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Founder: Prof. Pierre Lalive
Editor in Chief: Matthias Scherer



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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

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Non-Compliance with Multi-Tier Dispute Resolution Clauses in Switzerland

CHRISTIAN OETIKER, CLAUDIA WALZ*

A. Introduction

The topic of Multi-Tier Dispute Resolution (“MDR”) clauses was discussed at the ASA Conference in Bern in September 2017. This article is concerned with the question of what are the consequences if an MDR-clause is not complied with.

Before doing so, we shall very briefly describe the common features of MDR-clauses.¹ First of all, they provide for a (often tailor-made) dispute resolution mechanism which includes different layers and different methods. Each layer and method will only be triggered if the previous layer and method did not lead to a settlement. In the top layer, the dispute is usually submitted to adjudication, either by state courts or arbitral tribunals.

There is a wide variety of models and examples.² Many arbitration institutions, in particular those which also offer mediation services, provide model clauses that combine arbitration and mediation. For example, the model clause of the Swiss Chambers’ Arbitration Institution runs as follows:

“Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers’ Arbitration Institution in force on the date when the request for mediation was submitted in accordance with these Rules.

The seat of the mediation shall be ... [name of city in Switzerland, unless the parties agree on a city abroad], although the meetings may be held in ... [specify place].

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¹ This part was mainly inspired by the presentation given by Prof. Dr. Henry Peter, LL.M., and Dr. Stefanie Pfisterer, LL.M., at the ASA Conference in Bern in September 2017. See in detail: KAYALI, Enforceability of Multi-Tiered Dispute Resolution Clauses, *Journal of International Arbitration* 2010, p. 551 ss., 552 ss.

² See in detail KAYALI, *op.cit.*, fn. 1, p. 555 ss.

The mediation proceedings shall be conducted in ... [specify desired language].

If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the mediator(s) has (have) been confirmed or appointed, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.

The number of arbitrators shall be ... [“one”, “three”, “one or three”];

The seat of the arbitration shall be in ... [name of city in Switzerland, unless the parties agree on a city in another country];

The arbitral proceedings shall be conducted in ... [specify desired language].

The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties].”

In a recent landmark decision (DFSC 142 III 296), the Swiss Federal Supreme Court made findings on a number of issues related to the enforcement of MDR-clauses and the consequences of non-compliance.

B. The nature of Multi-Tiered Dispute Resolution clauses

1. Substantive vs procedural

The first issue under Swiss law, which has been discussed controversially in the past, is the nature of MDR-clauses. The question has some bearing on the remedies which are proposed in cases of non-compliance.

The discussion on this issue developed mainly around the question of the nature of mediation clauses. Some court decisions and commentators considered an agreement to mediate before initiating arbitration as an agreement of substantive nature.³ Other court decisions and commentators

³ Zurich Cassation Court, 15.3.1999, ZR 2000, p. 86, c. II.4.c; EIHOLZER, Die Streitbeilegungsabrede, Diss. Fribourg 1988, N 673; WALTHER, e-confidence in e-commerce durch Alternative Dispute Resolution, AJP 2001, p. 755 ss., 763.

took the view that such an agreement to mediate or similar agreements are of a procedural nature.⁴ A third opinion maintained that such agreements have a substantive nature, but procedural effects.⁵

In its recent landmark decision, the Swiss Federal Supreme Court left open the nature of MDR-clauses as this was not necessary for deciding the issues at hand. The fact that it held in that decision as well as in earlier decisions of 2011 and 2007 that MDR-clauses must be interpreted in accordance with the general principles of contract interpretation⁶ is of no avail in this respect since the same applies to arbitration agreements. Although it left the question of the nature of such clauses open, the Court clearly stated that any sensible remedy for non-compliance with MDR-clauses could only be of procedural nature.⁷ Hence, it may be concluded that under Swiss law, they are certainly not of purely contractual nature.

With regard to the law applicable to an MDR-clause, the Swiss Federal Supreme Court found that, independently from the law applicable to the contract (*lex causae*), this question had to be assessed under Art. 178 PILA.⁸ In the Court's view, MDR-clauses should be interpreted under the same law as the connected arbitration agreement since a different approach would be artificial and could lead to unnecessary complications.⁹

2. Admissibility vs jurisdiction

Another question that may have an impact on the consequences of non-compliance is whether MDR-clauses affect the admissibility of a claim or the jurisdiction of the arbitral tribunal. As will be seen, the importance of this distinction follows in particular from the fact that issues of jurisdiction may

⁴ Zurich Superior Court, 11.9.2001, ZR 2002, p. 77, c. 3; Thurgau Appeal Court, 23.4.2001, ASA Bull. 2003, p. 418 ss., c. 2.c; JOLLES, Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement, Arbitration 2006, p. 329 ss., 336; POUDET/BESSON, Comparative Law of International Arbitration, 2nd ed., Zurich 2007, p. 12.

⁵ BROWN-BERSET, La médiation commerciale: le géant s'éveille, ZSR 2002, p. 319 ss., 363-365.

