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Enforceability of Pre-Arbitration Negotiation and Mediation Clauses: A Comparative Analysis of the Strict English Approach and the Flexible French and Swiss Approaches

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In contemporary international commerce, contracts increasingly incorporate multi-tiered dispute resolution clauses that prescribe a sequence of negotiation, mediation, and arbitration. These clauses are intended to reduce costs, preserve commercial relationships, and facilitate the amicable settlement of disputes before resorting to adversarial proceedings. Nevertheless, when one party disregards a preliminary stage and proceeds directly to arbitration, a fundamental question arises: are pre-arbitration procedures sufficiently binding to preclude access to arbitration, or are they merely non-binding recommendations with no jurisdictional consequences? Different legal systems have provided divergent answers to this question, thereby demonstrating the need for a comparative examination. The central issue addressed in this study is the substantial divide between the strict approach of English law and the more flexible approaches adopted in France and Switzerland. Using a descriptive-analytical method and conducting a comparative examination of leading judicial decisions and statutory provisions in the legal systems of England, France, and Switzerland, this article investigates the theoretical foundations, interpretive criteria, evidentiary presumptions, and remedies associated with breaches of pre-arbitration clauses. The findings indicate that the English approach, based on a model of the "contract as a self-contained instrument," recognizes multi-tiered dispute resolution clauses as enforceable only when they provide complete certainty concerning the applicable procedure, time limits, and consequences of non-compliance; in the absence of such certainty, the clause is deemed ineffective. By contrast, the French legal system proceeds from a presumption that such clauses are non-mandatory and adopts a broad interpretation favoring access to arbitration, recognizing a procedural bar only where the parties' intention to establish one is explicit and unequivocal. Situated between these two approaches, the Swiss model adopts a form of "pragmatic balancing." While respecting party autonomy and recognizing the validity of pre-arbitration clauses, it incorporates the principle of good faith and examines the parties' actual conduct. It thereby avoids both the formalistic rigidity of the English approach and the excessive liberalism of the French approach, establishing a dynamic balance between contractual enforceability and procedural efficiency. The ultimate conclusion of this comparative analysis is that the enforceability of pre-arbitration negotiation and mediation clauses is not governed by a universal substantive rule; rather, it depends on each legal system's cultural and legal presumptions concerning good faith, methods of contractual interpretation, and the status of arbitration.

Keywords: *multi-tiered dispute resolution clauses, pre-arbitration negotiation, pre-arbitration mediation, enforceability, comparative approach, English law, French law, Swiss law.*

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1. Introduction

In contemporary international commerce, contracts rarely rely on a single stage for dispute resolution. Parties increasingly adopt multi-tiered dispute resolution clauses that establish a sequence of negotiation, mediation, and, ultimately, arbitration or litigation. The motivation behind this choice is not limited to reducing costs and accelerating proceedings; it also encompasses preserving commercial relationships and restoring the parties' control over the dispute resolution process. Nevertheless, when one party disregards the preliminary stage and proceeds directly to arbitration, a fundamental question arises: are these pre-arbitration stages sufficiently binding to prevent immediate access to arbitration, or are they merely ethical recommendations whose breach carries no jurisdictional consequence? The answer to this question differs significantly across legal systems, such that an identical contractual arrangement may be regarded in one jurisdiction as an enforceable condition precedent to the arbitral tribunal's jurisdiction, while in another it may have no obstructive effect on the arbitration proceedings. Born correctly observes that national courts have adopted divergent approaches to the enforceability of pre-arbitration procedural requirements, ranging from strict insistence on full compliance to flexible treatment and the disregard of minor defects (Born, 2014). This divergence provides the roadmap for the present study, which seeks to examine three prominent legal systems: England, France, and Switzerland.

The central issue addressed in this article is the profound divide between the strict approach of English law and the more flexible approaches of the two civil-law jurisdictions in assessing the validity and enforceability of pre-arbitration negotiation and mediation clauses. The courts of England and Wales, relying on the common-law tradition and its historical emphasis on contractual certainty, recognize such clauses as valid only when they are sufficiently clear to enable a court to determine, without ambiguity, the parties' obligations, the applicable time limits, and the consequences of non-compliance. Otherwise, the clause may be declared devoid of judicial effect. By contrast, the French legal system begins with the presumption that such clauses are recommendatory and interprets them in light of the principle of facilitating access to arbitration. Accordingly, a procedural barrier arises only when the parties' express and unequivocal intention to make the preliminary stages mandatory has been established. Situated between these two ends of the spectrum is the Swiss approach, which fully recognizes party autonomy and the validity of multi-tiered clauses while examining the parties' actual conduct and applying the principle of good faith to prevent such clauses from becoming instruments of delay or abuse. Redfern and Hunter, by asking whether compliance with preliminary stages constitutes an indispensable condition precedent to arbitration, identify the core challenge to which these three legal systems have responded in different ways (Redfern et al., 2015). Employing a comparative analytical method, the present study seeks to determine the structural differences among the theoretical foundations, interpretive criteria, evidentiary presumptions, and remedies applicable to breaches of pre-arbitration clauses in England, France, and Switzerland, as well as the implications of these differences for the contractual strategies of international commercial actors. To this end, the article examines landmark judicial decisions in each jurisdiction—from *Walford v Miles* in England to the decisions of the French Court of Cassation in *Sofidif* and *Uni-Kod*, and the pivotal Swiss Federal Supreme Court decision in ATF 142 III 296—and analyzes the relevant statutory provisions, including the English Civil Procedure Rules, the French Civil Code, and the Swiss Private International Law Act. It thereby develops an analytical framework for understanding the three models of "textual rigidity," "arbitration-oriented liberalism," and "pragmatic balance." Following this introduction, the article examines the approaches of England, France, and Switzerland in detail and subsequently presents a comparative analysis that evaluates the findings and explains their practical implications for drafting international contracts.

