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Pre-Arbitration Procedural Requirements

'A Dismal Swamp'

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I. Introduction

International arbitration agreements and investment treaties frequently impose pre-arbitration procedural requirements that apply prior to commencement of arbitral proceedings. Among other things, these provisions require either good faith negotiations between the parties to resolve their disputes, participation by the parties in mediation or conciliation proceedings, or other procedural steps prior to the initiation of an arbitration. These provisions are designed to enhance the efficiency of the arbitral process, by encouraging amicable dispute resolution and avoiding unnecessary proceedings and expense.

Despite their objectives, these various pre-arbitration procedural provisions have produced frequent, confusing, and often serious disputes. As this chapter explains, so-called 'multi-tiered dispute resolution provisions' or 'pre-arbitration procedural requirements' have given rise to issues concerning almost every aspect of such agreements—including disputes regarding the validity and enforceability of requirements for negotiation or mediation, the characterization of pre-arbitration procedural requirements (for example, do such provisions involve matters of 'jurisdiction', 'procedure', or 'admissibility'?; are such provisions mandatory or non-mandatory?), the consequences of non-compliance with a pre-arbitration procedural requirement (for example, does non-compliance with such provisions preclude subsequent arbitral proceedings?), the actions that are required to satisfy a pre-arbitration procedural requirement, the allocation of competence over disputes regarding such provisions between courts and arbitral tribunals (for example, should arbitrators or courts have primary authority for interpreting and applying such provisions?), and the scope of judicial review of decisions by arbitral tribunals applying such provisions.

* The swamp, as metaphor, has a rich history. See, eg, J R R Tolkien, *Lord of the Rings* (Allen & Unwin 1954–55); William Faulkner, *Absalom, Absalom!* (Random House 1936); Ernest Hemingway, *In Our Time* (Prentice Hall & IBD 1925). An appropriate reference here is to the writings of an English explorer, William Byrd II, who described the borderland between Virginia and North Carolina as a dismal swamp. See R Harper, *A History of Chesapeake, Virginia* (The History Press 2008) 124–8. That description applies well to the treatment of pre-arbitration procedural requirements in most national court decisions and arbitral awards, which are plagued by multiple and divergent characterizations and complications, none of which materially assists either analysis or the international arbitral process.

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National courts and arbitral tribunals have reached inconsistent results in addressing these various questions. Both judicial decisions and arbitral awards have adopted divergent, and often unsatisfying, analytical approaches to the characterization and resolution of disputes over the validity, enforceability, breach, and remedies for pre-arbitration procedural requirements. The resulting uncertainty creates a confusing, and sometimes perilous, landscape for parties and tribunals, which ill-serves the arbitral process. In many cases, unnecessary time and money is wasted on disputes concerning pre-arbitration procedural requirements, while in some instances, non-compliance with such requirements has resulted in annulment or non-recognition of otherwise valid arbitral awards, with commensurately greater wasted time and expense.

The disputes and uncertainties resulting from pre-arbitration procedural requirements are inconsistent with the fundamental objectives and aspirations of the arbitral process, and of multi-tiered arbitration provisions themselves. They are also inconsistent with the parties' desire, in virtually all cases, to ensure access to prompt, binding, and neutral means of resolving their disputes—which is the fundamental object of international arbitration agreements, whether in commercial contracts or investment treaties.[1]

This chapter suggests that the disputes and uncertainties arising from pre-arbitration procedural requirements argue decisively for treating requirements to negotiate or conciliate as invalid or unenforceable in many cases; that such agreements should, even when valid, generally be treated as non-mandatory and aspirational, rather than mandatory, absent clear language to the contrary; and that even valid, mandatory pre-arbitration procedural requirements should not ordinarily constitute jurisdictional bars to the initiation of arbitral proceedings, but should instead be regarded as matters of admissibility or procedure, that are capable of cure and whose breach does not ordinarily preclude resort to arbitration. For many of the same reasons, disputes about the validity and effects of pre-arbitration procedural requirements should, in principle, be matters for the arbitral tribunal to decide, like other procedural aspects of the arbitration, subject to only very limited judicial review in subsequent annulment proceedings.

Contrary approaches to pre-arbitration procedural requirements transform these provisions from tools for efficient dispute resolution into instruments of delay, inefficiency, and, ultimately, denials of justice. Regrettably, in practice, courts and arbitral tribunals have sometimes taken different approaches than those outlined above; although many decisions arrive at sensible results, through one rationale or another, there are non-trivial numbers of exceptions. Both these decisions and the analytical uncertainties arising from pre-arbitration procedural mechanisms suggest that considerable caution should be exercised before incorporating such provisions in international arbitration agreements. In most cases, such provisions should be omitted entirely from commercial arbitration agreements or investment treaties; when they are included, such provisions should be drafted with particular care, in order to address expressly the various issues addressed in this chapter.

[1] See Gary B Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014) 70–93.

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II. Validity and Effects of Pre-Arbitration Procedural Requirements

As noted above, international arbitration provisions are frequently accompanied by or contained within so-called 'multi-tier dispute resolution clauses' or 'escalation clauses'.[2] Most commonly, the arbitration clause, in a contract or investment treaty, will provide for the parties to negotiate (sometimes for a specified period of time and sometimes with specified company representatives) in order to resolve their differences before initiating an arbitration.[3] Alternatively, or in some cases additionally, the arbitration agreement will provide for the parties to submit their disputes to mediation or conciliation, or to a non-binding decision by engineers, architects, or similar persons, for attempted resolution prior to commencement of arbitral proceedings.[4] Alternatively, in the context of investment arbitration, both bilateral investment treaties and investment agreements often impose both these requirements and additional requirements for the exhaustion of local remedies, by litigation in domestic courts, for specified periods.[5] Other arbitration clauses may impose contractual time limits

[2] BIT between China and Cote d'Ivoire (2002), Art 9(3), in Christoph Schreuer with Loretta Malintoppi, August Reinisch et al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 406 ('If such dispute cannot be settled amicably through negotiations, any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall have exhausted the domestic administrative review procedure specified by the laws and regulations of that Contracting Party, before submission of the dispute to the aforementioned arbitration procedure …'); see Klaus Peter Berger, 'Law and Practice of Escalation Clauses' (2006) 22 Arb Int'l 1; Simon Chapman, 'Multi-Tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27 J Int'l Arb 89; Dyalé Jiménez Figueres, 'Multi-Tiered Dispute Resolution Clauses in ICC Arbitration' (2003) 14(1) ICC Ct Bull 82; Rachel Jacobs, 'Should Mediation Trigger Arbitration in A Multi-Step Alternative Dispute Resolution Clause?' (2004) 15 Am Rev Int'l Arb 161, 179 n 77; Eduardo Palmer and Eliana Lopez, 'The Use of Multi-Tiered Dispute Resolution Clauses in Latin America: Questions of Enforceability' (2003) 14 Am Rev Int'l Arb 285; Michael Pryles, 'Multi-Tiered Dispute Resolution Clauses' (2001) 18 J Int'l Arb 159.

[3] See *ICC Case No 9977*, Final Award (22 June 1999) in Figueres (n 2) 84; Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Wolters Kluwer 2013) 100–1; Chapman (n 2); Figueres (n 2); Pryles (n 2).

[4] See, eg, American Institute of Architects, *General Conditions of the Contract for Construction* (AIA A-2-1, 1997) §4.4.1 ('The [American Institute of Architects'] General Conditions A-201 states that the owner and contractor will initially refer all claims to the architect for decision "as a condition precedent to mediation, arbitration or litigation"'); Christopher Boog, 'How to Deal With Multi-Tiered Dispute Resolution Clauses' (2009) 26 ASA Bull 103; Alexander Jolles, 'Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement' (2006) 72 Arb 4; Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27 J Int'l Arb 551; Daniel D McMillan and Robert A Rubin, 'Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements' (2005) 25 Constr Law 14; Pryles (n 2). See also *ICC Case No 6535*, Award, discussed in Christopher R Seppälä, 'International Construction Disputes: Commentary on ICC Awards Dealing With the FIDIC International Conditions of Contract' [1999] ICLR 343; *ICC Case No 6276*, Partial Award (29 January 1990) (2003) 14(1) ICC Ct Bull 76, 77; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2011] SGCA 33 (Singapore Ct App).

[5] See, eg, UK-Argentine BIT, Art 8(2) ('The aforementioned disputes shall be submitted to international arbitration in the following cases: (a) if one of the Parties so requests, in any of the following circumstances: (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision; (ii) where the final decision of the aforementioned

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on the commencement of arbitral proceedings (for example, arbitration must be commenced either within or not before a specified time period (for example, three or six months) of a dispute arising).[6]

As noted above, the principal objective of most such pre-arbitration procedural mechanisms is enhanced efficiency and avoidance of formal legal proceedings: parties seek to encourage the amicable resolution of disputes through informal negotiations or conciliation, thereby avoiding the expenses, delays, and contention of actual arbitral proceedings. In the words of one proponent of such provisions:

> By shifting the resolution of the dispute to a sequence of ADR proceedings aimed at cooperation (through the management or through technicians) rather than confrontation (the lawyers in an arbitration), the further business relationship between the parties, without the disturbance and burden of litigating their dispute before the arbitral tribunal, is also preserved. This is of particular significance with respect to long-term contracts.[7]

Related, but somewhat different, objectives motivate requirements for resort to local remedies, by domestic litigation, in some investor-state settings—where such provisions seek both to obviate the need for formal (international) arbitral proceedings and to allow local authorities and courts to consider and address complaints of wrongful conduct.[8]

Despite these objectives, pre-arbitration procedural requirements have given rise to a wide range of disputes, whose complexity and unpredictability often threaten the objectives of the arbitral process. These disputes have raised issues concerning the validity, effects, and mandatory (versus aspirational) character of such dispute resolution provisions, which are discussed below; these disputes have also involved other issues, which are discussed in subsequent sections of this chapter. Importantly, all of these various issues involve the same related concerns, in particular, concerns about the consequences of denying parties access to their agreed means of dispute resolution

tribunal has been made but the Parties are still in dispute …'); *Candid Prod, Inc v Int'l Skating Union*, 530 F Supp 1330, 1337 (SDNY 1982); ICSID Convention, Art 26 (providing that the consent of the parties to arbitration 'shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy'). See also Thomas H Webster, *Handbook of Investment Arbitration* (Sweet & Maxwell 2012) paras A-26-26–A-26-29 and para II-1-25; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer 2009) 72; Schreuer et al (n 2) 402–13; Christopher Dugan, Noah D Rubins, Don Wallace, Jr et al, *Investor-State Arbitration* (Oxford University Press 2008) 347–65.

[6] The following are illustrative examples: 'The Parties agree to make all reasonable efforts to settle any dispute arising out of or relating to this Agreement by referring such dispute to their respective senior managers for a period of not less than 30 days following receipt of written notice describing such dispute from any other Party. In the event that the dispute is not resolved during such 30 day period, the Parties agree to submit such dispute to arbitration under [the ICC Rules]'; or 'All disputes arising out of or relating to this Agreement may be submitted to arbitration under [the ICC Rules] within 12 months of the date on which such dispute arises.'

[7] Berger (n 2) 1.

[8] See, eg, *Teinver SA v Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) para 135 ('[T]he core objective of [the 18-month local court] requirement, to give local courts the opportunity to consider the disputed measures, has been met'); *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) para 148.

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based on non-compliance with provisions that are inherently aspirational means of resolving disputes.

A. Validity of Agreements to Negotiate, Conciliate, or Mediate Disputes

There is substantial uncertainty regarding the validity and enforceability of one of the central components of most pre-arbitration procedural mechanisms—namely, agreements to negotiate (or mediate) disputes. In particular, disputes frequently arise regarding the validity and enforceability of agreements requiring that parties attempt to resolve disputes by negotiation, conciliation, or mediation prior to commencing arbitral (or other) proceedings.

Courts in a number of jurisdictions, both common law and civil law, hold that agreements to negotiate the resolution of disputes are invalid and unenforceable, in most circumstances on grounds of uncertainty. Whether pre-arbitration negotiation requirements are valid and enforceable in such jurisdictions frequently depends in substantial part on the specific wording and structure of the relevant clause. Many courts will uphold the validity of agreements to negotiate only where there is a reasonably clear set of substantive and procedural requirements against which a party's negotiating efforts can be meaningfully measured. Absent such guidelines, courts from both civil law and common law jurisdictions have frequently held that particular agreements to negotiate the resolution of disputes are inherently uncertain and indefinite, and therefore invalid.[9]

[9] See, eg, *Schoffman v Cent States Diversified, Inc*, 69 F3d 215, 221 (8th Cir 1995); *Richie Co LLP v Lyndon Ins Group Inc*, 2001 WL 1640039, paras 1, 3 (D Minn) (agreement to negotiate in good faith is unenforceable); *Copeland v Baskin Robbins USA*, 96 Cal App 4th 1251, 1257 (Cal Ct App 2002); *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297, 301–2 (English Ct App) ('That tentative opinion by Lord Wright does not seem to me to be well founded. If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law'); *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA—Enesa* [2012] EWHC 42, para 27 (Comm) (English High Ct) ('[T]here are three major difficulties which stand in the way of the submission that Condition 11 is an enforceable obligation. First, there is no unequivocal commitment to engage in mediation let alone a particular procedure … The parties … only agree in general terms to attempt to resolve differences in mediation. Second, there is no agreement to enter into any clear mediation process, whether based on a model put in place by an ADR organisation or otherwise. Third, there is no provision … for selection of the mediator'), aff'd [2012] EWCA Civ 638 (English Ct App); *Wah (aka Tang) v Grant Thornton Int'l Ltd* [2012] EWHC 3198, para 57 (Ch) (English High Ct) ('Agreements to agree and agreements to negotiate in good faith, without more, must be taken to be unenforceable: good faith is too open-ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve and when it can objectively be determined to be properly concluded'); *Halifax Fin Servs Ltd v Intuitive Sys Ltd* [1999] 1 All ER (Comm) 303, 311 (English High Ct) ('the Courts had consistently declined to compel parties to engage in co-operative processes, particularly "good faith" negotiation, because of the practical and legal impossibility of monitoring and enforcing the process'); *Itex Shipping PTE Ltd v China Ocean Shipping Co, The 'Jing Hong Hai'* [1989] 2 Lloyd's Rep 522 (QB) (English High Ct); *Brunet v Artige*, Judgment (15 January 1992) [1992] Rev Arb 646 (French Cour de cassation civ 2e).

