cannot blame the claimant for the absence of a mediation, since it refused from the outset to participate in it". *Ibid* at para 66 (author's translation).

[52] *Comren Contracting Inc. v Bouygues Building Canada Inc.*, 2020 NUCJ 2.

the dispute among them, either could request the appointment of a mediator, the "Project Manager". From there, the contract provided:

> 8.2.4 If the dispute has not been resolved within 10 Working Days after the Project Manager was requested … the Project Manager shall terminate the mediated negotiations by giving Notice in writing to both parties.
>
> 8.2.5 By giving Notice in Writing to the other party, not later than 10 Working Days after the termination of the mediated negotiations under paragraph 8.2.4, either party may refer the dispute to be finally resolved by arbitration under the Rules of Arbitration of Construction Disputes as provided in CCDC[2] …
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> 8.2.6 On expiration of the 10 Working Days, the arbitration agreement under paragraph 8.2.5 is not binding on the parties and, if a Notice in Writing is not given under paragraph 8.2.5 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.

Comren sent 23 written notices of dispute, to which Bouygues did not initially reply. There was a voluminous correspondence between the parties, and after back-and-forth far exceeding the timelines set out in the contract, a mediation was held. That mediation was unsuccessful. Comren eventually indicated that it would initiate arbitration, but not until several months after its initial request for mediation. The parties did agree on various aspects of the arbitral procedure but the arbitration never happened. Comren then applied to the Nunavut Court of Justice for an order appointing an arbitrator and compelling Bouygues to submit to arbitration.

The Court refused to compel arbitration or appoint an arbitrator. It reasoned that the parties were sophisticated commercial entities who had incorporated industry-standard timing provisions into their contract. The role of the judge, therefore, was only to give to the words "their plain and natural meaning within the factual context of the parties' relationship". Comren did not comply with the procedure required by the contract, and the fact that Bouygues failed to "facilitate mediation" did not entitle Comren to proceed as if the mediation had occurred (and in any event, Comren failed to initiate arbitration even by the date it had calculated).[53] Moreover, the fact that Bouygues agreed to participate in both mediation and arbitration processes did not imply a waiver of Bouygues's rights under the contract. Finally, Bouygues's previous willingness to participate in arbitration did not estop it from later refusing to arbitrate outside the provisions of the dispute resolution agreement.[54]

For multi-tier agreements that conclude with arbitration, arguable lack of jurisdiction of the arbitrator will not prevent courts from sending the parties back to complete mandatory preconditions to arbitration—the multi-tier agreement is still enforceable. For example, in *Capital JPEG v Corporation Zone B4*, the parties were shareholders in the same corporation, who included a multi-tier dispute resolution clause in their Shareholders Agreement calling for negotiation then mediation prior to arbitration.[55] After a dispute arose and a shareholder commenced arbitration, the respondent applied to the Québec Superior Court seeking dissolution of the arbitration. Barin J (himself an experienced arbitrator and arbitration counsel

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[53] *Ibid* at paras 30-37.

[54] *Ibid* at para 47 (distinguishing *Lorneville Mechanical Contractors Ltd. v Clyde Bergemann Canada Ltd.*, 2017 NSSC 119, where the respondent expressly waived the contractual time limits for commencing arbitration and so was later estopped from arguing that timely notice of arbitration had not been given).

[55] *Capital JPEG Inc. v Corporation Zone B4 Ltée*, 2019 QCCS 2986.

before his appointment to the bench) held the parties to their agreement, staying litigation but declining to refer the parties to arbitration. Although the dissolution of a corporation may be an un-arbitrable subject matter under Québec law, the parties agreed to commence with negotiation and then mediation, and the arguable non-arbitrability of the claim in question did not change that agreement. Declining to decide the arbitrability question, the Court directed the shareholders to mediate.

Similarly, in another Québec case, *9369-1426 Québec inc. v Allianz*, the dispute was a proposed class action arising from an insurance policy that contained a multi-tier clause calling for mediation and then arbitration.[56] Although the Court accepted that an arbitrator (if one was ever appointed) might lack jurisdiction, that possibility did not invalidate the parties' dispute resolution agreement. The Court therefore referred the parties to mediation.[57] If the dispute ever reached arbitration, it would be up to the arbitrator to determine their own jurisdiction in the first instance. The Court of Appeal upheld, finding that the judge had properly interpreted the multi-tier agreement and correctly applied the competence-competence principle (although it confusingly described that agreement as a "med-arb clause").[58]

A final wrinkle is presented by cases where the multi-tier agreement sets out preconditions to arbitration and also states that if those preconditions are not met, the parties are no longer bound to arbitrate. Such provisions are employed in an attempt to ensure expeditious resolution of disputes—parties must work through the tiers of the agreement quickly if they want to

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[56] *9369-1426 Québec inc. (Restaurant Bâton Rouge) v Allianz Global Risks US Insurance Company*, 2021 QCCS 47.

[57] *Ibid* at para 5.