2. The English Approach

The courts of England and Wales have adopted a distinctive and strict approach to multi-tiered dispute resolution clauses, founded on contractual certainty and the need for precise and transparent drafting. Rooted in the common-law tradition and its historical emphasis on party autonomy and legal certainty, this approach has developed through several significant judicial decisions over recent decades. It is currently regarded as one of the most exacting and demanding legal frameworks for evaluating the validity and enforceability of pre-arbitration negotiation and mediation clauses. Understanding this approach is crucial for parties to international commercial contracts that select English law as the governing law or designate London as the seat of arbitration.

2.1. Historical Development

During the middle decades of the twentieth century, English courts viewed multi-tiered clauses, particularly those imposing mandatory negotiation or mediation, with considerable skepticism. This skepticism primarily arose from concerns regarding the vagueness and indeterminacy of an obligation to negotiate and the difficulty of objectively assessing compliance with such an obligation. The turning point in this approach was the decision of the House of Lords in *Walford v Miles* in 1992. In that decision, Lord Ackner expressly stated that an "agreement to negotiate in good faith" lacked the requisite certainty and was therefore unenforceable because no objective criteria existed for determining whether it had been observed. For many years, this decision was perceived as a major obstacle to the recognition of clauses containing any form of obligation to negotiate. Nevertheless, the increasing use of alternative dispute resolution methods during the 1990s and 2000s, together with the growing complexity of international contracts, compelled English courts to moderate their approach and develop a more precise distinction among different types of multi-tiered clauses (Pryles, 2001). This development gradually produced the approach that now characterizes English law: although the courts continue to insist on certainty in the wording of a clause, they recognize properly drafted multi-tiered clauses as valid and enforceable.

2.2. Fundamental Principles of the Strict Approach

The contemporary approach of English courts rests on several fundamental principles that have been repeatedly articulated and reinforced in judicial decisions. The first and most important principle is the requirement of certainty and specificity. For a multi-tiered clause to be enforceable, its terms must be sufficiently clear to enable a court to determine, without ambiguity, what actions are required for compliance, the period within which those actions must be undertaken, and the point at which the pre-arbitration process comes to an end. The second principle is the distinction between substantive and procedural conditions. English courts generally characterize multi-tiered clauses as procedural requirements or conditions precedent to access to arbitration or litigation, rather than as conditions affecting the parties' substantive rights. The practical consequence of this distinction is that breach of such a condition usually results in the dismissal or suspension of the proceedings until the omitted stage has been completed, rather than liability for damages. The third principle is the requirement of strict and complete compliance. Merely performing the prescribed stages as a formality is insufficient; courts seek evidence demonstrating that the parties genuinely attempted, in good faith, to resolve the dispute through the agreed mechanisms. The fourth principle concerns the timing of an objection based on non-compliance. A party alleging that the opposing party has breached a multi-tiered clause must raise the objection at the earliest possible opportunity. Delay in objecting, or participation in the proceedings without objection, may be treated as a waiver of the right to object or as giving rise to an estoppel based on inconsistent conduct. Finally, the fifth principle is the narrow interpretation of obligations to negotiate in good faith. Despite the moderation of the English approach after *Walford v Miles*, English courts remain reluctant to recognize broad and indeterminate obligations to negotiate and will enforce them only when they are accompanied by objective and measurable standards.

2.3. Key Judicial Decisions

The development of the strict approach is attributable to several landmark judgments, which are examined below. The first, and perhaps the most important, is the decision of the Court of Appeal in *Cable & Wireless plc v IBM United Kingdom Ltd* in 2002. The contract between the parties contained a clause requiring disputes to be addressed first through negotiations at different levels of management and subsequently through mediation. Cable & Wireless commenced court proceedings without completing those stages. Emphasizing that the clause was sufficiently clear and certain, the Court of Appeal held that the claimant was required to complete the contractual procedures before resorting to litigation. In that decision, Colman J articulated simple yet effective criteria for assessing the validity of multi-tiered clauses: first, the clause must be sufficiently specific for the court to determine what steps are required for compliance; second, it must be possible to determine when the obligation to complete the dispute resolution stages ends and when the parties may proceed to arbitration or litigation; and third, the consequences of non-compliance must be identifiable. These criteria subsequently became important points of reference in English law.

Another prominent judgment is *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*, decided by the High Court of England and Wales in 2014. The disputed contract provided that, before commencing arbitration, the parties were required to attempt to resolve the dispute through "friendly discussions." The claimant commenced arbitration without engaging in negotiations, and the arbitral tribunal concluded that the pre-arbitration condition had not been satisfied. The court emphasized that multi-tiered clauses, including clauses imposing an obligation to negotiate, may be enforceable where they contain objective criteria and that non-compliance may have serious consequences for the arbitration rather than merely resulting in a procedural suspension. The judgment demonstrated that English courts may attach significant consequences to the disregard of pre-arbitration clauses and may treat them as conditions affecting the commencement of arbitration.

