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# THE USE OF MULTI-TIERED DISPUTE RESOLUTION CLAUSES TO SOLVE COMPLEX DISPUTES

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Counsel at the Secretariat of the International Court of Arbitration

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## IACCM Council members representing “Dispute, Claim and Conflict Management”



**Council elected for 2019, for Dispute, Claims and Conflict Management: Nidhi Sodhani, Jeff Barnes, Howard Carsman, Bernard Macarthur, Josiah Martins, Jan Bouckaert**

### **Actions:**

Council members can be contacted by all IACCM members.

Contributing to promotion of best practices in dispute resolution.

Interact with relevant associations (ICC, CIArb, DRBF etc) and influencers.

**Meet us at IACCM conferences!**

## Promotion of Best Practices

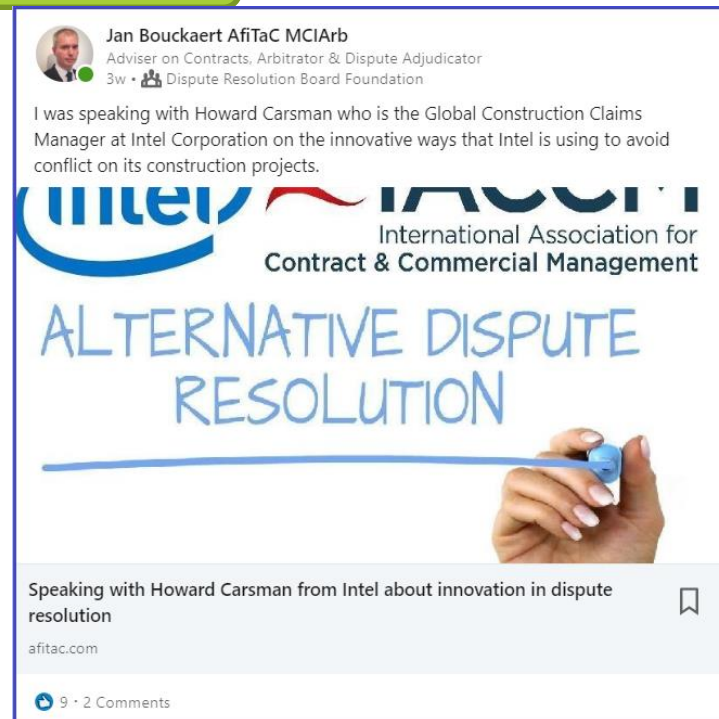
**Article: “Speaking with Howard Carsman from Intel about innovation in dispute resolution” → Executive Committee + Third Party Neutral**

**Published on social media with good success in LinkedIn groups of Dispute Resolution Board Foundation, Alternative Dispute Resolution (ADR) Professionals etc.**

**Collect further best practices for round table in IACCM Americas Conference 2019 which will be hosted in Phoenix, Arizona from 4 to 6 November. → Please support us with your contribution (before end of June)**

**Link to article:**

**<https://afitac.com/2019/04/03/innovation-in-dispute-resolution/#1>**



**Jan Bouckaert AfITaC MCI Arb**  
Adviser on Contracts, Arbitrator & Dispute Adjudicator  
3w • Dispute Resolution Board Foundation

I was speaking with Howard Carsman who is the Global Construction Claims Manager at Intel Corporation on the innovative ways that Intel is using to avoid conflict on its construction projects.

**Intel** **IACCM**  
International Association for  
Contract & Commercial Management

**ALTERNATIVE DISPUTE  
RESOLUTION**

Speaking with Howard Carsman from Intel about innovation in dispute resolution

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9 • 2 Comments

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## Today's "Ask the Expert" organized by the Council

**Gustavo Scheffer da Silveira, Counsel at International Chamber of Commerce**

**Author of "Dispute Settlement Methods in International Construction Contracts"**

**Topic for today : The Use of Multi-tiered Dispute Resolution Clauses to Solve Complex Disputes**



# INTRODUCTION

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## **I – The search for efficient dispute resolution mechanisms**

**A. What are the parties' needs when it comes to solving complex disputes?**

**B. What dispute resolution methods exist, and how do they respond to the parties' needs?**

**C. Multi-tier dispute resolution clauses may offer a more efficient system**

## **II – Practical difficulties using multi-tier clauses**

**A. Drafting and interpreting multi-tier dispute resolution clauses**

**B. The breach of a multi-tier dispute resolution clause**

a) The nature of the problem: jurisdiction vs admissibility

b) The remedy against the breach

**C. Arbitration within a multi-tier dispute resolution system**

# POLLING QUESTION 1

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**How often have you included a multi-tier dispute resolution clause in a contract?**

**A – Never**

**B – Seldom**

**C – Often**

## POLLING QUESTION 2

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**Do you think multi-tier dispute resolution clauses are efficient?**

**A – Yes**

**B – No**

**C – Depends**

# I – THE SEARCH FOR EFFICIENT DISPUTE RESOLUTION MECHANISMS

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## A. What are the parties' needs when it comes to solving complex disputes?

The answer to this question will vary depending on the sector.