[58] *9369-1426 Québec inc. (Restaurant Bâton Rouge) v Allianz Global Risks US Insurance Company*, 2021 QCCA 1594.

preserve their right to arbitrate. For example, in *Darim Masonary v The Roy Building*, the dispute resolution agreement provided in part:

> 8.2.6 By giving a *Notice in Writing* to the other party and the *Construction Manager*, not later than 10 *Working Days* after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the latest edition of the Rules for Mediation and Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing. The arbitration shall be conducted in the jurisdiction of the *Place of Project*.
>
> 8.2.7 On expiration of the 10 *Working Days*, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a *Notice in Writing* is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.[59]

The plaintiff brought a claim in Nova Scotia Small Claims Court and the defendant objected to court jurisdiction, arguing that the plaintiff had neither attempted mediation nor given the required notice in writing. It sought an order directing the claimant to implement the multi-tier dispute resolution agreement. The Court refused to stay the court proceedings, reasoning that according to clause 8.2.7, mediation and a notice in writing were only preconditions to arbitration, and not preconditions to litigation.[60]

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[59] *Darim Masonary Ltd. v The Roy Building Ltd.*, 2021 NSSM 23 at para 9.

[60] *Ibid* at para 23.

This review of the case law shows that once a Canadian court has been persuaded that a multi-tier agreement imposes mandatory jurisdictional preconditions to arbitration or litigation, it will hold the parties to their agreement, and prevent access to arbitration or litigation until the preconditions are met. The greater the specificity with which those preconditions are laid out, especially as to timelines, the more likely it is that a court will strictly enforce them. There are exceptions to this general rule, which will be addressed below in Part IV. However, the main lesson for parties is to consider carefully whether they want to impose mandatory preconditions to arbitration or litigation and. If so, they must draft their clause carefully so as to set out with maximum clarity the timelines and other criteria that determine when parties may transition from one stage of dispute resolution to the next. These drafting concerns are particularly acute when it comes to ensuring the enforceability of consensual methods of dispute resolution in an agreement's lower tiers, as discussed in the following section.

2. *Enforceability of Consensual Tiers in Multi-Tier Agreements*

Most multi-tier agreements involve consensual dispute resolution procedures in the lower tier or tiers. For these steps to constitute mandatory preconditions to arbitration or litigation, they must be separately enforceable as contractual obligations. Canada maintains the traditional common law suspicion of "mere agreements to agree", which can lead to nonenforcement of obligations to negotiate or mediate.[61] When incorporated into a multi-tier agreement, simple agreements to

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[61] As expressed in the famous trilogy of English Court of Appeal cases on definiteness: *May & Butcher Ltd v The King* [1934] 2 KB 17 (HL); *WN Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 (HL); and *Foley v Classique Coaches Ltd* [1934] 2 KB 1 (CA) (UK). Today, other common law jurisdictions are more apt to enforce agreements to negotiate than Canada is, including in the context of multi-tier agreements. See, e.g., Casey, *supra* note 3 at 133-136 (reviewing case law from England, Australia, and Singapore).

negotiate are void for lack of certainty (also called lack of definiteness) unless they include an objective, ascertainable standard by which to judge whether "negotiation" has occurred.[62] In such cases, they are effectively read out of the contract for enforcement purposes: arbitration or litigation will not be stayed for failure to fulfil the unenforceable lower tier of dispute resolution, nor will an arbitral award be denied enforcement on the ground that preconditions to arbitral jurisdiction were not met.

Lack of certainty can bedevil agreements to conduct any kind of consensual dispute resolution, although agreements to negotiate and agreements to mediate (or similar procedures) raise slightly different concerns and will be addressed separately, below. What all such agreements have in common is the need for an objective standard to render the agreement to agree sufficiently certain. That standard could be an objective *substantive benchmark* (such as a clause providing that the parties must negotiate as to a "fair market price" or "market rate"),[63] an objective *procedural benchmark* (such as a deadline after which negotiations may be abandoned and the next tier of dispute resolution commenced), or a *third party guarantor* of the process (such as the designation of an independent institution to administer mediation).

Under Canadian common law, the presence of a time limit for negotiations, while relevant, is not on its own sufficient to make a negotiation tier enforceable.[64] Similarly, requirements of

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[62] Didem Kayali, "Enforceability of Multi-tiered Dispute Resolution Clauses" (2010) 27:6 J Int'l Arb 551, 574.

[63] The classic Canadian case expressing this doctrine is *Empress Towers Ltd v Bank of Nova Scotia*, 73 DLR (4th) 400 (BCCA), where the Court enforced a clause in a commercial lease provided that "rental for any renewal period … shall be the market rental prevailing at the commencement of that renewal term as mutually agreed between the Landlord and the Tenant".

[64] See *L-3 Communications SPAR Aerospace Ltd v CAE Inc*, 2010 ONSC 7133 at para 2 [*L-3 Communications*]; *3289444 Nova Scotia*, *supra* note 25 at paras 6-9.