⁶ DFSC 142 III 296, c. 2.4.1.1; DFSC, 16.5.2011, 4A_46/2011, c. 3.5.2; DFSC, 6.6.2007, 4A_18/2007, c. 4.3.2; BOOG, How to Deal with Multi-tiered Dispute Resolution Clauses, Note on the Swiss Federal Supreme Court's Decision 4A_18/2007 of June 2007, ASA Bull. 1/2008, p. 103 ss., 105.

⁷ DFSC 142 III 296, c. 2.4.4.1.

⁸ DFSC, 7.7.2014, 4A_124/2014, c. 3.3; SCHERER/MOSS, Swiss and English Courts analyse enforceability of multi-tier dispute resolution provision providing for DAB proceedings [FIDIC, clause 20], ASA Bull. 4/2014, p. 849 ss., 851.

⁹ DFSC, 7.7.2014, 4A_124/2014, c. 3.3; SCHERER/MOSS, op.cit., fn. 8, p. 851.

be challenged before the Swiss Federal Supreme Court while issues of admissibility cannot. Unfortunately, the distinction is far from being clear.

a) *The position under Swiss civil procedure law*

The notion of admissibility of a claim (“Zulässigkeit der Klage”) is not one commonly used in Swiss civil procedure law. In Germany, the term describes what in Switzerland is called a condition for rendering a judgment on the merits (“Prozessvoraussetzung”).

The jurisdiction of the state court *ratione loci* and *ratione materiae* is an explicit requirement for entering into the merits of a claim and, hence, in other terms for the admissibility of a claim (Art. 59(2)(b) CPC). This leads to the conclusion that admissibility encompasses jurisdiction.

Swiss procedural law requires in many instances that a conciliation takes place before a state court can be seized. Art. 209(3) CPC states that the authorisation to proceed (“Klagebewilligung”), which is issued by the conciliator if no settlement is reached, allows the claimant to instigate court proceedings within three months. It must be filed with the statement of claim (Art. 221(2)(b) CPC). Art. 59 CPC does not mention the authorisation to proceed as a requirement for entering into the merits of a claim. However, if there is no authorisation to proceed or the three months have lapsed, the court will need to render a procedural decision that it will not enter into the merits of the case.¹⁰ Hence, compliance with the obligation to hold a conciliation amounts to a condition for a court rendering a judgment on the merits or, in other words, of admissibility.

b) *The situation under the PILA*

The PILA does not define the conditions under which an arbitral tribunal may render an award on the merits of a claim. However, such conditions exist and an arbitral tribunal may only deal with a claim if they are present.

The notion of jurisdiction in arbitration is different from the one in state court proceedings. The question is who is bound by the arbitration agreement and with regard to what. Although this is not undisputed, this includes the question as to when this binding effect exists (jurisdiction *ratione temporis*). For example, the question of whether the office of the arbitrators has lapsed falls under this notion and may be challenged under

¹⁰ LEUENBERGER, in: Sutter-Somm/Hasenböhler/Leuenberger, Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), 3rd ed., Zurich/Basel/Geneva 2016, Art. 220 CPC N 2a, 4.

Art. 190 PILA.¹¹ Pursuant to the Swiss Federal Supreme Court, jurisdiction *ratione temporis* also contemplates the situation in which the party agreed on a pre-arbitral conciliation or mediation.¹²

This leads to the preliminary conclusion that, while compliance with the legal requirement of holding a conciliation prior to state court proceedings is an issue of admissibility and thus separate from jurisdiction, the same issue falls within the notion of jurisdiction in the arbitration framework.

C. Requirements for the enforcement of MDR-clauses

1. Compulsory nature of the MDR-clause

The main requirement for enforcing an MDR-clause is that the parties intended the pre-adjudicatory tier to be compulsory.¹³ Whether this is the case cannot be determined in the abstract, but rather requires the interpretation of the specific MDR-clause.

When interpreting an MDR-clause (in accordance with the general principle of contract interpretation¹⁴), the wording is the starting point. If the parties intend to agree on an enforceable MDR-clause, it is recommended that the clause explicitly states that the pre-arbitral tier is compulsory and not only permissive or optional.¹⁵ Furthermore, the MDR-clause should specifically determine under which conditions the pre-arbitral tier is satisfied.¹⁶

¹¹ DFSC, 18.6.2012, 4A_488/2011, c. 4.3.1; DFSC, 6.6.2007, 4A_18/2007, c. 4.2; KAUFMANN-KOHLER/RIGOZZI, *International Arbitration, Law and Practice in Switzerland*, Oxford 2015, N 8.148; BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, N 1714, 582 ss.; PFISTERER, in: Honsell/Vogt/Schnyder/Berti (eds.), *Basler Kommentar, Internationales Privatrecht*, 3rd ed., Basel 2013, Art. 190 PILA N 44.

¹² DFSC 142 III 296, c. 2.2; DFSC, 20.11.2017, 4A_407/2017, c. 2.4.2; DFSC, 18.6.2012, 4A_488/2011, c. 4.3.1; DFSC, 16.5.2011, 4A_46/2011, c. 3; DFSC, 6.6.2007, 4A_18/2007, c. 4.2; PFISTERER, *op.cit.*, fn. 11, Art. 190 PILA N 44.