Finally, *Wah (aka Alan Tang) v Grant Thornton International Ltd*, decided in 2012, represented an important development regarding the enforcement of mediation and escalation clauses. The dispute resolution clause required the parties to follow a prescribed internal conciliation procedure before commencing arbitration. One party initiated proceedings without properly completing that procedure. The court examined whether the clause established a sufficiently defined process and emphasized that enforceability depended on the existence of an identifiable procedure, objective steps, and a sufficiently clear mechanism for determining when the preliminary process had been exhausted. The case therefore reinforced the proposition that mediation and conciliation clauses may be enforceable when their procedural content is adequately specified.

2.4. Criteria for Assessing Enforceability

Several clear criteria for assessing the validity of multi-tiered clauses under English law may be derived from these judgments. First, the pre-arbitration stages must be clearly defined, and the precise dispute resolution method—such as direct negotiation, managerial negotiation, mediation, or expert determination—must be specified. Second, definite time limits for each stage are essential, because without them both the implementation of the clause and judicial supervision of compliance become difficult (Alhasan, 2025). Third, where a clause requires the involvement of a third party, such as a mediator or expert, the procedure for appointing that person must be clearly stated (Westerlund, 2021). Fourth, the consequences of non-compliance should preferably be expressly included in the clause, although courts may, in the absence of express wording, determine consequences such as a stay or dismissal through contractual interpretation. Fifth, the use of broad and ambiguous expressions such as "reasonable efforts" or "amicable settlement," without objective definitions, substantially increases the risk that the clause will be considered unenforceable. Sixth, the clause must be compatible with fundamental principles of English law, including the right of access to justice. Clauses that restrict access to arbitration or litigation in an excessive or unreasonable manner may be unenforceable on public policy grounds.

2.5. The Influence of the Civil Procedure Rules and the Role of Supporting Institutions

One factor that accelerated the development of the English approach was the reform of the Civil Procedure Rules in 1999, commonly associated with the Woolf Reforms. These rules, introduced to reduce costs and accelerate civil proceedings, encouraged courts to promote the use of alternative dispute resolution methods before litigation. For example, in the landmark decision of *Halsey v Milton Keynes General NHS Trust* in 2004, the Court of Appeal stated that courts could not compel parties to mediate but could consider their conduct, including an unreasonable refusal to participate in mediation, when determining costs. This approach effectively enabled courts both to respect the sanctity of the parties' agreement embodied in a multi-tiered clause and to use financial measures to encourage compliance with contractual dispute resolution obligations. Consequently, a "culture of pre-litigation and pre-arbitration dispute resolution" became increasingly prominent in English judicial practice, and negotiation and mediation clauses satisfying the requirements of certainty acquired a stronger basis for enforcement.

2.6. Exceptions and Limited Flexibility

Despite the strictness described above, English courts have demonstrated flexibility in a limited number of circumstances. The most evident exception arises where compliance with the clause is practically impossible or clearly futile, for example, when one party expressly declares that it is unwilling to participate in negotiation or mediation. Similarly, where urgent interim measures or protective orders are required, courts recognize that an interested party may approach a court or arbitral tribunal without first completing the multi-tiered process. These exceptions, however, remain narrowly confined and do not alter the fundamentally strict character of the English legal framework in this area.

2.7. Assessment and Impact of the English Approach

Although the strict English approach has been criticized for potentially causing additional delay and expense and for being inconsistent with legal systems founded upon a general principle of good faith (Joneydi & Mansouri Razi, 2021; Lew, 2012), it has generally contributed to greater legal certainty. Parties' awareness that vaguely drafted clauses may lack effective enforcement encourages them to draft contractual provisions more precisely (Shiravi, 2013). Moreover, notwithstanding its strictness, the English judiciary respects contractual freedom and the parties' actual intentions by enforcing clauses that satisfy the requirements of certainty. The influence of this approach extends internationally, and many global commercial contracts governed by English law are now drafted with reference to the standards developed by English courts. Nevertheless, the relative inflexibility of this approach compared with continental European legal systems demonstrates the need for comparison with the more flexible approaches adopted in France and Switzerland, which are examined below.

3. The French Approach

In contrast to the strict approach of English courts, the French legal system has adopted a liberal and flexible approach to multi-tiered dispute resolution clauses. This approach is rooted in the French legal tradition and its emphasis on freedom of contract, the favorable interpretation of arbitration agreements, and the facilitation of access to alternative dispute resolution. French courts, particularly the Court of Cassation, have demonstrated through numerous decisions that multi-tiered clauses should be interpreted in a manner that does not obstruct access to arbitration unless the parties' express and clear intention to make the pre-arbitration stages mandatory has been established. This approach regards multi-tiered clauses primarily as instruments for encouraging the amicable resolution of disputes rather than as procedural obstacles capable of being exploited to delay adjudication.

3.1. Legal Foundations of the Liberal Approach

The French approach rests on several theoretical foundations that collectively create a favorable environment for arbitration and dispute resolution. The first and most important foundation is the principle of facilitating access to arbitration. This principle constitutes a central component of French legal policy in support of international commercial arbitration (Moqiseh, 2022). It requires arbitration clauses to be interpreted, in cases of doubt, in a manner that preserves their validity and enforceability. In the context of multi-tiered clauses, this means that an ambiguous preliminary requirement is generally construed as recommendatory and as having no obstructive effect on the arbitral tribunal's authority unless the contrary is established (Danaei Elmi, 2024). The second foundation is freedom of contract and the need to identify the parties' common intention. Under Article 1188 of the French Civil Code, contracts must be interpreted according to the parties' common intention rather than solely according to the literal meaning of their wording. This rule enables a French judge, when determining whether a clause is mandatory or recommendatory, to look beyond the text and consider the contractual context, preliminary negotiations, and the parties' subsequent conduct (Herati, 2025). The third foundation is the principle of good faith in contractual performance. Article 1104 of the French Civil Code provides that contracts must be negotiated, formed, and performed in good faith. In disputes concerning multi-tiered clauses, this principle means that neither party may use such clauses as delaying tactics or as instruments for avoiding arbitration. Where one party manifestly acts in bad faith by refusing to participate in the pre-arbitration stages, the court may disregard the resulting impediment and permit direct access to arbitration (Fauvarque-Cosson & Mazeaud, 2009).

