

ENFORCEABILITY OF

MULTI-TIERED CLAUSES LEADING TO ARBITRATION

BY

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Abstract

The issue of enforceability of multi-tiered clauses leading to arbitration arises when the claim is premature, for example, when it is submitted to arbitral tribunal before the Claimant employed all the stipulated mechanisms in the multi-tiered clause leading to arbitration. In those situations, the arbitral tribunals and courts may decide to enforce the multi-tiered clause by not allowing the Claimant to proceed further in the arbitral proceedings since the arbitral claim is premature, or they may decide not to enforce the multi-tiered clause. This paper will analyze the practice of the arbitral tribunals and the courts and scholarly work with regard to the issue of enforceability of multi-tiered clauses leading to arbitration. Furthermore, this paper will also outline the legal consequences in situations when the arbitral tribunal or the court find that the claim is premature and the multi-tiered clause should be enforced and will answer to the question who has the jurisdiction to decide on the issue whether the claim is premature. After aforementioned, this paper will analyze the issue of enforceability of multi-tiered clauses in Croatia, the legal consequences of enforcement of the multi-tiered clauses and who has the jurisdiction decide on the issue of enforcement of multi-tiered clauses according to Croatian legislation.

Enforceability of Multi-Tiered Clauses Leading to Arbitration

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1. INTRODUCTION

Multi-tiered clauses leading to arbitration are becoming more and more used in contracts dealing with international commercial transactions. According to some surveys, companies today increasingly use negotiating, mediation or expert determination in resolution of their disputes. Almost two-thirds of participants in the survey on the use of alternative resolution dispute replied that they are using an “early case assessment” which involves an overall examination of the status of the company prior to deciding how to proceed further in the dispute.¹ Therefore, it seems that business people tend not to submit the dispute directly to arbitration but rather prefer to employ some of the amicable dispute resolution mechanisms which are contemplated by multi-tiered clauses leading to arbitration. Furthermore, multi-tiered clauses leading to arbitration are commonly found in particular contracts which have significant role in international commercial practice. Notable examples are contracts dealing with construction projects² and intellectual property rights transactions³. The significance of these contracts in international commercial transactions and the fact that the multi-tiered clauses are commonly found in the mentioned contracts, further proves importance of multi-tiered clauses leading to arbitration in international commercial transactions.

However, international commercial practice has shown that there are some problems with the enforcement of multi-tiered clauses leading to arbitration which are mostly the result of poorly drafted multi-tiered clauses. This paper will deal with the practical problems which occur in the enforcement of multi-tiered clauses leading to arbitration and the possible solutions to these problems. It will examine cases when multi-tiered clauses leading to

¹ See Stipanowich, Thomas and Lamare, J. Ryan “Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations (2013)”. 19 Harvard Negotiation Law Review 1; Pepperdine University Legal Studies Research Paper No. 2013/16

² Pryles, Michael: „Multi-Tiered Dispute Resolution Clauses“, Volume 18, no. 2 (2001), Journal of International Arbitration, p. 159.

³ Gomm Ferreira Dos Santos, Mauricio: “The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements”, Revista Brasileira de Arbitragem, (Comitê Brasileiro de Arbitragem (CBAr) & IOB; Comitê Brasileiro de Arbitragem (CBAr) & IOB 2013, Volume X Issue 38), p. 9

arbitration are enforced in international commercial practice and also look at the legal consequences of such enforcement. It will be shown that courts and tribunals tend to enforce multi-tiered clauses leading to arbitration if they can deduct from the wording of the multi-tiered clause that the clause is mandatory. It will also be shown that such practice is beneficial for all the stakeholders. After providing an international perspective on the issue of enforceability of multi-tiered clauses leading to arbitration, this paper will provide an overview of enforcement of multi-tiered clauses leading to arbitration in Croatia. There is no published practice or scholarly work which deal with this issue in Croatia. It will be shown that international practice may serve as a guidance to Croatian courts and tribunals in resolving issues with regard to enforceability of multi-tiered clauses leading to arbitration.

Chapter one of this paper provides the definition of multi-tiered clauses leading to arbitration and analyzes the most common dispute resolution mechanisms which are stipulated in these clauses (e.g. negotiation, mediation and expert determination). Chapter two will deal with situations in which multi-tiered clauses leading to arbitration can be enforced in international commercial practice if the Claimant has submitted a premature claim. This analysis will be done on the basis of the practice of the arbitral tribunals and courts, and also on the basis of the opinions of the legal scholars. Chapter three will deal with the issue of legal consequences that follow in case the arbitral tribunal or the court find that the arbitral claim was premature and also with who has the jurisdiction to decide on this issue according to prevailing views in the international commercial practice. Chapter four will deal with issue of enforceability of multi-tiered clauses leading to arbitration in Croatia. Since there are no published awards, judgments or scholarly work on this issue in Croatia, this chapter will analyze applicability of solutions provided in the international commercial practice with regard to enforceability of multi-tiered clauses leading to arbitration in Croatian legal practice.

2. NOTION OF THE MULTI-TIERED CLAUSES LEADING TO ARBITRATION

Multi-tiered clauses are also often referred to as “escalation clauses”, “multi-tier clauses”, or “multi-step alternative dispute resolution clauses”.⁴ Multi-tiered clauses leading to arbitration are defined as clauses which provide for a two-or-more-stage mechanism for resolution of a dispute. The purpose of earlier, pre-arbitration stages in this mechanism is generally aimed at reaching an amicable solution between the parties through negotiations, mediation, expert determination or some other mechanism which parties contracted. In case the parties do not reach an amicable solution of the dispute through employing pre-arbitration stages, the dispute may be then submitted to arbitration for the decision.⁵

When contracting a multi-tiered clause leading to arbitration, the parties have a wide range of options of different dispute resolution mechanisms. However, mechanisms that are most commonly provided in the multi-tiered clauses leading to arbitration are:

- i. negotiation,
- ii. mediation,
- iii. expert determination, and
- iv. arbitration.⁶

The dispute resolution mechanism in a given multi-tiered clause leading to arbitration may use any combination of the mentioned mechanisms or just one mechanism preceding arbitration. The exact dispute resolution mechanism to be employed in the multi-tiered clause leading to arbitration depends on the parties themselves since the parties will contract the mechanism that they deem to suit their interests best in the particular transaction. The parties

⁴ Klaus Peter Berger: “Law and Practice of Escalation Clauses”, *Arbitration International*, 2006, Vol. 22, No. 1, p. 1

⁵ Jollies, Alexander: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, reprinted from (2006) 72 *Arbitration* 4 (Sweet and Maxwell, London), p. 329

⁶ Pryles, Michael: „Multi-Tiered Dispute Resolution Clauses“, Volume 18, no. 2 (2001), *Journal of International Arbitration*, p. 159

are free to contract very simple multi-tiered clauses leading to arbitration — for example the parties may stipulate that only negotiation should be conducted in case of a dispute, followed by arbitration — to very complex multi-tiered clauses leading to arbitration, which are mostly used in more demanding transactions such as big construction projects and which may stipulate all of the above mentioned pre-arbitration mechanisms.⁷

All of these mechanisms have a “filtering effect”⁸ — they filter the disputes that come before arbitration. The prospect of arbitration proceedings which may be time-consuming and involve high expenses will most probably not be appealing to the parties. Since the parties in most cases have a common goal to resolve the dispute as quickly and as cheap as possible, they will try in those situations to amicably settle the dispute by using some of the mentioned pre-arbitration mechanisms (e.g. negotiation, mediation or expert determination). In case the parties cannot find a common ground through pre-arbitration mechanism, they will submit the dispute to arbitration. This filtering effect of multi-tiered clauses leading to arbitration is regarded as one of their most appealing features and reasons why these clauses are used in today’s international commercial transactions.⁹

In order to better understand multi-tiered clauses leading to arbitration, the mentioned dispute resolution mechanisms should be appropriately defined. Although there is a wide range of possible pre-arbitration mechanisms which the parties may contract, this paper will focus on those that are most commonly contracted between the parties, that is, negotiation, mediation and expert determination. After the mentioned pre-arbitration mechanisms, this

⁷ Baizeau, Domitille; Anne-Marie Loong: Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013) p. 1453

⁸ Álvaro López De Argumedo Piñeiro, Multi-Step Dispute Resolution Clauses in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (© Wolters Kluwer España; La Ley 2010) p. 733 uses this phrase. Hereinafter, in this thesis the phrase “filtering effect” will be referred to without quotation marks.

⁹ Baizeau, Domitille; Anne-Marie Loong: Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013) p. 1453

paper will briefly discuss the notion of arbitration in multi-tiered clauses leading to arbitration.

2.1. Negotiation

Negotiation may be defined as a mutual and voluntary effort of the parties to resolve the dispute amicably without involving any third party in the process of dispute resolution.¹⁰ Main advantages of this mechanism of dispute resolution are that it is voluntary, cheap, non-formalistic (since the parties do not have to abide to any particular procedural rules) and low risk (since each party may leave the negotiations if it is dissatisfied with the way in which the negotiations are proceeding and may not be obliged to undertake any obligation it does not itself wish to undertake). Most commonly, negotiation will precede other stages in a multi-tiered clause leading to arbitration.¹¹

If the negotiations succeed, the parties will either conclude a settlement which will reflect parties' agreement on the dispute or will take other actions depending on the actual circumstances of the case. For example, one party may pay certain amount to the other party which will, as a consequence, withdraw its lawsuit. If the parties themselves are unable to find an amicable solution through negotiation, they may turn to further stages of pre-arbitration dispute resolution scheme (mediation, expert determination or some other scheme on which the parties have agreed) or directly to arbitration, depending on the stipulation in the multi-tiered clause leading to arbitration.¹²

Unless the parties have agreed otherwise, negotiations may be, in accordance with the general principles of company and contract law, conducted by any authorized representative of the party in dispute, for example, he or she may be a director of the company authorized by

¹⁰ See Kayali, Didem : "Enforceability of Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6) p. 553

¹¹ *Ibid.*

¹² *Ibid.*

law to represent the company towards the third parties, employee of the company who was properly assigned by the company to negotiate the dispute in question, or a third person acting as a proxy properly authorized to act on the party's behalf and conduct the negotiations (such as an attorney at law). They can also agree that negotiations will be conducted in two or more levels, for instance, in case the negotiations conducted by lower level management of the parties in dispute do not result in settlement of the dispute, the negotiations may be conducted further by the higher or the highest level of management.¹³ Generally speaking, the parties are free to stipulate conditions for start, continuation and termination of the pre-arbitration negotiation process within the boundaries of parties' autonomy, that is, within the boundaries set by applicable mandatory law provisions.¹⁴

Due to voluntary nature of negotiations, one may ask why parties contract pre-arbitration negotiations in multi-tiered clauses leading to arbitration, especially since the parties are always free to enter into negotiations and resolve a dispute by reaching a settlement. The answer is two-fold and depends on the type of the pre-arbitration negotiation stipulated in the multi-tiered clause leading to arbitration. On the one hand, in case the parties contracted mandatory pre-arbitration negotiation which fulfills all the conditions to be enforced by the tribunal or the court, the negotiations clause will be enforced by the tribunal or the court and the Respondent will have the right to require from the Claimant to negotiate the dispute in question before submitting the dispute to arbitration (for detailed explanation when the pre-arbitration negotiation clause fulfills the conditions of enforceability, see

¹³ For instance, see the multi-tiered clause leading to arbitration in the International Chamber of Commerce (hereinafter: ICC) case no. 9977 which provided that the negotiation should be conducted by senior management of the parties:

Any controversy that may arise among the parties with respect to the legal relation arising out of this Agreement shall be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement within fourteen (14) calendar days after submission.

If an amicable solution cannot be reached by negotiation, the dispute shall be finally settled by arbitration by a panel of one (1) arbitrator.

