United States: multi-step dispute resolution clauses

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So-called 'multi-step' dispute resolution clauses have become popular additions to domestic and international commercial contracts in the United States and elsewhere.[1] These clauses typically prescribe tiered procedures in the event of a dispute.

Such procedures often begin with the notification and description of a dispute by the aggrieved party followed by a period of consultation, negotiation and/or mediation.[2] In the event that the parties cannot agree on a way to resolve the dispute, in whole or in part, multi-step dispute resolution clauses typically provide for litigation, or, more commonly, arbitration under specified rules. Under certain conditions, these clauses have the potential to encourage early resolution of disputes with minimum acrimony by facilitating initial discussions in less adversarial settings.

With the onset of a dispute, however, disagreements may arise regarding the proper application of such dispute resolution clauses. Depending on the circumstances, one party may believe that recourse to the first step of the dispute resolution clause would be futile or would unnecessarily delay proceedings in a time-sensitive situation and would thus prefer to advance proceedings directly to a subsequent step in the clause such as arbitration. The other party may insist on negotiation or mediation first, either out of a good faith belief that common ground can be found through such procedures, or perhaps more opportunistically as a dilatory tactic. Or, both parties may wish to avoid negotiation or mediation for one of the above reasons, but one may seek to avoid the application of the dispute resolution clause altogether in an attempt to litigate the dispute in court, while the other may seek to enforce the arbitration component of the clause if there is one.

Such cases can raise important questions regarding whether and in what contexts, the negotiation or mediation component of a multi-step dispute resolution clause can be enforced against an unwilling party. As the discussion below illustrates, the negotiation or mediation component of a multi-step dispute resolution clause can be enforced under United States law, but only if the clause is sufficiently definite so as to provide objective standards by which compliance can be measured. Yet this rule can be a double-edged sword. As shown below, a specific and strongly-written requirement for negotiation or mediation as a precondition to arbitration, for example, has led some courts in the United States to retain jurisdiction over arbitrable disputes over the objection of one party on the basis that neither party sought to mediate and therefore, that the entire dispute resolution clause had not been 'triggered'. The potential for such results highlights the importance of careful drafting of such multi-step dispute resolution clauses in order to emphasise the parties' selection of arbitration even when neither party elects to avail itself of the mediation or negotiation component of the clause's procedure.

Enforceability of the negotiation, mediation or other non-binding component

Courts in the United States do not concur on whether an agreement to negotiate in *any* context is enforceable.[3] Consequently, courts in the same federal district have held both that an agreement 'to use best efforts to reach an agreement', constituted an enforceable agreement,[4] and that '[a]n agreement to negotiate in good faith' is unenforceable because it is 'even more vague than an agreement to agree'.[5]

Ultimately, a court's decision whether to enforce an agreement to negotiate appears to hinge, on a case-by-case basis, on the definiteness of the contractual terms. As one New York court observed, it is possible to enforce a definite and certain duty to negotiate in good faith, but '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'.[6]

In the context of contractual clauses requiring negotiation or mediation of disputes (or, for that matter, other non-binding procedures), courts focus on the definiteness of the negotiation or mediation procedures designated by the contract. Where such clauses contain *indicia* of definiteness, such as a limited duration of negotiation or mediation,[7] a specified number of negotiation sessions,[8] specified negotiation participants,[9] or mediation pursuant to specified rules or under the auspices of a particular dispute resolution institution,[10] courts appear more likely to enforce them.

