Spain

Félix J. Montero Pérez-Llorca Madrid fmontero@perezllorca.com Treasurer, IBA Litigation Committee	
Luis López Pérez-Llorca Madrid llopez@perezllorca.com	

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

Spain does not have an established tradition of using alternative dispute resolution such as multi-tiered dispute resolution clauses ("**MTDRC**"). This type of clause is a relatively recent phenomenon and is linked to the internationalization of contracts and the promotion of alternative dispute resolution.

However, MTDRC are valid and binding for the parties under Spanish legislation because: (i) they are not contrary to applicable law and do not harm third parties in accordance with the provisions of article 6.4 of the Spanish Civil Code ("**SCC**"); (ii) they are covered by the principle of contract freedom (article 1255 SCC); and (iii) the parties are required under Spanish law to comply with the agreed provisions (article 1090 SCC). In addition, article 1258 SCC states that agreements are concluded by mere consent, and are thereafter binding upon the parties. In this regard, see Judgment of 20th February of 1988 rendered by the Spanish Supreme Court [RJ 1988, 1072].

The purpose of MTDRC means that the aggrieved party should inform the other party of the existence of a dispute and explore the possibilities of reaching an amicable resolution. These clauses represent an opportunity for the dispute to be resolved before resorting to arbitration or to court, thereby avoiding the financial costs and delays involved in the process. Moreover, MTDRC allow the respondent to better prepare their defence in the event that negotiations do not lead to a satisfactory solution to the dispute, as stated in the Judgment of 9th June of 1988 rendered by the Spanish Supreme Court [RJ 1988, 5259].

As the MTDRC are not expressly regulated under Spanish law, its legal nature is defined on a case-by-case basis by Spanish courts with regard to the circumstances of the case, the common intention of the parties and the drafting of the clause.

Thus, even if the concept of MTDRC is not regulated under Spanish law, similar concepts such as the failure to exhaust previous administrative remedies stated in former article 533.7 of the Spanish Civil Procedure Act ("**SCPA**") of 1881 or the mandatory labour conciliation set out in article 63 of the Spanish Labour Procedure Act do however exist.

a. Breaching the agreement to negotiate

Under Spanish law, breaching the agreement to negotiate is the same as the breach of any other material obligation, and will result in the payment of damages, according to articles 1101 and 1902 SCC, as Prf. Díez-Picazo states.

The majority of Spanish scholars –Prf. Fernández-Ballesteros amongst others– consider MTDRC to be settlement agreements as defined by article 1809 SCC. Regarding the force of *res judicata*, article 1816 SCC states that settlement agreements have a binding effect upon the parties but not the excluding force of a subsequent review typical of an arbitral decision or a judicial ruling. In this regard, see Judgment of 5th April of 2010 rendered by the Spanish Supreme Court [RJ 2010, 2541].

The agreement to negotiate at each stage of the dispute resolution procedure as stated in the clause, as well as what has been agreed within such negotiations, is enforceable as a contract. Therefore, the parties must respect the negotiation process stated and must adapt their future conduct to what has been agreed upon.

However, it is important to note that there are no judicial precedents on the enforcement and consequences of non-compliance with these clauses. Spanish courts have adopted a case-by-case analysis in terms of the compliance and enforcement of similar clauses. This shows a certain flexibility and willingness to promote judicial efficiency in the interests of the parties.

Moreover, we would highlight that Spanish courts adopt similar reasoning regarding the requirement to exhaust administrative remedies, and always take into account the interests of the parties and respect the right to due process, as stated in Judgment of 16th March of 1989 rendered by the Spanish Constitutional Court [RTC 1989, 60].

b. Good faith standard

Spanish courts usually place significant importance on the parties' conduct throughout their contractual relationship and beyond it. In particular, the good faith rule is particularly relevant in order to prove compliance with the parties' obligation to negotiate.