¹⁴ See Michael Pryles: „Limits to Party Autonomy in Arbitral Procedure“, (2007) 24(3) Journal of International Arbitration pp. 328-330

Chapter 3 of this paper). On the other hand, if the pre-arbitration negotiation clause does not fulfill the conditions of enforceability, the Claimant will have the right to go to arbitration immediately and the Respondent will not have the right to require from the Claimant to first try to negotiate the dispute before submitting the dispute to arbitration. In such cases, the Respondent as the party invoking the non-enforceable negotiation clause may have the option to sue the Claimant for damages resulting from breach of the Claimant's contractual obligation to negotiate the dispute before submitting the dispute to arbitration. However, in most cases the Respondent, as the party invoking the pre-arbitration negotiations clause, will have a hard time proving any actual damages suffered.¹⁵

Nevertheless, multi-tiered clauses leading to arbitration which stipulate non-enforceable negotiation can still be found in many contracts. Legal scholars explain that the main reason for stipulating such non-enforceable negotiation clauses in contracts is mostly psychological.¹⁶ Namely, it is considered that the mentioned non-enforceable negotiation clauses ensure that businessmen in dispute will be more inclined to negotiate the dispute once it arises, rather than go immediately to arbitration.

2.2. Mediation

Mediation¹⁷ is a dispute resolution mechanism in which the parties try to amicably resolve the dispute and whereby the mediator as a third neutral person is assisting the parties

¹⁵ Jollies, Alexander: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration 4 (Sweet and Maxwell, London), p. 336

¹⁶ Vaibhay Verma. „Enforceability of Multi-tiered Dispute Resolution Clauses“, p. 4

¹⁷ The term mediation used in this thesis includes conciliation. Conciliation and mediation are sometimes differentiated in scholarly work since conciliation implies that conciliator could go a step further than mediator and be more active in his or her activities to resolve the dispute between the parties. For instance, conciliator may propose terms of settlement to the parties which is generally not done by mediator. For further details on this distinction, see for example Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, p. 44.

to reach resolution of the dispute.¹⁸ Similarly to negotiation, mediation is a non-compulsory process which means that its initiation, continuation and termination depend on parties' free will. Also, the mediator has no authority to impose a binding solution on the parties in dispute, yet the mediator will often have separate meetings with the parties and try to persuade each party to "meet in the middle" and thereby find an amicable solution which will best serve real interests of all the parties in dispute.¹⁹

The parties have considerable freedom in choosing the procedural rules according to which the mediation will be conducted. They can contract their own tailor-made rules, or they can choose some pre-drafted mediation rules. There are a wide range of already drafted mediation rules which provide a comprehensive set of provisions which the parties may choose from, the most popular being: Rules of Procedure for Conciliation Proceedings (Conciliation Rules) adopted by the International Centre for Settlement of Investment Disputes (hereinafter: ICSID)²⁰, the ICC Mediation Rules²¹, the Conciliation Rules adopted by the United Nations Commission on International Trade Law (hereinafter: UNCITRAL)²² and the Mediation Rules adopted by the World Intellectual Property Organization (hereinafter: WIPO)²³.

The said mediation rules deal with a wide range of issues that may arise in the mediation process, from appointment of mediators, representation of the parties and their participation in the meetings, conduct of the mediation process, roles of the mediators, to termination of the mediation process and confidentiality issues.

¹⁸ See Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, p. 44.

¹⁹ *Ibid.*

²⁰ The ICSID Conciliation Rules are available at:

https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

²¹ The ICC Mediation Rules are available at:

file:///C:/Documents%20and%20Settings/Korisnik/Desktop/ICC%20865-0%20ENG_Rules_Arbitration_Mediation.pdf

²² The UNCITRAL Conciliation Rules are available at:

<http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>

²³ The WIPO Mediation Rules as in force from June 1, 2014, available at:

<http://www.wipo.int/amc/en/mediation/rules/>

As with negotiations, if the parties contract pre-arbitration mediation in multi-tiered clauses leading to arbitration, the legal effect of such stipulation will depend whether the parties contracted mandatory or non-mandatory mediation. When the parties contracted for mandatory mediation, the tribunals and the courts will tend to enforce the mediation clause only if it fulfills all the requirements for enforceability (for detailed explanation under which circumstances the pre-arbitration mediation clause will be considered enforceable, see Chapter 3 of this paper). On the other hand, if the pre-arbitration mediation clause does not fulfill the conditions of enforceability as explained in Chapter 3 of this paper, and the Claimant goes to arbitration immediately, the Respondent will only have the option to sue the Claimant for damages resulting from breach of the Claimant's contractual obligation (the obligation to first submit the dispute to mediation before submitting the dispute to arbitration). Similar to what was said for negotiation, in most cases the Respondent will have a hard time proving any actual damages suffered.²⁴

Features which make mediation a desirable pre-arbitration dispute resolution mechanism are flexibility, low risk of the procedure, and participation of a third neutral mediator who may facilitate resolution of the dispute by encouraging the parties to reach a settlement in the dispute rather than submitting the dispute to arbitration.²⁵ In case the pre-arbitration mediation is successful, the parties may conclude a settlement stipulating therein the parties' agreement reached in the mediation process. On the other hand, if the pre-arbitration mediation is not successful, the parties may submit the dispute to further pre-arbitration mechanisms provided that they have contracted any, or submit the dispute to arbitration, depending on the stipulation in the multi-tiered clause leading to arbitration.

²⁴ See Jollies, Alexander: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration 4 (Sweet and Maxwell, London), pp. 336

²⁵ Christian Bühring-Uhle, Lars Kirchhoff et al., Arbitration and Mediation in International Business, (© Kluwer Law International; Kluwer Law International 2006), pp. 195

2.3. Expert Determination

Expert determination is defined as a dispute resolution mechanism whereby the parties submit a dispute to a single expert or a panel of experts for a review. The parties may decide to have the dispute submitted to one or more legal experts, engineers, accountants or some similar profession, whichever the parties think is more suited to resolve the dispute in question.²⁶ For instance, if the parties deem that the solution of the dispute in a particular case will entail certain technical knowledge they will contract for an engineer to decide on the dispute, and if the parties consider the dispute to be primarily of legal nature they will choose a legal expert. Also, there are no mandatory rules which would prohibit the parties to stipulate for submitting the dispute to a panel composed of both legal experts and engineers.

Some legal texts differentiate between Dispute Review Boards (hereinafter: DRB) and Dispute Adjudication Boards (hereinafter: DAB), depending on the extent of the authority conferred to the expert panel by the parties.²⁷ DAB will have the right to issue a decision on the dispute which is mandatory upon the parties and the parties must abide the decision of the DAB. On the other hand, DRB is authorized to issue merely a recommendation which is not mandatory but serves more as a basis for the parties' agreement on the issue in dispute.²⁸ These dispute boards are used particularly often in construction and engineering projects. One of their most appealing features is that the dispute boards are used not only to resolve disputes once they arise, but also to prevent disputes from arising. For instance, the dispute board may be appointed at the beginning of the project, before the dispute arise and they may visit

²⁶ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London

²⁷ For instance, ICC offers standard DRB and DAB clauses followed by ICC arbitration. For further information, see ICC web page available at:

<http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/standard-icc-dispute-boards-clauses/>

²⁸ See ICC text on DRB available at:

<http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/standard-icc-dispute-boards-clauses/>

the construction site and be actively involved in the day-to-day operations throughout the project.²⁹

Since expert determination is creature of contract, the parties may regulate the start, continuation and termination of the proceedings before the expert determination as they consider appropriate, in accordance with the rule of free will of the parties.³⁰ In the case of DRB, the exact legal effect of the recommendation will depend on what the parties have contracted to be the effect of recommendation once it is issued by the board. Generally speaking, recommendations will not have a binding effect such as decisions issued by DAB.

At the end of the process in front of the DAB, the panel of experts will adopt a binding decision. The term “binding decision” in the expert determination should not be understood to mean a “final and binding” decision as in the arbitration process. Namely, the term “binding decision” means that the decision adopted in the expert determination has a legal effect comparable to a contract concluded between the parties in the dispute.³¹ This means that if one party does not abide to the expert decision, the other party must seek to enforce the expert decision before the court claiming performance ordered by the expert decision.³² Also, expert decisions are not directly enforceable as awards adopted by arbitrators. If one party is dissatisfied with the expert decision, it will have the right to have the decision adopted in the process of expert determination reviewed in accordance with the mechanism provided in the

²⁹ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, pp. 49-51

³⁰ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, p. 50

³¹ *Ibid.*

³² In case one party is simply refusing to abide to the expert decision but did not contest the expert decision in accordance with the multi-tiered clause leading to arbitration, the other party relying on the expert decision will have the right to go to the court and require from court to order the other party to undertake what was decided in the expert decision. In most cases and depending on the exact wording of the arbitration clause, the party relying on the expert decision will not have the right to go to arbitration since in this case the subject matter will not be a dispute between the parties “arising out of or in relation to” the contract but the subject matter will be the enforcement of an already decided matter which falls within the state courts’ jurisdiction.

multi-tiered clause leading to arbitration (in most cases the decision adopted in the expert determination process will be subject to review in the arbitration proceedings).³³

Expert determination differs from negotiation since the process of expert determination involves a third party or parties (an expert or a panel of experts). It also differs from mediation since the expert or panel of experts are authorized to adopt a decision binding upon the parties in dispute whereas the mediator does not have any authority to impose binding decisions upon the parties.

Expert determination differs from arbitration in two important aspects. Firstly, experts deciding in the process of expert determination are subject to liability in case they perform their tasks negligently whereas arbitrators are generally not held liable for negligence. Secondly, expert decisions are not directly enforceable as arbitral awards. As already explained in this section, if one party does not abide to expert decision and does not dispute the decision before arbitral tribunal, the other party relying on the expert decision will have to go to the court seeking specific performance. It will seek a court order directing the first party to abide to the expert opinion. Also, expert decisions are not subject to application of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter: “New York Convention”) as arbitral decisions are.³⁴ A form of such expert determination may be seen in the standard dispute resolution clause in the Conditions of Contract for Works of Civil Engineering Construction issued by *Federation Internationale*

³³ For example, standard ICC DAB clause provides the following:

If any Party sends a written notice to the other Party and the DAB expressing its dissatisfaction with a Decision, as provided in the Rules, [...] the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

Standard ICC DAB clause is available at:

<http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/standard-icc-dispute-boards-clauses/>

³⁴ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, pp. 49 - 50.

des Ingenieurs-Conseils (hereinafter: “FIDIC”) which are frequently used in contracts for complex construction projects.³⁵

2.4. Arbitration

Arbitration is usually defined as a form of dispute resolution whereby the dispute is submitted to an arbitrator or an arbitral tribunal who has the authority to adopt the final and binding decision on the dispute. The arbitrator and the arbitral tribunal are not state bodies, but rather they infer their authority to decide on the dispute from the parties’ arbitration agreement.³⁶

In contrast to above mentioned dispute resolution mechanisms usually employed in the multi-tiered clause leading to arbitration (e.g. negotiations, mediation and expert determination), arbitration is a more formal procedure. Even though the party autonomy is the corner stone of arbitration and the parties have a rather considerable leverage to contract the jurisdiction and composition of the arbitral tribunal, as well as the start, continuation, termination and other aspects of the arbitral proceedings, the free will of the parties is in some cases restricted by the applicable mandatory rules of law. For instance, the arbitration agreement must be valid in accordance with the law governing the arbitration agreement³⁷ and the procedure contracted by the parties will have to be in accordance with the mandatory rules of applicable *lex arbitri*.³⁸

³⁵ For example, clause 67.1 of the Fourth Edition from 1987 with the 1992 amendments of the FIDIC Rules stipulates that in case of any kind of dispute in connection with or arising out of the Contract between the Employer and the Contractor, the matter shall be first submitted to the Engineer in writing. When the Engineer delivers a decision, and if the parties do not contest the decision within the period stipulated by the Contract, the said decision will become final and binding upon the parties.