¹³ DFSC 142 III 296, c. 2.4.4.1; DFSC, 6.6.2007, 4A_18/2007, c. 4.3.2 (compulsory nature denied); BOOG, *op.cit.*, fn. 6, p. 105.

¹⁴ See section B.1 above.

¹⁵ BOOG, *op.cit.*, fn. 6, p. 105; JOLLES, *op.cit.*, fn. 4, p. 336; BAIZEAU/LOONG, *Multi-tiered and Hybrid Arbitration Clauses*, in: Arroyo (ed.), *Arbitration in Switzerland – The Practitioner’s Guide*, Croydon 2013, N 32-34.

¹⁶ BOOG, *op.cit.*, fn. 6, p. 106; JOLLES, *op.cit.*, fn. 4, p. 336.

One of the key factors which the Swiss Federal Supreme Court considers is the question of whether the MDR-clause provides for a time limit for the pre-arbitration tier. If this is not the case, it is seen as a strong indication against the compulsory nature of the MDR-clause.¹⁷ Indeed, taking a different view would mean that the defendant could avoid arbitration by extending the pre-adjudication tier “into eternity”.¹⁸

2. Non-compliance with an MDR-clause

Second, enforcing an MDR-clause requires that it was indeed not complied with. This seems to be an overly simplistic statement. However, determining whether the party which commenced arbitral proceedings has not complied with a compulsory MDR-clause may lead to difficulties in practice. This can be illustrated by reference to mediation clauses, which usually include a right of each party to withdraw from the mediation process unilaterally after a determined stage has been reached or after determined efforts have been made. If the claimant in the arbitral proceedings did withdraw, the question will arise as to whether it had been entitled to do so at that specific stage. The arbitral tribunal, or the Swiss Federal Supreme Court in case of a challenge, will need to carefully consider this question.

In its recent landmark decision, the Swiss Federal Supreme Court dealt with this issue in some detail. The Court first assessed what the rules agreed upon by the parties required.¹⁹ In a second step, the Court examined whether the party that had initiated the arbitration had complied with these requirements.²⁰ It made a clear distinction between the fact that, in mediation, there is absolutely no obligation to achieve a settlement, and the parties’ obligation to adhere to the agreed procedure. With regard to the 2001 ICC ADR Rules, the Court found that the parties could not withdraw from the process before having had a discussion with the mediator.²¹

¹⁷ DFSC, 6.6.2007, 4A_18/2007, c. 4.3.2; BOOG, *op.cit.*, fn. 6, p. 106; KAUFMANN-KOHLER/RIGOZZI, *op.cit.*, fn. 11, N 5.22; BAIZEAU/LOONG, *op.cit.*, fn. 15, N 30.

¹⁸ See, however, DFSC, 7.7.2014, 4A_124/2014, c. 3.4.3.4, in which the Federal Supreme Court distinguished the lack of a time limit in clause 20 of the FIDIC Conditions of Contract. SCHERER/MOSS, *op.cit.*, fn. 8, p. 851.

¹⁹ DFSC 142 III 296, c. 2.4.1.

²⁰ DFSC 142 III 296, c. 2.4.2. In DFSC, 7.7.2014, 4A_124/2014, c. 3.5, the Federal Supreme Court had denied a violation of the MDR-clause.

²¹ DFSC 142 III 296, c. 2.4.2.

3. No abuse of rights

Third, enforcing an MDR-clause – i.e. inhibiting arbitral proceedings – will not be possible if this amounts to an abuse of rights.²²

The party invoking the non-compliance with an MDR-clause must act in good faith. This requires that this party has indeed proposed to the other party to hold the pre-arbitral tier before the arbitration. If it did not, it commits an abuse of rights by invoking the non-compliance in the arbitral proceedings.²³ If the other party initiated the pre-arbitral tier, the party invoking non-compliance with an MDR-clause must actually have participated, or at least offered to participate, in such pre-arbitral tier.²⁴ Furthermore, a party may not limit itself to invoking the arbitral tribunal's lack of competence during the arbitral proceedings, but is also required to request that the pre-arbitral step is implemented in the course of these proceedings to the extent this is possible.²⁵

Some authors have expressed the view that, contrary to what the case law of the Swiss Federal Supreme Court seems to imply, no general rule should be established according to which the breach of an MDR-clause by the party commencing arbitral proceedings would be generally remedied by the other party's mere inactivity.²⁶ The Court has not given an answer to this criticism in its most recent decision.²⁷

D. Consequences of non-compliance with an MDR-clause

The issue of non-compliance with an MDR-clause will usually be raised if one party commences arbitral proceedings and the other party is of the opinion that contractually agreed pre-arbitral steps were not complied with. Hence, in normal circumstances, it will be the arbitral tribunals which are faced with the question as to what consequences the non-compliance with an MDR-clause should trigger.

²² DFSC 142 III 296, c. 2.4.3.1. In DFSC, 7.7.2014, 4A_124/2014, c. 3.5, the Swiss Federal Supreme Court found such abuse of rights.

