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1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

When courts have held multi-tiered dispute resolution clauses to be unenforceable, the most common rationale has been that they are insufficiently definite or certain.

2. What drafting might increase the chances of enforcement in your jurisdiction?

The more definite and certain the clause, the better the chance that it will be enforced. The following drafting guidelines will increase the likelihood that a court in the U.S. will deem the clause to be sufficiently definite and certain.

- ***Expressly state that the prior steps are conditions precedent to the initiation of arbitration.*** See e.g., *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 42 (1st Cir. 2003) (where contract provided that claims “shall . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings” party could not compel arbitration because there had been no request for mediation); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335 (7th Cir. 1987) (affirming summary judgment against dealer where contract provided that “Appeal to the Policy Board shall be a condition precedent” to the dealer’s right to commence litigation and dealer failed to so appeal); *Bill Call Ford Inc. v. Ford Motor Co.*, 830 F. Supp. 1045, 1048, 1053 (N.D. Ohio 1993) (same); *Ponce Roofing, Inc. v. Roumel Corp.*, 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (granting motion to dismiss, and ordering the parties to submit their claims to mediation, and, if necessary,

arbitration, in compliance with contract requiring that claims “shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party”); *Weekley Homes, Inc. v. Jennings*, 936 S.W.2d 16, 17 (Tex. App. 1996) (affirming denial of defendant’s motion to compel arbitration where agreement provided that “Mediation of the Disputes is an express condition precedent to the arbitration of the Disputes” and defendant failed to fulfill that condition). When drafting multi-tiered dispute resolution clauses that impose conditions precedent to arbitration one should exercise care not to unintentionally deprive the tribunal of jurisdiction for reasons not contemplated by the parties.

- ***Use mandatory language when describing the obligation to undertake the prior steps.*** In *White v. Kampner*, 229 Conn. 465, 468, 641 A.2d 1381, 1382 (1994), the parties’ agreement contained a clause captioned “mandatory negotiation” which provided that in the event of a dispute the parties “shall negotiate in good faith at not less than two negotiation sessions” prior to commencing arbitration. The agreement also contained an arbitration clause which provided that any dispute “which has not been resolved under” the mandatory negotiation provision was to be resolved by arbitration. The parties had a dispute, and, instead of undertaking the mandatory negotiations, the plaintiff filed a demand for arbitration. The arbitration took place over the objections of the defendant. The court vacated the tribunal’s arbitration award, holding that the agreement called for mandatory negotiation as a condition precedent to arbitration.

In *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287, 1289 (11th Cir. 2002), the agreement between a supplier and its distributor provided that “In the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph. . . . In the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party.” The parties had a dispute, and, instead of either party seeking to mediate, the supplier commenced litigation and the distributor filed a motion to stay the litigation pending arbitration. The court held that mediation was a condition precedent to arbitration, and the failure to request mediation precluded enforcement of the arbitration clause.

- ***Provide a clear set of guidelines against which to measure obligations to negotiate or mediate in good faith or to use best efforts.*** See, e.g., *Mocca Lounge, Inc. v. Misak*, 94 A.D.2d 761, 763, 462 N.Y.S.2d 704 (1983) (“[E]ven when called upon to construe a clause in a contract expressly providing that a party is to apply his best efforts, a clear set of guidelines against which to measure a party’s best efforts is essential to the enforcement of such a clause.”) (citations omitted); *Jilley Film Enters. v. Home Box Office, Inc.*, 593 F. Supp. 515, 521 (S.D.N.Y. 1984) (“Because no definite, objective criteria or standards against which HBO’s conduct can be measured were provided in the July 21, 1982 letter agreement, the provision is unenforceable on the grounds of uncertainty and vagueness and should be dismissed.”).