³⁶ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, pp. 6 – 12.

³⁷ As it will be elaborated in more detail in Chapter 3 of this thesis, the law governing the pre-arbitration scheme in the multi-tiered clause leading to arbitration may be the same as the law governing the arbitration agreement within the multi-tiered clause leading to arbitration, but this is not necessarily always the case.

³⁸ *Lex arbitri* is defined as the law of the seat of the arbitration. Depending on the state concerned, *lex arbitri* may govern various issues however, in most cases it is regulating, among others, certain aspects of 1) arbitration

Arbitration comes after all the pre-arbitration mechanisms in the multi-tiered clause leading to arbitration have been exhausted and no resolution of the dispute has been reached. This is logical since the purpose of the arbitration is to provide a final and binding decision on the dispute between the parties. In connection with this, circumstances in which the Claimant may have the right to launch arbitration proceedings should be examined. To be even more precise, the question is may arbitration start only when the Claimant has used the whole scheme stipulated in the multi-tiered clause leading to arbitration or it may start the arbitration proceedings before some or all the mechanisms stipulated by the multi-tiered clause leading to arbitration were employed? This question will be dealt with in Chapter 3 of this paper.

In most cases, when either the arbitrator or the arbitral tribunal adopts a decision, the decision will be final and binding as there is no possibility to file an appeal against arbitral decision. In some cases regulated by applicable law, it will be possible to attack the decision by seeking annulment procedure before the competent courts. However, in comparison to appeals against courts' decisions, legal grounds for attacking arbitral decisions are rather narrow. Namely, in most cases, depending on the parties' agreement and the applicable rules of *lex arbitri*, arbitral decisions will be subject to court scrutiny only on jurisdiction and procedural issues, but will not be subject to court review in questions of mistake in the application of the substantive law or mistake in factual finding of the arbitral tribunal.³⁹

One should bear in mind that the exact reasons to seek annulment of the arbitral award depend on the national rules set down by the applicable *lex arbitri*. For instance, the reasons to seek annulment of the arbitral award according to the national laws which are *verbatim*

agreement (definition and form of arbitration agreement and which dispute is arbitrable); 2) internal arbitration procedure (constitution of arbitral tribunal, extent of *Kompetenz-Kompetenz* principle, freedom of the parties to agree on certain aspects of the procedure before the arbitral tribunal, form and validity of the arbitral award); and 3) external part of arbitration proceedings (right to challenge the arbitral award, the extent of court assistance and supervision on the arbitration). Fouchard, Gaillard, Goldman: „On International Commercial Arbitration“, Kluwer Law International, 1999, p. 95.

³⁹ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, pp. 485 – 488.

adoption of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 are only the following procedural grounds:

- a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the applicable law; or
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law; or
- the court finds that:
 - the subject-matter of the dispute is not capable of settlement by arbitration under the law of court's state; or
 - the award is in conflict with the public policy of the relevant court's state.⁴⁰

After adopted by the arbitrator or arbitral tribunal, the award may be directly enforced against the losing party in accordance with the rules of domestic enforcement procedure and in accordance with the New York Convention.

As explained in this Chapter 2, when contracting multi-tiered clause leading to arbitration, the parties have a wide range of possibilities in stipulating exact pre-arbitration mechanisms. Each of these pre-arbitration mechanisms has features which may be appealing to the parties when deciding on which particular pre-arbitration mechanism should they contract. Whichever mechanism the parties contract in a given multi-tiered clause leading to arbitration, the clause should fulfill certain conditions in order for it to be enforceable.

⁴⁰ The text of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 is available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. Furthermore, it is possible that the *lex arbitri* may also allow the parties to agree to exclude some of the reasons to seek annulment of the arbitral award.

3. ENFORCEABILITY OF MULTI-TIERED CLAUSES LEADING TO ARBITRATION IN CASE OF PREMATURE SUBMISSION OF A DISPUTE TO ARBITRATION

One of the most commonly recognized issues with regard to multi-tiered clauses leading to arbitration is the issue of enforceability of multi-tiered clauses leading to arbitration, and in connection with that, the issue of premature submission of the dispute to the arbitration.⁴¹ These issues are very closely related and in essence they are following: if a dispute arises which is covered by multi-tiered clause leading to arbitration, is the aggrieved party obliged to use all the pre-arbitration mechanisms which the parties foresaw in the multi-tiered clause leading to arbitration (e.g. negotiation, mediation or expert determination) or may the aggrieved party skip one or all of the stages provided in the multi-tiered clause leading to arbitration and submit the dispute immediately to arbitration?

If the aggrieved party decides for whatever reason to skip some or all of the pre-arbitration dispute resolution mechanisms provided in the scheme of the multi-tiered clause leading to arbitration, a question arises as to what the consequences of such action are. This question is especially important if we have in mind the voluntary nature of the negotiation and mediation procedure which both depend on the parties' free will to engage and continue to participate in the said mechanisms of dispute resolution and in principle no solution of the dispute can be imposed upon the parties. Or, in other words, if one party skips some or all of the pre-arbitration mechanisms stipulated in the multi-tiered clause leading to arbitration (e.g. negotiation, mediation or expert determination) and directly submits the dispute to arbitration, the principle questions which arise with regard to this situation are what the legal

⁴¹ Kayali, Didem : "Enforceability of Multi-Tiered Dispute Resolution Clauses", Kluwer Arbitration site, Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6), p. 552

consequences of such behavior are and at which point the aggrieved party may argue that it is entitled to submit the dispute to arbitration.

The practice of the courts and arbitral tribunals shows that courts and arbitral tribunals take a case-by-case approach in determining whether a particular multi-tiered clause leading to arbitration should be enforced or not. However, a closer analysis of the reasoning in the courts' and arbitral tribunals' decisions reveals some similarities in their approaches — both courts and arbitral tribunals try to establish true will of the parties from the contracted multi-tiered clause leading to arbitration. The courts and arbitral tribunals will try to establish whether the parties wanted to contract the pre-arbitration mechanisms in the multi-tiered clause (e.g. negotiation, mediation and expert determination) as an obligation — a mandatory mechanism, or just as a mere right to be used by the Claimant, and whether the parties wanted these mechanisms to be condition precedent to launching arbitration proceedings or not. In case the parties contracted a particular or several dispute resolution mechanisms in a multi-tiered clause leading to arbitration as mandatory, the courts and the tribunals will enforce all mandatory tiers in the multi-tiered clause leading to arbitration requiring from the Claimant to use all of these mechanisms to resolve the dispute.

For instance, in the ICC case no. 6276 from January 1990, multi-tiered clause provided for a two-tiered scheme for dispute resolution, the first tier being negotiation between the parties, and if the dispute could not be resolved through negotiations, the dispute should be resolved through second tier — expert determination via decision of the Engineer. In this case the Claimant employed only the first tier mechanism. However, the Claimant failed to submit the dispute to Engineer but rather directly launched arbitration. Upon Respondent's objection, the tribunal found that the second tier in the multi-tiered clause leading to arbitration was not used and the tribunal decided to enforce the multi-tiered clause leading to arbitration. It found that the claim was premature and required from the Claimant to

submit the dispute to the Engineer; if this procedure before the Engineer would not resolve the dispute, then the Claimant would be entitled submit the dispute to arbitration.⁴² It should be noted that, as evidenced by the cited ICC case no. 6276, tribunals and courts do not enforce multi-tiered clauses leading to arbitration *ex officio* but only upon the objection of one of the parties.⁴³

A multi-tiered clause leading to arbitration is a contractual provision which provides for dispute resolution mechanisms which the parties deemed to be suitable for resolution of their dispute. Therefore, it seems appropriate that, in determining the true will of the parties, the courts and arbitral tribunals use general rules on the interpretation of contracts stipulated by the relevant law regulating the multi-tiered clause leading to arbitration. Depending on the concrete rules of law regulating interpretation of the contracts, in most cases this will mean that the courts and arbitral tribunals will have to surpass the use of particular wording of the multi-tiered clause in situations when the circumstances of the case lead to the conclusion that the wording does not reflect the true will of the parties. However, on the other hand, when there is no doubt that the wording of the contract reflects the true will of the parties, there will be no reason for the court or tribunal to depart from the wording of the contract.⁴⁴

Another question is which law is the law relevant for regulating the validity and interpretation of multi-tiered clause leading to arbitration. Of course, in situations when the parties have expressly chosen the law regulating the validity and interpretation of multi-tiered

⁴² ICC case no. 6276 from January 1990, a Swedish contractor v The Secretary of the People's Committee for a municipality of an Arab State and the Secretary of the People's Committee of Health of that municipality, Partial Awards, ICC Case Nos. 6276 and 6277, 1990, International Journal of Arab Arbitration, (© International Journal of Arab Arbitration; International Journal of Arab Arbitration 2009, Volume 1 Issue 4) pp. 363 – 367.

⁴³ Jollies, Alexander: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration 4 (Sweet and Maxwell, London), p. 331.

⁴⁴ This is in line with the position of the Swiss Federal Supreme Court taken in the case A. SA v. B. SA, no. 4A_124/2014, judgment of July 7, 2014, where the court said:

The interpretation of an arbitration agreement in Swiss law takes place according to the general rules on the interpretation of contracts. The Court must first learn the real and common intent of the parties, empirically as the case may be, on the basis of clues without stopping at the inaccurate names or words they may have used. Failing this, it will apply the principle of reliance and determine the meaning that, according to the rules of good faith, the parties could and should give to their mutual statements of will in each circumstance. Even if it is apparently clear, the meaning of a text signed by the parties is not necessarily decisive, as purely literal interpretation is prohibited (Art. 18(1) CO11).

clause leading to arbitration, there will be no doubt which law to apply to resolve these questions. However, one might ask which law should the court or the arbitral tribunal apply in case the parties have not expressly chosen the law regulating the multi-tiered clause leading to arbitration, but the parties have, for instance, chosen one law regulating the main contract and a different law for the arbitration agreement. In this case, it could be argued that the law regulating the main contract is relevant for the multi-tiered clause leading to arbitration (not including the arbitration clause) and the other law (which the parties have chosen to govern arbitration agreement) is relevant for the arbitration clause. The main basis for this argument would be that an arbitration clause represents a special, separable agreement within the main contract and that the choice of law for the arbitration agreement should not be necessarily extended to the rest of multi-tiered clause since it represents a part of the main contract.⁴⁵ On the other hand, such approach may seem inappropriate since the multi-tiered clause leading to arbitration and the arbitration clause are in many cases so intertwined that they represent one mechanism and applying different laws to the multi-tiered clause and the arbitration agreement would be impractical in some situations. For instance, it is conceivable that when applying one law (regulating the main contract) the premature arbitral claim should be rejected by the arbitral tribunal as inadmissible, but when applying the different law (regulating arbitration agreement), the same arbitral claim would be accepted as admissible.

This question was dealt with by the Swiss Federal Supreme Court in the case no. 4A_124/2014, judgment of July 7, 2014. In this case the Swiss Federal Supreme Court decided that the law regulating the pre-arbitration mediation should be the one regulating the arbitration agreement and not the law which the parties have chosen to regulate the main

⁴⁵ One should bear in mind that the principle of severability of the arbitration agreement means that the arbitration agreement is a separable, autonomous agreement towards the main agreement and that the law regulating the arbitration agreement may be different from the law of the main contract. Consequently, even though the provisions regulating pre-arbitration mechanisms and provisions regulating arbitration may sometimes be contained in the same article of a given main contract, this does not necessarily mean that pre-arbitration mechanisms fall within the same legal regime as arbitration agreement and that they are governed by the same law as arbitration agreement. See Fouchard, Gaillard, Goldman: „On International Commercial Arbitration“, Kluwer Law International, 1999, pp. 212-213.

contract since the opposite (e.g. if the law regulating the main contract would be relevant for pre-arbitration mediation) would be artificial and would result in unnecessary complication of the dispute. This, especially having in mind that the question in this case was whether the pre-arbitration mediation was a mandatory pre-condition for start of the arbitration proceedings.⁴⁶ Therefore, it seems that the Swiss Federal Supreme Court regarded the pre-arbitration mediation stipulated in the multi-tiered clause leading to arbitration an integral part of the clause together with the arbitration clause and decided that the law which the parties contracted to govern the arbitration agreement should also govern the pre-arbitration mediation in the multi-tiered clause.