"good faith" efforts to reach a settlement do not suffice since they depend on the subjective intentions of the parties.[65] For an agreement to negotiate to be enforceable as a precondition to arbitration or litigation, the parties must set out the process of negotiations to a degree of specificity not required even in other jurisdictions.[66] As Kayali describes, "what is enforced in [negotiation] procedures is not cooperation and consent but participation in a process from which cooperation and consent may come".[67] For example, in *Alberici v Saskatchewan Power*, the Saskatchewan Court refused to enforce a contractual obligation to make "all reasonable efforts" to negotiate, since the clause set out neither a time frame for the negotiations nor any objective criterion by which to measure compliance.[68]

An agreement to mediate necessarily involves the participation of a neutral third party, which renders such an agreement more certain than an agreement to negotiate. However, Canadian courts have only consistently enforced agreements to mediate when they meet two criteria: they impose a clear time frame for mediation or deadline after which attempts to mediate may be abandoned, and they invoke established rules of procedure and/or an independent mediation provider.[69] For instance, in *PQ Licensing*, the mediation step of a multi-tier clause was enforced in part

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[65] See, e.g., *Mannpar Enterprises v Canada*, 1999 BCCA 239. Canadian courts continue to divide on whether best efforts-type duties may be implied into agreements to negotiate in order to render them sufficiently definite to be enforced.

[66] Kayali, *supra* note 62 at 569.

[67] *Ibid*, citing *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992), 28 NSWLR 194 (New South Wales) at para 206.

[68] *Alberici Western Constructors Ltd v Saskatchewan Power Corp*, 2015 SKQB 74 at para 67.

[69] Depending on the rules of procedure chosen, those rules could themselves impose a time limit that satisfies the first criterion.

because it called for mediation under the auspices of the American Arbitration Association.[70]

Multi-tier agreements that call for negotiation and/or mediation in the lower tiers—which includes most multi-tier agreements—risk non-enforcement unless the contract specifies (1) a particular time frame for completion and (2) some objective standard according to which an arbitrator or court may determine whether the parties actually participated in the consensual dispute resolution process. For mediation, parties are best advised to also contract for established rules of procedure to govern the mediation and, ideally, a mediation provider to administer the proceedings. That said, the consequences of non-enforcement of a lower tier are not necessarily dire: they render what would otherwise be a mandatory precondition unenforceable, but do not void the entire dispute resolution agreement. An aggrieved party may still resort to arbitration or litigation, as the agreement describes.

3. *Multi-tier Agreements and Limitation Periods*

The commencement and expiry of limitation periods are often contested in cases with multi-tier dispute resolution agreements: if lower tiers were not commenced expeditiously after a dispute arises, or themselves become dragged out, by the time arbitration or litigation is finally launched, the limitation period may have expired.[71] These cases present the question of whether the limitation period should be counted from the date the dispute first arose or the date when preconditions to arbitration or litigation were or should have been completed.

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[70] *PQ Licensing*, *supra* note 12 at para 9. See also *Jakobsen*, *supra* note 25, where a mediation tier was upheld as a mandatory precondition to arbitration when it called for a "structured negotiation conference … under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre".

[71] Pappas and Vlavianos, *supra* note 2 at 7.

The result may depend on the statutory language applicable in the province. Limitation periods in most provinces do not start running until the preconditions have been met (or when it has become futile to pursue consensual dispute resolution processes) because that is the date on which the right to arbitrate or litigate arises.[72] For example, in *PQ Licensing*, mediation was held to be a precondition to arbitral jurisdiction, and the court upheld the arbitrator's conclusion that the limitation period to initiate arbitration started running only after mediation had failed to produce a settlement.[73]

The outcome in *PQ Licensing* turned on Ontario's *Limitations Act*, which provides that a claim is not "discovered" prior to the day "the person with the claim first knew … that … a proceeding would be the appropriate means to seek to remedy it".[74] This language, which also appears in the limitations statutes of several other provinces, allows postponement of the commencement of the limitation period until a claimant reasonably knows that legal action is appropriate.[75] When there is a precondition to arbitration or litigation, reasonable knowledge that legal action is appropriate does not arise until the precondition is fulfilled or has become futile.[76]

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[72] See, e.g., *L-3 Communications*, *supra* note 64 at para 23 (finding that arbitration did not become an "appropriate remedy", such that the limitations period began running, until the alleged breaching party "indicated its intention to avoid any and all financial responsibility").

[73] *PQ Licensing*, *supra* note 12 at para 9.

[74] *Limitations Act*, SO 2002 c 24, s 5(1)(a)(4).

[75] Statutes with identical language include the BC *Limitation Act*, SBC 2012 c 13, s 8(d), Saskatchewan's *Limitations Act*, ss 2004, c L-16.1, s 6(1)(d), and Manitoba's newly-amended (which comes into force on September 30, 2022) *Limitations Act*, s 7(d).

[76] *Ibid*. See also *407 ETR Concession Co v Day*, 2016 ONCA 709.

By contrast, in Alberta and Nova Scotia, the limitations legislation provides that the limitation period commences no later than "the date the claimant first knew … that the injury … warrants bringing a proceeding."[77] Although the language is ambiguous, this has been interpreted to refer to a time *before* the first stages of a multi-tier dispute resolution processes have commenced.[78]

Prince Edward Island's *Limitations Act* commences all relevant limitation periods from the date "the cause of action arose" or from "discovery of the cause of action" but does not define these terms.[79] Newfoundland & Labrador's *Limitations Act* is similar.[80] New Brunswick's *Limitations Act* also contains no language requiring that a claimant must have had some awareness that a legal proceeding is warranted before their claim may be "discovered".[81] No case interpreting these provisions in the context of preconditions to arbitration or litigation could be found, so it is therefore unclear how courts in these provinces would deal with a claim that a limitations period did not start to run until after those preconditions were met (or became futile to pursue). Claimants should therefore take care to ensure that arbitration or litigation is commenced within the limitation period, regardless of the existence of preconditions.