3.2. The Fundamental Distinction Between Mandatory and Recommendatory Clauses

The central feature of the French approach is the distinction between mandatory and recommendatory, or procedural, clauses. Mandatory clauses are those through which the parties intended compliance to constitute a necessary condition precedent to arbitration. In such circumstances, non-compliance may result in the temporary inadmissibility of the claim or the suspension of the proceedings. Recommendatory clauses, by contrast, merely encourage the amicable settlement of disputes, and their breach does not affect the arbitral tribunal's authority, although it may influence the allocation of arbitration costs or give rise to contractual liability for damages (Fouchard et al., 1999).
A crucial feature of French judicial practice is that multi-tiered clauses are not treated as jurisdictional barriers merely because they contemplate negotiation or mediation. Their legal effect depends upon whether the wording identifies a sufficiently specific, mandatory procedure and clearly establishes that compliance must precede adjudicatory proceedings. The burden therefore falls upon the party invoking the clause to demonstrate that it was intended to create an obligatory procedural condition.

3.3. Leading Decisions of the French Court of Cassation

Two decisions of the French Court of Cassation have played a particularly important role in shaping the liberal approach. The first is the decision in *Société Sofidif v Société Dilma* in 2003. In this case, the First Civil Chamber considered the effect of a contractual conciliation mechanism and the relationship between the agreed preliminary procedure and subsequent adjudicatory proceedings. The Court emphasized the need to determine whether the clause established a genuine mandatory prerequisite and whether the prescribed procedure was sufficiently defined. The decision conveyed a clear message to commercial actors: where parties intend a pre-arbitration or pre-litigation procedure to operate as a compulsory procedural barrier, that intention must be reflected in clear and workable contractual language.
The second important decision is *Société Uni-Kod v Société Ouralkali* in 2017, in which the Court of Cassation further clarified the treatment of preliminary dispute resolution requirements. The Court examined whether the relevant clause created a mandatory procedural obligation and whether the prescribed mechanism applied to the dispute as presented. The decision reinforced the proposition that the effect of a multi-tiered clause must be determined through careful interpretation of its wording, scope, and procedural content rather than by relying exclusively on individual expressions such as "shall" or "must." It also confirmed that a party acting in bad faith by obstructing the preliminary procedure should not necessarily be permitted to rely upon the non-completion of that same procedure.

3.4. Criteria for Determining the Mandatory Nature of a Clause

The following criteria may be derived for determining whether a multi-tiered clause is mandatory under French law:

- **Express wording of the clause:** The clause should state in unequivocal terms that compliance with the preliminary stages is a condition precedent to arbitration. Expressions such as "a mandatory condition of access to arbitration" or "the claim shall be inadmissible unless this procedure has been completed" may communicate this intention.
- **Specified time limits:** The existence of definite time limits for each stage indicates that the parties seriously intended to make those stages obligatory.
- **Express consequences of non-compliance:** The clause should clearly state the consequences of a breach, such as inadmissibility of the claim or suspension of the proceedings.

- **Analysis of the context and the parties' common intention:** Where the wording is ambiguous, French courts may examine the contract as a whole, the parties' negotiations, and their subsequent conduct in order to determine their actual intention.
- **Compatibility with fundamental principles:** A mandatory interpretation must not conflict with the right of access to justice or the principle of good faith. Otherwise, the court may prefer an interpretation that avoids an excessive procedural obstacle.

3.5. Consequences of Non-Compliance and the Role of Good Faith

Where a clause is classified as mandatory, its breach may result in the temporary inadmissibility of the claim. This effect does not permanently deprive the claimant of the right to seek relief. Rather, the claimant may complete the pre-arbitration stages and subsequently recommence the proceedings. In other words, the consequence of breaching a mandatory clause is not the permanent loss of access to adjudication but a temporary procedural impediment that may be removed through compliance. In the case of recommendatory clauses, non-compliance does not deprive the arbitral tribunal of authority, but the tribunal may consider the non-compliant party's conduct when allocating costs. Where loss has been caused, liability for damages may also arise from breach of the obligation of good faith (Danaei Elmi, 2024). Good faith ultimately operates as a safeguard against abuse of multi-tiered clauses. If one party openly refuses to cooperate in the preliminary stages or deliberately disrupts the process, French courts may reject that party's attempt to rely upon non-compliance. This ensures that multi-tiered clauses retain their conciliatory function without becoming barriers to access to justice.

Through its inherently flexible balance, the French approach facilitates arbitration by avoiding the automatic treatment of ambiguous multi-tiered clauses as jurisdictional obstacles while simultaneously respecting the parties' clearly expressed contractual intentions. This position, which differs markedly from the strict English framework, provides a useful basis for comparative analysis after consideration of the Swiss approach.

