Give the Devil His Due: How the Road to Hell Paved by Multi-Tier Dispute Resolution Clauses Can Be Stopped by Liquidated Damages

'Sometimes a deal with the devil is better than no deal at all.'
– Lawrence Hill, *Someone Knows My Name*

INTRODUCTION

It is often said that the road to hell is paved with good intentions. Never has this proverb been more true than in reference to multi-tier dispute resolution clauses (MTDRCs). Construction contracts typically include these clauses to force parties to engage in alternative dispute resolution (ADR) before resorting to arbitration.[1] The reason is noble. Disputes are inevitable, but the parties hope that they can be resolved without acrimony. Unfortunately, that is not always the case, and the MTDRC becomes more of a burden than a benefit.

Consider a scenario where a contractor is hired to build a plant, and after completion, the employer withholds payment, because it claims that the plant does not achieve the desired output. The contractor disputes the allegations and wants to commence arbitration, but the contract requires 'good faith' negotiations between senior representatives of the companies, and if that fails, submission to a dispute adjudication board (DAB). The employer drags its feet, its representatives never seem to be available, and when negotiations finally occur, they are not willing to engage with the contractor's representatives. Then, the employer hinders submission of the claim to the DAB by refusing to assist in the composition of that body.

Prematurely submitting the dispute to the arbitral tribunal will not help and may make things worse. The employer will inevitably challenge the contractor's right to arbitrate, and the tribunal may stay or dismiss the case while the contractor completes the unfinished steps of the MTDRC. Even if it does not, there is a chance that a reviewing court will disagree with the tribunal's decision, find that it never had jurisdiction over the dispute, and annul, or refuse to enforce, whatever award the tribunal issues. Essentially, even when the end of the road outlined by the MTDRC is reached, the contractor will not know if it has found salvation—or just a pathway to future disappointment.

This essay analyses the chaos wrought by MTDRCs and suggests a solution to them familiar to construction lawyers (albeit in a different context)—specifically, liquidated damages. Part 1 looks at how MTDRCs work and why they are included in construction

[1] Jane Jenkins, *International Construction Arbitration Law* (2nd rev edn, Wolters Kluwer 2014) 5.

contracts. Part 2 lays out the multiple legal issues that are raised when a court or arbitrator must decide whether a party complied with a MTDRC. Part 3 examines the factors arbitrators must consider when they review compliance with a MTDRC. Finally, Part 4 explains how liquidated damages would preserve the benefits of MTDRCSs while eliminating their drawbacks.

DISCUSSION

1. MTDRCs operate well, when the parties want them to work.

As noted above, parties mean well when they incorporate MTDRCs into their construction contracts, as those clauses are not meant to bedevil claimants, but to help them. As infrastructure projects grow more technically complex, more problems inevitably arise during their execution. If claimants resorted to arbitration on every one of these occasions, the relationship between the parties would soon break down, costs would skyrocket, and the project would get waylaid.[2] Consequently, the drafters wanted claimants to attempt various forms of ADR before they initiate an arbitration against the other party.

There are various forms of ADR that drafters insert into construction contracts, including negotiations, mediation, conciliation, and DABs. Obviously, negotiations can occur at any time, but mandating it in a contract, provided the terms and conditions are clear, can be helpful to initiate discussions between senior management without either side having to show weakness. Mediation or conciliation by a qualified and respected third party can be useful as a quicker, cheaper, and nonbinding alternative to arbitration or litigation. And DABs provide a way for parties to resolve their disputes on an interim basis—which is especially important in the context of construction projects, where delay is a concern.

Wanting to take advantage of the different features, drafters of construction contracts will often incorporate more than one of these types of ADR into a given MTDRC. A classic example are the MTDRCs in the standard contracts of the International Federation of Consulting Engineers (FIDIC). Starting in 1957 with its Red Book (for Works of Civil Engineering Construction), FIDIC has published a collection of construction contracts[3]—often called the Rainbow Suite because each contract is differently coloured—and each contains a MTDRC.