The analysis of the courts' and arbitration tribunals' practice in this paper further shows that in determining the true will of the parties and whether the pre-arbitration mechanisms stipulated in the multi-tiered clause leading to arbitration are enforceable or not, courts and arbitration tribunals usually take into consideration the following circumstances:

- i. the wording of the multi-tiered clause leading to arbitration;
- ii. whether the parties contracted a precise mechanism with determined time limits; and
- iii. whether the parties in dispute were acting in good faith.

These circumstances are analyzed in the below sections 3.1. to 3.3. of this paper. It should be noted that the first two abovementioned criteria (e.g. the wording of the multi-tiered clause leading to arbitration and whether the parties contracted a precise mechanism with determined time limits) help the courts and tribunals to establish the true will of the parties, whereas the third criteria (e.g. whether the parties in dispute were acting in good faith) helps avoid situations in which the strict application of legal rules would lead to unjust results.

⁴⁶ A. SA v. B. SA, Swiss Federal Supreme Court (2014), case no. 4A_124/2014., p. 12

3.1. Wording of the Multi-tiered Clauses Leading to Arbitration

Courts and arbitral tribunals give strong importance to the wording of the multi-tiered clause leading to arbitration. If the language of the multi-tiered clause leading to arbitration is mandatory, the practice shows that in those cases the judges and arbitrators will tend to enforce multi-tiered clauses meaning that the Claimant will have to go through all the pre-arbitration mechanisms stipulated by the multi-tier clause leading to arbitration before submitting the dispute to arbitration. Such mandatory nature of the pre-arbitration mechanisms in the multi-tiered clause may be generally expressed by use of any appropriate wording. For example, either by expressly stipulating that a particular pre-arbitration mechanism is mandatory and that arbitration may not start before the mandatory pre-arbitration mechanism is employed, or by simply contracting that dispute “shall” be submitted to such pre-arbitration mechanism, or by some other appropriate language (for instance language which states that arbitration may start “only if” pre-arbitration mechanism is employed by the Claimant).⁴⁷ Contrary to this, use of the word “may” would, on the other hand, indicate that the pre-arbitration mechanisms in the multi-tiered clause leading to arbitration are non-mandatory so the Claimant has the right to submit the dispute directly to arbitration without using all the pre-arbitration mechanisms stipulated in the multi-tiered clause leading to arbitration.⁴⁸

In the ICC case no. 4230, the arbitral tribunal primarily relied on the wording of the multi-tier clause in order to establish whether the Claimant had an obligation to try to amicably settle the dispute before submitting it to arbitration or not. The tribunal found that

⁴⁷ Varady, Tibor, John J. Barcelo III, Arthur T. Von Mehren: International Commercial Arbitration, a Transnational Perspective, Fifth Edition, 2012, American Casebooks, p. 14

⁴⁸ *Ibid.*

the multi-tiered clause leading to arbitration was not enforceable because of the use of word “may” in the clause (“all disputes related to the present contract *may* be settled amicably”).⁴⁹ Similarly, in ICC case no. 10256 the parties also used the word “may” when stipulating that “either party ... *may* refer the dispute to an expert for consideration of the dispute.”⁵⁰ Therefore, the dispute was to be submitted to an expert as a pre-arbitration step in the multi-tiered clause. The court held that the Claimant was not obligated to submit the dispute to the expert since the word “may” indicated that this was only the Claimant’s right but not obligation.⁵¹

On the other hand, ICC tribunals considered the use of the word “shall” as an indication that the parties wanted mandatory and enforceable pre-arbitration mechanisms. For instance, the ICC case no. 9977 the clause read as follows:

Any controversy that may arise among the parties with respect to the legal relation arising out of this Agreement *shall* be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement [...] If an amicable solution cannot be reached by negotiation, the dispute *shall* be finally settled by arbitration by a panel of one (1) arbitrator.⁵²

In this case the arbitrator held that the use of the word “shall” clearly meant that the pre-arbitration negotiations were contracted as “a prior mandatory process of communication between the parties in conflict”.⁵³

⁴⁹ ICC case no. 4230, as cited in Kayali, Didem : “Enforceability of Multi-Tiered Dispute Resolution Clauses”, Kluwer Arbitration site, Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6) p. 567, (emphasis added).

⁵⁰ Dyala Jimenez-Figueres, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14 ICC Bull. 71 (No. 1, 2003), pp. 87-88, (emphasis added).

⁵¹ *Ibid.*

⁵² Dyala Jimenez-Figueres, *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, 14 ICC Bull. 71 (No. 1, 2003), pp. 84 – 85, (all emphasis added).

⁵³ *Ibid.*

The above analyzed practice shows that the wording of the multi-tiered clause is an important factor in interpreting and determining whether the multi-tiered clause is mandatory and whether it should be enforced or not. As seen from the above cited cases, the negotiations, as the most voluntary and least formal process of dispute resolution, were also considered as being a mandatory process⁵⁴ in resolving the dispute since it followed from the wording of the multi-tiered clause that this was the intention of the parties themselves. There is no reason not to reach the same conclusion when the parties contracted pre-arbitration mediation or expert determination and in case it follows from the wording of the parties wanted these pre-arbitration mechanisms to be mandatory (for instance, if the parties used the word “shall”, these pre-arbitration mechanisms should also be considered as mandatory).⁵⁵

However, the question arises whether the pre-arbitration mechanisms in the multi-tiered clause are mandatory when both words “may” and “shall” are used. With regard to this question, there are two interesting decisions, one of an English High Court of Justice, Queen's Bench Division, Commercial Court and the other is from Swiss Federal Supreme Court, which deal with such multi-tiered clause which use both word “may” and word “shall”, and which will be analyzed in the further text.

⁵⁴ *Ibid.*

⁵⁵ It follows from some scholarly work that this would be a valid approach. For example see Didem Kayali: “Enforceability of Multi-Tiered Dispute Resolution Clauses”, Kluwer Arbitration site, who says the following:

The first problem with regard to the drafting of a multi-tiered clause is the usage of non-mandatory words such as “may,” instead of obligatory ones like “shall.” When a multi-tiered dispute resolution clause provides that parties may refer to negotiation, mediation, or expert determination prior to arbitration, this reference to ADR techniques does not impose upon parties an obligation to comply and parties may directly commence arbitration proceedings. If the intention of the parties is not to grant each side only the choice of having the dispute resolved by initial ADR proceedings, but to make ADR procedures a precondition to arbitration, then the words which will give such effect to the clause should be chosen.

Didem Kayali, Enforceability of Multi-Tiered Dispute Resolution Clauses, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6), p. 571

In the English case *Emirates Trading Agency LLC v Prime Mineral Exports private Limited*⁵⁶, the clause was worded as follows:

In case of any dispute or claim arising out of or in connection with or under this LTC..., the Parties *shall* first seek to resolve the dispute or claim by friendly discussion. Any party *may* notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.⁵⁷

The English Commercial Court held that the use of the word “shall” indicated that the attempt of the amicable solution of the dispute provided in the multi-tiered clause is mandatory and should be enforced. The English court also took into consideration that the second sentence of the multi-tiered clause used the word “may” which, on the other hand, indicated that the parties intended the amicable solution of the dispute to be non-mandatory. Nevertheless, the court took a stand that the amicable solution of the dispute was mandatory first, “because commercial men expect the court to enforce obligations which they have freely undertaken”⁵⁸ and secondly “because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration”.⁵⁹

In the Swiss Supreme Court case, as the English court, the court relied mainly on the wording of the clause. Here, the clause 20.2. of the Contract stipulated that “Disputes *shall* be

⁵⁶ *Emirates Trading Agency LLC v Prime Mineral Exports private Limited*, High Court Of Justice, Queen's Bench Division, Commercial Court, [2014] EWHC 2104 (Comm), Case No: 2013 Folio 1559

⁵⁷ *Ibid.*, (emphasis added).

⁵⁸ *Ibid.* Also, for further commentary on the case see Gregory Travaini: “Multi-tiered dispute resolution clauses, a friendly Miranda warning”, available at:

<http://kluwerarbitrationblog.com/blog/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/>

⁵⁹ *Ibid.*

adjudicated by a DAB in accordance with Sub-Clause 20.4.”⁶⁰, whereas the clause 20.4. of the Contract was worded as follows:

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party *may* refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-clause.⁶¹

The Swiss Supreme Court concluded that the clause 20.4 of the Contract should not be read as a *lex specialis* to the clause 20.2 of the Contract but rather as an integral part and that the amicable solution of the dispute before launching arbitration is mandatory in this case.⁶²

The above described practice is well established in international commercial arbitration and generally recognized by courts and arbitral tribunals as well as by legal scholars.⁶³ The use of the word “may” or “shall” does strongly indicate the parties’ true intention whether the pre-arbitration mechanisms should be mandatory or not and, in that sense, it is understandable why the analysed practise shows great similarities in courts’ and arbitral tribunals’ decisions regarding mandatory nature of multi-tiered clauses.

⁶⁰ A. SA v. B. SA, (2014), case no. 4A_124/2014. p. 2, (emphasis added).

⁶¹ *Ibid.*

⁶² A. SA v. B. SA, Swiss Federal Supreme Court, (2014), case no. 4A_124/2014. p. 15

⁶³ See Didem Kayali, Enforceability of Multi-Tiered Dispute Resolution Clauses, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6) p. 571-572; Baizeau, Domitille; Anne-Marie Loong: Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013) p. 1456, Gomm Ferreira Dos Santos, Mauricio: “The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements”, *Revista Brasileira de Arbitragem*, (Comitê Brasileiro de Arbitragem (CBAr) & IOB; Comitê Brasileiro de Arbitragem (CBAr) & IOB 2013, Volume X Issue 38) p. 11. With regard to case law, see decision of French *Cour de cassation*, in *Cass. com. Medissimo v. Logica*, 29 April 2014, n° 12-27.004. (taking position that the use of “shall” showing that the pre-arbitration mechanism is mandatory), *English Commercial Courts Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* (2014) EWHC 2104, and Swiss Federal Supreme Court decision in the case *SA v. B. SA*, (2014), case no. 4A_124/2014.