²³ DFSC 142 III 296, c. 2.4.3.1; DFSC, 6.6.2007, 4A_18/2007, c. 4.3.3.1; DFSC, 8.7.2003, 4P.67/2003, c. 4; KAUFMANN-KOHLER/RIGOZZI, *op.cit.*, fn. 11, N 5.24.

²⁴ See, e.g., DFSC 142 III 296, c. 2.4.3.2; DFSC, 20.11.2017, 4A_407/2017, c. 2.4.2.

²⁵ DFSC, 6.6.2007, 4A_18/2007, c. 4.3.3.2; DFSC, 20.11.2017, 4A_407/2017, c. 2.4.2; BOOG, *op.cit.*, fn. 6, p. 110-111.

²⁶ BERGER/KELLERHALS, *op.cit.*, fn. 11, N 583.

²⁷ DFSC 142 III 296, c. 2.4.3.2.

Similarly to the question of the nature of MDR-clauses, there is no unequivocal opinion on this question. The Swiss Federal Supreme Court has stressed on two occasions that there need not necessarily be a single correct approach for all perceivable constellations.²⁸

In Switzerland, it is widely acknowledged that non-compliance with an MDR-clause should trigger some kind of consequences.²⁹ Basically four approaches are advocated by the courts and commentators.³⁰

1. Substantive remedies

As stated before, some courts and commentators maintain that MDR-clauses (or at least mediation clauses) are of substantive nature. The logical consequence of qualifying MDR-clauses as agreements of substantive nature is that non-compliance triggers substantive remedies (such as an action for specific performance, an action for damages, the rescission of the contract or contractually agreed consequences of non-performance such as penalties) and that the court or the arbitral tribunal seized may neither reject the action nor declare it inadmissible.³¹

However, other commentators who in principle also advocate that MDR-clauses are of substantive nature nevertheless recognise that it may also trigger procedural consequences.³² Further, they recognize that the statutory remedies for non-performance of contracts are not sufficient in the case of non-compliance with the MDR-clause and, hence, recommend providing for penalties to overcome this deficit.³³

It is submitted that viewing MDR-clauses as agreements of substantive nature is, at least on a general level, not the right approach. The main issue is indeed that the substantive remedies available in the case of non-compliance are not apt to the situation and the affected party.

The Swiss Federal Supreme Court has explicitly acknowledged that damages are not an appropriate and satisfactory means to sanction the non-compliance with an MDR-clause.³⁴ The Court considered that such a sanction

²⁸ DFSC 142 III 296, c. 2.4.4.1; DFSC, 16.5.2011, 4A_46/2011, c. 3.4 *in fine*.

²⁹ DFSC 142 III 296, c. 2.4.4.1. Contra: GÖKSU, *Schiedsgerichtsbarkeit*, Zurich 2014, N 76-79.

³⁰ See also: BAIZEAU/LOONG, *op.cit.*, fn. 15, N 49; FAVRE-BULLE, *Case Notes on International Arbitration*, SZIER 2015, p. 287 ss., 317.

³¹ EIHOLZER, *op.cit.*, fn. 3, N 506-673.

³² BROWN-BERSET, *op.cit.*, fn. 5, p. 364.

³³ BROWN-BERSET, *op.cit.*, fn. 5, p. 368-369.

³⁴ DFSC 142 III 296, c. 2.4.4.1.

would be too late and that it would be very difficult to establish any damage caused by the non-compliance.³⁵

2. Arbitral tribunal should decline jurisdiction *ratione temporis*

If MDR-clauses are not of a substantive, but rather of a procedural nature, the first issue to consider is whether a compulsory MDR-clause affects the jurisdiction *ratione temporis* of an arbitral tribunal. As was set out above, the arbitral tribunal's jurisdiction is affected (rather than the admissibility of the claim).³⁶ Furthermore, the Swiss Federal Supreme Court deals with complaints that MDR-clauses were not complied with under Art. 190(2)(b) PILA regarding the arbitral tribunal's jurisdiction.³⁷

Nevertheless, the Swiss Federal Supreme Court found that denying the arbitral tribunal's jurisdiction in the case of non-compliance with an MDR-clause cannot be the right approach.³⁸ This is in line with the majority of authors dealing with the question.³⁹

Indeed, closing the proceedings for lack of jurisdiction would mean that the arbitral tribunal's mission would come to an end and that, after the MDR-clause has been complied with, a new arbitral tribunal would need to be constituted.⁴⁰ This would imply a number of issues:

- The question whether the same arbitrators could be appointed by the parties.⁴¹
- The need to constitute a new arbitral tribunal would lead to a significant delay and to additional costs for the parties.⁴²
- The question of whether a statute of limitation was validly interrupted could arise.⁴³

³⁵ DFSC 142 III 296, c. 2.4.4.1.

³⁶ See section B.2 above.

³⁷ See section E below.

³⁸ DFSC 142 III 296, c. 2.4.4.1.