- ***Specify the deadline for commencing each step.*** In *Red Hook Meat Corp. v. Bogopa-Columbia, Inc.*, 31 Misc. 3d 814, 819, 918 N.Y.S.2d 706, 710 (Sup. Ct. 2011), the contract provided that lessee “may, within ten (10) days after [lessee] has received notice that [lessor] has withheld its consent[to allow a sublease,] give notice ... of [lessee’s] intention to submit the question ... to expedited arbitration.” The plaintiff failed to provide the defendant with notice of its intention to submit the issue to arbitration within the 10 day period. The court thus denied lessee’s motion for arbitration because lessee “failed to comply with a condition precedent ... with respect to the arbitration provision.” *See also Wagner Const. Co. v. Pac. Mech. Corp.*, 41 Cal. 4th 19, 30, 157 P.3d 1029, 1034 (2007) (“A party may also waive the right to compel by failing to comply with a time limit for demanding arbitration specified in the contract. Compliance is a condition precedent to the right to arbitration.”) (internal citations and quotation marks omitted).
- ***Specify the duration of each step.*** *See, e.g., HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (the claim “shall, after initial decision by the Architect, or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to” further proceedings); *Fluor Enters. v. Solutia Inc.*, 147 F. Supp. 2d 648, 650 n.1 (S.D. Tex. 2001) (“‘[I]f a controversy or claim should arise,’ the project managers for each party would ‘meet at least once.’ Either party’s project manager could request that this meeting take place within fourteen (14) days. If a problem could not be resolved at the project manager level ‘within twenty (20) days of [the project managers’] first meeting ... the project managers shall refer the matter to senior executives.’ The executives must then meet within fourteen (14) days of the referral to attempt to settle the dispute. The executives thereafter have thirty (30) days to resolve the dispute before the next resolution effort may begin.”). *But see Cumberland & York Distributors v. Coors Brewing Co.*, No. 01-244-P-H, 2002 WL 193323, at *4 (D. Me. Feb. 7, 2002) (declining to stay action to enforce mediation clause: “The contract at issue also includes a term requiring mediation before the defendant’s president as a condition precedent to arbitration, with no time limit for completion of such mediation. Even in the unlikely event that such a proceeding could possibly be considered mediation, this court is not required by law to stay actions for purposes of mediation, nor will it do so. The court should grant the defendant’s motion for a stay only on the condition that the defendant agrees to proceed immediately to arbitration.”).
- ***If negotiation is a step, specify the negotiation participants.*** *See, e.g., Fluor Enters Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648, 649 and n. 1 (S.D. Tex. 2001) (enforcing contract specifying negotiations first between “project managers” and then between “senior executives”).
- ***If negotiation is a step, specify the number of negotiation sessions.*** *See, e.g., White v. Kampner*, 229 Conn. 465, 468, 641 A.2d 1381, 1382 (1994) (“[The parties] agree that they will attempt to negotiate in good faith any dispute of any nature arising under this [agreement]. The parties shall negotiate in good faith at not less than two

negotiation sessions prior to seeking any resolution of any dispute under the [arbitration provision] of this [agreement]. Each party shall have the right to legal representation at any such negotiation session.”).

- ***If mediation is a step, specify mediation pursuant to specified rules or under the auspices of a particular dispute resolution institution.*** In *Fluor Enterprises, Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648 (S.D. Tex. 2001), the agreement provided that the parties shall “attempt in good faith to resolve the controversy or claim in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes.” However, “[i]f the matter has not been resolved pursuant to the aforesaid mediation procedure within thirty (30) days of the commencement of such procedure ... either party may initiate litigation.” The parties disagreed what actions commenced the “procedure” that set the 30 day clock in motion. Plaintiff argued that the procedure began when the parties chose a mediator, whereas defendant argued that the procedure was the actual meeting with the mediator. The court observed that in the absence of guidance from the express language of the contract, the court would agree that a mediation procedure is not commenced until the actual substantive discussions begin. However, the court held that, because the referenced Model Procedure included “selecting the mediator,” the act of selecting a mediator constituted a commencement of the mediation procedure.
- ***If a step requires the involvement of a third party, specify the identity of the third-party.*** The American Institute of Architects offers a form contract that is widely used in the construction industry. The contract has a multi-step dispute resolution procedure. It provides that “[c]laims . . . shall be referred initially to the Architect for decision,” and that the Architect’s “initial decision . . . shall be required as a condition precedent to mediation, arbitration or litigation.” It also provides that “Any Claim . . . shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration.” The form contract includes a fill-in-the-blank space allowing the parties to designate the identity of the Architect. Parties often fail to fill in the blank, and courts then have to decide whether or not the failure prevents the parties from proceeding to arbitration. *Ameristar Coil Proc., LLC v. William E. Buffington Co.*, 269 P.3d 55 (Okla. 2011) (instructing trial court to conduct an evidentiary hearing to decide whether the parties intended the mandatory arbitration provision to apply in the absence of an architect); *Tillman Park, LLC v. Dabbs-Williams Gen’s Contractors, LLC*, 298 Ga. App. 27, 679 S.E.2d 67(2009) (it is for the trier of fact to determine whether the parties’ failure to name an architect “results in a failure to meet a condition precedent thereby dispensing with the agreement’s arbitration requirement, or whether it results in an impossibility to satisfy the condition precedent thereby dispensing with the condition-precedent requirement”); *Auchter Co. v. Zagloul*, 949 So. 2d 1189 (Fla. Dist. Ct. App. 2007) (because the parties failed to name an architect, the arbitrator’s decision was not a condition precedent to mediation, arbitration, or litigation). See also *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 459 (E.D.N.Y. 1985) (designating the National Advertising Division of the Council of Better Business as the “advisory third party” for advisory negotiations over certain claims); *Compare Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*,