3.2. Precise Mechanism with Clear Time Limits

Precise mechanism with clear time limits is also considered in courts' and arbitral tribunals' practice as one of important circumstances in determining whether the multi-tiered clause leading to arbitration is enforceable. The below analyzed international commercial practice will show, as with the case of wording of the multi-tiered clause leading to arbitration and use of words "shall" and "may", that there are no significant discrepancies in the approach taken by tribunals and courts with regard to stipulations providing precise mechanisms with clear time limits. The general rule is that the more precise mechanism the parties have stipulated with clear time limits, the more the courts and arbitral tribunals will be inclined to consider the multi-tiered clause leading to arbitration as enforceable. This rule is applicable to all pre-arbitration mechanisms dealt in this paper (e.g. negotiation, mediation and expert determination).⁶⁴

The mentioned rule on enforceability of multi-tiered clause leading to arbitration is evident in the ICC case no. 6276 from January 1990 in which the dispute settlement clause was:

Any differences arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties; if not, it shall be settled in accordance with Clause 63 of the General Conditions of Contract.⁶⁵

⁶⁴ Mauricio Gomm Ferreira Dos Santos, The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements, *Revista Brasileira de Arbitragem*, (© © Comitê Brasileiro de Arbitragem (CBAr) & IOB; © Comitê Brasileiro de Arbitragem (CBAr) & IOB 2013, Volume X Issue 38) pp. 9 - 14

⁶⁵ See ICC case no. 6276 from January 1990, a Swedish contractor v The Secretary of the People's Committee for a municipality of an Arab State and the Secretary of the People's Committee of Health of that municipality,

Clause 63 provided that the dispute is to be submitted to the Engineer for decision on the dispute and provided in great detail the procedure to be followed by the parties and the Engineer. The arbitral tribunal found that the Claimant tried to amicably and in good faith settle the dispute and that those efforts have failed. Therefore, the Tribunal concluded that the Claimant fulfilled its obligation from the multi-tier arbitration clause to try to settle the dispute “[in a] friendly [manner] and according to mutual goodwill between the two parties”⁶⁶. However, the Tribunal found that the Claimant did not follow through the second step in the multi-tier clause which is the submission of the dispute to the Engineer as required by Clause 63 of the contract. The Claimant argued that it is dismissed from its obligation to submit the dispute to the Engineer since it was not informed by the Respondent on the name of the Engineer. The Tribunal rejected Claimant’s argument by stating that the Claimant should have asked the Respondent on the name of the Engineer in order to fulfill its obligation and submit the dispute to the Engineer before it may refer to arbitration. The Tribunal concluded that Clause 63 provided for:

procedure, which has been entered into voluntarily made detailed, encased within precise time limits and requiring the Engineer to draft a report, is strictly binding upon the parties and governs their conduct before resorting to arbitration... is governed by precise rules which may not be transgressed.⁶⁷

Consequently, the Tribunal decided to enforce the multi-tiered clause leading to arbitration. It found that the claim was premature and required from the Claimant first to ask the Respondent about the name of the Engineer, and then submit the dispute to the Engineer.

Partial Awards, ICC Case Nos. 6276 and 6277, 1990, International Journal of Arab Arbitration, (© International Journal of Arab Arbitration; International Journal of Arab Arbitration 2009, Volume 1 Issue 4) pp. 363 - 367

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

If this procedure before the Engineer would not resolve the dispute, the Claimant would be entitled submit the dispute to arbitration.⁶⁸

The Swiss Federal Supreme Court has taken a similar stand to the above mentioned ICC decision in the case no. 4A_46/20111, judgment of May 16, 2011, and decided that the precision of the mechanism stipulated by the parties in a multi-tiered clause leading to arbitration is one of the crucial factors in determining whether the pre-arbitration mechanism is enforceable or not.⁶⁹ In this case Article 20 of the Contract multi-tiered clause leading to arbitration reads as follows:

In case of a dispute as to the interpretation or the performance of this contract an amicable settlement shall first be sought by the parties. The possible disputes which may arise as to the interpretation or the performance of the provisions of this Procurement shall be submitted, after an attempt at conciliation fails, to an arbitral tribunal with no recourse to judiciary courts. The arbitral tribunal shall be composed of three arbitrators. Each party appoints an arbitrator.⁷⁰

On the basis of this Article the arbitral tribunal found that the procedure of conciliation stipulated by Article 20 was not precise enough to indicate that conciliation was mandatory and therefore it decided that the pre-arbitral conciliation was not enforceable. The Respondent saw to annul the tribunal's decision arguing that that the multi-tiered clause contained express wording which provided that the conciliation "shall" be sought by the parties and thereby argued that the pre-arbitral conciliation was mandatory. The Swiss Federal Supreme Court sided with the tribunal in finding that the imprecision of the clause strongly pointed to the

⁶⁸ *Ibid.*

⁶⁹ Decision of the Swiss Federal Supreme Court in case X. GmbH v. Y. Sàrl, case no. 4A_46/20111, judgment of May 16, 2011.

⁷⁰ *Ibid.*

conclusion that the pre-arbitral conciliation was not mandatory. The court analyzed the precision of the mechanism and the time limits provided in the multi-tiered clause to great detail. The court concluded that because the clause was so imprecise, it was impossible to conclude from the wording of the multi-tiered clause in question what the time-limits to start the mentioned conciliation are, what the conciliation would consist of and whether a conciliator would be involved in the conciliation or not.⁷¹ Even though in the end the court rejected the request for an annulment of the tribunal's decision (since it found that the Claimant tried to conciliate the dispute in accordance with the multi-tiered clause leading to arbitration), this case clearly shows that the precision of the mechanism and clear time limits bear great importance in courts' and tribunals' practice when determining whether to enforce the multi-tiered clauses or not.

Legal scholars have confirmed that the above approach is valid and that courts and arbitral tribunals mainly tend to interpret the clause, looking at the precision of the mechanism stipulated in the multi-tiered clause and the stipulated time limits as basic tools to determine whether a specific multi-tier arbitration clause is enforceable or not. Thus, the mentioned approach is not disputed in either practice or scholarly work.⁷²

⁷¹ *Ibid.*

⁷² See Álvaro López De Argumedo Piñeiro: "Multi-Step Dispute Resolution Clauses in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*" (© Wolters Kluwer España; La Ley 2010) p. 744. Also, ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 *Arbitration*, p. 330. and Baizeau, Domitille; Anne-Marie Loong: Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013) p. 1456.

With regard case law, see decision of the Supreme Court of New South Wales, in Australia, in the case *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd* in which the court held that the pre-arbitration conciliation was "sufficiently certain" for the promise of going through conciliation before submitting the dispute to arbitration to be enforced. The mentioned conciliation agreement contained the issues to be addressed, stipulated the procedure of the conciliation, and, very unusual for conciliation, even defined that conciliation would be with regard to some issues binding upon the parties. Cited in Michael Pryles: "Multi-Tiered Dispute Resolution Clauses", *Multi-Tiered Dispute Resolution Clauses*, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2001, Volume 18 Issue 2) pp. 162 - 163. The mentioned author agrees with the decision of the Supreme Court of New South Wales. Also, see decision of the Swiss Federal Supreme Court in case no. 4A_18/2007 of June 6, 2007, where the Court found that the pre-arbitration conciliation was non-mandatory and stated:

This is logical approach since the more precisely multi-tiered clause is drafted, the more courts and arbitral tribunals will be in a better position to determine the true will of the parties. The precise mechanisms stipulated in the multi-tiered clauses leading to arbitration with clear time limits will give strong indication that the parties stipulated mechanisms to be employed before arbitration with sufficient consideration and that their true will is to have mandatory pre-arbitration mechanisms which must be employed before the arbitration proceedings may be launched. Too vague multi-tiered clauses using general and imprecise terms with no time limits will often point to different conclusion, they will give rise to the question whether the parties agreed on the pre-arbitration mechanisms as mandatory or not. In such situations, if there are no other circumstances which would point to the mandatory nature of the stipulated pre-arbitration mechanisms (for instance, the use of word “shall”), the courts and tribunals will be more inclined to consider these pre-arbitration mechanisms as non-mandatory and will not enforce the multi-tiered clause when all pre-arbitration mechanisms were not used.

This impression is reinforced by the absence of any indication of a time limit within which the mediation procedure should be introduced or even reach a conclusion while the mention of such a time limit is usual in international contracts according to a finding of the Arbitral Tribunal in its discretion. Furthermore, see French Cour de Cassation in Cass. com. *Medissimo v. Logica*, 29 April 2014, n° 12-27.004. in which the court states that the pre-arbitration procedure needs to be sufficiently detailed to be enforceable. Case cited in Travaini, Gregory: “Multi-tiered dispute resolution clauses, a friendly Miranda warning”. Also see *Candid Prod. Inc. v. International Skating Union*, 530 F.Supp. 1330 (S.D.N.Y. 1982) in which the court summarized why it is problematic to enforce general agreements which only provide that the parties shall try to settle the dispute in good faith before going to arbitration, without stipulating any further details:

[A]n agreement to negotiate in good faith is unenforceable because it is even more vague than an agreement to agree; an agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise.

See also case, *International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd and Datamat*, Supreme Court of Singapore, High Court, 12 November 2012, Summons No 636 of 2012, in which the court concluded that the mediation was mandatory and stated: “Not only is there an unqualified reference to mediation through the respective committees, the process is clear and defined. There is nothing uncertain about the mediation procedure”.

3.3. Good Faith Behaviour of the Parties

In cases when the court or the tribunal finds that the multi-tiered clause leading to arbitration is binding upon the parties, the question arises whether the Claimant should always abide to the whole procedure in the multi-tiered clause leading to arbitration or whether the Claimant may be excused in some situations from using all the pre-arbitration mechanisms provided in the multi-tier arbitration clauses. Or, to put it simply in other words, depending on the circumstances of the case and the level of cooperation of the other party in dispute, how much effort the Claimant needs to be make in order for the Claimant to have the right to submit the claim to arbitration.

It follows from the courts' and tribunals' practice that the courts and the tribunals take into consideration various circumstances of the case when deciding whether to enforce the multi-tiered clause or not. Courts and tribunals usually look at circumstances such as:

- whether the Claimant went through the whole pre-arbitration scheme in the multi-tiered clause or not;
- whether the Claimant made reasonable effort to go through the whole pre-arbitration scheme in the multi-tiered clause or not;
- whether there are special circumstances which would release the Claimant from the obligation to abide to the whole mechanism in the multi-tiered clause;
- whether the Respondent cooperated with the Claimant when the Claimant employed the mechanisms provided in the multi-tiered clause.⁷³

When determining whether to enforce multi-tiered clauses leading to arbitration, both courts and tribunals have a case-to-case approach so the above list is not exhaustive.

⁷³ Álvaro López De Argumedo Piñeiro: Multi-Step Dispute Resolution Clauses in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (© Wolters Kluwer España; La Ley 2010), p. 741 - 742.

However, generally speaking, in cases when the multi-tiered clause leading to arbitration provides for the exact condition and/or clear time limits which state when the arbitration may be initiated, courts and arbitrators tend to require the Claimant to abide to the whole procedure and to submit the case to arbitration only when the stipulated condition has been fulfilled or the stipulated time limit has passed.⁷⁴ Naturally, in order for the Claimant to prove that it has the right to start the procedure, the Claimant will have to show that it initiated the stipulated pre-arbitration procedure (e.g. negotiation, mediation or expert determination), that the pre-arbitration procedure took place and that the dispute was not resolved in the pre-arbitration procedure which consequently made the Claimant launch arbitration proceedings. However, as the below analyzed practice will show, courts and arbitral tribunals are ready to take into consideration some other circumstances which may relieve the Claimant from obligation to go through the whole pre-arbitration procedure. This is especially true in situations when according to the circumstances of the case it would be unjust or contrary to good faith to demand from the Claimant to go through all the pre-arbitration mechanisms in the multi-tiered clause leading to arbitration.

In cases when Claimant tried to settle the dispute through the stipulated pre-arbitration procedure and the Respondent simply refused to participate in pre-arbitration procedure stipulated by the multi-tiered clause leading to arbitration without providing any valid reason, some scholars and court's and tribunals' decisions concluded that the Claimant fulfilled its duty to engage into pre-arbitration procedure and, consequently, that the Claimant was authorized to submit the dispute to arbitration.⁷⁵

⁷⁴ An example of such multi-tiered clause would be if the clause provides that negotiation *shall* be conducted before the arbitration and that it shall be deemed that the negotiation/mediation has failed if the parties do not agree within a certain deadline.