In Québec, limitation periods are governed by the law applicable to the merits of the dispute, so the relevant provisions are scattered throughout the *Civil Code of Québec* (*CCQ*). However, the dates from which these periods run are all contained in Book Eight, Title Three of the *CCQ*. In general, these limitation periods start from the time the cause of action arises,

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[77] Alberta *Limitations Act*, RSA 2000, c L-12, s 3(1)(a)(iii); Nova Scotia *Limitation of Actions Act*, SNS 2014, c 35, s 8(2)(d).

[78] *HOOPP Realty Inc. v Emery Jamieson LLP*, 2018 ABQB 276.

[79] RSPEI 1988, c S-7, s 2(1).

[80] SNL 1995, c L-56.1, s 2.

[81] SNB 2009, c L-8.5.

regardless of when it was discovered. For example, for contracts in which performance is not due simultaneously, the prescriptive period runs from the date the obligation comes due.[82] There, too, care should be taken to initiate judicial or arbitral proceedings within the prescriptive period, even if prior stages in a multi-tier process have not yet been completed.

As with so much else relating to dispute resolution agreements, limitations questions often turn on interpretation of the contract. Parties can avoid uncertainty about the limitation period by specifying clear timelines in their contracts. *Maisonneuve v Clark* is instructive. There, the contract provided for a two-tier dispute resolution process: "If the parties are unable to resolve the [dispute] as between them, then the Excluded Issue shall be fully and finally referred to the Arbitrator for resolution". [83] The Ontario Court of Appeal upheld the trial judge's decision that Clark's claim was not time-barred. In particular, the Court agreed that the two year limitation period did not start to run until attempts at reaching a negotiation settlement were exhausted, and that communications between the parties' counsel showed that the date by which the parties should have known that further negotiations would be fruitless came less than two years before the commencement of arbitration.[84]

Litigation over the limitation period could have been avoided if the parties had set out more clearly the transition between negotiation and arbitration. Responding to the appellants' argument that the trial judge's decision would lead

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[82] *CCQ* s 2932.

[83] *Jean Maisonneuve and 3721094 Canada Inc. v Christopher Clark and Lanciter Consulting Inc.*, 2022 ONCA 113.

[84] *Ibid* at para 13.

to uncertainty about the application of limitations periods to arbitration agreements, the Court offered these observations:

> The application judge's decision was based on the specific wording of this arbitration clause and the circumstances in which it was negotiated. Parties are free to agree to arbitration clauses that make no reference to the possibility of an informal agreement or that are more specific about the steps and timing leading to arbitration. In this case, as stated by the application judge, it was open to the appellants to let the respondents know at any time that no further negotiations would take place. Indeed, this is what occurred in January 2018, which the application judge found triggered the start of the limitation period.[85]

IV. ESCAPING MULTI-TIER AGREEMENTS

After a dispute arises, parties who have agreed to a multi-tier dispute resolution agreement may find themselves seeking to escape from it. Most often, this arises because the lower tier appears, from the midst of a dispute, to be futile or otherwise wasteful. Perhaps the parties are so entrenched in their positions that a negotiated or mediated settlement seems impossible. Perhaps a party declares its unwillingness to abide by a non-binding expert determination. Perhaps legal or factual uncertainties mean that the parties are unlikely to settle while those uncertainties remain unresolved. Perhaps the opposing party is drawing out negotiations simply to cause delays, or otherwise appears to be acting in bad faith. The reason does not really matter. The factual scenarios are various; what they have in common is that a party wants to escape from a dispute resolution process that once appeared advantageous but has lost its lustre, and proceed directly to the final tier of its dispute resolution agreement, arbitration or litigation.

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[85] *Ibid* at para 15.

As is often the case, the best response to this problem is to plan ahead for it, and draft one's dispute resolution agreement accordingly. By contracting for non-mandatory initial steps, parties can credibly commit to amicable and efficient resolution of disputes that may arise, but still allow themselves the option to skip directly to binding third-party dispute resolution if needed. If mandatory lower tiers are desired, they can be qualified by exceptions or paired with short timelines after which a party may declare the dispute resolution process failed. Such wording will minimize any delays if those initial tiers turn out to be problematic.

Suppose, however, that a party wants to escape from a multi-tier agreement that contains sufficiently mandatory language to be seen as imposing jurisdictional preconditions to litigation or arbitration. While parties to such contracts will normally be held to their bargain, Canadian courts may permit arbitration or litigation to proceed, or enforce an arbitral award issued following a contested proceeding. In the following sections, I describe two related scenarios in which courts have effectively "excused" a failure to comply with the lower tier of a multi-tier agreement. I then consider the interaction between multi-tier agreements and mandatory pre-trial mediation in the Canadian jurisdictions that impose it.

1. *Futility and Bad Faith*

In some cases where pursuing a consensual dispute resolution process was shown to be futile, Canadian courts have shown themselves willing to sweep aside preconditions and permit the parties to proceed directly to arbitration or litigation.