290 F.3d 1287, 1289 (11th Cir. 2002) (“If the parties are unable to select a mediator, the Florida Mediation Group shall select a mediator.”).

- ***Ensure that the steps are enforceable in the jurisdictions of both parties.*** In *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1081, 51 Cal. Rptr. 3d 19, 24 (2006), the court refused to enforce a construction contract purportedly requiring mediation in Nevada because Calif. Code of Civ. P. 410.42(a) renders such a provision void and unenforceable if it “purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state.”
- ***Consider adding consequences for failure to meet prior steps, such as forfeiting attorney fees and costs for failing to engage in mediation.*** See, e.g., *Frei v. Davey*, 124 Cal. App. 4th 1506, 1508, 22 Cal. Rptr. 3d 429, 431 (2004) (“Many written contracts include provisions requiring the parties to mediate before filing a lawsuit or arbitration proceeding, and conditioning recovery of attorney fees by a prevailing party on an attempt to mediate. . . . [W]e hold that the prevailing parties are barred from recovering attorney fees [if] they refused a request to mediate.”); *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1077, 51 Cal. Rptr. 3d 19, 22 (2006) (“If either party resorts to arbitration or court action . . . without first attempting to resolve the matter through mediation, then in the discretion of the Arbitrator or Judge, that party shall not be entitled to recover their attorney’s fees and costs even if such fees and costs would otherwise be available to that party”).

3. If your courts have enforced such clauses, how have they done so?

- ***They have denied motions to compel arbitration, allowing litigation or other proceedings to proceed.*** See, e.g., *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (movant could not compel arbitration or stay litigation because mediation, which was a condition precedent to litigation or arbitration, had not occurred); *Anagnostopoulos v. Union Tpk. Mgmt. Corp.*, 300 A.D.2d 393, 394, 751 N.Y.S.2d 762 (2002) (“[T]he Supreme Court should have denied the motion to compel arbitration based upon the respondent’s failure to fulfill in a timely fashion the contractually mandated condition precedent.”).
- ***They have allowed litigation to proceed because the parties failed to perform the prior steps.*** See, e.g., *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (11th Cir. 2002) (trial court properly declined to stay court action because neither party fulfilled conditions precedent to arbitration).
- ***They have dismissed litigation without prejudice because the parties failed to perform the prior steps.*** See, e.g., *Delamater v. Anytime Fitness, Inc.*, 722 F. Supp. 2d 1168, 1177 (E.D. Cal. 2010); *Tattoo Art, Inc. v. TAT International, LLC*, 711 F. Supp. 2d 645 (E.D. Va. 2010); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1986). Courts generally do *not* dismiss claims with prejudice.
- ***They have stayed litigation or arbitration pending performance of the prior steps.*** See, e.g., *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 561 (7th Cir.