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One US court stated this general approach as follows: 'an agreement to negotiate in good faith' is unenforceable because it is 'even more vague than an agreement to agree', and 'an agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise'.[10] Or, in the words of an early House of Lords decision:

> A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.[11]

Given this analysis, courts have generally upheld the validity of agreements to negotiate only where there is a reasonably specific and precise set of substantive and procedural guidelines against which the parties' negotiating efforts can be measured.[12] As one national court observed, 'even when called upon to construe a clause in a contract expressly providing that the parties are to apply their best efforts to resolve their dispute amicably, a clear set of guidelines against which to measure a party's best efforts is essential to the enforcement of such a clause'.[13]

In this context, courts usually emphasize the definiteness of the negotiation (or mediation) procedures set forth by the contract. For example, the English High Court recently held that an agreement to 'seek to resolve the dispute or claim by friendly discussion' for four weeks prior to referring the claim to arbitration is enforceable.[14]

Where clauses contain provisions such as a limited duration of negotiation or mediation,[15] a specified number of negotiation sessions,[16] or designated negotiation

[10] *Candid Prod Inc v Int'l Skating Union* (n 5) 1337.

[11] *Walford v Miles* [1992] 2 AC 128, 138 (House of Lords).

[12] See, eg, *Fluor Enters v Solutia*, 147 F Supp 2d 648, 651 (SD Tex 2001); *Jillcy Film Enters v Home Box Office Inc*, 593 F Supp 515, 520–1 (SDNY 1984); *Elizabeth Chong Pty Ltd v Brown* [2011] FMCA 565 para 23 (Australian Fed Mag Ct) ('An agreement to mediate is enforceable in principle, if the conduct required of the parties to participate in the process is sufficiently certain').

[13] *Mocca Lounge, Inc v Misak*, 94 AD2d 761, 763 (NY App Div 1983).

[14] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] WLR(D) 293, [2014] EWHC 2104, para 27 (Comm).

[15] See *Fluor Enters v Solutia* (n 12) 649 n 1 (enforcing contractual negotiation procedure requiring 'that "if a controversy or claim should arise," the project manager 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."). See also *Judgment (6 June 2007)* (2008) 26 ASA Bull 87 (Swiss Federal Tribunal).

[16] See *White v Kampner*, 641 A2d 1381, 1382 (Conn 1994) (enforcing 'mandatory negotiation' clause that stated '[t]he parties shall negotiate in good faith at not less than two negotiation sessions prior to seeking any resolution of any dispute' under contract).

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participants,[17] courts are more likely to enforce them than in the case of open-ended or unstructured obligations to negotiate.[18]

This approach is reflected in a recent English decision, holding that:

> In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach. In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.[19]

Consistent with this analysis, requirements to participate in a specified pre-arbitration dispute resolution procedure (for example, mediation before a designated institution or individual, an expert determination, or an engineer's assessment) are generally more likely than simple negotiation or 'amicable settlement' requirements to be valid and enforceable.[20]

Nevertheless, the degree of detail or precision that is necessary for an agreement to negotiate (or conciliate) to be valid is almost inevitably uncertain. Although the standard set forth above is more specific than decisions in many jurisdictions, and although the standard rests on a well-considered analysis of the character of agreements to negotiate, even this standard leaves scope for substantial uncertainty. This uncertainty is significantly exacerbated in international settings, where different jurisdictions adopt different standards to the validity and enforceability of such provisions and where disagreements about the choice of the law governing these provisions create further uncertainty.[21]

[17] See *Fluor Enters v Solutia* (n 12) 649 n 1.

[18] See also *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC) (English High Ct) ('[C]onsidering the … authorities the principles to be derived are that the ADR clause must meet at least the following three requirements: First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain').

[19] *Wah v Grant Thornton Int'l Ltd* (n 9) paras 60–1.

[20] See *HIM Portland LLC v DeVito Builders Inc*, 317 F3d 41, 42 (1st Cir 2003) (enforcing clause providing for mediation in accordance with AAA Construction Industry Mediation Rules). See also *AMF Inc v Brunswick Corp*, 621 F Supp 456 (SDNY 1985) (enforcing non-binding arbitration clause because, among other things, it was under auspices of the National Advertising Division of the Council of Better Business Bureaus, which 'has developed its own process of reviewing complaints of deceptiveness'); *Cable & Wireless plc v IBM* [2002] EWHC 2059 (English High Ct) (obligation that 'parties shall attempt in good faith to resolve the dispute or claim through an alternative dispute resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution' is enforceable).

[21] Choice of law issues applicable to pre-arbitration procedural requirements are discussed below. See below, section VII.

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More fundamentally, the hesitations of courts in many jurisdictions to enforce agreements to negotiate or conciliate reflects the inherently uncertain character of such agreements. By their nature, agreements to negotiate are aspirational, reflecting a shared desire to attempt to reach a mutually acceptable result, but not a commitment to any particular result. Undertakings of this character are properly treated as *sui generis*, valid and enforceable only in limited circumstances, which do not infringe on the parties' general freedom of contract and commercial autonomy.

B. Binding Nature of Pre-Arbitration Procedural Requirements: Mandatory versus Non-Mandatory

Assuming that contractual pre-arbitration procedural requirements are valid, they present questions of interpretation. In particular, a number of authorities have considered whether such requirements are mandatory, on the one hand, or non-mandatory (that is, merely aspirational), on the other.

As discussed below, national courts and arbitral tribunals have generally been hesitant, absent clear language to this effect, to conclude that compliance with contractual pre-arbitration requirements to negotiate or mediate disputes is a mandatory obligation. Nevertheless, where the parties' intent is clear, courts and arbitral tribunals hold such requirements to be mandatory—with potentially significant results. As discussed below, non-compliance with mandatory pre-arbitration procedures can subject the non-complying party to claims of breach of contract and, potentially, bar the party from commencing arbitral proceedings or asserting its claims in those proceedings; indeed, non-compliance with mandatory pre-arbitration procedural requirements can expose an otherwise valid arbitral award to annulment or non-recognition. Similar analysis applies to requirements to pursue alternative mechanisms for dispute resolution (that is, exhaust local remedies in domestic courts), although such requirements are more likely to be held mandatory.

A substantial body of decisions by international commercial arbitral tribunals holds that violations of pre-arbitration procedural requirements (such as violations of waiting, or 'cooling-off', periods or requirements to negotiate the resolution of disputes) are not violations of mandatory obligations. In one tribunal's words, clauses requiring efforts to reach an amicable settlement, before commencing arbitration, 'are primarily expression[s] of intention' and 'should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute'.[22] Other awards are to the same effect.[23]

The typical rationale of these decisions is that pre-arbitration procedures are, in significant part, aspirational, directional, or hortatory, and that a party's failure to

[22] *ICC Case No 10256*, Interim Award (12 August 2000) in Figueres (n 2) 87.

[23] See *ICC Case No 11490*, Final Award (2012) XXXVII YB Comm Arb 32 ('The provision in the arbitration clause that disputes "be settled in an amicable way" constituted no condition precedent to referral to arbitration but rather underlined the parties' intent not to litigate disputes in court'); *ICC Case No 8445*, Final Award, (2001) XXVI YB Comm Arb 167; *Licensor and Buyer v Manufacturer*, SCC, Interim Award (17 July 1992) (1997) XXII YB Comm Arb 197.

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comply with such procedures causes no material damage to its counter-party. This analysis appears to reflect, although it often does not cite, the rationale of the decisions discussed above, limiting the validity and enforceability of agreements to negotiate. These decisions also rest on a reluctance to deny parties access to adjudicative proceedings and relief on potentially meritorious claims, particularly on the basis of non-compliance with procedures that, even if enforceable, are very unlikely finally to resolve the parties' dispute and provide comparable forms of relief.[24]

Similarly, a number of arbitral awards in investor-state disputes conclude that compliance with negotiation, mediation, conciliation, or similar procedural requirements in an arbitration agreement (or bilateral investment treaty) is not ordinarily a prerequisite to commencing arbitral proceedings. These decisions arise in particular in the context of provisions containing so-called 'cooling-off periods' (requiring notice and negotiations for a specified time period);[25] fewer such decisions are found in the context of provisions requiring litigation of claims in domestic courts for a specified time period (although even with local litigation requirements, examples of such decisions exist).[26] In one tribunal's words:

> In the Tribunal's view … properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not prevent this Arbitral Tribunal from proceeding.[27]

Like commercial and investment arbitral tribunals, national courts have also generally been reluctant to interpret pre-arbitration requirements for negotiation or conciliation

[24] See also *X v Y*, Judgment (22 June 2011) 2116 Hanrei Jiho 64 (Tokyo Koto Saibansho) (refusing to require compliance with mediation and negotiation requirements because doing so restricted parties' access to justice (in case involving forum selection clause)).

[25] See, eg, *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011) para 335; *Abaclat v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 564; *Occidental Petroleum Corpn v The Repub of Ecuador*, ICSID Case No ARB/06/11, Decision on Jurisdiction (9 September 2008) paras 92–4; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 343; *Bayindir Insaat Turizm Ticaret Ve, Sanayi AS v Islamic Repub of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 88–102; *SGS Société Générale de Surveillance SA v Islamic Repub of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003) para 184; *Ethyl Corpn v Gov't of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction (24 June 1998) (1999) 38 ILM 708, paras 74–88; *Mohammad Ammar Al-Bahloul v Repub of Tajikistan*, SCC Case No V064/2008, Partial Award on Jurisdiction and Liability (2 September 2009) para 155; *Sedelmayer v Russian Fed'n*, SCC Award (7 July 1998) para 313; *Alps Fin & Trade AG v Slovak Repub*, Ad Hoc, Award (5 March 2011); *Link-Trading Joint Stock Co v Repub of Moldova*, Ad Hoc, Award on Jurisdiction (16 February 2001) para 6. See also Christoph Schreuer, 'Travelling the BIT Route, of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 J World Inv & Trade 231, 235.

[26] See, eg, *Abaclat v Argentina* (n 25) para 496 (holding that 'any non-compliance with [an 18-month litigation requirement] may not lead to a lack of ICSID jurisdiction, and only—if at all—to a lack of admissibility of the claim'); *BG Group plc v Repub of Argentina*, Ad Hoc, Final Award (24 December 2007) para 147 (requirement to litigate in host state courts for eighteen months cannot be construed as an absolute impediment to arbitration where recourse to the domestic judiciary is unilaterally prevented or hindered by host state).

[27] *Biwater Gauff v Tanzania* (n 25) para 343.

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as imposing mandatory requirements.[28] Again, the rationale in many cases is that pre-arbitration procedural mechanisms are generally in the nature of statements of intention, reflecting both doubts about the enforceability of agreements to negotiate and doubts that violations of such agreements impose material harm. Where dispute resolution provisions clearly and unambiguously state that negotiations, mediation, or other pre-arbitration procedural requirements are mandatory, courts give effect to the parties' intentions, but where such clarity is lacking, courts are likely to hold that pre-arbitration procedural steps are non-mandatory.

The same rationale is reflected in Article 13 of the UNCITRAL Model Law on International Commercial Conciliation, which provides:

> Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.[29]

Importantly, Article 13 provides that the parties' agreement not to initiate arbitral proceedings must be express (and requires a separate undertaking, in addition to the underlying agreement to conciliate). Moreover, Article 13 also provides that agreements not to commence arbitral proceedings need not be given effect 'to the extent necessary for a party, *in its opinion*, to preserve its rights'.[30] This text again reflects the fundamentally aspirational or hortatory character of agreements to conciliate or mediate (and, necessarily, negotiate).

On the other hand, as noted above, if dispute resolution clauses unequivocally provide that negotiations or other procedural steps are a mandatory obligation, which must objectively be complied with in order to proceed with arbitration, then some arbitral tribunals and national courts have given effect to such language. In one case, for example, the arbitral tribunal held that a Request for Arbitration was premature, and dismissed the arbitration, because of the claimant's failure to complete pre-arbitral dispute resolution steps.[31] Similarly, another tribunal concluded that the pre-arbitration procedures were 'strictly binding upon the parties and govern their conduct before resorting to arbitration'.[32]

[28] See, eg, *Euro Petroleum Trading Ltd v Transpetroleum Int'l Ltd*, 2002 Int'l Arb L Rev N-1 (Irish High Ct); *Catleiva SL v Herseca Inmobiliaria SL*, Judgment (8 May 2012) STSJ CV 3915/2012 (Valencia Community Tribunal Superior de Justicia) (non-compliance with pre-arbitration procedures did not provide grounds for annulment of arbitral award); *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] 153 FLR 236, 250 (NSW SCt).

[29] UNCITRAL Model Law on International Commercial Conciliation (2002), Art 13, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html> accessed 8 October 2014.

[30] Emphasis added.

[31] *ICC Case No 12739*, Award, cited in Michael Bühler and Thomas H Webster, *Handbook of ICC Arbitration* (Sweet & Maxwell 2008) 67. See also *ICC Case No 9977* (n 3).