⁷⁵ Álvaro López De Argumedo Piñeiro: Multi-Step Dispute Resolution Clauses in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (© Wolters Kluwer España; La Ley 2010), p. 740. Also, see ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 *Arbitration*, p. 330. With regard to case law, see ruling in *Biloune*

This is an understandable and logical approach. It is in accordance with the general principle of good faith not to let any of the parties misuse their rights against the other party. In this case, insisting that the Claimant should go through the whole pre-arbitration procedure even though the Respondent refused to participate in the pre-arbitral dispute resolution mechanism would leave the Claimant in a no man's land. The Claimant could not start arbitration proceedings even though it would have reasonable demand to start the arbitration at that point since it is obvious that no amicable settlement of the dispute can be reached. Also, by insisting that the Claimant should go through the whole pre-arbitration dispute resolution procedure, the Respondent would be awarded for his bad faith behavior of refusing to participate in pre-arbitration dispute resolution procedure since it would be protected from any proceedings which the Claimant could have launched against it. Namely, in this case the Claimant could not refer the dispute to the court since a valid arbitration clause would defer courts from taking the jurisdiction in the dispute, the Claimant could also not refer the dispute to arbitration since contracted mandatory pre-arbitration mechanisms were not employed by the Claimant.

Let us look more of the court's and tribunal's practice on these matters. In a case before the Swiss Federal Supreme Court,⁷⁶ the court found that the Claimant could have initiated arbitration even though all of the pre-arbitration steps have not been undertaken. The case appeared before the Swiss Federal Supreme Court due to annulment proceedings which the Respondent started against the tribunal's partial decision in which the tribunal found that it had jurisdiction over the dispute, even though the Claimant did not submit the dispute to the

(Syria) and Marine Drive Company Ltd. (Ghana) v. Ghana Investment Centre and Government of Ghana (UNCITRAL), where the tribunal said the following: "The Tribunal holds that the legal and contractual prerequisites to arbitration —failure of attempts at amicable settlement— were satisfied by the Claimant's efforts and the Respondent's inaction.", *Biloune (Syria) and Marine Drive Company Ltd. (Ghana) v. Ghana Investment Centre and Government of Ghana (UNCITRAL)*, Award on Jurisdiction and Liability, 27 October 1989, 95, ILR, 184, XIX Yearbook Commercial Arbitration 11 (1994), at p. 18. Also see decision by Zurich Court of Appeals of September 11, 2001, published in ZR 101 (2002), No.21, 77–81, especially p.78., as cited in ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration, p. 330.

⁷⁶ Case A. SA v. B. SA, no. 4A_124/2014, Swiss Federal Supreme Court, judgment of July 7, 2014.

pre-arbitration dispute resolution board as provided by the multi-tiered clause leading to arbitration. According to the Swiss Federal Supreme Court, even though the contract clause did not provide a completely precise mechanism with clear time limits (the multi-tiered clause provided for no time limit for appointment of the dispute resolution board, which indicated that the pre-arbitration procedure was not mandatory), because the clause used the word “shall”, the Swiss Federal Supreme Court concluded that the pre-arbitration procedure was mandatory.⁷⁷ However, according to the Swiss Federal Supreme Court, this did not mean that the Claimant did not have the right to submit the dispute to arbitration before the contracted pre-arbitration resolution of the dispute by the dispute resolution board was used, for two reasons.

Firstly, the court found that the Claimant made an effort to bring the dispute before the dispute resolution board. The Claimant and the Respondent tried to compose the dispute resolution board for several months, however, without success. But, at this point the parties were so hostile towards each other that, according to the Swiss Federal Supreme Court, their positions in the case were “irreconcilable”. Therefore, the pre-arbitration mechanism contemplated by the multi-tiered clause in this case would not serve its purpose — it would not have a filtering effect since even if the dispute would have been submitted to the dispute resolution board, the case would nevertheless go to arbitration since the dissatisfied party would certainly file a request for arbitration. Secondly, the Claimant was excused from its obligation to submit the dispute to dispute resolution board since the constitution of the dispute resolution board lasted too long — the board was not constituted within the period of 15 months. The main reason for this was, according to the finding of the court, the Respondent’s delaying tactics in the process of constitution of the board. Even though this was not expressly stated by the Swiss Federal Supreme Court, it seems that the court held that

⁷⁷ Case A. SA v. B. SA, no. 4A_124/2014, Swiss Federal Supreme Court, judgment of July 7, 2014, pp. 8-9.

it would be contrary to good faith and that the Respondent would unjustifiably benefit if the court took the opposite view and decided that the Claimant should submit the dispute to the dispute resolution board since the Respondent misused this pre-arbitration mechanism by dragging the composition process of the dispute resolution board for 15 months.⁷⁸

The mentioned case is a very good example for how many factors may come into play in considering whether the multi-tiered clause should be enforced and whether the Claimant should be ordered to engage in the pre-arbitration procedure. The Swiss Federal Supreme Court did not stop in analyzing the case when it determined that the multi-tiered clause leading to arbitration is mandatory (due to wording of the multi-tiered clause), but it also took into consideration the behavior of the Claimant⁷⁹ and behavior of the Respondent⁸⁰. Interestingly enough, the Swiss Federal Supreme Court also took into consideration one more factor, not often analyzed by courts and tribunals when deciding on enforcement of multi-tiered clauses. The Swiss Federal Supreme Court took into consideration the purpose of the multi-tiered clauses when it noted that the purpose of the multi-tiered clauses (the filtering effect) cannot be fulfilled in this case since the dispute would surely go to arbitration, even of the dispute was submitted to the dispute resolution board.

A somewhat similar case emerged within the auspices of ICC. In ICC case No. 8445 of 1996 the tribunal dealt with the mandatory multi-tiered clause leading to arbitration which provided for amicable settlement of dispute before the dispute is submitted to arbitration.⁸¹

⁷⁸ See case A. SA v. B. SA, no. 4A_124/2014, Swiss Federal Supreme Court, judgment of July 7, 2014.

⁷⁹ The Swiss Federal Supreme Court took into consideration that the Claimant tried for a considerable period to have the dispute resolved by the dispute resolution board, however this efforts did not succeed without the Claimant's fault.

⁸⁰ The Swiss Federal Supreme Court took into consideration that that the Respondent dragged the procedure of the composition of the dispute resolution board.

⁸¹ *Manufacturer v Manufacturer*, Final Award, ICC Case No. 8445, 1994 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2001 - Volume XXVI*, Yearbook Commercial Arbitration, Volume 26 (© Kluwer Law International; Kluwer Law International 2001) pp. 167 – 180. The exact text of the multi-tiered clause leading to arbitration is not visible from the text of the decision however, it may be ascertained from the available excerpt of the decision that the tribunal regarded the multi-tiered clause in question mandatory. Namely, the tribunal reasoned in its decision that the Claimant had an obligation to at least try to settle the dispute amicably, which implies that the multi-tiered clause in question did not provide for a right but for an obligation to settle the dispute amicably.

The tribunal found that the Claimant was not bound to make further efforts to reach amicable settlement of the dispute since the Claimant had correspondence with the Respondent and from the correspondence it followed that there was no possibility of reaching an amicable resolution of the dispute. Consequently, the tribunal held that the Claimant could refer the dispute directly to arbitration without sending a formal request to the Respondent to try to conclude a settlement. The tribunal concluded that the multi-tier arbitration clause should not be enforced in this case since there was so little chance for the parties to reach a compromise, meaning that the negotiations between the Claimant and the Respondent would be pointless. Consequently, the Claimant was excused from its obligation to enter into negotiations with the Respondent and was entitled to bring the case directly to arbitration.⁸² Although it was not expressly stated by the tribunal, it follows from the decision that the tribunal found that the Claimant at least tried to settle the dispute amicably in the correspondence with the Respondent. The tribunal stated:

There were several further letters, with each party maintaining its position. Those positions were far apart, with little prospect of a compromise, and the defendant did not respond to claimant's last proposal for a meeting in India. Against this background, claimant brought an action before the Indian Court... Thereafter, litigation having been commenced, the possibility of any amicable settlement was even more remote.⁸³

Therefore, it follows that the tribunals tend to require from the parties to at least try to settle the dispute amicably. They do not necessarily require from the parties to do whatever is possible to reach the settlement since this is not the purpose of the multi-tiered clauses. Namely, by enforcing the multi-tiered arbitration clauses courts and tribunals do not enforce cooperation and consent between the parties (since it is practically impossible to order parties

⁸² *Ibid.*

⁸³ *Ibid.*

to cooperate and consent to whatever might come from the said cooperation), but rather the courts and tribunals enforce “participation in a process from which cooperation and consent might come”.⁸⁴

While deciding on the enforcement of the multi-tiered clause, it is important for the courts and tribunals to analyze whether the parties acted in good faith. This criteria is important since it gives flexibility to the courts and tribunals in deciding on enforcement of multi-tiered clauses. For example, when the Respondent misuses its right to require from the Claimant to engage in pre-arbitration mechanisms before submitting the dispute to arbitration, the courts or the tribunals may deny the Respondent the right to require from the Claimant to engage in pre-arbitration mechanisms and deny to enforce the multi-tiered clause leading to arbitration. Therefore, by taking into account whether the parties acted in good faith in each particular case, the courts and tribunals may decide to enforce or not to enforce the multi-tiered clause, whichever would be in accordance with the good behavior of the parties in the particular case.

⁸⁴ Didem Kayali, Enforceability of Multi-Tiered Dispute Resolution Clauses, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6), p. 562

4. REPERCUSSIONS OF PREMATURE SUBMISSION OF A DISPUTE TO ARBITRATION

Generally, arbitral tribunals have adopted two main approaches in handling situations where the Claimant has submitted the claim to arbitral tribunals before complying to the stipulated multi-tiered clause leading to arbitration and exhausting the stipulated procedure. Those approaches are as follows:

- a) substantive approach, and
- b) procedural approach.

Generally speaking, the substantive approach is mostly abandoned in modern international commercial practice while procedural approach is widely used by courts and tribunals in deciding on cases which involve multi-tiered clauses leading to arbitration. The main features of these different approaches are elaborated in more detail in the below text.

4.1. The Substantive Approach

According to this approach multi-tiered clause is a contract of substantive nature. If one party does not abide to his obligation to try to amicably settle the dispute, that party will be liable for breach of contract to the other party and for any consequence which may follow from its breach of the said contractual obligation (e.g. damages), but the breach will not affect arbitral tribunals' jurisdiction nor will it affect the procedure before the arbitral tribunal.⁸⁵

⁸⁵ See Christopher Boog in: "How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court", who says the following: "If the breach of an obligation to engage in pre-arbitral proceedings is considered a question of substantive law, the consequence of such breach should only be, at least from a dogmatic point of view, the remedies provided for under contract law, without having any procedural effect...". Christopher Boog: "How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court" ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2008, Volume 26 Issue 1) p. 107. Also, see ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration, p. 336.

Most scholars criticize the substantive approach since it is not practical. Namely, the Claimant who has submitted the dispute to arbitral tribunal prematurely will be liable to the Respondent for breach of the contract, i.e. damages. However, in most cases it will be very difficult for the Respondent to prove any actual damages which it suffered.⁸⁶ Therefore, in such situations where the Respondent cannot prove any real damages it suffered on the basis of prematurely submitted claim against it, accepting the substantive approach would lead to the Claimant's breach of obligations under the multi-tier arbitration clause not being sanctioned.

It is notable that the available published case law and legal scholars when criticizing the substantive approach do not mentioned one particular right the Respondent might have in case of the Claimant's breach of obligations under the multi-tier clause leading to arbitration. Namely, they do not mention the Respondent's right to require specific performance from the Claimant, that is, to require from the Claimant to try to amicably settle the dispute in accordance with the multi-tiered clause leading to arbitration.