³⁹ BERGER/KELLERHALS, *op.cit.*, fn. 11, N 584; POUURET/BESSON, *op.cit.*, fn. 4, p. 12-13; JOLLES, *op.cit.*, fn. 4, p. 336-337; BOOG, *op.cit.*, fn. 6, p. 109; VOSER, *Sanktionen bei Nichterfüllung einer Schlichtungsklausel*, Note on a Decision of the Zurich Cassation Court of 15.3.1999, ASA Bull. 2/2002, p. 376 ss., 380 s; KAUFMANN-KOHLER/RIGOZZI, *op.cit.*, fn. 11, N 5.23; GEISINGER/VOSER, *International arbitration in Switzerland*, 2nd ed., 2013, § 13.05, D 3, p. 327; WALTHER, *op.cit.*, fn. 3, p. 762, fn. 79; only *de lege ferenda*: BROWN-BERSET, *op.cit.*, fn. 5, p. 372-373.

⁴⁰ DFSC 142 III 296, c. 2.4.4.1.

⁴¹ DFSC 142 III 296, c. 2.4.4.1.

⁴² DFSC 142 III 296, c. 2.4.4.1.

In line with this approach, it is maintained that the arbitral tribunal may decline jurisdiction only if the parties have worded the MDR-clause in such a way that compliance therewith is an actual condition for the jurisdiction of the arbitral tribunal.⁴⁴ When interpreting an MDR-clause, such wide-reaching consequences should not be easily assumed. Hence, it is submitted that the wording required to exclude the arbitral tribunal's jurisdiction must be manifest and unequivocal.

Some authors furthermore argue that no authority would have jurisdiction if the arbitral tribunal lacked jurisdiction as long as the parties have not complied with the first pre-arbitral tier of the MDR-clause. Pursuant to their position, no other arbitral tribunal or state court would have jurisdiction and the mediators, conciliators or experts dealing with the pre-arbitral tier(s) have, by definition, no jurisdictional power.⁴⁵ This line of argument is not convincing in our view. If the non-compliance with an MDR-clause deprived the arbitration tribunal of its jurisdiction, the state courts could uphold their jurisdiction. What is true though is that such temporary shifting of the jurisdiction from arbitration to state courts is not practical, which is another reason why the exclusion of jurisdiction is not an appropriate consequence of non-compliance.

3. Arbitral tribunal should find the claim inadmissible “for the time being”

Some commentators maintain that non-compliance with MDR-clauses does not affect the arbitral tribunal's jurisdiction, but the admissibility of the claim.⁴⁶ They conclude that the arbitral tribunal should find the claim inadmissible "for the time being".⁴⁷ This would mean that the arbitral tribunal makes no finding on jurisdiction, but nevertheless closes the proceedings since the claim, at that moment in time, cannot yet be submitted to arbitration. The claimant could re-initiate new arbitral proceedings after

⁴³ DFSC 142 III 296, c. 2.4.4.1; BOOG, *op.cit.*, fn. 6, p. 109.

⁴⁴ VOSER, *op.cit.*, fn. 39, p. 380; JOLLES, *op.cit.*, fn. 4, p. 335.

⁴⁵ SCHLAEPFER, *Jurisdiction and Admissibility: a Subtle Distinction, Not Always Easy to Make in International Arbitration*, *Les Cahiers de L'Arbitrage* 2/2013, p. 327 ss., N 2.1 s.

⁴⁶ STOJILJKOVIĆ, *Arbitral Jurisdiction and Court Review: Three Swiss Federal Supreme Court Decisions to Reconsider*, *ASA Bull.* 4/2016, p. 897 ss., 907; in favour of the Swiss Federal Supreme Court's pragmatic approach: HIRSCH, *De quelques récents arrêts du Tribunal fédéral Suisse, b-Arbitra* 2/2016, p. 195 ss., 201 s. See to this distinction section B.2 above.

⁴⁷ BOOG, *op.cit.*, fn. 6, p. 108; RÜEDE/HADENFELDT, *Schweizerisches Schiedsgerichtsrecht*, 2nd ed., Zurich 1993, p. 27.

having complied with the MDR-clause. This approach is followed in a number of countries such as Germany⁴⁸ and France⁴⁹.

Not admitting the claim for the time being would have exactly the same negative effects as denying jurisdiction.⁵⁰ Hence, this does not seem an appropriate approach for the same reasons as the arbitral tribunal should not deny jurisdiction.

4. Arbitral tribunal should stay the proceedings

The fourth approach, which is advocated by most authors in the meantime, takes into account the difficulties which would arise if the arbitral tribunal denied its jurisdiction or the admissibility of the claim. Pursuant to this approach, the arbitral tribunal should stay the proceedings in order to allow the parties to proceed to the agreed pre-arbitral tier within a fixed time limit.⁵¹

The Swiss Federal Supreme Court concurred that this approach is indeed the preferable solution.⁵² It made it clear that, for this remedy to apply properly, the suspension of the arbitral proceedings would need to be requested and the arbitral tribunal would need to set the conditions under which the arbitral proceedings could be continued.⁵³ As a consequence of such stay, the arbitral tribunal is not deprived of its jurisdiction and its previous decisions such as procedural orders remain valid.⁵⁴

⁴⁸ BELLINGHAUSEN/GROTHAUS, Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany? Kluwer Arbitration Blog, 1.12.2016; OLG Hamburg, 27.5.2015, 6 Sch 3/15; BGH, 14.1.2016, I ZB 50/15; BGH, 9.8.2016, I ZB 1/15.