[32] *ICC Case No 6276* (n 4). See also *ICC Case No 9812*, Final Award (2009) 20(2) ICC Ct Bull 69, 73.

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Some investment arbitration tribunals have reached similar conclusions. Where they are sufficiently certain to be valid, and where the applicable agreement or treaty contains explicitly mandatory language, these tribunals have held that both cooling-off periods[33] and, even more frequently, domestic litigation requirements[34] must be complied with. These decisions reason that particular pre-arbitration procedural requirements are mandatory obligations and, in some cases (as discussed further below), jurisdictional requirements whose violation requires dismissal of arbitral proceedings.[35] More generally, International Court of Justice authority also supports the mandatory (and jurisdictional) character of at least some treaty requirements to negotiate the resolution of disputes before commencing judicial proceedings.[36]

Likewise, a number of national court decisions have held that particular pre-arbitration requirements for negotiation or conciliation imposed mandatory contractual obligations. This is true in both civil law[37] and common

[33] See, eg, *Ambiente Ufficio SpA v Argentine Repub*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 577–82; *Murphy Exploration & Prod Co Int'l v Repub of Ecuador*, ICSID Case No ARB/08/4, Award on Jurisdiction (15 December 2010) para 108; *Burlington Res Inc v Repub of Ecuador & Petro Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010) paras 311–12; *Salini Costruttori v Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) (2003) 42 ILM 609, 612; *Enron Corpn & Ponderosa Assets LP v Argentine Repub*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) para 88 (failure to comply with six-month negotiation period 'would result in a determination of lack of jurisdiction'); *Tulip Real Estate Inv & Dev Netherlands BV v Repub of Turkey*, ICSID Case No ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) para 71 ('The explicit requirements that the parties must seek to engage in consultations and negotiations with respect to the dispute as arising under the BIT and that there be a one-year waiting period from the date the dispute arose are accepted by the Tribunal as pre-conditions to submitting the dispute to arbitration').

[34] See, eg, *Ambiente Ufficio v Argentina* (n 33) paras 595–607; *Urbaser SA & Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Repub*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) paras 106–50; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (6 July 2013) paras 6.3.12–6.3.14; *Hochtief AG v Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) para 55 ('The Tribunal thus proceeds on the assumption, and without deciding the point, that Article 10 of the Argentina-Germany BIT imposes a mandatory 18-month submission to the national courts as a precondition of unilateral recourse to arbitration under the BIT'). See also *Republic of Argentina v BG Group plc*, 665 F3d 1363 (DC Cir 2012) (holding eighteen-month waiting period was mandatory jurisdictional requirement).

[35] See below, n 63 and accompanying text.

[36] See *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Fed'n)* (Preliminary Objections), Judgment [2011] ICJ Rep 70, paras 115 et seq (dismissing application to ICJ on jurisdictional grounds for failure to satisfy requirement to negotiate disputes prior to seeking judicial resolution). Cf *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Fed'n)* (Preliminary Objections), Joint Dissenting Opinion, [2011] ICJ Rep 142, para 63 (dissent reasoning that ICJ's decision dismissing action for failure to negotiate 'substituted a formalistic approach for the realistic, substantive approach that it has consistently taken in the past').

[37] See, eg, *Société Polyclinique des Fleurs v Peyrin*, Judgment (6 July 2000) [2001] Rev Arb 749 (French Cour de cassation civ 2e) (contractual conciliation procedure was mandatory); *Société Nihon Plast Co v Société Takata-Petri Aktiengesellschaft*, Judgment (4 March 2004) [2005] Rev Arb 143 (Paris Cour d'appel); *X v Union Cycliste Internationale (UCI)*, Judgment (18 June 2012), 4A_488/2011 (Swiss Federal Tribunal) (pre-arbitration mediation requirement was mandatory); Judgment (7 July 2014), 4A_124/2014 (Swiss Federal Tribunal); Judgment (16 September 2008) [2010] Rev Arb 354 with note Chaaban (Dubai Cassation Ct) ('if parties have agreed upon the necessity to submit the dispute to an expert accountant to try to resolve amicably the conflict between them before any request for arbitration, no party is authorized to have recourse to arbitration until it has submitted the dispute to the said expert'). See also Judgment (29 October 2008) XII ZR 165/06 (German Bundesgerichtshof); Judgment (18 November 1998) VIII ZR 344/97 (German Bundesgerichtshof); Antje Boldt, in Burkhard Messerschmidt and Wolfgang Voit (eds), *Privates Baurecht* (2nd edn, C H Beck 2012) para 39.

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law[38] jurisdictions. For example, one court gave effect to what it called a 'mandatory negotiation' clause,[39] while another court annulled an arbitral award on the grounds that 'the parties were required to participate in the mandatory negotiation sessions prior to arbitration'.[40]

The question of whether the parties intended a pre-arbitration procedure to be mandatory, or, alternatively, non-mandatory, has often turned on a case-by-case assessment of the parties' contractual language and intentions. As in other contexts, the use of imperative terms, such as 'shall' or 'must', has sometimes been held to be consistent with a mandatory obligation; in contrast, terms such as 'can', 'may', or 'should' are typically non-mandatory.

For example, a study of ICC arbitral awards concludes, 'when a word expressing obligation [, such as "shall",] is used in connection with amicable dispute resolution techniques, arbitrators have found that this makes the provision binding upon the parties' and 'compulsory, before taking jurisdiction'.[41] In the words of one recent award, the requirement of a bilateral investment treaty for initial resort to domestic litigation is 'binding':

> That is apparent from the use of the term 'shall' which is unmistakably mandatory and from the obvious intention of [the parties] that these procedures be complied with, not ignored.[42]

Relatedly, and parallelling analysis of the validity of agreements to negotiate or conciliate,[43] specific and detailed procedural requirements (for example, obligations to mediate for a specified period before a named institution) are more likely to reflect mandatory requirements than is the case with generalized provisions (for example, to attempt to resolve disputes amicably).[44] Thus, agreements requiring negotiations for a specific time period (for example, 20 days) or mediation before a specific mediator or institution (for example, JAMS) have been more likely to be treated as mandatory obligations than general requirements to 'negotiate in good faith'. In addition, the

[38] See, eg, *Kemiron Atl, Inc v Aguakem Int'l, Inc*, 290 F3d 1287, 1291 (11th Cir 2002) (provision that 'the matter shall be mediated within fifteen (15) days after receipt of notice' and '[i]n the event the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten [10] days after receipt of notice' is mandatory); *Consolidated Edison Co of NY v Cruz Constr Corpn*, 685 NYS2d 683, 684 (NY App Div 1999); *In re Jack Kent Cooke Inc & Saatchi & Saatchi N Am*, 635 NYS2d 611 (NY App Div 1995); *Weekley Homes, Inc v Jennings*, 936 SW2d 16, 19 (Tex App 1996); *Belmont Constr, Inc v Lyondell Petrochem Co*, 896 SW2d 352 (Tex App 1995); *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041, 1054 (QB); *Hooper Bailie Assoc Ltd v Natcon Group Pty Ltd* [1992] 28 NSWLR 194, 211 (NSW SCt).

[39] *Fluor Enters v Solutia* (n 12) 653.

[40] *White v Kampner* (n 16) 1387.

[41] Figueres (n 2) 72. See also *Philip Morris v Uruguay* (n 8) paras 140–1 (requirement for domestic litigation is 'binding' regardless 'how Article 10(2)'s terms are characterized (ie, as jurisdictional, admissibility or procedural … That is apparent from the use of the term "shall" which is unmistakably mandatory and from the obvious intention of [the parties] that these procedures be complied with, not ignored.')).

[42] *Philip Morris v Uruguay* (n 8) paras 140–1.

[43] See above, section II.A.

[44] See, eg, *In re Jack Kent Cooke* (n 38) 612 ('clearly stated time limit' of 270 days from the receipt of a statement of expenses was condition precedent to arbitration); *Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis, Inc*, 480 NYS 2d 724, 725 (NY App Div 1984), aff'd, 65 NY 2d 785 (NY 1985) (party's 'failure to give a written notice within thirty days that it disputed the accuracy or appropriateness of the furnished statements precluded their right to arbitrate' because notice requirement 'constituted a condition precedent to arbitration'); *Judgment (6 June 2007)* (n 15) 87 (the fact that the clause in question did

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commercial significance of particular procedural requirements may affect their character (for example, pre-arbitration procedural requirements that are linked to commercial rights or obligations, as in price or rent renegotiation clauses, are more likely to be mandatory).[45]

Given these various approaches, it is difficult to identify clear standards defining when a tribunal or court will regard a pre-arbitration procedural requirement as mandatory or non-mandatory. Decisions reach different conclusions, in interpreting similar language, leaving it uncertain how particular provisions will be interpreted. This uncertainty is inconsistent with the objectives of the arbitral process, while, also fundamentally, it is doubtful that parties in fact consider, much less intend, the varying meanings attributed to different dispute resolution provisions.

The better approach would be to focus analysis on the character of the underlying obligation to negotiate—which, as discussed above, is inherently imperfect and frequently invalid or unenforceable[46]—and on the importance of providing parties ready access to legal process and remedies—which is reflected, among other things, in the text of Article 13 of the UNCITRAL Model Law on Conciliation. Given these considerations, all doubts regarding the mandatory character of contractual negotiation provisions should be resolved in favour of their aspirational, non-binding nature. Only in cases involving unequivocal language should a pre-arbitration negotiation provision be regarded as a mandatory requirement, obligating parties not to commence or continue arbitral proceedings. This analysis would provide materially greater certainty than many existing approaches, while better according with parties' genuine intentions and objectives.

C. Content of Obligations Imposed by Agreement to Negotiate, Conciliate, or Mediate Disputes

Even assuming that an agreement to engage in a pre-arbitration dispute resolution process of negotiation or mediation is valid, and mandatory, the obligations under such an agreement are usually limited. In particular, an agreement to negotiate or mediate, even if a binding contract, is not an agreement to negotiate successfully or to

not provide for a time limit within which the mediation process was to be initiated was a strong indication against the binding nature of the pre-arbitral steps). See also *ICC Case No 9812* (n 32) 73 ('When a party wants to request a price review due to changes in the economic circumstances, the party must fulfil the requirements [of the price review clause]'); *ICC Case No 6276* (n 4) (tribunal relied on 'precise rules' and 'detailed' nature of the procedure, 'within precise time limits', to conclude that the procedures was mandatory); *Int'l Research Corpn plc v Lufthansa Sys Asia Pac Pte Ltd* [2012] SGHC 226 para 97 (Singapore High Ct) (enforcing clause that referred disputes to mediation through clearly defined committees by stating '[a] court looking at the conduct of the parties can easily discern if the entire mediation procedure in cl 37.2 was complied with or not. Not only is there an unqualified reference to mediation through the respective committees, the process is clear and defined. There is nothing uncertain about the mediation procedure in cl 37.2'). See also Berger (n 2) 5 ('Not only the word "shall" used in the first paragraph, but also the conditional formulation in the subsequent arbitration clause (If …), both signal the intention of the parties to make an attempt to resolve the dispute through the senior management a mandatory condition precedent to initiating arbitral proceedings').

[45] See *ICC Case No 9812* (n 32) 73.

[46] See above, section II.A.

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agree on any particular terms, but only an agreement to discuss a particular issue. In the words of an early English decision:

> There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.[47]

The same conclusion necessarily applies to an agreement to participate in a mediation or conciliation process: by their nature, these processes do not subject the parties to a binding third-party determination or require that they reach agreement to resolve their dispute. Mediation, conciliation, and similar processes are consensual, leaving to the parties the decision whether or not to agree on a settlement of their dispute.[48]

Despite this, some courts have interpreted agreements to negotiate or mediate somewhat more expansively, as imposing an obligation to negotiate in good faith and genuinely attempt to reach settlement.[49] For example, an Australian court rejected traditional common law skepticism regarding agreements to negotiate, reasoning:

> An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance with the standard impossible of assessment. Honesty is such a standard … The assertion that each party has an unfettered right to have regard to any of its own interests on any basis begs the question as to what constraint the party may have imposed on itself by freely entering into a given contract. If what is required by the voluntarily assumed constraint is that a party negotiate honestly and genuinely with a view to resolution of a dispute with fidelity to the bargain, there is no inherent inconsistency with negotiation, so constrained. To say, as Lord Ackner did [in describing the historic common law rule], that a party is entitled not to continue with, or withdraw from, negotiations at any time and for any reason assumes that there is no relevant constraint on the negotiation or the manner of its conduct by the bargain that has been freely entered into. Here, the restraint is a requirement to meet and engage in genuine and good faith negotiations.[50]

This reasoning was recently reinforced in an English High Court decision, holding that 'a time limited obligation to seek to resolve a dispute in good faith should be enforceable', and explaining, as follows:

> The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable

[47] *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494, 505–7 (HL). [48] Born (n 1) 272.

[49] See *United Group Rail Servs Ltd v Rail Corpn New South Wales* [2009] NSWCA 177 para 23 (NSW SCt) ('The business people here chose words to describe the kind of negotiations they wanted to undertake, "genuine and good faith negotiations," meaning here honest and genuine with a fidelity to the bargain. That should be enforced'); *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* (n 14) paras 50–2, 64.

[50] Ibid para 65.