In *IWK v Northfield*, after refusing to engage in the first two stages of the agreed ADR process (consultation then mediation), the claimant initiated arbitration. It applied to the court to appoint an arbitrator, and the respondent raised, *inter alia*, the parties' failure to complete the consultation and mediation steps

as a bar to arbitration.[86] Although it found that consultation and mediation steps were "mandatory preconditions" to arbitration,[87] the Court nevertheless refused to stay the arbitration, reasoning that "the first two stages of the ADR process are futile".[88] In reaching that conclusion, the Court made two useful observations. First, it found that the parties' "positions are at polar opposites", such that a mediated settlement was unlikely.[89] Second, it found that the respondent had consistently dragged out proceedings and declined both to participate in consultation/mediation and to waive its right to those proceedings, so that going through such procedures would be futile.[90] Permitting the respondent to further delay matters by insisting on a return to mediation would deprive the claimant of its right to access arbitration and "reward" a party "responsible for the bulk of the delay", both of which would be "undesirable results and contrary to public policy".[91]

Similarly, in *Cityscape*, a construction contract provided that any disputes would be resolved by negotiation, mediation, and then arbitration.[92] The parties agreed to commence mediation, but the respondent contractor then changed its position, asserting that it would only mediate certain issues; finally, it vacated the worksite and commenced arbitration.[93] The Court enforced the parties' agreement to arbitrate despite the mediation precondition not having been satisfied. It interpreted

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[86] *IWK Health Center v Northfield Glass Group Ltd*, 2016 NSSC 281 at para 6 [*IWK*].

[87] *Ibid* at para 96.

[88] *Ibid* at para 108.

[89] *Ibid* at para 107.

[90] *Ibid* at para 110.

[91] *Ibid* at para 90. See also *Advanced Construction*, *supra* note 12 at para 222.

[92] *Cityscape*, *supra* note 15 at para 4.

[93] *Ibid* at paras 17-18.

the agreement to mediate as providing an opportunity for expeditious resolution of disputes arising between the parties; absent co-operation by the respondent, this option could not serve its expeditious purpose and so should not be enforced.[94]

In short, the case law shows that futility alone may be sufficient reason for a court to refuse to enforce otherwise mandatory preconditions to arbitration or litigation. Sufficient evidence of futility may come from the positions of the parties being too far apart or from the intransigent conduct of a party showing that it will not actually engage in voluntary dispute resolution proceedings.[95] In these cases, evidence of a party's bad faith or intransigence is relevant to the question of futility, rather than an independent ground for excusing noncompliance with lower tiers of a dispute resolution agreement.

This case law is consistent with Canadian courts' broader tendency to avoid formalistic interpretations that would hinder the meaningful attempts at resolution intended by the contracting parties.[96] In *Telus v Wellman*, the Supreme Court observed that a primary purpose of the *Ontario Arbitration Act* is to "encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and

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[94] *Ibid*.

[95] Cases in non-commercial contexts follow the same pattern. For example, in *Fraizinger v Mensher*, 2012 ONSC 7363, a family law case involving a divorced couple, the mother sought a court order changing the parties' parenting schedule. The father opposed on the ground that the dispute resolution clause in the parties' separation agreement had a mandatory mediation tier. The Court granted the mother's application on the basis that the parties' past behaviour showed that mediation would be futile: "It simply would not be fair to the Child, or in her best interests, to leave this uncertainty and dispute to continue while the parties proceed through futile mediation." *Ibid* at para 44.

[96] See, e.g., *Canadian Ground Water*, *supra* note 12 at para 12; *L-3 Communications*, *supra* note 64 at para 24; *IWK*, *supra* note 86 at paras 98-100; *Ambatovy*, *supra* note 42 at paras 38, 46-55.

to require them to hold to that course once they have agreed to do so".[97] It follows that enforcing preconditions that would hinder the operation of the parties' chosen dispute resolution process would frustrate this goal of our arbitration legislation.

2. Preconditions as Shields to Litigation or Arbitration

Other Canadian courts have resolved factually similar situations on a different legal basis, one that might best be described as a form of estoppel (although courts have not used that term). Where one party refuses to participate in a dispute resolution process to which it previously agreed, it may be prevented from invoking the agreement to prevent arbitration or litigation. Some courts have even held that arbitration agreements (which would otherwise oust court jurisdiction) cannot be used as "shields" to avoid litigation where the parties have demonstrated negligible concern for the arbitration process they chose.[98]

The clearest example of this principle in action is *Yukon Energy*, where the parties agreed to mediation followed by arbitration.[99] When one party commenced arbitration, the Supreme Court of the Yukon refused to stay the proceedings even though it found that the preconditions to arbitration had not been met. The first stage of the dispute resolution agreement required the parties to mediate with the help of a project consultant; the respondent had the exclusive responsibility to appoint that consultant, but failed to do so.

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[97] *Telus Communications Inc v Wellman*, 2019 SCC 19 at para 82.