Furthermore, the good faith rule is expressly stated in Spanish law: article 1258 SCC states that "*Contracts are concluded by simple consent, and from then on bind the parties, not just to the*

performance of the matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, custom and the law". Article 7 of this same Code provides that "*Rights must be exercised in accordance with the requirements of good faith*", thereby including this rule as a general principle applicable to all legal relations.

The good faith rule implies the exercise of a right in accordance with the rules of loyalty, trust and fair behaviour that the other party could reasonably expect. The good faith rule is also closely linked to the prohibition of the *venire contra factum propium* concept which constitute the hypothesis that a party has given the other party the reasonable and objective expectation that a certain conduct will be displayed, implying that this first party must be consistent with this conduct in order to maintain the trust placed in them– to some extent equivalent to stoppel defence. This theory means that the party in question should avoid carrying out any action which contradicts their previous conduct and which is reasonably expected by its co-contracting party.

Furthermore, the parties may establish specific obligations related to the conduct they must adopt and which might not be explicitly included in the agreement and which constitute additional and binding obligations for these parties (*i.e*. ancillary obligations deriving from the essential obligation).

Failure to comply with these obligations arising from the good faith principle is generally considered as unlawful and can be a source of liability, insofar as it causes damage to the aggrieved party and it is definitively carried out.

The good faith rule also entails that the parties are totally free to negotiate or to stop the negotiations if they have not reached an agreement, as long as their conduct is in line with this principle (*i.e*. if one of the parties holds negotiations without any real intention to reach an agreement, his conduct is contrary to the good faith rule).

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

Due to the limited Spanish court rulings on this matter, we need to look to arbitral awards and scholars to determine the current state under Spanish law. Arbitrators have found that where the wording of the dispute resolution clause makes the use of ADR optional, a party is entitled to submit a request for arbitration whenever it wishes. The words "may" –as used in the arbitration clause in ICC Case 10256– and "however" –as used in the arbitration clause in ICC Case 4229– leave no room for doubt that the parties wish to be bound only by the obligation to submit their disputes to arbitration, the second option contemplated in the clause.

Vagueness in the wording of clauses has also led tribunals to rule that the parties did not wish to be forced into an amicable settlement stage. On the other hand, when wording expressing an obligation is used in connection with amicable dispute resolution techniques, arbitrators have found that it makes the provision binding upon the parties. This is illustrated in ICC Case 9984, where the word "shall" requires the parties first to seek an amicable solution.

The award in ICC Case 6276 points out the difficulty sometimes encountered when conducting such a factual analysis: "*Everything depends on the circumstances and chiefly the good faith of*

the parties". In that case, the clause did not state clearly how and by what date the parties were required to comply with their obligation to seek an amicable settlement of the dispute.

In Spain, enforcement of MTDRC is based on a case-by-case analysis in light of the basic principles of contract law and the common intention of the parties arising from article 1281 SCC, as stated in Judgments of 18th May of 2012 [RJ 2012, 6358] and 5th June of 2013 [RJ 2013, 4969] rendered by the Spanish Supreme Court. The circumstances permitting the enforcement of a MTDRC by Spanish courts have to be determined *in concreto*, depending on the nature and complexity of the contract and the dispute. However, authors and scholars such as Entrena, López-Peña, López de Argumedo and Prf. Fernández-Ballesteros have provided specific recommendations:

i. Regarding the formal requirements, and unless otherwise agreed by the parties, the request should be made in writing in order to inform the receiving party of the nature of the dispute and to demonstrate compliance with the obligation to negotiate (in fact, a verbal request to initiate negotiations is more difficult to prove). This written request can be a simple letter or document referring to the nature of the controversy and the request for a meeting to start the negotiations.

ii. The wording of the clause shall be clear and precise indicating that negotiation, mediation or conciliation are mandatory prerequisites in order to proceed to the following means of dispute settlement provided in such clause (e.g. arbitration or litigation).