⁴⁹ SCHLAEFFER, *op.cit.*, fn. 45, p. 327 ss., N 2.1 pointing out that the breach of a contractual pre-arbitral tier pertains to the admissibility of a claim («fin de non-recevoir»); Cour de cassation, chambre mixte, 14 February 2003, No. 00-19423, 00-19424; Cour de cassation, chambre mixte, 14 February 2003, Poiré v. Tripier, *Revue de l'arbitrage* 2/2003, p. 403 s.; Cour d'appel de Paris, 4 March 2004, Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft, *Revue de l'arbitrage* 1/2005, p. 143 ss.

⁵⁰ See section D.2 above; BOOG, *op.cit.*, fn. 6, p. 109.

⁵¹ BERGER/KELLERHALS, *op.cit.*, fn. 11, N 584; POUURET/BESSON, *op.cit.*, fn. 4, p. 12-13; JOLLES, *op.cit.*, fn. 4, p. 336-337; BOOG, *op.cit.*, fn. 6, p. 109; SCHOTT/COURVOISIER, in: Honsell/Vogt/Schnyder/Berti (eds.), *Basler Kommentar, Internationales Privatrecht*, 3rd ed., Basel 2013, Art. 186 PILA N 60; VOSER, *op.cit.*, fn. 39, p. 380; KAUFMANN-KOHLER/RIGOZZI, *op.cit.*, fn. 11, N 5.23; GEISINGER/VOSER, *op.cit.*, fn. 39, § 13.05, D3, p. 327; WALTHER, *op.cit.*, fn. 3, fn. 79; only *de lege ferenda*: BROWN-BERSET, *op.cit.*, fn. 5, p. 372-373.

⁵² DFSC 142 III 296, c. 2.4.4.1; left undecided in DFSC, 16.5.2011, 4A_46/2011, c. 3.4.

⁵³ DFSC 142 III 296, c. 2.4.4.1; BOOG, *op.cit.*, fn. 6, p. 109; JOLLES *op.cit.*, fn. 4, p. 337.

⁵⁴ See DFSC, 20.9.2016, 4A_524/2016; BOOG: Swiss Supreme Court refuses to review the merits of a manifestly inadmissible petition to set aside two procedural orders, published on 28 November 2016 <http://www.swlegal.ch/getdoc/bd2a3f45-d1d5-496a-8f23->

It seems clear that any objection to the arbitral tribunal's jurisdiction (or the admissibility of the claim, as the case may be) is foregone if the party invoking the MDR-clause does not comply with the time limit to be set by the arbitral tribunal. The arbitration may then proceed.

The situation is less clear if the party invoking the MDR-clause indeed initiates the pre-arbitral tier as agreed by the parties, but the other party refuses to participate. If such party is the claimant in the arbitral proceedings, it would seem odd if the arbitral tribunal could continue its proceedings. On the contrary, it would seem correct that the arbitral tribunal denied its jurisdiction *ratione temporis* in this situation. The negative consequences thereof as set out above seem appropriate in these circumstances.

5. Positions taken by arbitral tribunals having their seat in Switzerland in reported ICC-cases

JIMÉNEZ FIGUERES published a report on the positions taken by ICC arbitral tribunals towards MDR-clauses in 2003.⁵⁵ It contains a number of findings of arbitral tribunals in proceedings governed by the Swiss *lex arbitri*.

In the ICC-case 7422 (interim award of 28 June 1996), the arbitral tribunal rejected the defendant's defence that the arbitration proceedings were premature because of non-compliance with an MDR-clause by finding that the required negotiations had taken place.⁵⁶ This is in line with the fact that the party invoking non-compliance with an MDR-clause must establish non-compliance.

In the ICC-case 8073 (final award of 27 November 1995), the arbitral tribunal held that, pursuant to the jurisprudence of the ICC Court of Arbitration, agreements to conciliate were of facultative nature, unless the parties had stipulated otherwise *expressis verbis*.⁵⁷ The arbitral tribunal found that there was no such agreement and that the allegation of non-compliance was wrong in any event.⁵⁸ This is in line with the fact that only mandatory MDR-clauses can lead to sanctions for non-compliance and that non-compliance must be established.

a17dfad4b934/2016_Christopher-Boog_Swiss-Supreme-Court-refuses.aspx (last accessed on 9 October 2017).

⁵⁵ JIMÉNEZ FIGUERES, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, ICC Bulletin 2003, p. 71 ss.

⁵⁶ JIMÉNEZ FIGUERES, op.cit., fn. 55, p. 78 s.

⁵⁷ JIMÉNEZ FIGUERES, op.cit., fn. 55, p. 81.

⁵⁸ JIMÉNEZ FIGUERES, op.cit., fn. 55, p. 81.