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> standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration.[51]

The premise of substantive obligations of good faith, applicable during the negotiation process, also exists in other jurisdictions where, by similar logic, agreements to negotiate (or mediate) may be more readily enforceable and may impose more significant obligations on the parties.[52]

The existence of these divergent approaches to the interpretation (and validity) of agreements to negotiate or conciliate inevitably produces greater uncertainty as to their meaning and effects. Even in those jurisdictions which afford broader meaning and consequences to agreements to negotiate, however, the consequences of breaching such an agreement will generally be limited to monetary damages resulting from breach of the negotiation obligation, rather than from breach of an underlying substantive agreement that allegedly would or should have been reached. The obligation to negotiate or conciliate in good faith remains only that—the obligation of means, and not an obligation of result (that is, not an obligation to accept any particular agreement).

Again, the content of agreements to negotiate (or conciliate) reflects the inherently limited scope and particular character of such agreements. Agreements to negotiate do not, by their very nature, entail commitments to resolve disputes in particular ways, or at all, but only to engage in a process that is necessarily aspirational and, experience teaches, very often unsuccessful. In many events, such agreements are so uncertain as to be invalid or unenforceable and, even when valid, the obligations imposed by such agreements are very limited.

D. Obligations to Resort to Local Remedies

As discussed above, many multilateral and bilateral investment treaties contain pre-arbitration procedural requirements providing for investors to resort to local remedies (typically by litigation in domestic courts for a specified time period) prior to

[51] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* (n 14) para 64.

[52] See, eg, *Mocca Lounge, Inc v Misak* (n 13) 763 ('It is true that where the parties are under a duty to perform an obligation which is definite and certain, the courts will imply and enforce a duty of good-faith performance, including good-faith negotiations, in order that a party not escape from the obligation he has contracted to perform. However, even 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'); *HSBC Inst'l Trust Servs (Singapore) Ltd v Toshin Dev Singapore Pte Ltd* [2012] SGCA 48 (Singapore Ct App).

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commencing an arbitration.[53] In general, many of the same considerations that inform the analysis of pre-arbitration procedural requirements in international commercial arbitration agreements apply also to local litigation requirements in investment treaties.

Requirements in investment treaties do not require the host state to resolve the litigation in any particular manner, but simply provide the investor with a local forum in which to (initially) pursue its claim; equally, such requirements virtually never[54] require the investor to accept the result reached in local courts, instead merely obligating the investor to initiate and pursue a litigation, while retaining the freedom to commence arbitral proceedings after (or before) a judgment is reached.[55] Like agreements to negotiate or conciliate, local litigation requirements are ultimately capable of resolving investment disputes only when both parties are willing to accept the result—failing which international arbitration is available as the prescribed mechanism for dispute resolution.

Given this, many of the same considerations that result in treating conciliation and mediation requirements as either unenforceable or aspirational also apply to local litigation requirements. Of course, local litigation requirements also reflect state interests in having disputes resolved locally in domestic courts, rather than in international proceedings.[56] This arguably justifies treating local litigation requirements as mandatory more readily

[53] See above, n 5 and accompanying text.

[54] For one very unusual exception, see *Philip Morris v Uruguay* (n 8) para 143 ('The Claimants' actions before the TCA sought annulment of the administrative measures that are claimed in this arbitration to be in breach of the BIT. Had the TCA granted the Claimants' requests within the prescribed 18-month period, or even thereafter, by annulling the measures in question, the Claimants' claims in this arbitration would have lost their legal grounds. The object and purpose of the domestic litigation requirement under Article 10(2) would thus have been met') (footnote omitted). The Switzerland-Uruguay BIT, Art 10(2), provides: 'If a dispute within the meaning of paragraph (1) cannot be settled within a period of six months after it was raised, the dispute shall, upon request of either party to the dispute, be submitted to the competent courts of the Contracting Party in the territory of which the investment has been made. If within a period of 18 months after the proceedings have been instituted no judgment has been passed, the investor concerned may appeal to an arbitral tribunal which decides on the dispute in all its aspects.'

[55] See Schreuer et al (n 2) 413 ('Insistence on the exhaustion of local remedies does not seem to serve the interests of either party. From the investor's perspective, resort to local remedies before institution of ICSID arbitration is a waste of time and money. The host State's investment climate may be affected by the public proceedings in its courts and may further exacerbate the dispute between the parties. If the ICSID tribunal overturns a decision by the host State's highest court, this may be a source of embarrassment. Therefore, it seems wisest to leave the Convention's basic rule of non-exhaustion in place and to follow the example of the vast majority of consent agreements in not requiring the exhaustion of local remedies'); Richard Kreindler, 'Parallel Proceedings: A Practitioner's Perspective' in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung et al (eds), *The Backlash against Investment Arbitration* (Wolters Kluwer 2010) 148 ('[W]here a BIT-based claim has been brought before a local court or in local arbitration rather than, for example, before ICSID, and where jurisdiction in the local proceedings is upheld, such a decision should not normally divest a later constituted BIT-based arbitral tribunal of jurisdiction over the same BIT-based claim'); Georgios Petrochilos, Sylvia Noury and Daniel Kalderimis, 'ICSID Convention, Chapter II, Article 26 [Exclusive remedy]' in Loukas A Mistelis (ed), *Concise International Arbitration* (Wolters Kluwer 2010) 78 ('Some BITs provide for the mandatory attempt to first settle the dispute in the domestic courts of the host State for a certain period of time (art 10(3)(a) of the Argentina-Germany BIT provides for a period of eighteen months). It can be argued that the most likely effect of such a provision is delay in the settlement of the dispute').

[56] See *Philip Morris v Uruguay* (n 8) para 137. See also *Maffezini v Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) para 35 ('This language suggests that the Contracting Parties to the BIT—Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration').

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than negotiation on mediation requirements.[57] Nevertheless, states have multiple available avenues for resolving disputes locally (including themselves initiating litigation in local courts), while local litigation requirements are inherently incapable of either resolving disputes or resolving them in any particular way.

In these circumstances, the better approach is to treat local litigation requirements as presumptively aspirational and hortatory, rather than presumptively mandatory. Only in cases involving clear, unequivocal language should a local litigation requirement be interpreted as imposing a binding, mandatory obligation.[58]

III. Characterization of Pre-Arbitration Procedural Requirements: 'Admissibility', 'Jurisdictional', or 'Procedural'

Recurrent issues related to the validity and effects of pre-arbitration procedural requirements involve the characterization of such requirements. In particular, issues of characterization concern whether such requirements involve 'admissibility', 'jurisdictional', or 'procedural' issues. Cases presenting the issues have produced divergent decisions by arbitral tribunals, courts, and other authorities. These results are not only analytically confusing, but also often leave the legal consequences of breaches of pre-arbitration procedural requirements uncertain.

Disputes over pre-arbitration procedural requirements frequently involve issues of characterization. In particular, claims of non-compliance with procedural requirements can be characterized as 'jurisdictional' defences (on the theory that the arbitration agreement is not triggered (or formed) and does not provide an arbitral tribunal with any authority until pre-arbitration procedural requirements have been complied with, or on the theory that the parties' consent to arbitration is subject to the fulfilment of pre-arbitration steps), 'admissibility' defences (on the theory that the arbitration agreement exists and provides the arbitrators with jurisdiction, but does not permit assertion of substantive claims until after specified requirements have been satisfied), or 'procedural' requirements (on the theory that pre-arbitration requirements merely concern the procedural conduct of the dispute resolution mechanism, but do not affect the parties' substantive rights to be heard).

[57] See *Philip Morris v Uruguay* (n 8) para 137 ("The Tribunal also considers that a finding that domestic litigation would be "futile" must be approached with care and circumspection. Except where this conclusion is justified in the factual circumstances of the particular case, the domestic litigation requirement may not be ignored or dispensed with as futile in view of its paramount importance for the host State. Its purpose is to offer the State an opportunity to redress alleged violations of the investor's rights under the relevant treaty before the latter may pursue claims in international arbitration'). See also Born (n 1) 923–8.

[58] See, eg, *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) paras 115–19 ('The manner in which Article 10 of the BIT is worded (and it is words that determine the intention of the Parties when interpreting a treaty) it is apparent that reference to ICSID arbitration is expressly conditioned upon *inter alia* a claimant-investor first submitting his/its dispute to a Court of competent jurisdiction in Argentina, during an 18-month period (and a three month further waiting period) and then proceeding to ICSID arbitration'); *Republic of Argentina v BG Group plc* (n 34) 1373 ('Because the Treaty provision at issue is explicit, the usual 'emphatic federal policy in favor of arbitral dispute resolution … cannot override the intent of the contracting parties').

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The characterization of contractual pre-arbitration procedural requirements varies among different legal systems,[59] but it can have potentially important consequences in some jurisdictions. For example, some authorities suggest that non-compliance with pre-arbitration procedural requirements should be characterized as an issue of 'admissibility', rather than of 'jurisdiction', because doing so will limit the possibilities of interlocutory judicial decisions and of annulment or non-recognition of arbitral awards on jurisdictional grounds.[60] Alternatively, a 'jurisdictional' requirement must arguably be satisfied solely by circumstances existing as of the date of initiation of an arbitration,[61] while an 'admissibility' or 'procedural' requirement can generally be satisfied subsequently (by circumstances arising after the arbitration has been commenced).

[59] The concept of 'admissibility' has different meanings in different jurisdictions. In the context of arbitration, admissibility generally refers to preliminary aspects of the substantive merits of a claim (ie, whether the claim is ripe to be heard), as distinguished from the jurisdiction of a tribunal to consider and decide the claim (ie, whether the tribunal is competent to hear the claim at all, irrespective of whether the claim is premature or not). See *Waste Mgt Inc v United Mexican States*, ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000) para 58 ('Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act. If the Claimant's case is inadmissible, the Tribunal has jurisdiction to hear it, but should decline it on grounds relating to the case itself—not relating to the role or powers of the Tribunal'); Gerald Fitzmaurice, *The Law and the Procedure of the International Court of Justice* (Grotius Publ 1986) 438–9 ('[Admissibility] is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits … [The term "ultimate merits"] is used because often a preliminary objection—based, for example, on the nationality of the claimant, or the question of exhaustion of legal remedies, or of undue delay, is connected with, and not entirely without relevance to, the substantive merits, and it is often more closely related to these than purely jurisdictional issues'); Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen, Karl Heinz Böckstiegel, Paolo Michele Patocchi et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005) 601, 617 ('If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse. If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final'); *Kılıç v Turkmenistan* (n 34) paras 6.3.4–6.3.5.

[60] See Paulsson (n 59) 617 ('Decisions of tribunals which do not respect jurisdictional limits may be invalidated by a controlling authority. But if parties have consented to the jurisdiction of a given tribunal, its determinations as to the admissibility of claims should be final. Mistakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of the scope for challenging awards').

[61] See, eg, *ICS Inspection & Control Servs Ltd (UK) v The Repub of Argentina*, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) para 272 ('At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed … [T]he investment treaty presents a "take it or leave it" situation at the time the dispute and the investor's circumstances are already known'). This principle is also expressed in jurisprudence of the International Court of Justice. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment [2002] ICJ Rep 3, para 26 ('The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events'); See *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Fed'n)* (Preliminary Objection) (n 36) 70 ('To the extent that the procedural requirements of Article 22 may be conditions, they must be conditions precedent to the seizing of the Court even when the term is not qualified by a temporal element').

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Both arbitral awards and other authorities have reached divergent conclusions regarding the proper characterization of pre-arbitration procedural requirements. Some authorities have held that such requirements involve issues of 'admissibility', rather than 'jurisdiction'.[62] Other authorities have held that pre-arbitration procedural requirements are 'jurisdictional', and that non-compliance with such requirements precludes the proper initiation of an arbitration.[63] A third line of authority has declined to characterize pre-arbitration procedural requirements as involving either admissibility, jurisdiction, or procedural issues—holding instead that such requirements are mandatory ones that must be complied with (as discussed below[64]), while adopting pragmatic approaches to the remedies for violation of such requirements.[65]

[62] See, eg, *Hochtief AG v Argentina* (n 34) para 96 ('[The Tribunal] regards the 18-month period as a condition relating to the manner in which the right to have recourse to arbitration must be exercised—as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal'); *Telefónica SA v Argentine Repub*, ICSID Case No ARB/03/20, Award on Jurisdiction (25 May 2006) para 157 ('[T]he Tribunal notes that this requirement [that an aggrieved investor, before resorting to ICSID arbitration, must submit its claims to domestic courts and pursue its case there for at least 18 months if no decision on the merits has been rendered within this time period] or precondition, is best qualified as a temporary bar to the initiation of arbitration. The objection is therefore technically an exception of inadmissibility raised by Argentina against the Claimant for not having complied with the requirement. The Tribunal notes that the inadmissibility of the claim would result in the Tribunal's temporary lack of jurisdiction, that is until the condition of the Claimant having submitted its claims to the courts of Argentina as the host State and not having obtained a decision on the merits within eighteen months would not had been satisfied').

[63] See, eg, *Burlington v Ecuador* (n 33) para 315 ('[B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction'); *Murphy Exploration v Ecuador* (n 33) para 149 ('This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, "a procedural rule" or a "directory and procedural" rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules'); *Wintershall v Argentina* (n 58) para 116 ('In the present case, therefore the BIT between Argentine and Germany is a treaty undoubtedly providing for a right of access to international arbitration (ICSID) for foreign investors, who are German nationals—but this right of access to ICSID arbitration is not provided for *unreservedly*, but upon condition of first approaching competent Courts in Argentina. That such a condition as that stipulated under Article 10(2) (eg, a local-remedies-clause with an opt-out provision) can be lawfully provided for is clear from the provisions of Article 26 of the ICSID Convention—The first part of Article 26 states that "consent of the parties to arbitration under this Convention shall, *unless otherwise stated* be deemed consent to such arbitration to the exclusion of any other remedy." The *exclusive* remedy rule mentioned in the first sentence of Article 26 is subject to modification by the terms of a particular BIT between two Contracting States. Thus, a local-remedies rule may be lawfully provided for in the BIT—under the first part of Article 26; once so provided, as in Article 10(2), it becomes a condition of Argentina's "consent"—which is, in effect, Argentina's "offer" to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions *inter alia* of Article 10(2); an investor (like the Claimant) can accept the "offer" only as so conditioned' (emphasis in original)).