[98] See e.g., *Benner & Associates Ltd v Northern Lights Distribution Inc* [1995] OJ No 626 [20] (party's failure to pursue pre-litigation steps constituted "undue delay"). Other consequences can also ensue from a failure to participate in agreed dispute resolution procedures. In *Zen & Sens Inc. v Entreprises Éric Boucher Inc., 2021 QCCQ 4224*, the Court required a party that requested mediation but then withdrew from the process without ever attending any mediation session to pay the entirety of the mediation fee plus statutory interest.

[99] *Yukon Energy*, *supra* note 25 at para 3.

When the respondent later sought a stay of arbitration on the ground that the mediation had not occurred,[100] the Court held that the respondent "cannot rely on the non-fulfillment of any conditions precedent as a bar to the referral of disputes to arbitration, where those preliminary steps were prevented by [its] acts or omissions".[101]

A comparable outcome was reached in *Mera Software v Intelligent Mechatronic Systems*, where the contract contained a two-tier dispute resolution clause with negotiation and mediation tiers.[102] Mera filed suit in Ontario court over an unpaid invoice, and IMS sought a stay of litigation and referral to mediation. IMS's statement of defence contained only a generic denial of liability and made no reply to any of the allegations contained in Mera's statement of claim, much less allege any contradictory evidence. Although the Court acknowledged that the parties had agreed to mediate, it nevertheless granted summary judgment in Mera's favour. Since IMS had not identified any dispute, "hence, there can be nothing to mediate".[103] The Court concluded that "the lack of detail in the statement of defence and responding affidavit strongly suggests the mediation request is merely a delaying tactic."[104] This case shows the importance not merely of claiming a right to enforce a dispute resolution agreement, but of taking steps to vindicate that claim—whether with the other party or in pleadings.

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[100] *Ibid* at paras 8, 29.

[101] *Ibid* at para 27; *Morin-Houde v Costisella*, *supra* note 50.

[102] *Mera Software v Intelligent Mechatronic Systems*, 2018 ONSC 5208.

[103] *Ibid* at para 21.

[104] *Ibid*.

3. Multi-Tier Agreements and Mandatory Mediation

Systems of mandatory pre-trial mediation are now in place in British Columbia, Alberta, Saskatchewan, and certain parts of Ontario (including its most populous regions). In other provinces, such as Québec and Nova Scotia, pre-trial mediation is not mandatory for all disputes but courts are empowered to send the parties to mediation as they see fit. Where the parties subject to these regimes have attempted to bypass mandatory mediation, courts have consistently stayed litigation and referred the parties to mediation.[105] Given how much of Canada's population is subject to mandatory mediation before a case may be set down for trial, the case law interpreting that legislation in the context of multi-tier dispute resolution agreements is surprisingly sparse.[106] The few reported cases show that courts consistently refer the parties to mediation so long as the court's jurisdiction is not ousted by an arbitration agreement. Although parties may be exempted from mandatory mediation in all of the provinces that implement it, the exemptions have been interpreted narrowly.

In the cases where exemptions were granted, the courts invariably found that requiring mediation would not serve the objectives of the mandatory mediation program: to save time and costs for parties and for the judicial system. For example, an exemption was granted in *Welldone v Total Comfort Systems* on the basis that a previous mediation held before the plaintiff filed

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[105] See, e.g., *Slater v Amendola* 1999 CarswellOnt 3049, [1999] OJ No 3787; *Kneider v Benson, Percival, Brown* 2000 CarswellOnt 990, 95 ACWS (3d) 1049; *Timmins Nickel Inc v Marshall Minerals Corp* 2001 CarswellOnt 1762, [2001] OTC 369; *Davidson v Richman* 2003 CarswellOnt 509, [2003] OJ No 519; *Rogacki v Belz* 2003 CarswellOnt 3717, [2003] OJ No 3809; *Rudd v Trossacs Investments Inc* 2006 CarswellOnt 1417, [2006] OJ No 922; *Latstiwka v Bray* 2006 ABQB 935; *Chase v Great Lakes Altus Motor Yacht Sales*, 2010 ONSC 6365; *Calyniuk Restaurants Inc v DC Holdings Ltd*, 2012 SKQB 160; *Cioffi v Modelevich et al*, 2018 ONSC 7084.

[106] This section does not address specific statutory regimes requiring mediation, such as those in force in various provinces pertaining to condominium or insurance disputes.

suit had been unsuccessful, so requiring further mediation would add time and costs without achieving the objectives of the Act.[107] In *Calyniuk Restaurants v DC Holdings*, the mandatory mediation was scheduled but the defendant objected that the plaintiff was represented by someone with no power to enter into a binding settlement.[108] The Court held that, under the mandatory mediation statute, a corporate officer is assumed to be an agent with the authority to bind the company.[109] On that basis, it found that the mediation requirement had been fulfilled, so the plaintiff could proceed with litigation.[110] These cases are consistent in spirit with those described in the previous section, in which courts have refused to enforce preconditions to arbitration where to do so would be futile.

A complication is presented by multi-tier clauses that culminate in arbitration, but where the arbitration agreement is invalid or the tribunal otherwise lacks jurisdiction. Is mediation still required before an aggrieved party may proceed in litigation? None of the various provincial statutes providing for mandatory pre-trial mediation address this situation. In principle, therefore, the mandatory mediation provisions should apply equally where the parties intended to litigate from the outset and where one party first pursued arbitration but the arbitration agreement was invalid or the tribunal otherwise exceeded its jurisdiction. On the other hand, requiring mediation where the parties have already attempted to pursue a form of binding third-party adjudication seems futile or at least wasteful.