iii. The clause shall accurately foresee material conditions under which the negotiation process, mediation process, etc. have to be held, establishing certain substantive and procedural parameters in order to evaluate compliance with the obligation. It is essential that the clause provides details on how the procedure must be followed. The most important point is that the foreseen procedure should operate without the need for subsequent negotiations on how it should be carried out. This requirement implies that the clause does not merely constitute an agreement to agree.

iv. To avoid problems, the procedure to evidence good faith negotiations should, as far as possible apply to all possible disputes. This is sometimes difficult to achieve. MTDRC sometimes state these friendly methods of resolving disputes although they would only be applicable at certain stages or in relation to very specific issues related to the contract performance. This is very common in construction contracts: once the obligations have been performed, the application of certain procedures provided by the clause no longer hold the meaning that the contract established for them. As an example: a mediation procedure on how to remedy damages of an urgent and provisional nature for construction defects discovered during the execution of the construction will no longer be relevant once the construction process has finished or if the defect is clearly irreparable.

v. It is advisable for the parties to establish a specific time period during which a party may request negotiations, and after which arbitration or court proceedings would be the only possible course of action. The request to negotiate must be presented within a reasonable period of time after the dispute has arisen. This requirement is closely linked to the good faith rule required, related to the parties' conduct, and provides the parties with the opportunity to collect the necessary evidence and files needed to attempt to settle the dispute.

vi. Depending on the nature and complexity of the contract and the dispute, the MTDRC should be appropriately detailed. However, it is advisable that the consequences of the breach of each step in the dispute resolution procedure are previously agreed by the parties and expressly included in the clause. Compliance with the MTDRC is evaluated on a case-by-case basis and can be considered as partially met, for example, when representatives of the parties who have carried out the negotiations were not the representatives specifically appointed in the clause (*i.e.* the negotiations were supposed to be held between "senior representatives" of the parties and a only a lower level representative of a party attended the meeting). Moreover, the negotiation requirement should be considered fulfilled when the position of the parties is so different that it is impossible to reach an out-of-court agreement. A decision as to whether the MTDRC have been complied with or not will be made in accordance with the common intention of the parties and the objective of judicial/arbitral efficiency.

The appearance of the MTDRC is closely linked to the increasing importance of the will of the parties. Thus, including this type of clause in contracts implies that Spanish courts will need to be flexible and comply with judicial efficacy.

It is necessary to analyze the exact drafting of the MTDRC in order to identify if the provisions are deemed as facultative or voluntary, or have been stipulated as necessary or mandatory, according to the common intention of the parties arising from article 1281 SCC and the *pacta sunt servanda* principle.

With some hesitation of the courts under Spanish law the parties may submit certain aspects of the dispute to an arbitration process and others to a litigation process. Spanish courts allow the parties to agree to a "double agreement" (*i.e.* the dispute can be submitted to an arbitration process and to a litigation process). In this regard, please see the Judgments of 11th December 1999 and 10th July 2007 [RJ 2007, 5586] rendered by the Spanish Supreme Court [RJ 1999, 9018]. It is worth noting that in any case those clauses do not work as they do under English or US law, and thus before including them in a contract subject to Spanish law or Spanish jurisdiction (including Spain as the arbitration place) some deep legal analysis should be carried out.

The Spanish Supreme Court states that this "double agreement" is justified under the following circumstances: (i) when the parties decide to withdraw the arbitration process; (ii) when the controversy may not be submitted to arbitration in accordance with the law applicable to

arbitration proceedings; and (iii) when the arbitration agreement is null and void, ineffective or impossible to fulfil.

In any case, the parties may refer to the *IBA Guidelines for Drafting International Arbitration Clauses adopted by a resolution of the IBA Council on 7 October 2010* as a model when drafting MTDRC, or to any other model clause that has been used before court and/or arbitral tribunal (FIDIC, MA, etc.).

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

The existence of MTDRC establishing the duty to negotiate or participate in a previous dispute settlement mechanism raises the issue of the admissibility of the request for arbitration or the statement of claim before a court if this previous mechanism has not been complied with.