[64] See below, ns 98–101 and accompanying text.

[65] *Philip Morris v Uruguay* (n 8) para 142 ('[T]he Tribunal does not consider it necessary to characterize the 18-month domestic litigation requirement as pertaining to jurisdiction or to admissibility. Even if that requirement were considered as pertaining to admissibility, its compulsory character would be evident').

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It is doubtful that analysis is advanced by emphasis on characterization of procedural requirements. The allocation of jurisdictional competence and scope of judicial review under many national laws is dealt with without regard to characterization of pre-arbitration requirements as issues of 'admissibility', 'jurisdiction', 'procedure', or otherwise.[66] Resolution of issues of characterization may therefore influence the resolution of questions regarding the scope of judicial review and allocation of competence, but will not necessarily resolve it, at least not in all jurisdictions. Moreover, in most instances, characterization of a procedural requirement as 'jurisdictional' or 'procedural' expresses a conclusion, rather than reasoning for that conclusion; the better approach is to consider the purpose for which a characterization is adopted, and address directly the practical and legal consequences of, and arguments regarding, that particular purpose.

In characterizing contractual procedural requirements, the better view is that the character of such requirements depends on the intentions of the parties with regard to specific issues (for example, allocation of competence, time at which procedural requirement must be satisfied). Some pre-arbitration procedural requirements may be characterized as 'jurisdictional' because it is evident that the parties did not wish for any rights or obligations to arbitrate to arise, or for any arbitral tribunal to have authority to consider or decide the parties' disputes, until after pre-arbitration procedures have been satisfied; in these instances, the contractual procedural requirement has a 'jurisdictional' character. Other contractual requirements may be in the nature of procedural regulation of the arbitral process itself or substantive limitations on the parties' ability to assert claims in the arbitration, which the parties intended for the arbitrators to decide; in these cases, the requirements have a 'procedural' nature (relevant to the conduct of the arbitration) or 'substantive' character (relevant to the admissibility of a claim). Characterizing a particular procedural requirement depends ultimately on an interpretation of the parties' contractual language and intentions.

In this context, requirements in some investment protection instruments that parties exhaust local remedies, typically by litigation in national courts, can raise considerations that are not more broadly applicable. Thus, Article 26 of the ICSID Convention permits contracting states to make reservations to their consent to submit investment disputes to arbitration where the foreign investor has not exhausted its local remedies:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. *A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*[67]

Some investment arbitration tribunals have treated provisions in bilateral investment treaties (BITs) or investment agreements requiring the exhaustion of local remedies as mandatory, jurisdictional requirements, holding that such requirements are essential preconditions to arbitration which are 'an essential preliminary

[66] Eg, the United States Federal Arbitration Act and English Arbitration Act, 1996, do not (thus far) attribute significance to the concept of 'admissibility' in this context.

[67] ICSID Convention, Art 26 (emphasis added).

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step to the institution of ICSID arbitration'.[68] These decisions generally rest on the specific language of the ICSID Convention in conjunction with the particular character of requirements for the exhaustion of local remedies, to suggest that the local litigation requirements are 'jurisdictional' in nature, pertaining to the *ratione consensus* element of jurisdiction. However, this reasoning does not apply more broadly outside the ICSID context, to contractual requirements for negotiation or conciliation in commercial settings or to other investment treaty settings. On the contrary, the same basic objectives of ensuring ready access to legal remedies also generally apply to the interpretation of local litigation requirements (or comparable requirements for resort to other forms of alternative dispute resolution) as to other pre-arbitration procedural requirements.

IV. Effects of Non-Compliance with Pre-Arbitration Procedural Requirement

A related, and recurrent, question concerns the effects of a party's breach of a mandatory pre-arbitration procedural requirement. Again, this should principally be an issue of interpreting the terms of the parties' agreement (or the applicable investment treaty), involving a number of the same interpretative considerations as those outlined above in the context of discussing the validity and mandatory character of pre-arbitration requirements.

A. Pre-Arbitration Procedural Requirements: Conditions Precedent versus Contractual Obligations

Some authorities conclude that violation of a 'condition precedent', as distinguished from non-compliance with a 'contractual obligation', results in either a jurisdictional or substantive bar to a party's claim. For example, New York courts have repeatedly held that 'conditions precedent' to arbitration are 'prerequisite[s] to the submission of any dispute to arbitration', and 'a precondition to access to the arbitral forum',[69] and that a party's failure to comply with these preconditions 'foreclose[s]' access to arbitration.[70]

[68] *Wintershall v Argentina* (n 58) paras 114–18; see also *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) paras 79–94.

[69] *Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis, Inc*, 65 NY2d 785, 787 (NY 1985) (granting stay of arbitration where party failed to follow timing and notice requirements before submitting dispute to arbitration); *Rockland County v Primiano Constr Co*, 431 NYS2d 478, 482 (NY App Div 1980). See also *Lakeland Fire Dist v E Area Gen Contractors Inc*, 791 NYS2d 594, 596 (NY App Div 2005) ('permanent stay' of arbitration granted where contractor failed to fulfil pre-arbitration steps); *Polesky v GEICO Ins Co*, 661 NYS2d 639 (NY App Div 1997); *In re Jack Kent Cooke* (n 38) 612 (notice and 270-day negotiation requirements were conditions precedent to arbitration); *Sucher v 26 Realty Assocs*, 554 NYS2d 717, 718 (NY App Div 1990) (where party had not complied with conditions precedent it was 'not entitled to have the dispute submitted to arbitration'); *NY Plaza Bldg Co v Oppenheim, Appel, Dixon & Co*, 479 NYS2d 217, 221 (NY App Div 1984); *Am Silk Mills Corpn v Meinhard Commercial Corpn*, 315 NYS2d 144, 148 (NY App Div 1970).

[70] *Consolidated Edison Co v Cruz Constr* (n 38) 684.

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Other US authority is similar in holding that non-compliance with 'conditions precedent' to arbitration will preclude resort to arbitration.[71] In one representative case, the US Court of Appeals held that it was premature to commence arbitral proceedings because 'the mediation clause here states that it is a condition precedent to any litigation … and the mediation clause demands strict compliance with its requirement[s]'.[72] In another decision, a US court considered a contract with a multi-step dispute resolution clause which provided, among other things, that disputes 'shall … be subject to mediation as a condition precedent to arbitration'.[73] After disputes arose, and one party attempted to commence arbitration, the court held that '[u]nder the plain language of the contract, the arbitration provision is not triggered until one of the parties requests mediation;[74] because neither party 'ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration'.[75]

Decisions in some other common law[76] and civil law[77] jurisdictions are to the same effect, often using similar terminology and analysis, holding that the breach of particular pre-arbitration procedural requirements mandated dismissal of a request for arbitration. As one Singaporean decision reasoned:

> Where an agreement is subject to a condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance under the agreement … A dispute resolution clause, which may be multi-tiered in nature, should be construed like any other commercial agreement … Therefore, until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration. In the same vein, an arbitral tribunal would not have jurisdiction before the condition precedent is fulfilled.[78]

Some arbitral authority reaches the same result, concluding that failure to comply with mandatory pre-arbitration procedural requirements bars a party from initiating arbitral proceedings.[79]

Despite these various authorities, a number of other national court decisions have concluded that particular pre-arbitration procedural requirements were not conditions precedent to commencing arbitral proceedings—even where such requirements

[71] See, eg, *Kemiron Atl v Aguakem Int'l* (n 38) 1291; *424 W 33rd St, LLC v Planned Parenthood Fed'n of Am, Inc*, 911 NYS2d 46, 48 (NY App Div 2010); *Weekley Homes v Jennings* (n 38) 19; *Belmont Constr v Lyondell Petrochem* (n 38) 352.

[72] *De Valk Lincoln Mercury, Inc v Ford Motor Co*, 811 F2d 326, 336 (7th Cir 1987).

[73] *HIM Portland v DeVito Builders* (n 20) 42. [74] Ibid 44. [75] Ibid 44.

[76] See, eg, *Cable & Wireless v IBM UK* (n 38) 1054; *Hooper Bailie Assoc v Natcon Group* (n 38) 211; *Int'l Research v Lufthansa Sys Asia Pac* (n 44) paras 104 et seq (Singapore High Ct) (citing G Born, *International Commercial Arbitration* (Kluwer Law International 2009) 842–3 and holding 'since [the mediation provision] is a condition precedent, if [the court finds] that [it] has not been complied with, the [arbitral tribunal] does not have jurisdiction to resolve the dispute').

[77] See, eg, *Société Polyclinique des Fleurs v Peyrin* (n 37); *Société Nihon Plast v Société Takata-Petri* (n 37); *X v UCI* (n 37); Judgment (16 September 2008) (n 37), [2010] Rev Arb 354, Note, Chaaban (Dubai Cassation Ct) ('if parties have agreed upon the necessity to submit the dispute to an expert accountant to try to resolve amicably the conflict between them before any request for arbitration, no party is authorized to have recourse to arbitration until it has submitted the dispute to the said expert').

[78] *Int'l Research v Lufthansa Sys Asia Pac* (n 44) paras 101 et seq.

[79] *ICC Case No 12739* (n 31); *ICC Case No 9812* (n 32) 73; Figueres (n 2) 72.

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were valid, mandatory contractual obligations. These decisions have instead reasoned that pre-arbitration procedural requirements were contractual obligations, whose breach entitled a counter-party to damages, but were not conditions whose breach would preclude a party from initiating arbitration.[80] In one commentator's words:

> The clause [providing for pre-arbitration procedures] is on the one hand regarded as valid and admissible. However, for the court, applying the clause is irrelevant. This means a party can file a claim at any time irrespective of such a clause. The party is at most liable to pay damages.[81]

To determine whether a particular provision is a 'condition precedent' or similar precondition to arbitration, whose breach bars access to arbitration, the language of the provision is important. Provisions that specifically provide that a particular pre-arbitration step is a 'condition precedent' or 'condition' will generally be more likely to be characterized as foreclosing access to arbitration if they are breached.[82] Similarly, provisions with defined time periods and concrete pre-arbitration steps are more likely to be categorized as conditions precedent, whose breach forecloses access to arbitration, than mere contractual obligations.[83]

In many cases, however, even a mandatory obligation to negotiate for a specified time period will not be treated as a condition precedent to arbitration, but will instead constitute only a contractual commitment whose breach entitles a party to damages (or other forms of procedural relief), but which is not a bar to commencement of arbitration. This conclusion rests in part on the underlying rationale that obligations to negotiate or conciliate are by nature imperfect and uncertain obligations, whose breach has only minimal consequences on the parties' rights, and which are not intended to impose a bar to access to arbitration and adjudicative relief. The same

[80] See, eg, *ICC Case No 11490* (n 23); *Judgment (16 May 2011)* (2011) 29 ASA Bull 643, 651 et seq (Swiss Federal Tribunal); *Judgment of 15 March 1999*, (2002) 20 ASA Bull 373, 374 (Kassationsgericht Zürich) (obligation to mediate was substantive obligation, but did not prevent commencement of arbitration); *Thyssen Canada Ltd v Mariana* [2000] 3 FC 398 (Canadian Fed Ct App); *Fai Tak Eng'g Co Ltd v Sui Chong Constr & Eng'g Co Ltd* [2009] HKDC 141 (HK Dist Ct); *Hercules Data Comm Co Ltd v Koywa Commc'ns Ltd* [2001] HKCFI 71 (HK Ct First Inst); *Astel-Peiniger Joint Venture v Argos Eng'g & Heavy Indus Co Ltd* [1994] HKCFI 276 (HK Ct First Inst). See also Doug Jones, 'Dealing with Multi-Tiered Dispute Resolution Process' (2009) 75 Arb 2, 191; Isaak Meier, *Schweizeriches Zivilprozessrecht—Eine Kritische Darstellung aus der Sicht von Praxis und Lehre* (Schulthess 2010) 598.

[81] Meier (n 80) 598.

[82] See, eg, *HIM Portland v DeVito Builders* (n 20) 44 (where the arbitration agreement provided that mediation was 'a condition precedent to arbitration', the court held that '[i]t is difficult to imagine language which more plainly states that the parties intended to establish mediation as a condition precedent to arbitration'); *In re Eimco Corpn*, 163 NYS2d 273, 282 (NY 1957); *424 W 33rd St v Planned Parenthood Fed'n of Am* (n 71) 48; *Consolidated Edison v Cruz Constr* (n 38) 684. See also Berger (n 2) 5 (2006) ('not only the word "shall" … but also the conditional formulation in the subsequent arbitration clause ("If …") … signal the intention of the parties to make an attempt to resolve the dispute through [a particular process] a mandatory condition precedent to initiating arbitral proceedings').

[83] See, eg, *In re Jack Kent Cooke* (n 38) 612 ('clearly stated time limit' of 270 days from receipt of statement of expenses was condition precedent); *Silverstein Prop v Paine, Webber, Jackson & Curtis* (n 44) 725. (NY App Div 1984), aff'd, 65 NY2d 785 (NY 1985) (party's 'failure to give a written notice within 30 days that it disputed the accuracy or appropriateness of the furnished statements precluded their right to arbitrate' because notice requirement 'constituted a condition precedent to arbitration').