For instance, the 2017 edition of the Red Book provides that ‘claims’ should first be brought to the ‘Engineer’,[4] a professional engineer who is appointed by the ‘Employer’ and

---

[2] *ibid* 50.
[3] Aisha Nadar, *Settlement of Disputes Under FIDIC Forms of Contract* (ICC 2017) at [10]-[20].
[4] FIDIC, Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer (2nd edn, FIDIC 2017) cl 20.2.

deemed to act on his behalf.[5] The Engineer will then make a determination on the claim within a set time period.[6] If either party disagrees with the Engineer's determination, it can refer the dispute to a Dispute Avoidance/Adjudication Board (DAAB),[7] which should have been jointly appointed by the parties at the outset of the project.[8] DAAB proceedings are 'not deemed to be an arbitration', but its decisions are 'binding'.[9] That is, a party may submit a 'Notice of Dissatisfaction' (NOD) with the DAAB decision and thereby begin the process for bringing an arbitration,[10] but that party is still expected to 'promptly comply' with the DAAB decision unless and until there is a conflicting arbitral award.[11] That party is also asked to 'attempt to settle the dispute amicably' before bringing an arbitration, but that just translates to a requirement to wait 28 days from filing the NOD before serving the notice of arbitration.[12]

There are numerous other examples of construction contracts with MTDRCs, including the other contracts in the FIDIC Rainbow Suite, the Institution of Civil Engineers New Engineering Contracts, as well as the thousands of bespoke contracts corporate parties use. However, the Red Book is useful in that it shows the benefits and drawbacks of even a well-drafted MTDRC. It establishes a process whereby claimants must elaborate on their claims to both the Engineer and the DAAB before resorting to arbitration. Thus, if the claims are the result of miscommunication or of the sort that can be helped by the perspective of a third party, they can be resolved before arbitration. Just as importantly, the presence of the DAAB to provide binding interim decisions will ensure that the project continues apace notwithstanding the dispute. The problem lies, however, when a dispute is so clear that discussions are meaningless or arises after the project is complete when a DAAB decision bears no value. The MTDRC then becomes a source of frustration for parties who want to resolve their dispute expeditiously.

2. Deciding whether a party complied with an MTDRC requires multiple complex determinations.

Ironically, while the lawyers who draft construction contracts include MTDRCs to promote less expensive methods of resolving disputes than arbitration, MTDRCs can often lead

[5] *ibid* cl 3.1-3.2.
[6] *ibid* cl 3.7.2, 20.2.
[7] *ibid* cl 3.7.5.
[8] *ibid* cl 21.1.
[9] *ibid* cl 21.4.3.
[10] *ibid* cl 21.4.4.
[11] *ibid* cl 21.4.3.
[12] *ibid* cl 21.5.

to more money being spent on lawyers. The reason is simple. An arbitration clause, standing alone, raises few jurisdictional questions. Thanks to the 1959 New York Convention,[13] arbitrators typically need only concern themselves with whether disputants are parties to a written arbitration agreement that encompasses the scope of their dispute—which is usually an easy inquiry in the context of a construction contract. Unfortunately, the same is not true when that agreement to arbitrate is contained within a MTDRC, as deciding whether a party complied with the precursor steps of that MTDRC will raise a host of other issues.

First and foremost, there is the issue of governing law. What law governs an arbitration clause is always a tricky issue. Usually, it is either the law of the main contract or the law of the seat of arbitration, but not necessarily. Indeed, one commentator identified nine different approaches to this choice-of-law issue.[14] Moreover, as was the case in the United Kingdom prior to the Supreme Court's decision in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb*,[15] the law governing an arbitration clause in a given jurisdiction may be unclear. Furthermore, as Lord Burrows suggested in *Enka*, there is an open question whether the precursor steps in a MTDRC are governed by the same law as the arbitration clause:

> There may sometimes be practical problems in drawing the line for proper law purposes between the arbitration agreement and the rest of the main contract. This case provides an excellent example. This is because the arbitration agreement is itself part of a wider dispute resolution clause …. It would be very odd and inconvenient to apply one proper law to interpret the earlier sentences in article 50.1 and a different proper law to interpret the later sentences. … It might be said that the whole of article 50.1 should be separated off from the main contract for the purposes of deciding the proper law. But while that would avoid the difficulty of different proper laws applying within the same dispute resolution clause, it creates the problem of how to ensure consistency with other terms of the main contract.[16]

Thus, before determining whether a claimant complied with an MTDRC, a court or tribunal will need to decide whether that clause is governed by the law that governs the contract or the law that governs the arbitration clause—and then what that particular law is.