Let us briefly analyze this Respondent's right and its influence on the substantive approach to multi-tiered clauses leading to arbitration. In this scenario, if the Claimant submits the claim to arbitration prematurely and we accept the substantive approach to the nature of multi-tiered clauses leading to arbitration, the Respondent would have the right to require from the arbitrators to issue an injunction ordering the Claimant to try to amicably settle the dispute. At first glance, possibility of obtaining mentioned injunction would make substantive approach an acceptable solution for the Respondent. Namely, substantive approach would adequately protect the Respondent's rights, since it would be easy for the Respondent to obtain the mentioned injunction in the arbitration proceedings — the Respondent would only have to prove that the Claimant breached its obligation to try to

⁸⁶ *Ibid.*

amicably settle the dispute which could be easily proven. However, after more careful analysis, it is obvious that this argumentation does not hold ground and that the substantive approach is not an optimal solution for the Respondent. There are several reasons because of which substantive approach is not an optimal solution even in this scenario.

Firstly, if the parties have contracted the enforceable multi-tiered clause leading to arbitration, the Respondent does not only have the right to require from the Claimant to engage in contracted pre-arbitration mechanism in case dispute arises, but it has the right to require from the Claimant to engage in the mentioned pre-arbitration mechanisms *before* the dispute is submitted to arbitration pursuant to conditions provided in the multi-tiered clause leading to arbitration. Accepting the purely substantive approach would deny this right to the Respondent since substantive approach provides that the breach of obligation to try to settle the dispute amicably before arbitration starts, does not affect the start or continuation of arbitration at all. In effect this would require from the Respondent to enter in arbitration proceedings even though the contractual condition for the start of the arbitration procedure was not fulfilled. Furthermore, even if the Respondent would have obtained the said injunction ordering the Claimant to try to amicably settle the dispute, again this would not necessarily stop the arbitral proceeding. Namely, if the Claimant would try to amicably settle the dispute pursuant to the issued injunction, the arbitral proceedings could continue parallel with the Claimant's effort to settle the dispute amicably. Therefore, the Respondent would, on one hand, have the arbitral tribunal's decision ordering the Claimant to try to amicably settle the dispute, and on the other hand, the arbitral proceedings would proceed to go on. Consequently, this would deny the Respondent's right to require from the Claimant to try to amicably settle the dispute *before* submitting the dispute to arbitration because the Claimant would be free to try to amicably settle the dispute parallel with the ongoing arbitration proceedings.

Secondly, accepting the substantive approach would undermine one of the main purposes of multi-tier arbitration clauses — to filter the disputes that reach arbitration. As elaborated in Chapter 2 of this paper, one of the main reasons why parties use multi-tiered clauses leading to arbitration in today's international commercial transactions is to take advantage of the filtering effect. If the Claimant would submit a premature claim contrary to the multi-tier arbitration clause, and the Respondent would succeed in obtaining the said injunction ordering the Claimant to try to amicably settle the dispute, this would not necessarily prevent the arbitration from continuing, as already explained in this section. The Claimant could try to amicably settle dispute with the Respondent while at the same time continuing to seek award before arbitrators. Consequently, the continuation of the arbitration would hinder the filtering effect of the multi-tiered clauses since the parties would try to amicably settle the dispute while there would be an ongoing arbitration concerning the same dispute. In this case, it is also questionable whether the amicable resolution of the dispute would be probable, especially having in mind the ongoing arbitration proceedings between the parties which could result in more hostile atmosphere between the parties during the process of negotiation on amicable settlement of the dispute. Therefore, accepting the substantive approach to the nature of multi-tier arbitration clauses would undermine one of main advantages of these clauses, that is, the filtering effect, and would thus be counter effective.

4.2. The Procedural Approach

According to the procedural approach, the multi-tiered clause leading to arbitration is of procedural nature and the whole pre-arbitration procedure should be exhausted before the

arbitration proceedings may start or continue.⁸⁷ When the Claimant submits the dispute to arbitral tribunal by skipping the contracted pre-arbitration mechanisms, arbitral tribunal has the following two options:

- i) it may order stay of the arbitration proceedings until the contracted procedure has been complied with by the Claimant, or
- ii) dismiss the claim.⁸⁸

Courts and tribunals use both of these options frequently, although legal scholars are mostly in favor of staying of the arbitral proceedings, except when the parties have expressly contracted otherwise. These options will be examined in the below text.

4.2.1. Dismissing the Request for Arbitration

According to this approach, if the Claimant submits the dispute to arbitration even though it has not used all the pre-arbitration mechanisms stipulated in the multi-tiered clause leading to arbitration, the arbitral tribunal should dismiss the claim. The reasoning behind this approach is that the pre-arbitration mechanisms stipulated in the multi-tiered clause present a condition precedent for arbitration and therefore, arbitration proceedings cannot start at all and need be closed since the condition precedent for arbitration was not fulfilled.⁸⁹

It seems that the arbitral tribunals and courts tend to dismiss the claim if the Claimant has not used all the pre-arbitration mechanisms stipulated in the multi-tiered clause leading to arbitration. For example, in its decision the French *Cour de Cassation* held that mandatory

⁸⁷ Domitille Baizeau and Anne-Marie Loong, Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013), pp. 1458.

⁸⁸ Jollies, Alexander: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 *Arbitration* 4 (Sweet and Maxwell, London), p. 331.

⁸⁹ *Ibid.*

conciliation should be enforced since it is “lawful and binding upon the parties until the end of the conciliation procedure”⁹⁰. Further on, the court stated that if the Claimant does not abide to the stipulated pre-arbitration procedure, the mentioned pre-arbitration procedure should be enforced by finding the claim being inadmissible without even further consideration of the substance of the dispute.⁹¹

In ICC case no. 6276 from January 1990 the multi-tiered clause provided as follows:

Any differences arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties; if not, it shall be settled in accordance with Clause 63 of the General Conditions of Contract.⁹²

Clause 63 further provided that the dispute is to be submitted to the Engineer for decision on the dispute and provided in great detail the procedure to be followed by the parties and the Engineer. The Claimant tried to settle the dispute, but failed to submit the dispute to the Engineer as required by the Clause 63 of the contract. The tribunal concluded that the Claimant did not follow through the mandatory pre-arbitration mechanism in the multi-tiered clause and decided to enforce the multi-tiered clause – it found that the prerequisite for arbitration was not met and that the claim was premature at this point.⁹³

It appears that German and French courts tend to uphold this approach and on several occasions have decided to close the proceedings and found that the claim was inadmissible.⁹⁴

⁹⁰ Cass. com. Medissimo v. Logica, 29 April 2014, n° 12-27.004., decision from the French Cour de Cassation from 29 April 2014, as cited by Gregory Travaini in: “Multi-tiered dispute resolution clauses, a friendly Miranda warning”, available at:

<http://kluwerarbitrationblog.com/blog/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/>

⁹¹ *Ibid.*

⁹² ICC case no. 6276 from January 1990, a Swedish contractor v The Secretary of the People's Committee for a municipality of an Arab State and the Secretary of the People's Committee of Health of that municipality, Partial Awards, ICC Case Nos. 6276 and 6277, 1990, International Journal of Arab Arbitration, (© International Journal of Arab Arbitration; International Journal of Arab Arbitration 2009, Volume 1 Issue 4) pp. 363 – 367

⁹³ *Ibid.*

⁹⁴ With regard to German cases, see: decision German BGH, 23 November 1983, NJW 1984, 669-670, and Decision German BGH, 18 November 1998, reported in NJW 1999, 647-648. With regard to French cases see decision Cour de Cassation, 14 February 2003, *Poiré v. Tripier*, Arbitration International, Vol. 19 (no. 3) 2003,

Legal scholars seem to prefer that the tribunals and courts not find the arbitrable claim inadmissible and close the proceedings, except when the parties have expressly provided otherwise. For example, when the parties have contracted the pre-arbitration proceedings as condition precedent and have contracted that the arbitral proceedings cannot even start without the whole mandatory pre-arbitral proceedings being used, finding the arbitrable claim inadmissible and closing the proceedings would be reasonable approach.⁹⁵ Legal scholars argue that when the arbitral tribunal finds the claim premature, it should order the Claimant to use the contracted mandatory pre-arbitration mechanisms and the arbitral tribunal should stay the proceedings during the period of mandatory pre-arbitration process. Namely, if the tribunal decides to dismiss the claim, the tribunal's jurisdiction would end and if the amicable resolution of the dispute would prove to be unsuccessful, the parties should then appoint another tribunal. This whole procedure would be time consuming and more expensive since the parties should pay another set of fees for the second round of arbitration proceedings.⁹⁶ Also, if the tribunal dismisses the claim another issue could also be lapse of statute of limitation, since in some legislations, dismissal of claim results in presumption as if the claim has not been submitted at all.⁹⁷

368-369; Decision Cour de Cassation, 6 July 2000, *Polyclinique des Fleurs v. Peyrin*, Revue de l'arbitrage 4/2001, 749-764, note by Charles Jarrosson; Decision Cour d'appel Paris, 4 March 2004 in *Nihon Plast v. Takata-Petri*, Revue de l'arbitrage 1/2005, 143-161, note by François-Xavier Train; see also the decisions cited by Poudret/Besson (fn. 12), n. 13, all cited by Christopher Boog in: "How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court", ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2008, Volume 26 Issue 1) pp. 103 – 112. Also, see ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration, pp. 336 - 337.

⁹⁵ See Álvaro López De Argumedo Piñeiro: "Multi-Step Dispute Resolution Clauses", Multi-Step Dispute Resolution Clauses in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (© Wolters Kluwer España; La Ley 2010) pp. 733 - 745. Also, see ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration, pp. 336 - 337.

⁹⁶ *Ibid.*

⁹⁷ See ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 Arbitration, pp. 336 – 337.

4.2.2. Stay of the Arbitration Proceedings

With regard to the two options within the procedural approach (whether to stay the proceedings or to dismiss the claim and close the proceedings), legal scholars are mainly for the first option, i.e. to stay the proceedings, since that option is considered to be more in both parties' interests. Of course, this approach is valid only when the parties have not contracted otherwise, for example that the premature claim submitted to arbitration shall be inadmissible. Namely, when tribunal decides to stay the proceedings, the Respondent's interests are validly protected since the arbitral proceedings shall not be continued at all until the Claimant does not fulfill its duty to try to amicably settle the dispute arising from the multi-tiered clause leading to arbitration. On the other hand, the Claimant's interests are also protected since it will not have to pay double fees for the arbitration proceedings and there will be no risk of lapse of statute of limitation (since the claim would not be dismissed). Furthermore, both parties will benefit from swift justice since it would not be necessary to appoint another tribunal, which in some cases may be time consuming and incurs additional costs⁹⁸.

It seems that, unlike German and French courts, common law courts have more pragmatic approach and they order stay of proceedings.⁹⁹ For instance, in case *Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd* case, Hooper Bailie subcontracted construction work to Natcon and the contract in question contained an arbitration clause. Afterwards, when the dispute arose between the parties and the arbitration already started, Hooper Bailie and Natcon agreed to have some issues resolved via conciliation proceedings. However, a

⁹⁸ *Ibid.*

⁹⁹ See Australian case *Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd.*, (1992) 28 N.S.W.L.R. 194., English case *Channel Tunnel Group v. Balfour Beatty Construction Ltd.* [1993] A.C. 334., English case *Cable & Wireless plc v. IBM United Kingdom Ltd.* [2002] C.L.C. 1319, as cited in Didem Kayali: "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Enforceability of Multi-Tiered Dispute Resolution Clauses*, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6) pp. 551 – 577. Furthermore, see Alexander Jollies who states: "United States courts [...] have also granted motion to compel and accompanying requests to stay court proceedings under multi-tiered dispute resolution clauses." Alexander Jollies: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, Reprinted from (2006) 72 *Arbitration*, pp. 332 - 333.

liquidator was nominated upon Natcon who wanted to continue with the arbitration proceedings. Hooper Bailie immediately submitted a request to the Supreme Court of New South Wales to prohibit Natcon from continuing the arbitration proceedings. The court found that the agreement on the conciliation was mandatory and enforceable. Consequently, the court ordered a stay of the arbitral proceedings until the end of the stipulated conciliation proceedings.¹⁰⁰

It is notable that in Switzerland the court practice differs significantly since there are decisions which dismissed the arbitration claim as premature¹⁰¹ and even those which deemed multi-tiered clause to be a clause of substantive nature.¹⁰² However, in its decision of May 16, 2011, the Swiss Federal Supreme Court hinted that the stay of proceedings should be the appropriate way to go.¹⁰³ Namely, the court noted the Respondent's request to dismiss the claim as premature and in its *obiter dictum* stated as a response to this request that a majority of legal writers in Switzerland are in favor of stay of proceedings, which gives the parties opportunity to remedy the non-compliance with the stipulated pre-arbitration mechanisms. Unfortunately, since the question of stay of proceedings was not relevant to decide on the case, the Swiss Federal Supreme Court did not take a final decision on this issue.