The possible futility of seeking in good faith to enforce a non-binding component of a multi-step dispute resolution clause against an unwilling party is not necessarily a reason for denying enforcement of that component. At least one federal court of appeals has held in the context of a 'non-binding' arbitration

procedure that, despite the fact that one party believed the procedure would be futile, the possibility existed that the procedure could generate an advisory result that the resistant party would find 'favourable'.[11] In that context, the court enforced the dispute resolution clause, finding that it was 'unable to conclude' that the procedure 'would be futile'.[12]

The context of multi-step dispute resolution clauses, however, leads courts to emphasise a further key factor affecting whether an agreement to negotiate or mediate is sufficiently definite to be enforced: whether or not the clause clearly makes resort to those less adversarial procedures a mandatory precondition to escalating the dispute. Where multi-step dispute resolution clauses do not state that negotiation or mediation is a condition precedent to the pursuit of more adversarial procedures, courts in the United States tend to view negotiation or mediation provisions more flexibly – ranging from a reluctance to strictly enforce notice provisions or time limits surrounding the negotiation provisions to a refusal to enforce those provisions at all.[13]

By contrast, where multi-step dispute resolution clauses contain condition precedent language associated with negotiation or mediation provisions, courts will be more likely to enforce those provisions strictly according to their terms. Thus, where a contract contained a 'mandatory negotiation' clause[14] and the plaintiff commenced an arbitration before any negotiations could take place, the court vacated the eventual arbitration award that was favourable to the plaintiff. Because the defendant had objected during the arbitration that no negotiation had taken place in advance of the arbitration and 'the parties were required to participate in the mandatory negotiation sessions prior to arbitration[,]…the trial court was correct in vacating the arbitration award'.[15]

Likewise, where a defendant's attempt to enforce a mediation clause was resisted by the plaintiffs on the grounds that the plaintiffs had 'substantially complied' with the provision by writing letters detailing the nature of their grievances, the court held: 'The mediation clause here states that it is a condition precedent to any litigation.…Because the mediation clause demands strict compliance with its requirement[s]…before the parties can litigate, plaintiffs' substantial performance arguments must fail.'[16]

It should be noted, however, that courts in the United States have not always unquestioningly enforced negotiation or mediation portions of multi-step dispute resolution clauses even where they were conditions precedent to arbitration or litigation. Where it is evident that a party is attempting to delay arbitration or litigation by insisting on enforcement of a negotiation or mediation requirement, courts may decline to assist that party in its delay. Thus, even where the contract at issue included 'a term requiring mediation…as a condition precedent to arbitration', and the defendant had requested a stay from a federal district court where the plaintiff had instead filed suit in order to pursue mediation,[17] the court observed 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'.[18]

Ultimately, the negotiation or mediation components of a multi-step dispute resolution clause can be enforced in the United States, but enforceability depends on a variety of factors. Whether the clauses are definite in terms of time, place and procedures, for example, can play an important role in determining whether such clauses are legally cognisable agreements. Similarly, whether the clauses describe negotiation or mediation as a mandatory condition precedent to further, more adversarial, procedures will also enhance the likelihood of enforcement. Enforcement can be obtained even where a party is unwilling to participate, as some courts hold out the possibility that a settlement could accrue from non-adversarial or non-binding procedures. Nevertheless, courts retain the prerogative to deny enforcement if it appears that it is sought for illegitimate, tactical reasons.

Interaction between the negotiation or mediation component and the arbitration component

Parties seeking to create enforceable duties to negotiate or mediate as part of a multi-step dispute resolution clause may be surprised, however, by the ways some United States courts have addressed the interaction between those non-adversarial components and the arbitration component of such clauses. Many parties might, for various reasons, prefer to use negotiation or mediation as a condition precedent to arbitration. They might assume that even if they decided not to pursue negotiation or mediation in a particular dispute, their intent at the time of contracting to arbitrate all disputes arising out of their contract would be respected. In many jurisdictions in the United States, under prevailing law, they would be wrong.

