The Non-Compliance with Multi-Tier Dispute Resolution Clauses: Switzerland and Germany

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Overview

- Legal nature of Multi-Tier Dispute Resolution ("MDR") clauses.
- Requirements for enforcement of MDR-clauses.
- Consequences of non-compliance with an MDR-clause.
- Challenge of an arbitral award dealing with the non-compliance of an MDR-clause.
Nature of MDR-clauses

– Proposed approaches:
  – Agreement of substantive nature.
  – Agreement of procedural nature.
  – Agreement of substantive nature, but with procedural effects.

– Interpretation in accordance with the general principles of contract interpretation (DFSC 142 III 296, c. 2.4.1.1; DFSC 4A_18/2007, c. 4.3.2).

– The Federal Supreme Court held that any sensible remedy for non-compliance may be only of procedural nature (DFSC 142 III 296, c. 2.4.4.1).
Requirements for enforcement of MDR-clauses

- Compulsory nature of the MDR-clause (DFSC 142 III 296, c. 2.4.4.1; DFSC 4A_18/2007, c. 4.3.2):
  - Inclusion of a clear time-limit.
  - Wording of the MDR-clause.

- Non-compliance.

- No abuse of rights:
  - Party invoking the non-compliance must have proposed to hold the pre-arbitral tier (DFSC 142 III 296, c. 2.4.3.1; DFSC 4A_18/2007, c. 4.3.3.1; DFSC 4P.67/2003, c. 4).
  - If the other party initiated the pre-arbitral tier, the party invoking non-compliance with an MDR-clause must have participated, or offered to participate (DFSC 142 III 296, c. 2.4.3.2).
Consequences of non-compliance with an MDR-clause

Four proposed approaches

- Substantive remedies.
- Arbitral tribunal should decline jurisdiction.
- Arbitral tribunal should find the claim inadmissible "for the time being".
- Arbitral tribunal should stay the proceedings.
Consequences of non-compliance with an MDR-clause

First approach: Substantive remedies

- Non-compliance triggers only substantive remedies:
  - Specific performance.
  - Damages.
  - Rescission of the contract.
  - Contractually agreed consequences of non-performance (e.g. penalties).

- The Swiss Federal Supreme Court has explicitly stated that damages are not an appropriate and satisfactory means to sanction the non-compliance with an MDR-clause (DFSC 142 III 296, c. 2.4.4.1).
Consequences of non-compliance with an MDR-clause

**Second approach: Arbitral tribunal should decline jurisdiction**

- Such approach would raise a number of issues:
  - Could the same arbitrators be appointed by the parties again?
  - The need to constitute a new arbitral tribunal would lead to a significant delay and to additional costs for the parties.
  - The question of whether a statute of limitation was validly interrupted could arise.

- The Swiss Federal Supreme Court found that, in view of these issues, declining jurisdiction cannot be the appropriate remedy (DFSC 142 III 296, c. 2.4.4.1).
Consequences of non-compliance with an MDR-clause

Third approach: Arbitral tribunal should find the claim inadmissible "for the time being"

- The arbitral tribunal makes no finding on jurisdiction.
- The arbitral proceedings are closed.
- The claimant may re-initiate new arbitral proceedings after having complied with the MDR-clause.
- Same issues as in case of declining jurisdiction.
Consequences of non-compliance with an MDR-clause

Fourth approach: Arbitral tribunal should stay the proceedings

- The arbitral tribunal stays the proceedings.
- The parties are set a time-limit to proceed to the agreed pre-arbitral tier.
- The Swiss Federal Supreme Court concurs that this approach is indeed the preferable solution (DFSC 142 III 296, c. 2.4.4.1):
  - The suspension of the arbitral proceedings needs to be requested.
  - The arbitral tribunal needs to set the conditions under which the arbitral proceedings will be continued.
Challenge of an arbitral award dealing with the non-compliance of an MDR-clause

- The violation of an MDR-clause can be challenged based on Art. 190(2)(b) PILS which deals with jurisdictional issues (DFSC 142 III 296, c. 2.2; DFSC 4A_46/2011, E. 3.4).
- No violation of public policy.
Conclusions

- An MDR-clause may only be enforced if it is compulsory and if the reliance on such clause does not constitute an abuse of rights. Non-compliance must be established.
- A Swiss arbitral tribunal may not find that the non-compliance with an MDR-clause excludes its jurisdiction.
- The arbitral tribunal will need to stay the proceedings and set the claimant a time-limit to comply.
- The Swiss Federal Supreme Court has left open the door for different approaches in particular situations.
Germany
Position of the German courts


- Not a question of jurisdiction, but of the admissibility of a claim.

- The arbitral tribunal would need to reject the claim for the time being.
Findings

- A German arbitral tribunal may uphold jurisdiction although a multi-tier dispute resolution clause was not complied with.
- In case of non-compliance, the arbitral must deny the admissibility of the claim for the time being.
- It is unclear whether the arbitral tribunal may instead stay the proceedings.
- Non-compliance is not an issue of jurisdiction. A challenge of an award dealing with non-compliance must, therefore, be based on a different ground.
Thank you.