Second, the court or tribunal must determine whether the step with which the party allegedly did not comply was compulsory. The answer often hinges on whether the contractual language suggests that the ADR step was optional, *e.g.*, 'may', or mandatory, *e.g.*, 'shall'.[17] Disputes on this point can elicit tremendous debate. For example, there have been conflicting

---

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.
[14] Marc Blessing, 'The Law Applicable to the Arbitration Clause and to Arbitrability,' in *International Council for Commercial Arbitration, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA 1999) 168-69.
[15] [2020] UKSC 38.
[16] *ibid* at [235].
[17] Gary Born and Marija Scekic, 'Pre-Arbitration Procedural Requirements: A Dismal Swamp', in David D Caron and others (eds), *Practicing Virtue: Inside International Arbitration* (OUP 2015) 238.

arbitral awards on whether the Rainbow Suite requires parties to refer claims to the Engineer before commencing arbitration.[18] Similarly, in *Peterborough City Council v Enterprise Managed Services Ltd*,[19] the High Court was forced to decide whether the 1999 Silver Book (for EPC/Turnkey projects) mandated that parties refer their cases to the applicable DAB, as there was conflicting language in the MTDRC.[20]

Third, if a step is mandatory, the court or tribunal must decide what parties must do to fulfil that step. This is particularly a problem when drafters of construction contracts insert nebulous language requiring the parties to meet and engage in 'good faith' negotiations.[21] In England and other jurisdictions, an agreement to negotiate is not enforceable. As Lord Denning explained in *Courtney & Fairbarn Ltd v Tolaini Brothers (Hotels) Ltd*,[22]

> 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.

Likewise, agreements to mediate or conciliate may also not be enforceable, if the terms of the mediation and conciliation are not outlined with sufficient particularity in the contract.[23] Consequently, whenever an MTRDC calls for negotiations, mediation, or conciliation, its wording must be carefully parsed to see if there are objective criteria that can be enforced.[24]

Fourth, assuming that the claimant has not fulfilled a mandatory step in the MTDRC, the court or tribunal must determine if that step i) relates to the jurisdiction of the tribunal, ii) affects the admissibility of the claim, or iii) is just procedural. Put another way, the court or tribunal will need to decide whether the ADR step was a condition precedent to the parties' consent to arbitration (such that noncompliance step divests the tribunal of jurisdiction), a requirement for any claim under the contract (in arbitration or otherwise), or a procedural hurdle that can be waived.[25] The difference is more than just a matter of semantics. While an arbitral tribunal has the power to rule on its own jurisdiction, that decision can be reviewed by courts, either in the seat of arbitration or in whatever jurisdiction a party seeks to enforce an award of that tribunal;

---

[18] *Compare* ICC Case 16765, at 128-129 (respondent cannot bring counterclaims it did not raise with Engineer), *with* ICC Case 18505, at 109-111 (claimant was not required to raise claims with Engineer).
[19] [2014] EWHC 3193 (TCC).
[20] *ibid* at [16]-[23].
[21] *Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), at [57].
[22] [1975] 1 WLR 297.
[23] *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm), at [27].
[24] *Cable & Wireless PLC v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).
[25] Born and Scekic (17) 243; Jan Paulsson, 'Jurisdiction and Admissibility', in Gerald Aksen and others, *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC 2005) 617.

in contrast, courts are obliged to leave undisturbed a tribunal's rulings on matters of admissibility and procedure.

As can be seen, each MTDRC tier with which a party allegedly does not comply raises an array of legal questions for a tribunal or reviewing court to address. This is a problem not only for those decision-makers, but also for claimants. When dealing with a recalcitrant respondent, claimants with meritorious cases may be forced to expend vast amounts of time and resources demonstrating their compliance with the various steps of a MTDRC, before they can get a chance to present their dispute to a tribunal—let alone receive an award.