For example, the First Circuit Court of Appeals considered a construction contract with a multi-step dispute resolution clause that provided, among other things, that disputes 'shall…be subject to mediation as a condition precedent to arbitration'.[19] Neither party attempted to mediate the ensuing dispute and after the plaintiff filed suit, it subsequently moved to compel arbitration based on the arbitration component of the contract's multi-step dispute resolution clause. When the defendant resisted this motion, 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'.[20] Consequently, because neither party 'ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration'.[21]

Indeed, the Eleventh Circuit Court of Appeals considered a contract that did not even state explicitly

that mediation was a condition precedent to arbitration, but rather stated that '[i]n the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph'.[22] The dispute resolution clause went on to say that '[i]n the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party'.[23] The court nevertheless read this clause to create conditions precedent to arbitration, which in turn suggested to the court that 'the parties clearly intended to make arbitration a dispute resolution mechanism of last resort'.[24] When a dispute arose and the plaintiff filed suit in federal court, the defendant attempted to stay the action pending arbitration. But because neither party had met the notice requirements for the mediation component of the dispute resolution clause, the court concluded that 'the arbitration provision has not been activated' and that the suit should not be stayed.[25]

These cases raise the interesting possibility that where both parties wish to avoid negotiation or mediation, a party that seeks to avoid the application of the dispute resolution clause altogether may find success litigating in court on the basis that the remainder of the dispute resolution clause has not been 'triggered' or 'activated'. Although other courts have followed similar paths of analysis,[26] such an approach is not without criticism.[27] Other courts have observed the irony of compelling a party or parties to litigate a dispute in court simply because they determined that the first step in their multi-step dispute resolution clause was not appropriate under the circumstances.

For example, where a party sued to enforce the negotiation component of a multi-step dispute resolution clause, one court noted that it would be inappropriate for judicial resolution where the entire point of the clause was to avoid courts:

> 'The good-faith-negotiation provision, when considered in its entirety and in context, was intended basically as the first step of a more comprehensive procedural scheme and obligation – imposed upon both parties – "to seek prompt and expeditious non-judicial resolution of disputes between them." The highly detailed nonjudicial dispute resolution procedures…begin with management review, progressing to a stipulation as to the facts and issues in dispute, moving to third-party resolution and, finally, to binding arbitration. Those procedures and their sequence, make it evident that litigation was intended as a last resort, and not…the beginning point, of the dispute resolution process.'[28]

Likewise, other courts have observed that 'a party cannot avoid arbitration because of the other party's failure to comply with the negotiation steps of a grievance procedure as long as that other party acted in good faith to preserve its right to arbitration'.[29] Indeed, the purpose of multi-step dispute resolution clauses that culminate in binding arbitration 'is undoubtedly to encourage successful negotiations so that neither litigation nor arbitration will be necessary, not to prefer the courts to an arbitrator if informal discussions break down'.[30]

Dispute resolution clause drafting considerations

The discussion above highlights the importance of focusing on the interaction between the non-adversarial components of a multi-step dispute resolution clause and the arbitration component of the clause, if applicable, where the selected forum for arbitration is the United States. Particularly where parties seek to draft strong clauses to encourage negotiation or mediation at the earliest possible point in a dispute, they should remember that there may be circumstances where such negotiation or mediation is inappropriate. Given this possibility, if parties are interested in ensuring that their disputes are arbitrable, and that they are not haled into the courts of an opposing party, for example, they may wish to consider explicit language indicating that arbitrators shall be empowered to hear all disputes arising out of or relating to the contract, *including* disputes as to whether the conditions precedent for arbitration have been met. Such language would preserve the greatest likelihood that negotiation or mediation provisions can be enforced, while reducing the risk of short-circuiting the multi-step dispute resolution clause in the event that circumstances arise where neither party desires to negotiate or mediate a dispute according to the contractual terms.

More fundamentally, parties should think carefully and seek expert guidance where appropriate, regarding whether they should require such negotiation or mediation components in a dispute resolution clause in the first place. Although they may be appropriate for some contracts, sophisticated parties often know when and how, it is appropriate to negotiate without needing a contractual mandate to do so. The foregoing analysis shows that these clauses can decrease predictability and certainty regarding who will decide a dispute and when and where it will be decided. Particularly in disputes presenting an acute need to preserve the status quo with equitable or injunctive relief, such uncertainty could be costly. Contemplating such possibilities is essential to ensuring that parties' dispute resolution clauses are tailored to their circumstances and ultimately meet their needs.