In the ICC-case 9984 (preliminary award of 7 June 1999), it was undisputed that negotiations had taken place.⁵⁹ However, the defendant argued that they had not been informed by the claimant in writing of the failure of the amicable settlement phase before filing the request for arbitration. The arbitral tribunal held that it was sufficient that the claimant had set a time limit for the termination of the negotiations in line with the MDR-clause at the outset.⁶⁰ The fact that the negotiations continued after the lapse of this time limit did not modify this conclusion.⁶¹

E. Challenge of the arbitral tribunal's decision

If the issue of non-compliance with an MDR-clause is raised and the arbitral tribunal renders a decision on this issue, the question arises whether such decision can be challenged. For this purpose, it is of relevance whether such non-compliance affects the jurisdiction of the arbitral tribunal or the admissibility of the claim.⁶² In the latter case, a challenge would usually be excluded since a finding on the admissibility of the claim is not an issue which can normally be challenged under the *lex arbitri*. This is certainly the case for Switzerland.

The Swiss Federal Supreme Court decided that the violation of an MDR-clause can be challenged based on Art. 190(2)(b) PILA which deals with jurisdictional issues.⁶³ In a very recent decision, the Court held that such challenge is forfeited if not made within 30 days after the arbitral tribunal's decision dealing with the issue of non-compliance with an MDR-clause.⁶⁴ The Court stressed that this fact had no direct impact on the question of how an arbitral tribunal has to deal with non-compliance.⁶⁵ In other words: In the Court's view, its finding on the possibility to make a challenge does not imply that non-compliance with an MDR-clause does necessarily exclude the arbitral tribunal's jurisdiction. Indeed, the Court stressed that it upheld the applicability of Art. 190(2)(b) PILA by default

⁵⁹ JIMÉNEZ FIGUERES, *op.cit.*, fn. 55, p. 85 ss.

⁶⁰ JIMÉNEZ FIGUERES, *op.cit.*, fn. 55, p. 87.

⁶¹ JIMÉNEZ FIGUERES, *op.cit.*, fn. 55, p. 87.

⁶² See section B.2 above.

⁶³ DFSC 142 III 296, c. 2.2; DFSC, 7.7.2014, 4A_124/2014, c. 3.2; DFSC, 16.5.2011, 4A_46/2011, c. 3.4; DFSC, 6.6.2007, 4A_18/2007, c. 4.2; DFSC, 20.11.2017, 4A_407/2017, c. 2.4.2.

⁶⁴ DFSC, 20.11.2017, 4A_407/2017, c. 2.4.2.

⁶⁵ DFSC 142 III 296, c. 2.2; DFSC, 7.7.2014, 4A_124/2014, c. 3.2; DFSC, 16.5.2011, 4A_46/2011, c. 3.4.

since no other ground for review was available while the issue was of such importance that the possibility of a review had to be granted.⁶⁶ It also stressed that the violation of such a clause would not amount to a violation of public policy in its view.⁶⁷

If the proper remedy in the case of non-compliance with an MDR-clause is a stay of proceedings by the arbitral tribunal, the challenge of such decision basically concerns the questions whether an unwarranted stay was ordered or whether a warranted stay was not ordered. The arbitral tribunal's decision to stay the proceedings amounts to a procedural order, which can generally not be challenged under Art. 190(2) PILA.⁶⁸ However, there is an exception if a procedural order touches upon the jurisdiction of the arbitral tribunal, which may be the case with orders on the stay of the proceedings.⁶⁹ For example, the decision of an arbitral tribunal not to stay the proceedings pursuant to Art. 186(1^{bis}) PILA can be challenged.⁷⁰ Furthermore, it seems likely that the inverse decision to stay the proceedings under this provision can also be challenged⁷¹, although this has not yet been decided⁷². It is submitted that the issue of non-compliance with MDR-clauses should be dealt with by analogy.⁷³

In DFSC 142 III 296, the Swiss Federal Supreme Court not only quashed the arbitral tribunal's decision, but itself ordered the stay of the proceedings.⁷⁴ This has been criticized since the Court is generally not

⁶⁶ DFSC 142 III 296, c. 2.2; DFSC, 7.7.2014, 4A_124/2014, c. 3.2; DFSC, 16.5.2011, 4A_46/2011, c. 3.4; see also SCHLAEPFER, op.cit., fn. 45, p. 327 ss., N 2.1.

⁶⁷ DFSC 142 III 296, c. 2.2; DFSC, 16.5.2011, 4A_46/2011, c. 3.4.

⁶⁸ SCHNEIDER/SCHERER, in: Honsell/Vogt/Schnyder/Berti (eds.), Basler Kommentar, Internationales Privatrecht, 3rd ed., Basel 2013, Art. 182 PILA N 47; DFSC, 15.4.2013, 4A_596/2012, c. 3.3; DFSC, 13.2.2012, 4A_428/2011, c. 5.1.1; DFSC 136 III 597, c. 4.2; DFSC 136 III 200, c. 2.3.1; DFSC 122 III 492, c. 1b.bb.