4. The Swiss Approach

As one of the most respected and frequently selected venues for international commercial arbitration, Switzerland has adopted a balanced and pragmatic approach to multi-tiered dispute resolution clauses. This approach places it between English strictness and French flexibility. The Swiss Federal Supreme Court, as the country's highest judicial authority, draws upon a legal tradition that combines civil-law principles with commercial realism. On the one hand, it affirms party autonomy and the binding character of agreed contractual clauses; on the other hand, it interprets such provisions reasonably and flexibly to prevent them from becoming instruments of delay or abuse. This approach was particularly reflected in the landmark decision ATF 142 III 296 in 2016 and has been further developed in subsequent jurisprudence.

4.1. The Position of the Swiss Federal Supreme Court and Leading Decisions

The Swiss Federal Supreme Court has repeatedly emphasized that multi-tiered clauses, like other contractual provisions, are valid and enforceable on the basis of party autonomy. Nevertheless, the mere existence of such a clause does not automatically render every preliminary step an absolute bar to arbitration. The parties' actual intention must be determined in order to establish whether they intended to create a condition affecting the initiation of arbitration or merely to encourage an amicable settlement. This interpretive method is based on the subjective-objective approach under Article 18 of the Swiss Code of Obligations, which enables the adjudicator to look beyond the apparent wording and consider the parties' common intention and the specific circumstances of the case.

The central case in this area is ATF 142 III 296, decided in 2016. The dispute concerned a contract under which the parties were required, before commencing arbitration, to "attempt in good faith" to resolve their dispute through negotiation. The agreement prescribed a period of 30 days for initiating negotiations and a period of 60 days for continuing them. After sending two letters and proposing a meeting, the claimant commenced arbitration before the expiration of the 60-day period because the respondent had not provided a positive response. The respondent challenged the arbitral tribunal's jurisdiction on the ground that the clause had not been fully complied with. The arbitral tribunal rejected the objection, and the Swiss Federal Supreme Court upheld the relevant conclusion.

The Court established several important principles in this decision. First, an amicable negotiation clause may, in principle, be valid and binding, but the obligation it creates is an obligation of means rather than an obligation to achieve a result. In other words, the parties are required to make reasonable, good-faith efforts, but they are not required to secure an agreement. Second, where one party's manifest refusal to cooperate effectively blocks the negotiation process, the other party may proceed to arbitration without completing every contractual formality or waiting for the full expiry of the prescribed period, and such action will not necessarily constitute a breach of the clause. Third, pursuant to the principle of competence-competence embodied in Article 186 of the Swiss Private International Law Act, the arbitral tribunal has the authority to determine whether the preliminary stages have been complied with, while judicial intervention is confined to the limited circumstances permitted by Swiss arbitration law.

In addition to this decision, the Swiss Federal Supreme Court emphasized in ATF 136 III 200 in 2010 that express contractual time limits in multi-tiered clauses must generally be observed. A party's unilateral belief that negotiations would be futile is not, by itself, sufficient to justify disregarding agreed time limits unless the opposing party has clearly demonstrated that it is unwilling to participate. Similarly, ATF 138 III 714 in 2012 confirmed that where a multi-tiered clause is drafted as a genuine condition precedent, non-compliance may affect the ability to commence arbitration because the clause defines the time and circumstances under which the agreed adjudicatory mechanism may be activated.

4.2. Statutory Foundations: The Swiss Private International Law Act

The balanced Swiss approach derives substantially from the Swiss Private International Law Act, enacted in 1987 and subsequently amended. Chapter 12 of the Act, comprising Articles 176 to 194, establishes an advanced and liberal framework for international arbitration. Article 176 adopts a broad definition of international arbitration, bringing a substantial proportion of commercial arbitrations seated in Switzerland within the scope of these provisions. Article 178 reinforces party autonomy and enables the parties to design their arbitral procedure, including any pre-arbitration stages, according to their preferences. Article 186 recognizes the arbitral tribunal's authority to rule on its own jurisdiction, thereby minimizing premature intervention by national courts. Finally, Article 190 restricts the grounds for setting aside an arbitral award to limited matters, including an incorrect decision on jurisdiction and violations of public policy. The Swiss Federal Supreme Court's restrictive interpretation of these grounds has contributed to a high degree of stability and finality in awards involving multi-tiered clauses. Taken together, these provisions create a legal environment in which multi-tiered clauses are treated seriously but are implemented flexibly and with minimal judicial interference.

4.3. Balancing Respect for Party Autonomy and Procedural Efficiency

The principal characteristic of the Swiss approach is its pragmatic, case-specific analysis, through which a balance is achieved between respect for party autonomy and the efficiency of dispute resolution proceedings. This balance rests upon four key principles reflected in ATF 142 III 296 and other decisions of the Swiss Federal Supreme Court:

1. **Respect for the parties' actual intention:** Applying the subjective-objective method under Article 18 of the Swiss Code of Obligations, Swiss courts first seek to identify the parties' genuine common intention through preliminary negotiations and subsequent conduct. If that intention cannot be established, the courts apply an objective interpretation. Accordingly, expressions such as "shall" or "is required to," particularly when accompanied by express consequences for non-compliance, may transform a clause into a condition precedent. More general expressions such as "shall attempt," however, are more likely to indicate an obligation of means.
2. **Distinction between obligations of means and obligations to achieve a result:** Recognizing the nature of consensual dispute

resolution processes, the Swiss Federal Supreme Court has treated negotiation and mediation clauses as obligations of means because parties cannot guarantee the conclusion of a settlement. Compliance is therefore established by demonstrating reasonable and good-faith efforts; proof that negotiations reached an absolute and definitive impasse is not always necessary.