Notes

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1 See, eg PriceWaterhouseCoopers, 'International Arbitration: Corporate Attitudes and Practices', at 11 (2006), available at www.pwc.com/arbitrationstudy. These clauses are also known as 'escalation clauses', 'multi-tier' clauses, or multi-step alternative dispute resolution (ADR) clauses.

2 Although this article analyses negotiation and mediation primarily, these preliminary procedures can also include conciliation, facilitation, 'early neutral evaluation' and other forms of non-binding, non-adjudicative procedures. For a more comprehensive catalogue of such procedures, see, eg Paul Mitchard, 'Alternative Dispute Resolution', Introduction to Martindale-Hubbell International Arbitration and Dispute Resolution Directory (2001).

3 See, eg *Vestar Development II LLC v General Dynamics Corp*, 249 F 3d 958, 961 (9th Cir 2001) (describing California law on this question as 'unsettled'). This confusion appears to stem from the empirical difficulty of distinguishing between 'agreements to agree' and 'contracts to negotiate', see *Copeland v Baskin Robbins USA*, 96 Cal App 4th 1251, 1257 (Cal Ct App 1992), as well as the theoretical difficulties of determining what, if any, damages would flow from the breach of a contract to negotiate and whether contractual duties of good faith can properly be imported into the context of a contract to negotiate. See *ibid.* at 1260–61.

4 *Thompson v Liquichimica of America Inc*, 481 F Supp 365, 366 (SDNY 1979).

5 *Candid Productions, Inc v Int'l Skating Union*, 530 F Supp 1330, 1337 (SDNY 1982). The court went on to state: '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.'

6 *Mocca Lounge, Inc v Misak*, 94 AD 2d 761, 763 (2d Dep't 1983). See also *Fluor Enters Inc v Solutia Inc*, 147 F Supp 2d 648, 651 (SD Tex. 2001) (observing that the mediation provision met the test '[u]nder both Missouri and Texas law' that the contract be 'so worded that it can be given certain or definite legal meaning'); *Jillcy Film Enters v Home Box Office Inc*, 593 F Supp 515, 520–21 (SDNY 1984).

7 See *Fluor Enters*, 147 F Supp 2d at 649 and n 1 (enforcing contractual negotiation and mediation procedure described by the court as requiring: 'that if a controversy or claim should arise', the project managers 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.'' In the event this step was unsuccessful, the contract required the parties to 'attempt in good faith to resolve the controversy or claim in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes', but that '[i]f the matter has not been resolved pursuant to the aforesaid mediation procedure within thirty (30) days of the commencement of such procedure…either party may initiate litigation.').

8 See *White v Kampner*, 641 A.2d 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 the contract's arbitration provision).

9 See *Fluor Enters*, 147 F Supp 2d at 649 n 1.

10 See *HIM Portland LLC v DeVito Builders Inc*, 317 F 3d 41, 42 (1st Cir 2003) (enforcing clause providing for mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association). See also *AMF, Inc v Brunswick Corp*, 621 F Supp 456, 462 (SDNY 1985) (enforcing contractual non-binding arbitration clause because, among other things, it was under the auspices of the National Advertising Division of the Council of Better Business Bureaus, which 'has developed its own process of reviewing complaints of deceptiveness, coupling relative informality with and confidentiality with safeguards to ensure procedural fairness').

11 *US v Bankers Ins Co*, 245 F 3d 315, 323 (4th Cir 2001). Some may view the phrase 'non-binding arbitration' as a contradiction in terms – ultimately, this phrase refers to procedures which resemble an arbitration but lead to a purely advisory opinion or finding by a decision-maker.