⁶⁹ DFSC 116 Ia 154, c. 3a; DFSC, 13.2.2012, 4A_428/2011, c. 5.1.1; DFSC, 6.4.2011, 4A_614/2010, c. 2.1; DFSC, 29.10.2008, 4A_210/2008, c. 2.1; SCHNEIDER/SCHERER, op.cit., fn. 68, Art. 182 PILA N 47; BESSON/THOMMESEN, in: Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration, Commentary, 2nd ed., Zurich/Basel/Geneva 2013, Art. 31 Swiss Rules N 9.

⁷⁰ DFSC 127 III 279, c. 2a; BERGER/KELLERHALS, op.cit., fn. 11, N 1035, 1054, 1715.

⁷¹ Such decision clearly fulfils the criteria set in the *Fomento*-decision: DFSC 127 III 279, c. 2a; BERGER/KELLERHALS, op.cit., fn. 11, N 1035.

⁷² DFSC, 13.2.2012, 4A_428/2011, c. 5.1.

⁷³ BERGER/KELLERHALS, op.cit., fn. 11, N 1055; BERGER, in: Arroyo (ed.), Arbitration in Switzerland - The Practitioner's Guide 2013, Art. 186 PILA N 26 s.; PFISTERER, op.cit., fn. 11, Art. 190 PILA N 46.

⁷⁴ See for the order (not contained in DFSC 142 III 296): DFSC, 16.03.2016, 4A_628/2015 *in fine*.

allowed to, and does not, render decisions instead of the arbitral tribunal.⁷⁵ In our view, it is not necessary that the Court issues such order, in particular since it will be the arbitral tribunal's responsibility to define the conditions for a lifting of the stay in any event.⁷⁶ However, in view of the fact that the Court has the competence to render decisions on jurisdiction⁷⁷ and that – if one follows the approach of the Court – the issue of non-compliance with MDR-clauses is related to jurisdiction, it seems conceptually possible that the Court itself order a stay of proceedings.

F. Conclusions

Under Swiss law, an MDR-clause may only be enforced if it is compulsory, if non-compliance is established and if the reliance on such clause does not constitute an abuse of rights. An arbitral tribunal having its seat in Switzerland may in principle not find that the non-compliance with an MDR-clause excludes its jurisdiction *ratione temporis*. Rather, the arbitral tribunal will need to stay the proceedings and set the parties a time limit to comply with the pre-arbitral step. Only if the claimant in the arbitral proceedings does not comply with the MDR-clause within the time limit set (while the defendant was willing to do so), the arbitral tribunal may deny jurisdiction *ratione temporis*. The arbitral tribunal's decision on a request to stay the proceedings may be challenged under Art. 190(2)(b) PILA. The Swiss Federal Supreme Court has left the door open for different approaches in particular situations.

⁷⁵ STOJILJKOVIĆ, op.cit., fn. 46, p. 905.

⁷⁶ DFSC 142 III 296, c. 2.4.4.2.

⁷⁷ DFSC, 30.4.2015, 4A_623/2014, c. 2.2; DFSC, 28.8.2014, 4A_74/2014, c. 2.4; DFSC 136 III 605, c. 3.3.4; DFSC 128 III 50, c. 1b; DFSC 117 II 94, c. 4; SCHOTT/COURVOISIER, op.cit., fn. 51, Art. 186 PILA N 127; PFISTERER, op.cit., fn. 11, Art. 190 PILA N 50; BERGER/KELLERHALS, op.cit., fn. 11, N 1729; GÖKSU, op.cit., fn. 29, N 2154.

Christian OETIKER, Claudia WALZ, *Non-Compliance with Multi-Tier Dispute Resolution Clauses in Switzerland*

Summary

The article discusses the Multi-Tier Dispute Resolution (“MDR”) clauses and in particular the consequences of non-compliance with such clauses.

A common feature of MDR-clauses is that they provide for a (often tailor-made) dispute resolution mechanism which includes different layers and different methods and each layer and method will only be triggered if the previous layer and method did not lead to a settlement. The nature of MDR-clauses is of some importance and has been discussed controversially, since this issue has some bearing on the remedies that are proposed in cases of non-compliance. The Swiss Federal Supreme Court left this question open but stated that any sensible remedy for non-compliance could only be of procedural nature.

Under Swiss law, an MDR-clause may only be enforced if it is compulsory, if non-compliance is established and if the reliance on such clause does not constitute an abuse of rights. An arbitral tribunal having its seat in Switzerland may in principle not find that the non-compliance with an MDR-clause excludes its jurisdiction *ratione temporis*. Rather, the arbitral tribunal will need to stay the proceedings and set the parties a time limit to comply with the pre-arbitral step. Only if the claimant in the arbitral proceedings does not comply with the MDR-clause within the time limit set (while the defendant was willing to do so), the arbitral tribunal may deny jurisdiction *ratione temporis*. The arbitral tribunal’s decision on a request to stay the proceedings may be challenged under Art. 190(2)(b) PILA. The Swiss Federal Supreme Court has left the door open for different approaches in particular situations.

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Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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