3. **The importance of the parties' conduct and the principle of good faith:** The principle of good faith under Article 2 of the Swiss Civil Code, which prohibits manifest abuse of rights, imposes a positive obligation upon the parties to cooperate honestly during the preliminary stages. It also prevents a party from obstructing the process and subsequently relying upon non-compliance with the clause. In ATF 142 III 296, the Federal Supreme Court took account of the respondent's failure to reply and unwillingness to participate when assessing the respondent's objection.
4. **Attention to efficiency and procedural economy:** Unlike a purely formalistic approach, Swiss courts prefer an interpretation consistent with the ultimate objective of multi-tiered clauses: the rapid, economical, and effective resolution of disputes. Requiring a party to wait pointlessly for the expiration of a contractual period when the other party has clearly refused to cooperate is regarded as inconsistent with this objective. Swiss practice therefore permits direct access to arbitration in such circumstances.

Together, these four principles portray the Swiss legal system as one that remains faithful to party autonomy while carefully preventing multi-tiered dispute resolution clauses from becoming burdensome obstacles to adjudication. This approach protects the parties' commercial expectations, sustains Switzerland's prominent position as a secure and efficient venue for international arbitration, and offers a distinctive model when compared with English strictness and French liberalism.

5. Comparative Analysis

A comparative analysis of the three legal systems demonstrates that the enforceability of pre-arbitration negotiation and mediation clauses is not governed by a single substantive proposition. Rather, the answer is shaped by each system's legal culture and the relative weight attributed to its fundamental principles. The strict English approach, French flexibility, and balanced Swiss pragmatism each establish a different equilibrium among three competing values: contractual certainty, party autonomy, and effective access to justice. This section compares the various dimensions of the three approaches in order to provide commercial actors and international arbitrators with a clearer understanding of their foundations, methods, and consequences.

5.1. Theoretical Foundations and the Role of Good Faith

The profound divide between the English approach, on the one hand, and the two civil-law systems, on the other, primarily reflects their differing conceptions of good faith during contractual performance and the implementation of dispute resolution clauses. English common law has traditionally been reluctant to recognize a general obligation to negotiate in good faith, regarding it as an uncertain and elusive concept that may be incompatible with commercial self-interest and the certainty required for judicial enforcement (Pryles, 2001). The decision in *Walford v Miles* expressly stated that an obligation to negotiate in good faith was inherently lacking in objective criteria by which compliance could be measured and was therefore not enforceable. Consequently, English courts recognize an enforceable negotiation obligation only where it is surrounded by a clearly specified process, definite time limits, and measurable standards, effectively transforming a general obligation of good faith into a precise procedural duty.

By contrast, French and Swiss law are founded upon general principles of good faith. Article 1104 of the French Civil Code and Article 2 of the Swiss Civil Code treat good faith not as an exception but as a principle governing all stages of contractual life, including the implementation of dispute resolution clauses. Within this framework, a pre-arbitration obligation to negotiate or mediate is naturally treated as an obligation of means that requires the parties to make reasonable efforts rather than necessarily achieve a settlement. Compliance may therefore be assessed by reference to the conduct expected of reasonable contracting parties and to applicable commercial practices (Fauvarque-Cosson & Mazeaud, 2009). Nevertheless, there is a subtle difference between France and Switzerland in the application of this principle. French practice primarily employs good faith as a safeguard against the abusive use of multi-tiered clauses and, where the wording is ambiguous, tends to favor an interpretation that avoids obstructing arbitration. Swiss practice, by contrast, places good faith alongside party autonomy and examines the parties' actual conduct to prevent a clause from becoming a procedural trap without readily disregarding its binding character. Accordingly, in the English system good faith plays, at most, a marginal role in the performance of obligations that have already been defined with sufficient certainty. In the French system, it operates as an interpretive instrument facilitating access to adjudication, while in the Swiss system it provides a basis for balancing the parties' common intention with fair conduct.

5.2. Interpretive Methods: Textual Certainty Versus the Identification of Intention

The three legal systems differ not only in the substantive content of their rules but also in their methods of contractual interpretation, which directly influence the outcome of disputes. English courts have traditionally adhered to an objective interpretation based on the ordinary meaning of the contractual language in its documentary and commercial context and have generally avoided searching for the parties' unexpressed subjective intentions. This method, reinforced by the criteria of certainty articulated in *Cable & Wireless*, requires a multi-tiered clause to be evaluated primarily according to its written content. Ambiguity concerning the type of process, the relevant time limits, or the steps required for implementation may therefore render the preliminary obligation unenforceable. In other words, the English inquiry is not simply whether the parties may have intended to make the pre-arbitration stages mandatory, but whether they expressed that intention with sufficient clarity for a court to determine their obligations without speculation. This strictness requires commercial actors choosing English law to devote substantial attention and resources to drafting highly detailed and carefully timed clauses (Shiravi, 2013).

By contrast, under Article 1188 of the French Civil Code, the adjudicator seeks to identify the parties' common intention and may consider material beyond the wording of the contract, including preliminary negotiations and subsequent conduct (Herati, 2025). As a result, even relatively strong expressions such as "shall" or "is required to" may not independently establish the precise effect of a clause unless, when considered with the remaining evidence, they demonstrate an intention to create a mandatory procedural condition. This approach places the burden on the party asserting that the clause precludes immediate proceedings and requires an assessment of the clause as a whole (Fouchard et al., 1999).