3. MTDRCs place arbitrators in a difficult position.

In light of the complex legal issues that MTDRCs produce and the delays they can impose on an arbitration, one might wonder why arbitrators do not adapt an approach of not enforcing those clauses unless the contractual language clearly demands it. Indeed, that is what Gary Born and Marija Scekic suggested in an article on this topic:

> 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.[26]

However, there are both legal and practical problems with this approach.

For one, particularly in construction contracts, which are produced by sophisticated commercial actors engaged in arms-length negotiations, the terms to which the parties have agreed should be respected and enforced to the extent they can. As Longmore LJ noted in *Petromec Inc v Petroleo Brasileiro SA Petrobras* with respect to a MTDRC requirement for good faith negotiations,

> It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has 'no legal content' to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men ….[27]

Thus, the law (or at least English law) will not countenance Born and Scekic's approach.

Moreover, there are practical problems with their proposal. Modern arbitrators are different than those of yesteryear, in that they are increasingly drawn from the ranks of

---

[26] Born and Scekic (17) 263.
[27] [2005] EWCA Civ 891, at [121].

arbitration specialists and focus on the proper organization and management of the arbitral proceedings.[28] Trained by institutions like the Chartered Institute of Arbitrators, this new generation of 'management' arbitrators has been primed to produce enforceable awards. Unfortunately, one of the grounds for annulling an award[29] or not enforcing it[30] is a lack of jurisdiction. Were a tribunal not to strictly enforce a MTDRC, a court could later review that decision, find the steps not performed by a claimant were a jurisdictional requirement, and set aside whatever award the tribunal ultimately issues.

The uncertainty of the applicable law makes that threat even more ominous. As mentioned above, it is not clear whether a MTDRC is governed by the law that governs the contract or the law that governs the arbitration agreement—and different jurisdictions may reach different conclusions. By way of illustration, an award issued by a Paris-seated arbitration between Kabab-Ji SAL and Kout Food Group was confirmed by the Paris Court of Appeal, but not enforced by the English Court of Appeal, because of different outcomes due to the fact that the former believed French law governed the arbitration clause and the latter felt that English law governed.[31] It is similarly possible that an arbitral tribunal could follow the law of its seat for guidance on the governing law of the MTDRC, but then the jurisdiction in which a party later seeks to enforce the tribunal's award applies a different approach.

Consequently, in direct contrast to the approach advocated by Born and Scekic, a safer approach for any tribunal faced with potential MTDRC noncompliance would be to stay its proceedings and require claimants to complete any unfinished steps.[32] The respondent then cannot challenge any subsequent award for lack of jurisdiction, and it will be easier for the claimant to comply with such an order than challenge it. Still, there are practical and legal problems with this approach as well.

To start, widespread adoption of this conservative approach will encourage respondents not to work with claimants. They could delay responding to messages from claimants about negotiations, mediations, and conciliations, not cooperate on dates or locations for meetings, and take every step short of refusing to participate to frustrate the process. Likewise, even though many contracts (like the FIDIC Rainbow Suite) call for the constitution of a DAB at the

---

[28] Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators?' (2012) 28 *Arb Int'l* 161.
[29] *See, e.g.*, Arbitration Act 1996 s 67; *UNCITRAL Model Law on International Commercial Arbitration* (UN 2006) art 34(2)(a)(iii).
[30] New York Convention art V(1)(c).
[31] *Compare Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [CA Paris, 23 June 2020, n°17/22943], *with Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6.
[32] *See, e.g.*, ICC Case 14431.

commencement of a project, parties, wanting to save money, often wait until there is a dispute.[33] Obstructive respondents can object to proposed candidates for the board, knowing the delay may push claimants to initiate arbitration prematurely, and then take comfort that a tribunal will probably make the claimant go back and complete the unfinished MTDRC steps.

Setting aside the fact that it essentially rewards recalcitrant respondents, a stay is also legally questionable. If the precursor step that the claimant needs to complete is a condition precedent to arbitral jurisdiction, then the arbitration should not be stayed, but dismissed. While some courts have suggested that tribunals can stay proceedings to save claimants the time and expense of reconstituting a tribunal,[34] that defies logic: If the tribunal has no jurisdiction, it should not exist. Moreover, it denies the parties the right to select new arbitrators if the ADR process reveals that the case will turn on issues different than they otherwise thought.

