

ASA CONFERENCE\_BERN, SWITZERLAND

# Application of Multi-tier Dispute Resolution Clauses (“MDR Clauses”)

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# I. Always Applicable?

- Always incorporate a MDR Clause?
  - No. Due to their complex structure, MDR Clauses are not necessary if expedited resolution is more appropriate and to the parties' best interest
  - Typical “tiers” of MDR Clauses:
    - Amicable negotiation
    - management escalation
    - mediation/conciliation
    - expert determination
    - arbitration/litigation

## II. In Certain Industries?

- Which industries would require MDR Clauses?
  - Examples:
    - Construction: such as international construction and engineering projects
    - Energy: such as long term oil/gas supply disputes
  - Common features:
    - large scale of monetary payments
    - complex and scheduled performance of work
    - scheduled delivery of milestone work products

# III. In Certain Parts of the World?

- China

- Parties often incline to agree on a MDR Clause requiring
  - A pre-requisite amicable negotiation/mediation/conciliation phase
    - ❑ Typically 30, 45, 60 or 90 days
    - ❑ Known as “cool-off” period
    - ❑ Pre-requisite or soft requirement? (*May vs. Shall, see next slide*)
  - Followed by arbitration *or* litigation (cannot choose both under PRC law)

# III. In Certain Parts of the World?

- China

- Zoom-in: whether "amicable negotiation/mediation/conciliation" must be completed in order to satisfy the jurisdiction of an arbitral tribunal?
  - CIETAC traditional position: no need to be completed as long as either party doesn't want to negotiate/mediate/conciliate, unless explicit expression that the pre-condition "must" be completed.
  - Extraordinary case: Chinese politics is in the play.
  - Supreme People's Court: No need to prove that the process has been completed, which is considered fulfilled upon one party's filing for arbitration.

## IV. In Certain Relationships?

- Which relationships would require carefully designed MDR Clause?
  - Those where long-term stable relationship is the key for both parties' interest
    - Such as: long-term gas/oil supply contracts
  - Those where stable relationship is the key due to the nature of the cooperation or due to one party's reliance on the relationship
    - Such as:
      - Government procurement projects (at least in China)
      - Product sharing contracts (where the State owns the resources)