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[107] *Welldone Plumbing, Heating & Air Conditioning (1990) v Total Comfort Systems*, 2002 SKQB 475 at paras 12-13.

[108] *Calyniuk Restaurants Inc v DC Holdings Ltd*, *supra* note 105 at paras 6, 9.

[109] *Ibid* at para 23.

[110] *Ibid* at para 30. A similar result was obtained in *Skvaridlo v Cross Country Saskatchewan Assn Inc*, 2015 SKQB 356 at para 4.

I could find no reported case from a province that maintains a mandatory mediation program in which the court found that an arbitration agreement was unenforceable and then referred the parties to mediation before litigation could be commenced. In these cases, the courts seem to neglect the mandatory mediation requirements altogether, focusing only on the issue of arbitral versus court jurisdiction. For example, in *Suncor*, the parties had agreed to engage in good faith negotiations, followed by mediation and finally arbitration.[111] Negotiations ensued, but mediation did not.[112] The Court held that the limitation period to initiate arbitration had expired but that the claimant could proceed in court; the judgment never mentions Alberta's mandatory ADR program.[113] Since the legislation enacting the mandatory mediation programs emphasises the speed and low cost of mediation, it appears that judges believe that if the parties have already litigated over the validity of an arbitration agreement, little is gained by requiring them to mediate before they may access the courts.

These decisions are consistent with court treatment of multi-tier arbitration agreements more generally. As discussed above, if an arbitration has already gone through to an award on the merits, courts tend to defer to arbitrators' decisions on satisfaction of preconditions, often implicitly treating them as issues of admissibility even where they ought to be treated as issues of jurisdiction where no deference is due to the arbitrators. Moreover, even where arbitral proceedings are ongoing, Canadian courts may find reasons not to send the parties back to previous tiers of the agreement, citing futility or inefficiency or refusing to "reward" a party that scuttled attempts at a consensual resolution by then allowing them delay or avoid arbitration.

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[111] *Suncor*, *supra* note 12 at para 53.

[112] *Ibid* at para 47.

[113] *Ibid* at para 55.

The heartening takeaway from these cases is that courts do seem alive to the efficiency concerns that motivate many parties to opt for multi-tier dispute resolution agreements in the first place, especially those that culminate in arbitration. Parties should not be permitted to frustrate the implementation of a multi-tier agreement—or even just to delay matters unreasonably—and then insist on the punctilious performance of each tier in their agreement. At minimum, if a party can demonstrate that returning to the lower tier of a dispute resolution agreement will be not just inefficient but actually futile—especially if the party seeking a stay of litigation or arbitration is the reason for that futility—courts should not stay litigation or arbitration and send the parties back to perform a pointless pantomime of dispute resolution. In such cases, blindly following an overly literal interpretation of the preconditions to arbitration or litigation would frustrate both the likely intentions of the parties and the efficient administration of justice overall.

V. CONCLUSION AND RECOMMENDATIONS

As the profile and popularity of ADR mechanisms have risen in Canada, they have achieved broad acceptance from the commercial bar, legislatures, and the judiciary.[114] Multi-tier dispute resolution agreements have correspondingly become more prevalent, but remain poorly understood by many. This article has attempted to consolidate the growing body of case law interpreting and enforcing (or declining to enforce) multi-tier agreements, in order to derive actionable guidance for parties, counsel, arbitrators, and courts.

While the generally-applicable rules of contractual interpretation and enforcement apply, trends specific to multi-tier dispute resolution agreements are identifiable:

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[114] MacFarlane and Keet, *supra* note 107 at 679–80.

- Canadian courts tend to interpret lower tiers of multi-tier dispute resolution agreements as optional, absent clear, express language designating them as mandatory preconditions to arbitral or court jurisdiction. They focus on the literal meaning of the words used, emphasizing the presence or absence of words like "shall" or "must".

- Courts generally defer to arbitral tribunals to decide whether lower tiers constitute mandatory preconditions to arbitration and, if so, whether those preconditions have been satisfied. Courts will usually stay litigation before tribunals have had an opportunity to rule and will enforce or refuse to set aside arbitral awards decided over an objection that preconditions to arbitration were not satisfied, so long as the award sets out the arbitrator's reasoning, including their interpretation of the agreement.

- The same deference to arbitrators on the interpretation of multi-tier agreements can be seen in actions to set aside awards, even though courts presiding over such actions should consider arbitral jurisdiction *de novo*. It is not clear whether the same *de novo* review applies in actions for a court to "decide the matter" of arbitral jurisdiction following a preliminary decision by the arbitrator; however, the sparse case law thus far does point toward *de novo* review.

- Whether as a cause or consequence of that deference, Canadian courts treat the satisfaction of preconditions to arbitration as a matter of procedure or admissibility, not of jurisdiction, unless the contractual language makes clear that the lower tiers are jurisdictional preconditions.

