

# NEGOTIATE BEFORE YOU LITIGATE? THE CASE FOR MULTI-TIER DISPUTE RESOLUTION CLAUSES.

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## Executive Summary:

- Multi-tier dispute resolution clauses encourage parties to address conflicts through negotiation, internal escalation, and, where appropriate, mediation before resorting to litigation or arbitration, fostering faster, more collaborative, and cost-effective outcomes.
- Their effectiveness depends on clear drafting that defines the applicable stages, participants, and timelines, helping avoid unnecessary delays while promoting the strategic management of disputes from their earliest stages.

When companies negotiate a contract, they tend to focus on the commercial terms of the deal—pricing, delivery timelines, service levels, or payment structures. Yet they rarely devote the same attention to an equally important question: what happens if things go wrong?

Traditionally, contracts include a clause specifying whether disputes will be resolved before the courts or through arbitration. Increasingly, however, contracts incorporate what is known as a multi-tier dispute resolution clause.

The name may sound technical, but the concept is straightforward. Rather than allowing either party to immediately initiate litigation or arbitration, these clauses require the parties to exhaust a series of preliminary steps before submitting their dispute to a third-party decision-maker, whether a judge or an arbitrator.

A common example involves requiring the parties, upon the emergence of a dispute, to first attempt to resolve it through direct negotiations between their designated representatives. If no agreement is reach-

ed within a specified period, the matter may be escalated to senior executives. In some cases, an additional mediation stage is built in before formal proceedings may be initiated.

The logic behind this mechanism is to prevent the unnecessary escalation of a conflict—and the toll that comes with it. Not every disagreement needs to be resolved through adversarial proceedings. Many commercial disputes arise from operational issues, differences in contractual interpretation, or simple breakdowns in communication. When a structured space for dialogue exists, a significant number of these disagreements can be resolved before they turn into costly and prolonged legal battles.

Consider, for instance, a supply agreement between two companies that have maintained a business relationship for years. A delay in a critical delivery could trigger claims, financial losses, and friction between the parties. In many cases, however, both companies have an interest in preserving the relationship. Under those circumstances, an early negotiation can prove far more constructive than immediately commencing an arbitration or filing a

lawsuit that could irreparably damage the commercial bond.

Beyond helping reduce costs, these clauses tend to bring disputes to the attention of individuals with genuine decision-making authority. It is not uncommon for a dispute that seemed intractable at the operational level to find a resolution once it is reviewed by executives who have a broader perspective on the business and on the risks the conflict entails.

Of course, multi-tier clauses are not a silver bullet. If poorly drafted, they can produce precisely the opposite of their intended effect. A clause that fails to set clear timelines, that does not define the preliminary stages with sufficient precision, or that does not identify the participants at each level can give rise to procedural objections over whether a party satisfied the escalation requirements as a condition precedent to arbitration or litigation.

There is also the risk that one party may use these stages as a delay tactic. For that reason, it is essential that the mechanism be clear, predictable, and reasonably time bound. The goal should not be to create barriers to access to justice, but rather to generate genuine opportunities for the parties to reach an amicable, consensual resolution in the early stages of the conflict.

In recent years, the growing interest in alternative dispute resolution (ADR) has led many companies and their legal advisors to rethink the way they structure dispute resolution clauses in their contracts. Experience shows that a dispute managed effectively from its earliest stages can, in many cases, spare the parties months or even years of litigation, along with the reputational costs that contentious proceedings often entail.

In a business environment where conflicts are inevitable, the real differentiator often lies not in avoiding them, but in managing them efficiently. Multi-tier clauses offer an orderly framework for the parties to attempt to resolve their differences collaboratively before turning to more costly and adversarial mechanisms. In many cases, a negotiation that results in a well-documented and carefully structured settlement can be just as effective as a court judgment or an arbitral award, and considerably less expensive.

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