Even if arbitral jurisdiction is not at issue, whether a stay is the most appropriate remedy is debatable. In *Enka*, the UK Supreme Court noted that, for most purposes, arbitration clauses are no different than any other contractual clause:

> The assumption that, unless there is good reason to conclude otherwise, all the terms of a contract are governed by the same law applies to an arbitration clause, as it does to any other clause of a contract…. As counsel for Chubb Russia emphasised, the principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that it is to be so treated for the purpose of determining its validity or enforceability.[35]

The same must hold true for an MTDRC, which as afore-mentioned, may not even be considered part of the arbitration clause—but instead of awarding damages for an MTDRC breach, most English courts choose to exercise their discretionary power and grant stays 'to enforce the terms of the agreement made by the parties themselves.'[36] This makes no sense. Forcing parties to engage in ADR after an arbitration has been initiated and when it is almost assuredly destined for failure is inefficient.[37] Awarding damages and moving forward to a final resolution of the issues seems the more prudent approach.

Indeed, there is no reason why damages cannot be awarded for noncompliance with a MTDRC. That noncompliance arguably prevented the dispute from being settled prior to arbitration, so the damage caused will be easy to calculate. It is the amount the other party spends on the arbitration. Therefore, if it found that a claimant did not comply with a MTDRC,

---

[33] Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (10th edn, Thomson Reuters 2016) s 17-175.
[34] Swiss Federal Supreme Court, Judgment dated 16 March 2016, 4A_628/2015.
[35] *Enka* (n 15) at [40]-[41].
[36] *DGT Steel and Cladding v Cubitt Building* [2007] BLR 371, at [11].
[37] *Peterborough* (19) at [38]-[40].

a tribunal, rather than staying the arbitration, could issue an award that the claimant has presumptively forfeited its right to a costs award should it succeed and agreed to pay for the respondent's costs if it loses. Unfortunately, because of the threat of a jurisdictional challenge, it is unlikely that a tribunal would adopt this approach.

4. Inserting provisions for liquidated damages into MTDRCs will solve the problems.

As explained in the previous sections, MTDRCs pose dilemmas for all involved. Parties to a construction contract do not want disputes that arise during the course of a project to derail the parties' ability to work together or on-time completion of the project—but find it frustrating when irreconcilable disputes, especially those that arise after a project is complete, cannot be brought directly to an arbitrator. For arbitrators, they want to treat the parties fairly and conduct arbitrations expeditiously—but they are constrained by the murkiness of the law and the threat of jurisdictional challenges. Fortunately, there is a solution to the problem: liquidated damages.

Liquidated damages have long been used in commercial contracts where the amount of damages for a breach might be difficult to measure, such as delay damages in construction contracts. So long as they are 'a genuine pre-estimate of loss' and not so 'substantially in excess of that sum' as to be considered a 'penalty', liquidated damages will be enforced by the courts.[38] In 2015, the UK Supreme Court expanded the scope of acceptable liquidated damages to also include those that protect a party's 'legitimate interest' in the enforcement of a 'primary obligation',[39] especially where the parties to the contract are 'properly advised' and of 'comparable bargaining power'.[40] Not all jurisdictions have followed in lockstep with this new approach, however.[41] Nevertheless, provisions awarding liquidated damages for violations of MTDRCs could meet either standard.

Turning first to the new English rule, it goes without saying that sophisticated, 'properly advised' parties, like the companies who enter into construction contracts, will negotiate an amount of liquidated damages for MTDRC noncompliance that reflects their legitimate interest in the other party complying with that clause. What that amount will be is unclear. Each party will want to ensure that the other uses the ADR mechanisms in the MTDRC wherever possible. However, each will also want to ensure that if the other is being obstructionist and the dispute

[38] *Scandinavian Trading Tanker Co v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, at 702 (Lord Diplock).
[39] *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 [32] (Lord Neuberger and Lord Sumption).
[40] *ibid* at [35].
[41] *Compare Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28 (High Court of Australia uses 'legitimate interest' test), *with NewCSI v Staffing 360 Solutions*, 865 F.3d 251, 261 (2017) (New York follows common law rule).

is significant enough, that it will not be cost-prohibitive to commence an arbitration without completing all of the steps in the MTDRC. Ultimately, the figure at which the parties arrive for liquidated damages will reflect an amalgamation of considerations—and represent how much they value compliance with the MTDRC.