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rationale applies to local litigation requirements which, as discussed above, are generally also incapable of resolving the parties' dispute unless both parties consent.[84]

This rationale is well considered. Treating a negotiation, mediation, or local litigation requirement as a condition precedent to arbitration, which bars access to arbitral remedies, imposes disproportionate costs and delays on the entire dispute resolution process, which reasonable parties cannot generally be assumed to have intended absent very explicit language requiring this result.

Moreover, it is also important that pre-arbitration negotiation and litigation requirements not limit the parties' access to justice. These provisions create the risk that parties will be prevented from pursuing presumptively meritorious claims, and obtaining presumptively justified relief, in the parties' agreed forum for dispute resolution. Conditions restricting a party's access to adjudicative mechanisms, in an agreed forum, are not to be favoured or interpreted expansively. Indeed, one tribunal held that access to arbitration could not be limited in the absence of explicit statutory authority under applicable law.[85]

B. Time for Satisfying 'Pre-Arbitration' Procedural Requirement

Even if a negotiation, conciliation, or litigation requirement is characterized as a mandatory condition precedent, this does not mean that the requirement must be satisfied prior to initiation of arbitration. On the contrary, in many cases, the better interpretation is that the parties intended to permit negotiation, mediation, or local litigation requirements to be satisfied (at least in part) after the filing of a notice or request for arbitration, and not necessarily before such a filing. On this view, it is unduly formalistic to dismiss an arbitration, requiring a party to commence or complete a contractual period for negotiations, only to thereafter commence the same arbitral process.

This result has been adopted by a number of arbitral awards, which have held that a 'pre-arbitration' procedural requirement, such as litigation for a specified period or negotiations or conciliation for such a period, may be satisfied after the initiation of an arbitration.[86] As one tribunal reasoned:

[84] See above, section II.D.

[85] See Eduardo Zuleta Jaramillo, *Empresa Nacional de Telecomunicaciones (Telecom, En Liquidación) v IBM de Colombia SA, Award of 17 November 2004*, A contribution by the ITA Board of Reporters, <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn80480> accessed 6 October 2014: 'The tribunal rejected the objection, reasoning that the right of access to the administration of justice, provided under article 229 of the Colombian Constitution, could not be limited by agreement of the Parties … [T]he tribunal reasoned that any requirements—such as a prior direct resolution mechanism or a prior conciliation procedure established by the parties as a step prior to arbitration—limited the access of the parties to the administration of justice. According to the tribunal, the regulation of the right to access the administration of justice is exclusively the authority of the legislator. Hence, any limitation may be established only by law. The tribunal established that individuals involved in a dispute that may be subject to arbitration, are barred from demanding compliance with dispute resolution mechanisms not provided for in the law, even if such mechanisms have been agreed upon by the Parties in an arbitration clause.'

[86] *Philip Morris v Uruguay* (n 8) para 148; *TSA Spectrum de Argentina SA v Argentine Republic*, ICSID Case No ARB/05/5, Award (19 December 2008) paras 110–12 ('The Arbitral Tribunal has some doubts as to whether Article 10(2) should be understood to give an investor a choice between administrative and judicial remedies. The provision has some resemblance with Article 26 of the ICSID Convention which provides that a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention. However, the purpose of Article 10(2)

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> [T]he core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources.[87]

Other international authorities are to the same effect.[88] These decisions are well considered: it makes little sense to require the expense and delays associated with refiling a request for arbitration and (especially) reconstituting an arbitral tribunal because the primarily aspirational terms of pre-arbitration procedural requirements have not (yet) been fully satisfied. As long as the requirements are satisfied prior to the ultimate arbitral award, there is no reason to impose costly delays and burdens, with little countervailing benefit.

A similar approach to failures to comply with pre-arbitration negotiation, mediation, or litigation requirements, suggested by thoughtful commentary, is for an arbitral tribunal to direct the parties to participate in pre-arbitration mediation and/or other contractual dispute resolution steps, either prior to or in parallel with proceeding with the arbitration.[89] Several Swiss judicial decisions appear to have adopted this approach,[90] as have at least some investor-state arbitral awards.[91] This approach is well considered and, even where a contractual provision is interpreted as a mandatory condition precedent, it should be capable of being satisfied even after an arbitration is

would seem to be that domestic remedies should be exhausted to the extent that this might produce results within an eighteen-month period, and this purpose is best served if the investor is required successively to avail himself of all remedies, whether administrative or judicial, which give him a fair chance of obtaining satisfaction at the national level within the said time frame … In these circumstances, and despite the fact that ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to reject the case on the ground of failure to observe the formalities in Article 10(3) of the BIT, since a rejection on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter').

[87] *Teinver v Argentina* (n 8) para 135.

[88] *Mavrommatis Palestine Concessions Case (Greece v Great Britain)*, Judgment (30 August 1924) (1924) PCIJ Series A, No 2, 34 ('Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications'); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide Between Croatia and Serbia (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412, para 87 ('[T]he question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense. But it is nevertheless closely related to jurisdiction, inasmuch as the consequence is exactly the same whether it is the conditions of access or the conditions of jurisdiction *ratione materiae* or *ratione temporis* which are unmet: the Court lacks jurisdiction to entertain the case. It is always within the context of an objection to jurisdiction, as in the present case, that arguments will be raised before the Court regarding the parties' capacity to participate in the proceedings … It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently').

[89] Boog (n 4); Jacobs (n 2); Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Thomson 2007) para 13.

[90] See *Judgment (16 May 2011)* (n 80) paras 3.4, 3.5, 4 (approving stay of proceedings and setting of timeframe for parties to comply with procedural requirements); *Judgment (6 June 2007)* (n 15).

[91] See *Philip Morris v Uruguay* (n 8) 144.

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commenced; this avoids the inefficiencies and denials of access to adjudicative remedies that a contrary interpretation would produce.[92]

C. Effect of Non-Compliance with Contractual Time Period for Commencing Arbitration

A party's failure to commence an arbitration within a contractual time period for doing so will often result in barring it from pursuing that claim, in either arbitral or other proceedings. Courts have refused to interpret clauses providing that arbitral proceeding had to be commenced within a specified time limit as granting the claimant the option of commencing a court action in the event that it does not resort to arbitration within that time frame.[93] As with other types of time limitations (for example, statutes of limitations), contractual time limitations are generally for the arbitrators to decide as elements of the parties' substantive dispute.

V. Compliance with Procedural Requirements

Another recurrent issue in disputes regarding compliance with pre-arbitration procedural requirements is whether a party has complied with an obligation to negotiate or resolve disputes amicably, or to resort to local remedies prior to initiation of arbitration. It is clear that a duty to negotiate imposes only limited obligations, which are generally satisfied very readily:[94] negotiating ordinarily means no more than indicating availability to exchange views about a dispute and imposes no obligation to compromise, to consider compromises, to volunteer a new or revised position, or otherwise to engage in bargaining with a counter-party.

A related issue is how long a party must attempt to negotiate in order to satisfy a pre-arbitration requirement to attempt to resolve disputes amicably. In some agreements, a defined time period (for example, thirty days or six months) is specified; in these cases, the time limit in principle defines the parties' obligations (with neither party being required to negotiate or refrain from commencing arbitration beyond this time period). In other cases, however, the parties' agreement will specify no time period for negotiations or cooling off, leaving for interpretation how lengthy an effort will satisfy the contractual requirement.[95] The better view, consistent with the character of the obligation to negotiate, is that neither rigid nor lengthy periods of attempted negotiation are required.

Thus, an early decision of the Permanent Court of International Justice declared:

> Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches: it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is

[92] The same analysis permits 'cooling-off' or waiting periods to be satisfied by the running of time or conduct of negotiations after the filing of a request or notice of arbitration.

[93] See *China Merchant Heavy Indus Co Ltd v JGC Corpn* [2001] HKCA 248 (HK Ct App); *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2002] HKCFI 682 (HK Ct First Inst).

[94] See above, section II.C.

[95] See Palmer and Lopez (n 2); Pryles (n 2).

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> reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiations.[96]

Other authorities are to the same effect.[97]

Parties frequently argue that their obligations to negotiate were either fulfilled, or did not need to be fulfilled, because negotiations were or would have been futile—claiming that negotiations could not be pursued because neither party would have altered its position meaningfully or that, even if negotiations had been pursued, no agreement would have been reached. Both national courts[98] and arbitral tribunals[99] frequently rely on the asserted futility of negotiations or discussions

[96] *Mavrommatis Palestine Concessions Case* (n 88) 13.

[97] *ICC Case No 11490* (n 23) 35–6 ('Rather, the reference to "amicable" in the arbitration provision merely highlights the desire of the parties to avoid costly litigation over disputes under the Consortium Agreement … The Tribunal therefore finds that the attempt to settle disputes under the Consortium Agreement is not a precondition to referral to arbitration, and that in any case Claimant has attempted to resolve the dispute amicably'); *ICC Case No 6276* (n 4) 79 ('With regard to prior resort to amicable settlement, the Tribunal notes that there are no objective criteria making it possible to declare that the means of amicable settlement have been actually exhausted. These means cannot be identified in absolute terms and do not obey any pre-established and stereotyped rules. Everything depends on the circumstances and chiefly on good faith of the parties. What matters is that they should have shown their goodwill by seizing every opportunity to try to settle their dispute in amicable manner. They will only be discharged of this duty when they arrive in good faith at the conviction that they have reached a persistent deadlock'); *Antoine Biloune, Marine Drive Complex Ltd v Ghana Invs Ctr, the Gov't of Ghana*, Award (27 October 1989) (1994) XIX YB Comm Arb 14, 15 ('[T]he claimants have made a clear showing of their efforts to reach an amicable settlement. On more than one occasion the claimants invited negotiations with the respondents on this matter. [The respondents] failed to make any response to those invitations … In light of these findings, the Tribunal holds that the legal and contractual prerequisite to arbitration—failure of attempts at amicable settlement—was satisfied by the claimants' efforts and the respondents' inaction'); Alan Berg, 'Promises to Negotiate in Good Faith' (2003) LQR 357, 363 ('Subject to the particular factual setting, such an undertaking can be taken to involve (1) an obligation to commence negotiations and to have some minimum participation in them … (2) an obligation to have an open mind in the sense of: (i) a willingness to consider such options for the resolution of the dispute as may be proposed by the other party, (ii) a willingness to give consideration to putting forward options for the resolution of the dispute … (3) an obligation not to take advantage, in the course of the negotiations, of the known ignorance of the other party … (4) an obligation not to withdraw from the negotiations without first giving a reason and a reasonable opportunity for the other party to respond'); Berger (n 2) 11; Chapman (n 2) 95–7; Figueres (n 2) 87 (referring to *ICC Case No 7422*, Interim Award (28 June 1996)).

[98] See, eg, *Perez v Lemarroy*, 592 FSupp2d 924, 937 (SD Tex 2008) ('There is authority for the premise that a defendant need not comply with the procedural and timing requirements of an arbitration provision, where the plaintiff in the action allegedly breached the arbitration agreement by bringing the action against the defendant in the first place'); *Cumberland & York Distrib v Coors Brewing Co*, 2002 WL 193323, para 4 (D Me) (citing *Southland Corpn v Keating*, 465 US 1 (US SCt 1984)); *Judgment (6 June 2007)* (n 15); *Elizabeth Chong Pty Ltd v Brown* (n 12).

[99] See, eg, *ICC Case No 6149*, Final Award (1990) (1995) XX YB Comm Arb 41, 48 ('Claimant … has complied with this requirement by appointing his arbitrator and by requesting defendant to act accordingly. The fact that defendant did not respond and refused to appoint another arbitrator was not susceptible of preventing claimant from having performed all steps necessary within the first stage of the arbitration proceedings…. A provision in an arbitration agreement must never be abused as a tool to delay the proceedings. On the contrary, arbitration proceedings require the bona fide cooperation of both parties'); *Teinver v Argentina* (n 8) para 126 ('[Even if Claimant] had not attempted to amicably settle the dispute by the time they filed the Request for Arbitration on December 11, 2008, the Claimants' failure to comply with this obligation should be excused for reasons of futility'); *Himpurna Cal Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, Final Award (4 May 1999) (2000) XXV YB Comm Arb 11, 50.

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aimed at amicably resolving the parties' dispute as a basis for rejecting either jurisdictional or admissibility objections to a party's claim. In the words of one award:

> As a preliminary matter, the arbitrators must address the contention made by defendant that claimant has not made any effort to settle the dispute amicably, as called for in … the Agreement, and that this arbitration has therefore been brought prematurely … The arbitrators are of the opinion that a clause calling for attempts to settle a dispute amicably … should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute.[100]

The rationale for these decisions, which is persuasive, is that a party suffers no injury from being denied participation in negotiations that will produce no resolution of the parties' dispute (and, less clearly, that the same party may be in part responsible for the futility of the negotiations); in these circumstances, it would be inappropriate to bar a presumptively valid claim on either jurisdictional or admissibility grounds.[101]

It is also clear that, where a party attempts to delay arbitration by insisting on enforcement of a negotiation requirement, courts may decline to assist that party in its delay efforts. Thus, in one instance, even where the contract at issue included 'a term requiring mediation … as a condition precedent to arbitration', a court held that 'surely a party may not be allowed to prolong resolution of a dispute by insisting on a term of the agreement that, reasonably construed, can only lead to further delay'.[102] Similarly, where a party is responsible for non-fulfilment of a pre-arbitration procedural requirement, well-reasoned authority holds that that party may not invoke the requirement's non-fulfilment to preclude resort to arbitration.[103]

Parties also sometimes argue that, although a counter-party has provided notice or engaged in negotiations of some claims, it did not provide notice or engage in efforts to resolve the claims it has raised in arbitral proceedings. In these circumstances, the decisive issues are the terms of the arbitration agreement and the identity of the claims that were noticed or discussed in pre-arbitration negotiations. As a general

[100] ICC Case No 8445 (n 23) 168.