12 *Ibid.* The court also observed that the decision 'need not be binding as long as there are reasonable commercial expectations that the dispute will be settled by this arbitration'. *Ibid.* at 322 (quoting *AMF*, 621 F Supp at 460–61). Thus, '[a]lthough non-binding arbitration may turn out to be a futile exercise[,]…this fact does not, as a legal matter, preclude a non-binding arbitration agreement from being enforced.' *Ibid.* Likewise, courts have declined to hold that ordering 'specific performance' in the context of a non-binding dispute resolution procedure with an unwilling party would be a 'vain order', because such a holding would reduce the parties' agreement to 'a nullity'. *AMF*, 621 F Supp at 462.

13 For example, where a defendant complained in a summary judgment motion that the plaintiff did not comply with what the defendant alleged were conditions precedent to litigation, including a requirement of written notice of withdrawal from mediation and a failure to discuss other dispute resolution alternatives, the court rejected the notion that such requirements were conditions precedent to litigation. Although the dispute resolution clause had multiple steps, nowhere did the clause expressly state that all of the requirements of one step had to be fulfilled to advance to the next step. Thus, as the court stated, '[t]he point Defendant misses is that Plaintiff could have permissibly filed suit while continuing to pursue mediation.' *Fluor Enters*, 147 F Supp 2d at 653. In this way, the notice and other requirements were not enforceable and could not form the basis for granting the defendant's summary judgment motion. *Ibid.*

14 See *supra* n 7.

15 *White*, 641 A.2d at 1387. See also *Bill Call Ford Inc v Ford Motor Co*, 830 F Supp 1045, 1048, 1053 (ND Ohio 1993) (finding in defendant's favour where plaintiffs filed suit against a defendant without having first sought to mediate the dispute pursuant to the condition precedent to litigation in the parties' contract). Such decisions can be viewed as vacating arbitration awards on the ground that the arbitrator or tribunal did not have jurisdiction to determine the question of arbitrability or otherwise proceed with the arbitration due to the existence of the condition precedent language. See, eg *White*, 641 A.2d at 1385–86.

16 *DeValk Lincoln Mercury Inc v Ford Motor Co*, 811 F 2d 326, 336 (7th Cir 1987).

17 *Cumberland and York Distributors v Coors Brewing Co* No 01-244-P-H, 2002 WL 193323, at *4 (D Me 7 February 2002). The court also observed that the mediation provision had 'no time limit for completion of such mediation'. *Ibid.*

18 *Ibid.* at *4 n 5 (citing *Southland Corp v Keating*, 465 US 1, 7 (1984)). Courts will 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*, Civ A. No 13462, 1994 WL 728827, at *19 (Del Ch 22 December 1994).

19 *HIM Portland LLC v DeVito Builders Inc*, 317 F 3d 41, 42 (1st Cir 2003).

20 *Ibid.* at 44.

21 *Ibid.*

22 *Kemiron Atlantic, Inc v Aguakem Int'l Inc*, 290 F 3d 1287, 1289 (11th Cir 2002).

23 *Ibid.*

24 *Ibid.* at 1291.

25 *Ibid.*

26 See, eg *Weekley Homes, Inc v Jennings*, 936 SW 2d 16, 19 (Tex. App. 1996); *White*, 641 A.2d at 1385 ('The trial court correctly interpreted the contractual language to require satisfaction of the provisions of the mandatory negotiation clause as a condition precedent to arbitration, and correctly determined that this arbitrability issue was one for the courts to determine, not the arbitrator. Although the arbitration clause begins with broad language that generally grants jurisdiction to the arbitrator to determine the issue of arbitrability, express language in the contract restricts the breadth of that clause. The arbitration provision that makes arbitrable 'any dispute or question arising under the provisions of this agreement' is qualified by the clause 'which has not been resolved under the mandatory negotiation provision.').