The Swiss method may be described as an intelligent synthesis of the two approaches. Article 18 of the Swiss Code of Obligations initially directs the adjudicator to ascertain the parties' actual common intention through subjective interpretation and, if that is not possible, to apply an objective interpretation based on the understanding of a reasonable person. ATF 142 III 296 clearly demonstrated that although wording such as "shall attempt" may create a binding obligation of means, the Federal Supreme Court will also consider whether the respondent's subsequent conduct, such as failing to respond to invitations to negotiate, effectively blocked the process. The respondent may therefore be prevented from relying on the literal duration of a contractual waiting period to challenge the arbitration. Thus, without abandoning the language of the clause, the Swiss method permits commercial realities and the parties' conduct to influence interpretation and thereby avoids unreasonable outcomes.

5.3. Presumptions of Enforceability or Recommendatory Effect and the Allocation of the Burden of Proof

One of the most significant distinctions among the three systems concerns the presumption applied when a clause is ambiguous or silent on a material issue. English law does not adopt a presumption in favor of enforcing an uncertain multi-tiered procedure. Rather, the case law reflects the general principle that an agreement lacking sufficient certainty cannot be judicially enforced. The party seeking enforcement must therefore demonstrate that the clause clearly defines the relevant obligations and the means by which compliance may be assessed. This requirement is applied particularly rigorously to negotiation clauses in light of *Walford v Miles* (Alhasan, 2025). The burden of establishing certainty thus falls upon the party relying on the clause.

The French legal system adopts a substantially different position. Although French law recognizes the binding force of clearly drafted preliminary procedures, it is reluctant to treat ambiguous language as creating a jurisdictional obstacle to arbitration. The party asserting that a preliminary procedure constitutes a mandatory condition must establish the clause's obligatory nature and demonstrate that its procedural requirements apply to the dispute (Moqiseh, 2022). This approach facilitates access to arbitration and protects parties against becoming entangled in procedural objections founded upon vague contractual wording.

Switzerland follows an intermediate course. The Swiss Federal Supreme Court generally recognizes the validity and potential enforceability of negotiation and mediation clauses, but ordinarily characterizes their substantive content as an obligation of means. Such a clause does not create an absolute bar to arbitration unless the parties have specifically designed it as an express condition precedent (Westerlund, 2021). The party invoking a jurisdictional or admissibility objection must demonstrate that the clause was intended to have that effect. At the same time, where a claimant has disregarded the preliminary process, the claimant may need to establish that commencing arbitration was justified by the respondent's refusal to cooperate or by other circumstances rendering further compliance unreasonable. Switzerland therefore establishes a dynamic allocation of the burden of proof that is sensitive to the factual circumstances rather than assigning the entire burden to one party.

5.4. Remedies and the Nature of the Consequences of Breach

Differences in theoretical foundations and interpretive methods directly affect the nature and severity of the consequences attached to breaches of pre-arbitration clauses. Under English law, once a clause satisfies the requirements of certainty, non-compliance may lead to significant procedural consequences. Depending on the wording of the clause and the procedural context, the claim may be stayed, dismissed, or regarded as prematurely commenced until the agreed preliminary stages have been completed. The non-compliant party may also face adverse cost consequences. This firm approach conveys a clear message to the commercial market: precise drafting and observance of agreed procedures will be respected, while vague drafting may result in the loss of enforceability. Critics, however, have warned that strict procedural enforcement may encourage dilatory technical objections and increase the costs of dispute resolution (Joneydi & Mansouri Razi, 2021).

In France, the consequences of non-compliance depend heavily upon the wording and scope of the preliminary procedure. Where the clause constitutes a genuine mandatory condition, a claim may be declared temporarily inadmissible until the agreed procedure has been completed. In other circumstances, failure to pursue an amicable settlement procedure does not necessarily deprive an arbitral tribunal of jurisdiction. The tribunal may instead consider the party's conduct in allocating costs or determining contractual liability. The procedural consequence is therefore generally directed toward restoring the dispute resolution process to the agreed path rather than permanently depriving a party of access to adjudication (Danaei Elmi, 2024).

The Swiss approach is closer to the English model in recognizing that breach of a genuine condition precedent may affect the commencement of arbitration, but it introduces a greater degree of flexibility. An arbitral tribunal may decline to proceed or may suspend the proceedings where an actual mandatory condition has not been satisfied. Nevertheless, because Swiss practice focuses on the parties' conduct, a party that has itself refused in bad faith to participate in negotiations may be prevented from relying on the opposing party's failure to observe every contractual formality. In effect, the consequences of breach are applied only where reliance upon them is compatible with good faith and the prohibition against inconsistent conduct. This approach respects party autonomy while remaining consistent with procedural economy and arbitral efficiency.

5.5. Balancing Legal Certainty and Procedural Efficiency

All three systems claim to promote legal certainty and predictability for commercial parties, but their understanding of these objectives and the mechanisms used to achieve them differ substantially. The English approach seeks certainty through textual precision and predictable outcomes based on clear rules. Although this approach increases pre-contractual drafting costs, it provides legal advisers and contracting parties with a relatively clear roadmap and reduces the risk of unexpected judicial reconstruction of the agreed procedure (Lew, 2012). Its weakness, however, becomes apparent when a commercially reasonable dispute resolution process loses enforceability because of a relatively minor defect in drafting.