- If the agreement unambiguously describes the lower tiers as jurisdictional preconditions to the higher tiers, courts will enforce that agreement, barring access to litigation or arbitration until the lower tiers are satisfied.

- Courts will not enforce consensual tiers of multi-tier agreements unless those tiers incorporate ascertainable or objective criteria to assess compliance, especially time limits, objective reference points for negotiation such as market rates, and adoption of the mediation rules of an established ADR institution.

- Courts tend to construe limitation periods as running from the time at which preconditions to arbitration or litigation have been satisfied (at least in provinces that follow a "discovery rule" for limitation periods).

- When they find that parties to an unenforceable arbitration agreement (whether or not as part of a multi-tier clause) may proceed to litigation, courts tend not to refer them to mediation, even in provinces that mandate pre-trial mediation.

- Even when lower tiers are construed as jurisdictional preconditions to arbitration or litigation, courts may "excuse" nonfulfillment of those preconditions if a party seeking to arbitrate or litigate can show that consensual efforts at dispute resolution will be futile, whether due to the distance between the parties' positions or the intransigence of one party. Alternatively, courts may estop a party that frustrated the completion of preconditions from arguing that their non-fulfilment constitutes a bar to arbitration or litigation.

These trends are consistent with Canada's arbitration legislation and its pro-arbitration policy. The problems that arise tend to come not from poor doctrine, but from inconsistent applications of that doctrine. Those inconsistencies, in turn, often arise because of incomplete or ambiguously-worded multi-tier agreements. Parties' best insurance against costly litigation over the meaning and enforceability of multi-tier

agreements is their best insurance against all contract litigation: clear and precise drafting.

After deciding which modes of dispute resolution will be employed, the single most important drafting consideration is whether the lower tiers should be jurisdictional preconditions to the upper tiers. If the parties are serious about trying consensual means of dispute resolution, they should so provide in their contract. Equally, it is important to remember that parties can *always* negotiate to settle a dispute, and most judges and arbitrators will amend a procedural schedule if settlement negotiations appear to be bearing fruit. In practice, mandatory preconditions often serve to *delay* arbitration or litigation, although that delay may be worthwhile if it leads to a mutually agreeable resolution.

Parties should keep in mind their options: strict jurisdictional preconditions, an intended sequence of dispute resolution methods but without preconditions, or an optional clause setting out alternative means of dispute resolution. If jurisdictional preconditions are desired, the contract should so state explicitly, using mandatory language, such as "the parties shall appoint a mediator" and "the parties must participate in a mediation and use their best efforts to seek a resolution to the dispute". If arbitration is the upper tier, it is helpful to stipulate that arbitration may be commenced only if the prior dispute resolution processes have been attempted but have not resolved the dispute, as in "the parties may not initiate arbitration until at least fourteen days have passed since the start of mediation".

If the parties want to require negotiation or mediation, they should ensure the enforceability of such "agreements to agree" by specifying time limits, providing objective standards for negotiation such as a reasonable market price, and adopting codified rules of procedure for mediation from an established administering institution.

Parties should pay close attention to drafting the descriptions of how and when they may transition between tiers of the agreement, since these are the areas most likely to give rise to disputes over what the agreement requires. Drafting a contract that says little more than "negotiation, then arbitration" is asking for trouble. (Such vague formulations are distressingly common.)

Explicit time limits should be employed where possible. For negotiation, parties may want to empower one party to declare by express notice that negotiations have broken down, perhaps after a certain number of days have passed since negotiations began. For mediation, they should empower the mediator or a party to declare further efforts at mediation futile, establishing a clear end-date of the mediation. For non-binding expert determination or similar dispute resolution methods, the contract might specify a length of time within which the parties must decide whether to accept the report of the expert or move to the next tier.

If a dispute arises over the implementation of a multi-tier agreement, parties must consider their overall position. If a party—usually the claimant—wants to drive forward to a binding decision as quickly as possible, they may attempt to skip straight to the final tier of the agreement, whether arbitration or litigation. In such case, their strongest argument to avoid a stay will usually be that the agreement does not make the lower tiers mandatory jurisdictional preconditions of the higher tiers. If they can persuade an arbitrator that he or she has jurisdiction, that decision will usually hold up in the face of a court challenge, although determinations of arbitral jurisdiction are reviewed by courts *de novo.* If the lower tiers of the agreement are unambiguously mandatory, parties may have success arguing the futility of sending the parties "back" to consensual dispute resolution, especially if the opposing party has dragged its feet or thwarted implementation of the lower tiers.

For a party that wants to insist on implementation of every tier of the dispute resolution agreement, whether because they believe in the agreed procedure or just because they want to throw sand in the gears, the strongest argument will also be interpretive: that the agreement establishes the lower tiers as mandatory preconditions of the upper tiers. This will usually require evidence of clear mandatory language in the contract.

If arbitration or litigation has already been initiated, they should also be prepared to show evidence that returning to the lower tiers of the agreement has some real likelihood of resolving the dispute. However, blocking or refusing to participate in consensual processes stipulated in the lower tiers of the agreement is usually a losing tactic. It may drive the other party to initiate arbitration or litigation sooner than would otherwise occur, and may enable them to avoid a stay by arguing for the futility of consensual dispute resolution processes in the face of an intransigent counterparty.