27 As an initial matter, it is not clear that these decisions correctly reflect US courts' general presumption that parties intended to arbitrate questions of procedural arbitrability in cases of broadly-worded, valid arbitration clauses. For example, the US Supreme Court has held 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', *Howsam v Dean Witter Reynolds Inc*, 537 US 79, 84 (2002), and in that context has quoted with approval the comments to the Revised Uniform Arbitration Act of 2000, noting that 'in the absence of an agreement to the contrary,…issues of procedural arbitrability, *i.e.* whether prerequisites such as…conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.' *Ibid.* at 85 (quoting RUAA § 6, comment 2). See also *New Avex, Inc v Socata Aircraft, Inc*, No 02 Civ 6519, 2002 WL 1998193, at *5 (SDNY 29 August 2002); *Unis Group, Inc v Compagnie Financière de CIC et de L'Union Européene*, No 00 Civ 1563, 2001 WL 487427, at *2 (SDNY 7 May 2001) (finding that 'the parties' dispute relating to the satisfaction of a condition precedent is within the scope of the Clause and that the arbitrators should determine whether [the defendant] satisfied such a condition'); *US Titan, Inc v Guangzhou Zhen Hua Shipping Co Ltd*, 182 FRD 97, 102 (SDNY 1998) (observing that 'it has been repeatedly held that even a dispute regarding the satisfaction of a condition precedent to a contract will be referred to arbitration if it may reasonably be said to come within the scope of an arbitration clause'); *Town Cove Jersey City Urban Renewal, Inc v Procida Construction Corp*, No 96 Civ 2551, 1996 WL 337293, at *2 (SDNY 19 June 1996) ('Whether or not a condition precedent to arbitration has been satisfied is a procedural matter for the arbitrator to decide.').

28 *Dave Greytak Enters, Inc v Mazda Motors of America, Inc*, 622 A. 2d 14, 23–24 (Del Ch 1992).

29 *Welborn Clinic v Medquist Inc* 301 3d 634, 638 (7th Cir. 2002).

30 *Ibid.*

Previous mediator as later judge or arbitrator

Involvement of a judge as mediator does not necessarily prevent him from later deciding the case

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There are various different reasons for parties to take their dispute to mediation. Mediation may be required by law,[1] be agreed in advance by some form of a multi-tier clause in a contract, or be independently agreed between parties seeking to settle a particular dispute. In Germany, mediation can also be court-annexed, which means that the court concerned with a particular dispute may, subject to the agreement of both parties, refer the parties to a commissioned or requested judge for a conciliation hearing.[2]

Although parties in larger commercial disputes will likely more often than not choose to individually and independently agree on mediation (hoping to avoid having to initiate litigious or arbitral proceedings altogether),[3] court-annexed mediation is becoming increasingly recognised. It also is subject to a number of model projects in different German courts,[4] which were implemented with the express intention to promote the amicable solution of disputes already pending in court.[5]

Importance of neutrality of the mediator

Regardless of whether parties decide to find their own mediator or whether they follow a referral to a requested or commissioned judge in a court-annexed mediation, one of their main concerns will be that the mediator is neutral. Moreover, as mediation ideally allows, if not requires, the parties to openly discuss their respective interests, confidentiality of the mediation will be important to them.[6] If parties are concerned that issues disclosed in a mediation could be used to their disadvantage in later court or arbitral proceedings,[7] they likely will not be as open about their motivations or positions as would be desirable form the viewpoint of the mediation proceedings.

The same concern would similarly extend to the person of the mediator. If parties have to expect the mediator to have an influence on the decision in later litigation or arbitral proceedings, they will likely try to avoid bringing anything to the attention of the mediator which could weaken their position in such later proceedings.

In principle, the intention of mediation thus requires that there be a strict distinction between the mediator and the deciding body.

Advantages of a mediator becoming judge or arbitrator

This 'principle' however, is not universal. Whilst parties should not have to be concerned about the mediator becoming (part of) a deciding body in later proceedings