The French approach gives greater priority to procedural efficiency and access to adjudication than to strict textual completeness. Under this model, the arbitrator or judge considers whether requiring compliance with a preliminary procedure is consistent with the clause's contractual scope and practical purpose. This may preserve the progress of dispute resolution and prevent unnecessary delay. From the perspective of an English legal adviser, however, such flexibility may reduce predictability and may weaken clauses that the parties intended to have a more substantial procedural effect.

Through its case-specific model, Switzerland has sought to build a stable bridge between these two positions. The standard of reasonable and good-faith conduct provides a flexible measure of compliance. On the one hand, it reassures parties that minor textual imperfections will not automatically deprive their obligations of effect; on the other, by retaining meaningful consequences for clear and unjustified non-compliance, it prevents such clauses from becoming merely ceremonial language. This balance has contributed to Switzerland's position as a reliable and efficient seat for international commercial arbitration and reduces the likelihood that contracts providing for a Swiss seat will be disrupted by highly formalistic or unpredictable judicial interpretations.

5.6. Effects on Commercial Conduct and Contractual Strategies

The present comparative analysis has direct practical implications for parties to international contracts and their legal advisers. Where English law governs the contract, the parties must carefully specify each pre-arbitration stage, its commencement and conclusion, the applicable time limits, the procedure for inviting the opposing party to negotiate or mediate, the method for selecting a mediator, and the consequences of non-compliance. Failure to address these matters may render the clause unenforceable and eliminate the opportunity for a contractually structured amicable settlement process.

Where French law governs, parties seeking to establish a compulsory preliminary procedure should use explicit wording demonstrating that the procedure must be completed before arbitration or litigation may be commenced. They should also define the applicable disputes, procedural steps, time limits, and consequences of non-compliance. Without such precision, the clause may be interpreted in a manner that does not prevent immediate access to adjudication.

Where Switzerland is selected as the seat of arbitration or Swiss law governs the agreement, the parties may draft comparatively balanced clauses, provided that they establish clear procedures and specified time limits and understand the implications of characterizing a preliminary stage as a condition precedent. Under the Swiss framework, conduct after the dispute arises may be as important as the contractual wording in determining the outcome of a procedural objection. This feature encourages both careful drafting and good-faith cooperation during implementation.

At the conclusion of this comparative analysis, the three approaches may be represented as three ideal models. The English model views "the contract as a self-contained instrument" that will be enforced only when drafted with adequate precision. The French model treats "arbitration and access to adjudication as predominant objectives," with preliminary clauses interpreted according to their wording, scope, and practical purpose rather than automatically elevated into jurisdictional barriers. The Swiss model reflects a "realistic equilibrium" that relies on conduct and good faith to respect party autonomy without sacrificing efficiency to formalism. Choosing among these models is not merely a technical drafting decision; it is a strategic choice that reflects the nature of the legal relationship, the parties' commercial cultures, and the degree of mutual trust, and it affects the entire life cycle of the dispute.

6. Conclusion

This comparative analysis demonstrates that the approaches of England, France, and Switzerland represent three distinct philosophies concerning multi-tiered dispute resolution clauses, each establishing a different balance among contractual certainty, party autonomy, and effective access to justice. The strict English approach, corresponding to the model of "the contract as a self-contained instrument," recognizes pre-arbitration obligations as enforceable only where the relevant procedures, time limits, and requirements have been drafted with substantial precision. Where the language lacks the certainty required for judicial enforcement, the preliminary obligation may be deprived of legal effect. The French system, by contrast, places greater emphasis on access to adjudication and on interpreting preliminary procedures according to the parties' common intention, their procedural content, and the scope of the disputes covered. It is reluctant to treat imprecise clauses as automatic barriers to arbitration. Between these two positions, Switzerland adopts a model of "realistic equilibrium." It respects party autonomy and recognizes the validity of multi-tiered clauses while applying good faith and examining the parties' actual conduct to avoid both rigid formalism and excessive procedural liberalism. Rather than supporting either textual certainty or ease of access in an absolute manner, the Swiss model establishes a dynamic balance between contractual enforceability and procedural efficiency. These three approaches demonstrate that the answer to the question of whether negotiation and mediation clauses are binding is not governed by a universal substantive rule. Instead, it depends upon each legal system's cultural and doctrinal assumptions concerning good faith, contractual interpretation, and the position of arbitration within the broader dispute resolution framework.

For international commercial actors and legal advisers, the practical lesson of this comparison is that the selection of the governing law or arbitral seat fundamentally alters the strategy required for drafting multi-tiered clauses. Where the contract is governed by English law or London is selected as the arbitral seat, the parties must invest in detailed language that eliminates uncertainty regarding the process, timing, and consequences of non-compliance. Otherwise, they risk losing the enforceability of the preliminary procedure and the opportunity for an amicable settlement. Where French law governs, creating an effective mandatory procedural condition requires clear and decisive wording that defines the compulsory process and its legal consequences. Switzerland, meanwhile, provides an environment in which express contractual intentions are respected and good-faith conduct is given considerable weight, allowing parties to design comparatively balanced and cooperative procedures. Ultimately, all three legal systems demonstrate a converging tendency to take properly drafted pre-arbitration clauses seriously. Nevertheless, the threshold of what constitutes "proper drafting," and the degree of tolerance afforded to minor defects, remain the principal boundaries distinguishing these jurisdictions and transforming the choice among them into a strategic decision in contractual architecture.

Authors' Contributions

Authors contributed equally to this article.

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In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

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