- 2008) (“the proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings rather than to dismiss outright”), *cited in N-Tron Corp. v. Rockwell Automation, Inc.*, No. CIV. A. 09-0733-WS-C, 2010 WL 653760, at *7 (S.D. Ala. Feb. 18, 2010) (dismissal without prejudice would effectively be *with* prejudice because statute of limitation already had run); *Swartz v. Westminster Servs.*, No. 810-CV-1722-T-30AEP, 2010 WL 3522141, at *2 (M.D. Fla. Sept. 8, 2010).
- ***They have enforced provisions that deny an award of attorney fees due to failure to perform the prior steps.*** See, e.g., *Frei v. Davey*, 124 Cal. App. 4th 1506, 1508, 22 Cal. Rptr. 3d 429, 431 (2004) (attorney fees should have been denied for movant who failed to mediate before suing; parties conditioned attorney fees on participation in mediation).
 - ***They have vacated arbitration awards because the arbitrator lacked authority due to parties’ failure to perform the prior steps.*** See, e.g., *White v. Kampner*, 641 A.2d 1381, 1382 (Conn. 1994) (trial court properly vacated award because contract contained a “mandatory negotiation” clause, and plaintiff commenced an arbitration before any negotiations could take place).
 - ***They have severed unenforceable portions of a clause in order to save the clause as a whole.*** See, e.g., *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1084, 51 Cal. Rptr. 3d 19, 27 (2006) (“Here, the interests of justice are best served by severing only the portion of paragraph 11.3.3 that violates section 410.42—the terms that state mediation must take place in Nevada.”); *Estrada v. CleanNet USA, Inc.*, No. C 14-01785 JSW, 2015 WL 833701, at *3 (N.D. Cal. Feb. 24, 2015) (severing ambiguous clause that was arguably unconscionable in that the parties “impermissibly shorten[ed] the limitations period to 180 days when they state that, if negotiations fail, the dissatisfied party must submit the dispute to mediation or arbitration within 180 days. . . . The Court agrees that this statement is ambiguous, however, in an abundance of caution the Court SEVERES the requirement . . .”).
- 4. Conduct causing courts to decline to enforce such clauses**
- ***Party frustrated or prevented the occurrence of a condition.*** See, e.g., *Coby Electronics Co. v. Toshiba Corp.*, 108 A.D.3d 419, 968 N.Y.S.2d 490 (2013) (petitioner argued that independent audit of royalties was a condition precedent to awarding underreported royalties in arbitration; court refused to require audit where petitioner frustrated such an audit); *Tillman Park, LLC v. Dabbs-Williams Gen. Contractors, LLC*, 298 Ga. App. 27, 31-32, 679 S.E.2d 67 (2009) (parties intentionally declined to staff position of architect who was assigned to hear disputes).
 - ***Party waived condition due to actions inconsistent with the process.*** See, e.g., *Metzler Contracting Co. LLC v. Stephens*, 774 F. Supp. 2d 1073, 1087 (D. Haw. 2011), *aff’d* 479 F. App’x 783 (9th Cir. 2012) (party waived conditions by voluntarily submitting construction defect claims to arbitration despite a clause that otherwise

required submission to the project architect); *Gladwynne Const. Co. v. Mayor & City Council of Baltimore*, 147 Md. App. 149, 197-98, 807 A.2d 1141, 1169-70 (2002) (city waived condition precedent requiring submission of dispute to city official where city failed to bring the issue to the trial court's attention until the first day of trial, city had engaged in substantial litigation activity before then, and "the basic purpose of the 'arbitration' clause was accomplished"); *Morrison Restaurants, Inc. v. Homestead Vill. of Fairhope, Ltd.*, 710 So. 2d 905, 907 (Ala. 1998) (defendant waived right to mediation/arbitration where "eight months passed from the filing of the complaint before Homestead first asserted its right . . . [P]erhaps more important, when Homestead did assert its right to mediation or arbitration under the contract, it was not until after it had suffered an adverse ruling, in the form of the summary judgment as to liability.").

4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.

No such clause serves as a good exemplar. Better exemplars can be found at paragraphs 86-96 of the IBA Guidelines for Drafting International Arbitration Clauses. These can easily be modified for situations where the parties wish to litigate their disputes rather than arbitrate them.