For instance, the international construction industry requires a dispute resolution mechanism that facilitates the:

- (i)** Construction of the project within the time limit and price agreed on the contract
- (ii)** Quick resolution of dispute during the performance of the contract
  - Dispute cannot be left to the side
  - Quick solution
- (iii)** Preservation of the contracting parties' relationship
  - Despite the existence of disputes, the parties will have to continue to work together for the construction of the project
- (iv)** Management of cultural differences



## I – THE SEARCH FOR EFFICIENT DISPUTE RESOLUTION MECHANISMS

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The construction sector will also require a dispute resolution mechanism well adapted to deal with:

- (i)** A large number of disputes (construction contracts are exposed to all sorts of risks)
- (ii)** Technical disputes
- (iii)** Multi-contract and multi-party disputes
- (iv)** As the case may be, the international nature of the contract, offering a neutral forum.

Other commercial sectors will have their own constellation of needs when it comes to dispute resolution.

It is important that the parties identify the special needs of their industry and contracts, in order to identify which dispute resolution mechanism responds more efficiently.

# I – THE SEARCH FOR EFFICIENT DISPUTE RESOLUTION MECHANISMS

## B. What dispute resolution methods exist, and how do they respond to the parties' needs?

In order to select the most adequate dispute resolution mechanism, the parties need to know what options they have.

**Existing mechanism, among possible others:**

Negotiation	The Engineer
Conciliation	Dispute Boards
Mediation	Baseball Arbitration
Mini-trial	Arbitration
Expertise	State Courts

## I – THE SEARCH FOR EFFICIENT DISPUTE RESOLUTION MECHANISMS


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Each one of these mechanisms will offer the parties advantages and disadvantages


For instance:

**Mediation:**  Preserves the parties' relationship

 Only resolves the dispute if the parties collaborate and reach an agreement

**Dispute Board:**  Quick resolution of the dispute (90 days under the ICC Rules)

 The rapidity of the procedure may have some negative impacts and the decision is not immediately final and may not even be binding

**Arbitration:**  Final and binding award, with enforcement under the N.Y. Convention

 Not very good to preserve the parties' relationship; long and expensive

# I – THE SEARCH FOR EFFICIENT DISPUTE RESOLUTION MECHANISMS

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## C. Multi-tier dispute resolution clauses offer a more efficient system

- **What is a multi-tier dispute resolution clause**
- **How does it work?**
  - Obligation of results (*obligation de résultat*)
  - Obligation of means (*obligation de moyens*)
- **How is it adapted to complex disputes?**

As the multi-tier system combines more than one dispute resolution mechanism, this system will:

- Be more adapted to the different types of disputes that may arise from complex contracts
  - Filter the disputes that will reach the arbitration level
  - Reduce the overall costs related to dispute resolution
  - Favor the preservation of the parties' good relationship
- **In practice, however, the parties need to be attentive to some difficulties related to the use of multi-tier dispute resolution clauses**

## II – PRACTICAL DIFFICULTIES USING MULTI-TIER CLAUSES

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### A. Drafting and interpreting multi-tier dispute resolution clauses

Not easy to draft and requires special attention from the parties

- Which disputes resolution mechanism will form each tier of clause?
- The parties need to understand what is expected and required from them in each tier (it is important to understand what the chosen mechanism actually is)
  - Depending on the jurisdiction, the parties will have to include the procedure to be followed in each tier (maybe be by reference to a specific set of rules)
- The parties will have to include clear language of the mandatory nature of each tier: “shall” vs “may”
- It requires careful drafting of the conditions from the transition from the first tier to the next

## II – PRACTICAL DIFFICULTIES USING MULTI-TIER CLAUSES

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### **B. The breach of a multi-tier dispute resolution clause**

Despite clear provisions, sometimes a party will jump all tiers and go straight to arbitration.

If this issue is raised by any of the parties, the arbitrators will have to address the issue of the breach of the multi-tier dispute resolution clause.

Two main issues will arise.

#### **a) What is the nature of this breach?**

Is it a problem affecting the arbitrator's jurisdiction *or* the admissibility of the claims?

#### **b) The sanction against the breach**

- Contractual sanctions vs procedural sanctions
- What procedural sanctions are available
  - Suspension or termination of the arbitral proceedings

## II – PRACTICAL DIFFICULTIES USING MULTI-TIER CLAUSES

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### C. Arbitration within a multi-tier dispute resolution system

- Arbitration will almost always be the final dispute resolution mechanism of the multi-tier clause (final and binding award).
- The arbitration procedure within the multi-tier dispute resolution system is a normal procedure, completely autonomous from the previous dispute resolution mechanisms.
  - The parties are not bound by the arguments and evidence submitted in the previous mechanisms
  - The arbitrators will be completely free to analyse the dispute

The specific case of the *Dispute Adjudication Boards* prior to arbitration (e.g. FIDIC)

- The characteristics mentioned above remain valid BUT:
  - The parties will have to immediately give effect to the DAB decision, despite the arbitration procedure
  - In case the losing party does not give effect to the DAB decision:
    - (i) the other party may submit this dispute directly to the arbitral tribunal, and
    - (ii) the arbitrators may order the enforcement of the DAB decision prior to analysing the merits of the dispute

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