Even if the governing law of the MTDRC followed the old common law rule and required that the amount of liquidated damages be based upon a reasonable estimate of the expected harm to the respondent of a claimant's noncompliance with the MTDRC, a liquidated damages provision could still work. As discussed in the previous section, the harm caused by lack of compliance with an MTDRC is the loss of the chance to resolve the case before arbitration. Thus, damages would be the time and expense a party would be estimated to spend on a major arbitration. Employers and contractors are sophisticated parties, who could estimate this amount from past experience and industry data, so they should have no problem coming up with a figure. Alternatively, the parties could forego inserting an exact number and simply include a provision that any party found not to comply with the MTDRC will forfeit any costs award if it wins at arbitration and will pay the costs of the other party should it lose.

More than just being lawful, however, a liquidated damages provision should solve many of the problem associated with MTDRCs. For instance, as discussed above, MTDRCs add value in some situations, *e.g.*, providing binding interim decisions so work on the project can go forward, but can be detrimental on other occasions, *e.g.*, when a party uses them to obstruct final resolution of a dispute after the project is complete. Rather than force drafters of construction contracts to predictively parse out those times when they want MTDRCs to be enforced, a liquidated damages provisions will allow the clause to be applied flexibly based upon a cost/benefit analysis. Each party will be inclined to comply with the MTDRC, not only to avoid paying the liquidated damages amount, but also to maintain a cooperative relationship with the other party. However, when the other side is being obstructive to the point that it is clear that the relationship has already broken down, and the harm to the claimant of the respondent's recalcitrance is greater than the liquidated damages, parties will now have the option not to comply with the MTDRC.

An MTDRC liquidated damages provision also relieves the pressure on arbitrators who perpetually sit under a jurisdictional Sword of Damocles. As explained above, the uncertainty of the law governing MTDRCs could influence arbitrators, when asked to determine whether a party complied with one of these clauses, to adopt a more conservative approach than they otherwise would. However, by affirmatively indicating that the correct penalty for noncompliance with the MTDRC is not a stay or dismissal, a well-crafted liquidated damages

provision will signal to any reviewing court that the clause is merely a procedural requirement and thus any decisions on a party's compliance with that clause should fall solely within the ambit of the tribunal.

Finally, including a liquidated damages provision will expedite the arbitration, ensuring that justice, in whatever form it may take, is not delayed. Whenever a respondent challenges a claimant's compliance with an MTDRC, the arbitration will inevitably get side-tracked, as the tribunal will need to resolve it before continuing with the substantive merits of the arbitration. Thus, even if the tribunal ultimately finds that the claimant complied with the MTDRC, the claimant loses to the extent that the merits of its case have been set aside while the tribunal adjudicated the issue of compliance. A liquidated damages provision would alter that outcome. Because the tribunal would no longer need to consider the possibility of a stay or dismissal, it could address the issue of MTDRC compliance as an ancillary matter and not allow it to delay its consideration of the merits of the claimant's case.

CONCLUSION

MTDRCs are the norm in construction contracts, because they serve the primary goal of those agreements: on-time project completion. The fact that those clauses often lead to acrimonious disputes between the parties after the project has been completed and vex the arbitrators who must adjudicate those disputes is of little concern to the commercial lawyers who draft the contracts. Still, as this essay has demonstrated, there is an easy solution that maintains the benefits of the MTDRCs, while eliminating most, if not all, of their drawbacks. If the drafters of construction contracts could be convinced to include liquidated damages provisions in the MTDRCs—a toll to exit the road to procedural hell, so to speak—it will not affect the parties' substantive rights, but it could drastically improve the efficiency and expediency with which major disputes between the parties are resolved.