[101] See *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Fed'n) (Preliminary Objection)* (n 36) para 159 ('Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked'). Some authorities suggest that care should be exercised in concluding that it would have been futile to litigate in local courts under a BIT. See, eg, *Philip Morris v Uruguay* (n 8) para 137 ('[A] finding that domestic litigation would be "futile" must be approached with care and circumspection. Except where this conclusion is justified in the factual circumstances of the particular case, the domestic litigation requirement may not be ignored or dispensed with as futile in view of its paramount importance for the host State'). Different considerations apply to negotiation, conciliation, and mediation requirements.

[102] *Cumberland & York Distrib v Coors Brewing* (n 98). Courts seek to ensure that contractual dispute resolution mechanisms are not abused or used for improper purposes. See, eg, *Cosmotek Mumessillik ve Ticaret Ltd Sirkketi v Cosmotek USA, Inc*, 942 F Supp 757, 761 (D Conn 1996); *Abex Inc v Koll Real Estate Group, Inc*, 1994 WL 728827, para 19 (Del Ch).

[103] See *BG Group plc v Republic of Argentina*, 134 SCt 1198, para 1224 (US SCt 2014) (Roberts, CJ, dissenting).

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proposition, doubts should be resolved against barring a party from seeking relief on a presumptively valid claim in arbitral proceedings.

VI. Competence to Decide Objections Based on Non-Compliance with Procedural Requirements of Arbitration Agreement

In addition to issues of characterization, questions arise as to whether compliance with an arbitration agreement's procedural requirements is for a national court, or an arbitral tribunal, to determine and as to the scope of judicial review of arbitral awards addressing these issues.[104] As commentators have frequently observed, different national legal systems have resolved these issues in materially different ways.[105]

A. Competence to Decide Objections Based on Non-Compliance with Negotiation, Conciliation, and Local Litigation Requirements

Notwithstanding the general availability of interlocutory judicial resolution of jurisdictional disputes under the Federal Arbitration Act (FAA) in the United States, US courts have generally refused to consider claims whether pre-arbitration procedural requirements have been satisfied; instead, US courts have reasoned that disputes over pre-arbitration procedural requirements are ordinarily for the arbitrators to decide.[106]

[104] See Born (n 1) 935–41.

[105] See, eg, Born (n 1) 935–7; George Bermann, 'The "Gateway" Problem in International Commercial Arbitration' in Stefan Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Wolters Kluwer 2011) 78–82; William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Wolters Kluwer 2007) 71–8.

[106] See *John Wiley & Sons, Inc v Livingston*, 376 US 543 (US SCt 1964); *Dialysis Access Ctr, LLC v RMS Lifeline, Inc*, 638 F3d 367, 383 (1st Cir 2011) ('[T]he parties' disagreement over whether RMS complied with the MSA's alleged good faith negotiations pre-requisite to arbitration is an issue for the arbitrator to resolve in this case'); *United Steelworkers of Am v St Gobain Ceramics & Plastics, Inc*, 2007 WL 2827583, para 1 (6th Cir) ('Whether the parties have complied with the procedural requirements for arbitrating the case, by contrast, is generally a question for the arbitrator to decide'); *Marie v Allied Home Mortg Corpn*, 402 F3d 1, 9–11 (1st Cir 2005); *PaineWebber, Inc v Elahi*, 87 F3d 589 (1st Cir 1996); *PaineWebber, Inc v Bybyk*, 81 F3d 1193, 1196 (2d Cir 1996); *Del E Webb Constr v Richardson Hosp Auth*, 823 F2d 145, 149 (5th Cir 1987); *Belke v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 693 F2d 1023, 1027–8 (11th Cir 1982); *PTA-FLA, Inc v ZTE USA, Inc*, 2011 WL 4549280, para 5 (DSC) (whether '[d]efendant failed to satisfy a condition precedent to arbitration by failing to participate in pre-arbitration proceedings in good faith is a matter for resolution by the arbitration panel'); *PTA-FLA, Inc v ZTE USA, Inc*, 2011 WL 5024647, paras 2–5 (MD Fla) ('Whether those steps satisfy the condition precedent in paragraph 20 of the Agreement is not for this court to decide. Pursuant to *Howsam*, "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." Therefore, an arbitrator must determine whether ZTE satisfied the condition precedent in paragraph 20 of the Agreement'); *Vertner v TAC Ams, Inc*, 2007 WL 2495559, para 3, n 3 (WD Wash) (issues of 'procedural arbitrability', such as compliance with pre-arbitration procedures, are for arbitrators); *Ballard v Illinois Cent RR Co*, 338 FSupp2d 712, 715 (SD Miss 2004) (refusing to consider whether condition precedent to arbitration was satisfied: 'Threshold issues of procedural arbitrability are subject to arbitration'); *New Avex, Inc v Socata Aircraft, Inc*, 2002 WL 1998193, para 5 (SDNY); *Unis Group, Inc v Compagnie Fin de CIC et de L'Union Europeene*, 2001 WL 487427, para 2 (SDNY); *Miller & Co v China Nat'l Minerals Imp & Exp Corpn*, 1991 WL 171268 (ND Ill).

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The US Supreme Court has held, in general terms, that '"procedural" questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide'.[107] More specifically, US lower courts have generally held that:

> The arbitrator is not the judge of his own authority—though … there is an exception: the arbitrator, like any other adjudicator, is empowered to decide whether the parties have taken whatever procedural steps are required to preserve their right to arbitrate a particular dispute.[108]

As another court concluded: '[w]hether or not a condition precedent to arbitration has been satisfied is a procedural matter for the arbitrator to decide'.[109] Moreover, under the FAA, decisions regarding procedural requirements are generally subject to review only under a highly deferential 'manifest disregard of law' standard (assuming that even it is applied).[110] There are a few contrary lower court decisions,[111] but these are anomalies and wrong.

This conclusion was recently reaffirmed in an international setting, under the FAA, by the US Supreme Court in *BG Group plc v Republic of Argentina*,[112] which involved an action to annul an arbitral award that was made in the United States under the US-Argentina bilateral investment treaty. In *BG Group*, the arbitrators initially upheld their own jurisdiction, rejecting an argument that BG Group's non-compliance with the BIT's requirement for litigation in local Argentine courts for eighteen months barred its underlying claims, reasoning instead that compliance with the requirement would have been futile; the tribunal then made an award on the merits in favour of BG Group for US$185 million.

In subsequent annulment proceedings, a US appellate court vacated the award for an excess of jurisdiction under §10 of the FAA on the grounds that the BIT's requirement for litigation in Argentine courts (for eighteen months) had not been satisfied.[113] The court held that the BIT's pre-arbitration litigation requirement was a jurisdictional requirement (distinguishable from procedural requirements regarding the conduct of the arbitral process itself) and that compliance with that requirement was reviewable on a de novo basis in a vacatur proceeding under the FAA.[114] The court

[107] *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 84–5 (US SCt 2002). The Supreme Court quoted with approval the comments to the Revised Uniform Arbitration Act, that 'in the absence of an agreement to the contrary … issues of procedural arbitrability, ie, whether prerequisites such as … conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.'

[108] *Int'l Ass'n of Machinists v Gen Elec Co*, 865 F2d 902, 904 (7th Cir 1989).

[109] *Town Cove Jersey City Urban Renewal Inc v Procida Constr Corpn*, 1996 WL 337293, para 2 (SDNY).

[110] See, eg, *Howsam v Dean Witter Reynolds* (n 107) 83 ('At the same time the Court has found the phrase "question of arbitrability" *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus "procedural" questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide' (emphasis in original)).

[111] See, eg, *Republic of Argentina v BG Group plc* (n 34); rev'd *BG Group plc v Republic of Argentina*, 134 SCt 1198 (2014); *HIM Portland v DeVito Builders* (n 20); *Kemiron Atl v Aguakem Int'l* (n 38).

[112] *BG Group plc v Argentina* (n 111).

[113] *Argentina v BG Group plc* (n 111).

[114] Ibid 1372 n 6.

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rejected, without meaningful analysis, the tribunal's conclusion that compliance with the local litigation requirements would have been futile.[115]

The US Supreme Court reversed the appellate court's decision, holding that the arbitral tribunal had not exceeded its jurisdiction and reinstating its award. Citing domestic FAA authority, the Court held that contracting parties generally 'intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration'.[116] Applying standards generally applicable under the FAA to commercial arbitration agreements, the Supreme Court held that the BIT's local litigation requirement constituted a 'procedural condition precedent to arbitration'[117] or a 'claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute'.[118]

The Court rejected the suggestion that the US-Argentina BIT should be interpreted differently from commercial contracts (reasoning that 'a treaty is a contract, though between nations'[119]). The Court went on to hold that nothing in the BIT indicated that the local litigation requirement was 'a substantive condition on the formation of the arbitration contract',[120] as distinguished from a 'procedural pre-condition' to arbitration. The Court also reasoned that '[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations regarding the operation of the provisions [for local litigation]'.[121] The Court also cited international authority interpreting similar pre-arbitration requirements in BITs and other international instruments as 'purely procedural precondition[s] to arbitration'.[122]

Applying the 'highly deferential' standard of review for arbitral awards under the FAA, the Court readily upheld the arbitrators' jurisdictional determination. The Court held that the arbitrators' ruling that recourse to Argentine courts would have been futile lay 'well within the arbitrators' interpretive authority'.[123]

A dissenting opinion (by Chief Justice Roberts) characterized the BIT's local litigation requirement as a 'condition of consent' to arbitration by Argentina.[124] According to the dissent, determining whether this condition of consent was satisfied (or waived), thereby giving rise to an agreement to arbitrate, was an issue for de novo judicial determination; in the dissent's view, satisfaction (or waiver) of the local litigation requirement was a jurisdictional requirement for a valid arbitration agreement, not merely a procedural, 'claims-processing' rule.[125] (Despite this, the dissent indicated that, even

[115] Ibid 1365–1366.6 ('Although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties. Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty, the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration').

[116] *BG Group plc v Republic of Argentina* (n 111) para 1207 (citing *Howsam*, 537 US at 86).

[117] Ibid para 1207. [118] Ibid para 1207. [119] Ibid para 1208. [120] Ibid para 1210.

[121] Ibid para 1210.

[122] Ibid para 1211 (citing Gary B Born, *International Commercial Arbitration* (Wolters Kluwer 2009) 842).

[123] *BG Group plc v Republic of Argentina* (n 111) para 1212.

[124] See ibid para 1218 (Roberts, CJ, dissenting).

[125] See ibid para 1221 (Roberts, CJ, dissenting).

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applying a de novo review standard, it might well have reached the same result as the arbitral tribunal, suggesting that Argentina was responsible for BG Group's failure to satisfy the local litigation requirement and would therefore be precluded from relying on non-fulfilment of the requirement.[126])

The approach to pre-arbitration procedural requirements adopted in *BG Group* and other US authorities is generally correct. Although pre-arbitration procedural requirements can be drafted to resemble jurisdictional requirements, the better view is that these requirements inherently involve aspects of the arbitral procedure and, equally important, the remedies for breach of these requirements necessarily involve procedural issues—in both cases, which are best suited for resolution by arbitral tribunals, subject to minimal judicial review, like other procedural decisions.[127]

Courts in jurisdictions other than the United States have also generally held that disputes regarding compliance with pre-arbitration procedural requirements are for arbitral tribunals' determination.[128] In some cases, they have done so on the theory, outlined above, that such procedural requirements are issues of 'admissibility', not 'jurisdiction', and are therefore for the arbitrators' substantive determination.[129] In most instances (including in the United States), courts have also subjected arbitrators' decisions on issues of pre-arbitration procedural requirements to very deferential scrutiny, treating them in the same manner as other decisions on the merits of the parties' dispute.[130]

These decisions, like the view of the Supreme Court in *BG Group* in the United States, are well considered. In interpreting the parties' intentions, it is appropriate to presume, absent contrary evidence, that pre-arbitration procedural requirements are not 'jurisdictional'; such requirements are presumptively both capable of resolution by the arbitrators and required to be submitted to the arbitrators (as opposed to a national court) for their decision.[131]

[126] See ibid para 1224 (Roberts, CJ, dissenting).

[127] See *Langlais v Pennmont Benefit Sers Inc*, 2013 WL 2450752, para 1 (3d Cir); *Rintin Corpn, SA v Domar, Ltd*, 374 FSupp2d 1165, 1168, 1171 (SD Fla 2005).

[128] See, eg, *Société Nihon Plast v Société Takata-Petri* (n 37) (objection based on preliminary conciliation clause is not challenge to arbitral tribunal's jurisdiction but issue relating to admissibility of claim which cannot be reviewed by Cour d'appel); *Burlington N RR Co v Canadian Nat'l Railway* [1997] 1 SCR 5 (BC SCt); *Krutov v Vancouver Hockey Club Ltd* [1991] BCJ No 2654 (BC SCt); *Swiss Cargill Int'l SA v Russian CJSC Neftekhimeksport*, Case No 5-Г02-23 (Russian SCt 2002). See also Award in Hamburg Chamber of Commerce (14 July 2006) [2007] SchiedsVZ 55.

[129] *Société Nihon Plast v Société Takata-Petri* (n 37).

[130] See, eg, *Green Tree Fin Corpn v Bazzle*, 539 US 444, 453 (US SCt 2003) ('The question … does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide whether they agreed to arbitrate a matter … Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures … It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question'); *Howsam v Dean Witter Reynolds* (n 107) 83; *John Wiley & Sons v Livingston* (n 106) 557 (US SCt 1964) ('Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator').