Minimal Spanish case law on this issue prevents us from being able to make an exhaustive analysis of how an arbitral tribunal or a court would enforce a MTDRC under Spanish law. From a procedural point of view, the failure by the parties to negotiate as it is stated in the MTDRC raises the question of the consequences of this failure once an arbitral or court proceeding has already been initiated.

If the parties have agreed to submit their dispute directly to arbitration, the commonly held view is that the arbitrators should decide on this issue by virtue of the powers entrusted in them by the parties and the *kompetenz-kompetenz* principle. Therefore, the arbitrators must decide if the previously established requirement is sufficient or not for impeding (at that time) the arbitration process, and in the event that the arbitration process has indeed been initiated, whether it should continue or not.

If the parties have agreed to submit their dispute to a national court, the court must decide whether to accept the claim. At a later stage the judge will decide whether to suspend the process until the previous requirement of negotiation, mediation or the like will be considered as performed. The court will consider the drafting of the clause, taking into account the common intention of the parties and their conduct throughout their contractual relationship (*i.e.* whether or not the parties have acted in good faith and have respected their obligations, etc.).

If the law were to impose this –although for the time being this is not the case, the performance of these previous requirements will be considered as an admissibility prerequisite of the claim, which can essentially be remedied. Until there is a legal regulation, article 404 SCPA requires the court clerk to register the claim and neither the MTDRC nor the agreements established by the parties are the exception to this rule. Its effect should be limited to suspending temporarily the legal dispute or the arbitration. The decision on whether to suspend the process or not should be taken by the competent judge or arbitrator by virtue of their full freedom and full jurisdiction.

This uncertainty does not disappear completely, even in the case of legal regulation, as is the case with the Spanish Mediation Act. Article 6.2 of this Act merely states that, when contracting

mediation as a prior option, the parties should turn to it before proceeding to arbitration or to court.

It therefore follows that, if the parties have agreed and formalized a mediation process within the contract, it must be complied with by the parties and initiated before turning to arbitration or court proceedings. Moreover, once the mediation process has been initiated, none of the parties have the obligation to exhaust the process.

In order to demonstrate compliance with the MTDRC, the parties must provide evidence of: (i) the request to negotiate; (ii) the negotiation process; and generally (iii) compliance with all the dispute resolution processes stated in the clause.

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

In the most simple clauses, an attempt at prior negotiations can only be established before submitting the dispute to national state courts or to arbitration, while in the most complex, we can consider several successive and previous stages permitting the parties to find a friendly solution before submitting their dispute to the courts or to arbitration

A model of an enforceable MTDRC clause under Spanish law proposed by Cremades taken from the model clause of the CPR Institute for Dispute Resolution would be the following:

> "*In the event that any disputes arise between the parties regarding the application or interpretation of this Agreement, X's and Y's project managers shall use their best good faith efforts to reach a reasonable, equitable and mutually agreed upon resolution of the item or items in dispute. In the event that the project managers cannot so resolve the disputed matter(s) within* [*] *days, the parties shall use their best good faith efforts to agree, within a further* [*] *days, upon an appropriate method of non-judicial dispute resolution, including mediation or arbitration. In the event that the parties shall decide that any disputed matters shall be resolved by arbitration, such arbitral proceedings shall be governed by the* [*] *Rules of Arbitration and there shall be three arbitrators, one of whom shall be selected by the claimant in the request for arbitration, the second shall be selected by the respondent within* [*] *days of receipt of the request for arbitration, and the third, who shall act as presiding arbitrator, shall be selected by the two parties within* [*] *days of the selection of the second arbitrator. The place of arbitration shall be [city, country]. This agreement is governed by, and all disputes arising under or in connection with this agreement shall be resolved in accordance with* [*] *law.*"

However, it is important to note that a step may be added or withdrawn, depending on the nature of the contract, its complexity and the specific circumstances of the case in question.