[131] This conclusion does not mean that a party's claims may be pursued in arbitration, notwithstanding non-compliance with pre-arbitration procedural requirements; it rather means that it is the arbitral tribunal that will have competence to resolve the question of whether the procedural requirements were complied with.

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The reason for this presumption is that parties can be assumed to desire a single, centralized forum (a 'one-stop shop') for resolution of their disputes, particularly those regarding the procedural aspects of their dispute resolution mechanism. Fragmenting resolution of procedural issues between (potentially two or more) national courts and the arbitral tribunal produces the risk of multiple proceedings, inconsistent decisions, judicial interference in the arbitral process, and the like. At the same time, arbitral tribunals ordinarily have greater experience with the procedural setting of the parties' dispute, and the commercial (or investment) context in which pre-arbitration procedures occur, than a national court. Likewise, the parties' interests in expedition and finality are better served by limiting the scope of judicial review of arbitral decisions regarding compliance with pre-arbitration procedural requirements.

The more objective, efficient, and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism.[132] Ultimately, the proper analysis is one of interpreting the parties' intentions, with the presumptive rule being that parties intend compliance with pre-arbitration procedures to be for arbitral, not judicial, determination: absent very clear and unequivocal language requiring a contrary result, questions of compliance with contractual procedural requirements should be submitted to the arbitrators, subject to only the generally deferential standard of judicial review applicable to other decisions by the arbitral tribunal.

Nevertheless, where the parties' contractual language clearly and unequivocally provides that pre-arbitration procedural requirements are for judicial determination, not for arbitral resolution, their intentions will control. In general, this requirement is not satisfied by a showing that contractual procedural requirements were a pre-arbitration condition to commencing an arbitration; these sorts of requirements are elements of the parties' dispute resolution mechanism and the desirability of centralized decision-making applies equally to them. Rather, there must be some additional affirmative indication that the arbitrators would not be empowered to interpret pre-arbitration procedural requirements.

B. Competence to Decide Objections Based on Time Limits or Laches

In some cases, the procedural provisions of arbitration agreements may be drafted to include time bars (or other contractual prohibitions against pursuing claims). For example, some contracts include provisions requiring that claims be brought within a specified period after they arise (or are discovered). In general, these provisions are properly categorized as substantive elements of the parties' contract, within the tribunal's general competence to decide the parties' dispute, and not limitations on the tribunal's jurisdiction.

[132] An alternative approach to the issue of competence to decide objections based on non-compliance with pre-arbitration requirements would be that characterization of such requirements as issues of 'admissibility' or 'jurisdiction' is unhelpful. Instead, the proper enquiry should be whether parties' expectations are for arbitral or judicial determination and that, in general, the presumption should be for arbitral resolution with minimal judicial review.

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US and other courts have held that statute of limitations, laches, and similar defences are presumptively for resolution by the arbitrators, not the courts.[133] The US Supreme Court has recently confirmed this conclusion.[134] Canadian courts have taken the same approach.[135]

On the other hand, courts have reached divergent results concerning the allocation of competence to decide disputes over basic aspects of the arbitral procedure (for example, is institutional or ad hoc arbitration required? Is one form of institutional arbitration, or another, required?).[136] These fundamental aspects of the arbitral process can properly be subject to different allocations of jurisdictional competence than pre-arbitration procedural requirements.

VII. Choice-of-Law Issues Applicable to Pre-Arbitration Procedural Requirements

Decisions addressing pre-arbitration procedural requirements generally offer little by way of consideration of choice-of-law issues. Possible options for the law governing the validity of an arbitration agreement include: (i) the law of the state where judicial enforcement proceedings are pending; or (ii) the law chosen by the parties to apply to the arbitration agreement; or (iii) the law of the arbitral seat.[137]

Some courts have chosen either to not consider the question of applicable law (simply interpreting arbitration agreements by reference to general principles of law) or to apply the law of the judicial enforcement forum without explanation.[138] Other courts have applied the law of the arbitral seat to the substantive validity of the arbitration agreement, as well

[133] See, eg, *Glass v Kidder Peabody & Co*, 114 F3d 446, 456 (4th Cir 1997); *Shearson Lehman Hutton, Inc v Wagoner*, 944 F2d 114, 121 (2d Cir 1991); *Trafalgar Shipping Co v Int'l Milling Co*, 401 F2d 568 (2d Cir 1968); *Louis Dreyfus Corpn v Cook Indus, Inc*, 505 FSupp 4 (SDNY 1980).

[134] See *Howsam v Dean Witter Reynolds* (n 107). See also *BG Group plc v Republic of Argentina* (n 111); Revised Uniform Arbitration Act, §6(c) (2000) ('An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable'). Some early US decisions, often relying on state law (eg, New York), concluded that the statute of limitations and laches issues were for courts to decide. See also NY Civil Practice Law and Rules §§7502(b), 7503; *Smith Barney v Luckie*, 85 NY2d 193 (NY 1995). These decisions are no longer good law in the United States.

[135] *BC Navigation SA v Canpotex Shipping Servs Ltd* [1987] 16 FTR 79 (Canadian Fed Ct 1987).

[136] Cf *OEMSDF Inc v Europe Israel Ltd* [1999] OJ No 3594 (Ontario SCt) (court considers and decides question of whether the arbitration agreement provides for LCIA or ICC arbitration) with *Gone to the Beach LLC v Choicepoint Servs, Inc*, 514 FSupp2d 1048, 1051 (WD Tenn 2007) ('[T]he parties agree that the only issue for the court to resolve is not whether arbitration is appropriate, but what kind of arbitration is required under the contract. This issue of contract interpretation is not properly before the court', but is instead for the arbitrators to decide).

[137] It is also occasionally suggested that the interpretation of international arbitration agreements should be governed by the procedural law of the arbitration and the law governing the parties' underlying contract. See Born (n 1) 1394.

[138] See *Mitsubishi Motors Corpn v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626 (US SCt 1985) (applying FAA's pro-arbitration presumption to an arbitration clause in a contract governed by Swiss law and that provided for arbitration in Japan); Ulrich Haas, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958' in Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2nd edn, Oxford University Press 2009) 511–12; Peter Schlosser, in Friedrich Stein and Martin Jonas (eds), *Kommentar zur Zivilprozessordnung* (22nd edn, Beck 2002) Anhang § 1061 para 46; Peter Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (2nd edn, Mohr Siebeck 1989) para 422.

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as to issues of interpretation, again typically without detailed discussion.[139] However, some authorities have applied the law chosen by the parties to govern the underlying contract to issues of substantive validity (and interpretation).[140]

Applying the law of the judicial enforcement forum to the validity of interpretation of international arbitration agreements, including their arbitration procedural provisions, should be avoided. If a national law is to be applied, the better approach is that the interpretation of an international arbitration agreement should be subject to the law applicable to the substantive validity of that agreement, which would produce more uniform results than application of the law of the judicial enforcement forum (which would vary depending on where litigation is brought) and would in most cases more closely accord with the parties' intentions.[141]

More fundamentally, the preferred approach is to apply pro-arbitration rules of substantive validity and interpretation regardless of the national law applicable to the parties' agreement to arbitrate. Pro-arbitration rules of this character are mandated by the New York Convention, which requires interpreting international arbitration agreements expansively, not restrictively, and resolving all doubts in favour of encompassing disputes within the parties' agreement to arbitrate.[142] This uniform international rule applies regardless of what law is applicable to the parties' agreement to arbitrate.[143] Most jurisdictions have adopted a 'pro-arbitration' rule of construction of international arbitration agreements, reducing materially the practical significance of choice-of-law questions on this issue. Similarly, while virtually all contemporary authorities recognize the autonomy of parties to select the law applicable to the substantive validity of their arbitration agreements, a number of developed legal systems also adopt additional choice-of-law rules, designed to maximize the enforceability of international arbitration agreements.[144] These rules aim to give

[139] See, eg, Judgment (5 December 2008) (2009) 27 ASA Bull 762, 769 (Swiss Federal Tribunal); Judgment (17 November 1995) [1996] RIW 239, 240 (Oberlandesgericht Düsseldorf); Judgment (7 April 1989) [1990] RIW 585, 586 (Oberlandesgericht München); Reinhold Geimer, in Richard Zöller (ed), *Zivilprozessordnung* (30th edn, Otto Schmidt 2014) § 1029 para 108; *Int'l Tank & Pipe SAK v Kuwait Aviation Fuelling* [1975] QB 224, 232–4 (English Ct App) (English law governs interpretation and effect of contract, including arbitration clause: 'Thus, if parties agreed on an arbitration clause expressed to be governed by English law but providing for arbitration in Switzerland, it may be held that, whereas English law governs the validity, interpretation and effect of the arbitration clause as such (including the scope of the arbitrators' jurisdiction), the proceedings are governed by Swiss law'); *Judgment (7 July 2014)* (n 37) (confirming arbitral tribunal's decision to apply Swiss law, holding that '[i]t would indeed be artificial to distinguish from that point of view the actual arbitral procedure on the one hand and the mediation *lato sensu* preceding it on the other hand, in particular when it must be decided whether the latter is a mandatory precondition to the former … Submitting the pre-arbitration phase and the subsequent arbitration to two different laws would doubtlessly be inappropriate and could unnecessarily complicate the resolution of the dispute between the parties').

[140] See *Recyclers of Australia Pty Ltd v Hettinga Equip Inc* [2000] 175 ALR 725 (Australian Fed Ct); *Aloe Vera of Am, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174, para 61 (Singapore High Ct). See also Sabrina Pearson, 'Sulamérica v Enesa: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement' (2013) 29 Arb Int'l 115, 125.

[141] Born (n 1) 1398. See also *Restatement (Second) Conflict of Laws* §218, comment a (1971); C G J Morse, David McClean, Lawrence Collins et al (eds), *Dicey, Morris and Collins on The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 16-008.

[142] See Born (n 1) 1318–19. [143] See ibid 1326–38.

[144] Indeed, some of the leading jurisdictions apply either a validation principle (eg, Switzerland) or international principles (eg, France, United States) in order to give effect to international arbitration

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effect to the parties' true and authentic intentions regarding their agreement to arbitrate, which are typically not expressed in a choice-of-law clause that would invalidate that agreement.[145]

While the 'pro-arbitration' rule of interpretation should generally be the guiding principle in investment, as well as in commercial arbitration, certain circumstances surrounding the conclusion of arbitration agreements in investment cases may call for consideration of some additional principles. Specifically, in addition to concluding express arbitration agreements with foreign investors (either as a part of an investment agreement or as a stand-alone agreement), state parties can subject themselves to arbitration through unilateral offers contained in BITs or national legislation. When interpreting a BIT offer to arbitrate investment disputes, certain public international law standards, including the Vienna Convention on the Law of Treaties (VCLT), should be taken into account.[146] Alternatively, states sometimes provide consent to investment arbitration under national investment laws.[147] In those cases, where the source of obligation to arbitrate is found in the state's unilateral statutory offer, the host state's legal principles of statutory and contractual interpretation should be taken into account.

VIII. Effect of Non-Compliance with Procedural Requirements on Validity of Arbitration Agreement

Finally, in virtually all cases, procedural missteps in commencing an arbitration will not affect the validity of the parties' underlying arbitration agreement, but instead only the ability of the claimant to pursue a particular submission or reference to arbitration. In general, nothing prevents the claimant who has failed to comply with procedural requirements of an arbitration agreement in one instance from subsequently complying with the applicable procedural requirements and then properly commencing a new or different arbitration.[148]

agreements, including agreements that the law chosen by the parties' choice-of-law agreement would arguably invalidate. Born (n 1) 560.

[145] See Born (n 1) 560, 571–6.

[146] See ibid 1317–26. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 28–9 ('Most tribunals start by invoking Article 31 of the Vienna Convention on the Law of Treaties (VCLT) when interpreting treaties … At times, tribunals will also refer to supplementary means of interpretation contained in Article 32 of the VCLT').

[147] See, eg, Art 8(2) of the Albanian Law on Foreign Investment of 1993, in Schreuer et al (n 2) 197 ('… the foreign investor may submit the dispute for Resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes …').

[148] See, eg, *Waste Mgt Inc v Mexico*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) (2004) 43 ILM 967 paras 70 et seq, 118 et seq; *Cable & Wireless v IBM UK* (n 38); *Westco Airconditioning Ltd v Sui Chong Constr & Eng'g Co Ltd* [1998] HKCFI 946 (HK Ct First Inst) (failure to proceed to mediation as required under a multi-tier dispute resolution clause does not render arbitration clause inoperative or incapable of being performed); *Fulgensius Mungereza v Africa Cent* [2004] UGSC 9 (Mengo SCt).

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IX. Conclusion

It is fashionable to draft international arbitration agreements to include various types of 'multi-tier', pre-arbitration procedural mechanisms, including requirements that the parties negotiate or mediate disputes prior to submitting them to arbitration or that disputes be submitted to litigation in local courts or some other form of alternative dispute resolution, prior to initiation of an arbitration. Although designed to enhance the efficiency of the arbitral process, these sorts of provisions have frequently produced new disputes of their own, often with material, and undesirable, consequences for the arbitral process. National courts, arbitral tribunals, and commentators have adopted a range of different approaches of such provisions, producing what can fairly be described as a swamp of confusing characterizations and rules, none of which advances the objectives of the arbitral process.

The better view would be to acknowledge more explicitly and consistently the imperfect and aspirational character of agreements to negotiate and the importance of ensuring parties access to justice. Adopting this analysis would limit the treatment of pre-arbitration procedural requirements as 'conditions precedent' or 'jurisdictional bars' to very rare cases, where the parties' agreement permits no other characterization. This would allow pre-arbitration procedural requirements to serve their intended objectives—of facilitating amicable settlement—without frustrating the adjudicative process of resolving parties' disputes.

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