¹⁰⁰ Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd., (1992) 28 N.S.W.L.R. 194. As cited in Didem Kayali: "Enforceability of Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6) p. 562.

¹⁰¹ See Decision by Decision of April 23, 2001 by Court of Appeals, Canton of Thurgau; reported in ASA Bulletin 2003 pp.418–420, cited in ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, *Reprinted from* (2006) 72 *Arbitration*, pp. 336 - 337.

¹⁰² See decision of the Cassation Court of the Canton of Zurich on March 15, 1999, published in ZR 99 (2000) No.29. in which the court held that agreement to conciliate is an agreement of substantive nature and that the courts and tribunals should always accept jurisdiction in case the Claimant has not used all the pre-arbitration mechanisms. Cited in ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, *Reprinted from* (2006) 72 *Arbitration*, pp. 329 – 330.

¹⁰³ X. GmbH v. Y. Sàrl, Swiss Federal Supreme Court case no. 4A_46/20111, judgment of May 16, 2011.

5. JURISDICTION TO DECIDE ON THE EFFECTS OF THE PREMATURE ARBITRATION

In some cases when procedure stipulated by the multi-tier arbitration clause was not complied with by the Claimant and the Claimant filed a premature claim to the arbitrators, the Respondent asserted that the arbitrators did not have jurisdiction since arbitration may start only after the whole procedure stipulated in the multi-tier arbitration clause was followed through.

Arbitral tribunals have decided in most cases that this issue falls within the application of the *Kompetenz-Kompetenz* principle.¹⁰⁴ The *Kompetenz-Kompetenz* principle is regarded as one of the most fundamental principles of international commercial arbitration. According to this principle the arbitral tribunal may decide on its own jurisdiction.¹⁰⁵ This means that if the arbitral tribunal finds that the multi-tiered clause leading to arbitration is enforceable, the arbitral tribunal has jurisdiction to decide on its jurisdiction and is also competent to order the Claimant to abide to the clause and establish that the claim is premature. This is in line with the nature of the multi-tiered clauses leading to arbitration. In these clauses the parties agree on arbitration which should be preceded by an attempt to amicably settle the dispute. The fact that the Claimant did not attempt to amicably settle the dispute in accordance with the conditions set out in the multi-tiered clause leading to arbitration, should not affect tribunal's jurisdiction, but only the admissibility of the premature request to arbitrate.¹⁰⁶

However, in certain cases, U.S. courts have interpreted multi-tiered clauses leading to arbitration differently. The courts have interpreted multi-tiered clauses as parties' intention to try to amicably settle the dispute as a condition precedent to submitting the dispute to

¹⁰⁴ ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, *Reprinted from* (2006) 72 *Arbitration*, p. 335.

¹⁰⁵ Fouchard, Gaillard, Goldman: „On International Commercial Arbitration“, Kluwer Law International, 1999. p. 213

¹⁰⁶ ALEXANDER JOLLIES: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, *Reprinted from* (2006) 72 *Arbitration*, p. 335.

arbitration, meaning that the arbitration cannot start at all before the parties tried to settle the dispute amicably in accordance with the stipulation in the multi-tier arbitration clause. If the parties did not follow the scheme provided in the multi-tiered clause leading to arbitration, U.S. courts have found that the condition precedent for the arbitration was not fulfilled. Consequently, the courts have found that they had jurisdiction to decide on the issues regarding enforcement of the multi-tiered clauses leading to arbitration and on the Claimant's liability for not following the mechanism of the multi-tier clause leading to arbitration.

For instance, in the case *HIM PORTLAND, LLC v. DEVITO BUILDERS, INC.*, the United States Court of Appeals, the First Circuit, found that the parties intended for the mediation to be the condition precedent to arbitration proceedings.¹⁰⁷ The court held that “[the] [a]rbitration clause in parties' agreement, stating that disputes between the parties were subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party, required mediation as a precursor to arbitration proceedings.”¹⁰⁸ The court concluded that since arbitration is a creature of contract and the parties intended mediation to be the condition precedent to arbitration, the will of the parties should be enforced by the court and not arbitrators, i.e. the court found that the Claimant was precluded to compel arbitration since it did not follow the procedure provided in the multi-tiered clause leading to arbitration. In other decisions, U.S. courts have also decided that the

¹⁰⁷ The multi-tiered clause in this case provided as follows:

9.10.1 *Claims, disputes and other matters in question arising out of or relating to this Contract*, including those alleging an error or omission by the Architect but excluding those arising under Paragraph 15.2 [Hazardous Materials], shall be referred initially to the Architect for decision. Such matters, except those relating to aesthetic effect and except those waived as provided for in Paragraph 9.11 [Consequential Damages] and Subparagraphs 14.5.3 and 14.5.4 [making or acceptance of final payment constitutes waiver], *shall, after initial decision by the Architect, or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party* [all emphasis added].

HIM PORTLAND, LLC v. DEVITO BUILDERS, INC., 317 F.3d 41, decided by the United States Court of Appeals, the First Circuit on 17th January 2003.

¹⁰⁸ *HIM PORTLAND, LLC v. DEVITO BUILDERS, INC.*, 317 F.3d 41, decided by the United States Court of Appeals, First Circuit on 17th January 2003.

court, and not the arbitral tribunal, has jurisdiction when arbitrability issue arose.¹⁰⁹ This approach seems to be defensible only in special circumstances when the parties themselves expressly contracted that pre-arbitration mechanism should be the condition precedent to arbitration, as was the situation in the above cited cases. In such situations, if the whole pre-arbitration mechanism has not been used, the arbitration agreement has not come into legal existence. However, in other situations, in which the parties have contracted a particular pre-arbitration mechanism as an obligation but have not expressly contracted the pre-arbitration mechanisms as a condition precedent to arbitration, such stand-point is without merit and the arbitral tribunals should have jurisdiction to decide on the issue of their jurisdiction pursuant to the *Kompetenz-Kompetenz* principle.¹¹⁰

Many scholars today argue that arbitral tribunals should have jurisdiction to decide on the legal consequences in cases where the Claimant did not follow through the contracted pre-arbitration procedure.¹¹¹ This seems like a good and valid approach. If courts adopt the mentioned reasoning that every condition precedent pre-arbitration mechanism disables the tribunal's jurisdiction, this would in effect significantly open the doors for the other party to misuse the said pre-arbitration mechanism and avoid arbitration. For instance, the Respondent could refuse to negotiate with the Claimant and afterwards argue that since the pre-arbitration negotiation was not conducted, the tribunal has no jurisdiction.

¹⁰⁹ See *Weekley Homes Inc. v. Jennings*, 936 SW 2d 16, 18 (Tex. App. 1996). The Court held likewise in *Kemiron Atlantic Inc. v. Aguakem Int'l Inc.*: "The parties agreed to conditions precedent and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort ... [therefore,] [b]ecause neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." *Kemiron Atlantic Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002)

¹¹⁰ Álvaro López De Argumedo Piñeiro: "Multi-Step Dispute Resolution Clauses", in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (© Wolters Kluwer España; La Ley 2010) p. 735.

¹¹¹ For instance, see Álvaro López De Argumedo Piñeiro: "Multi-Step Dispute Resolution Clauses", in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (© Wolters Kluwer España; La Ley 2010) p. 733. Furthermore see Mauricio Gomm Ferreira Dos Santos, *The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements*, *Revista Brasileira de Arbitragem*, (© © Comitê Brasileiro de Arbitragem (CBAr) & IOB; © Comitê Brasileiro de Arbitragem (CBAr) & IOB 2013, Volume X Issue 38) pp. 11-12. Also see, Gary B. Born: *International Commercial Arbitration*, (3d. ed. 2009), p. 241 and Alexander Jollies: "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 *Arbitration*, p. 330.

6. MULTI-TIERED CLAUSES LEADING TO ARBITRATION IN CROATIA

In Croatia, there is little scholarly work or publicly available practice on multi-tier clauses leading to arbitration. This is to some extent surprising since some of the industry sectors which are generally favorable to using multi-tiered clauses leading to arbitration, for instance, the construction sector, have a significant impact on the Croatian economy.¹¹² Furthermore, it is generally accepted today that multi-tiered clauses leading to arbitration provide a flexible, tailor-made mechanism of dispute resolution, which benefits the parties involved in the dispute.¹¹³ Proper drafting and application of multi-tiered clauses leading to arbitration could provide businesses in Croatia advantage with regard to costs and time efficiency in resolving disputes, which would in turn give them further competitive advantage in today's competitive world economy environment. In the light of these facts, it is interesting to analyze issues which were dealt with in this paper through the Croatian perspective and see how the Croatian practice should approach some of the issues which may arise with regard to multi-tiered clauses leading to arbitration.

It is worth noting that the general features of possible pre-arbitration mechanisms that are most commonly contracted between the parties (e.g. negotiation, mediation, dispute resolution) do not deviate from those described in Chapter 2 of this paper. Consequently, the main question that should be answered with regard to multi-tiered clauses leading to arbitration is what the Croatian perspective on the following issues is:

¹¹² Value of performed construction works in the period January-September 2014 decreased by 8.4 percent compared to the same period in 2013 and amounted to about 12.5 billion HRK (cca 1.7 billion EUR). Damir Percel: "Croatian Continued Collapse of the Construction Sector Exception to the EU", *Poslovni Plus*, dated February 9, 2015, p. 1.

¹¹³ Domitille Baizeau and Anne-Marie Loong, Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (© Kluwer Law International; Kluwer Law International 2013) p. 1453

- i. Under what conditions a multi-tiered clause leading to arbitration may be enforced;
- ii. what the criteria for determining enforceable pre-arbitration mechanisms are; and
- iii. what the legal consequences of submitting premature arbitral claim to the arbitral tribunal in Croatia are and who should decide on these consequences.

These questions are basically the same issues which arose in the international commercial arbitration practice and scholarly work. Since there is little scholarly work or publicly available practice on these questions in Croatia, it seems that the solutions provided in the international commercial arbitration practice and scholarly work, which were analyzed in Chapters 3 to 5 of this paper, give a good starting point for addressing the mentioned questions.

6.1. Conditions Under Which a Multi-tiered Clause Leading to Arbitration May be Enforced

When the parties have contracted a particular pre-arbitration mechanism which is to be employed before the dispute may be submitted to arbitration, the main question which should be considered by the tribunal or the court is whether the tribunal may enforce the multi-tiered clause if the Claimant submitted a premature claim and whether the tribunal may order the Claimant to submit the dispute to the pre-arbitral dispute resolution mechanism that the parties have contracted.

There is no reason why a Croatian court or tribunal should approach the problem of enforcing multi-tiered clause leading to arbitration differently than the prevailing number of tribunals and courts in international commercial arbitration, as elaborated in Chapter 3 of this paper. Therefore, the Croatian court and the tribunal should analyze the multi-tiered clause leading to arbitration and establish whether the parties have contracted some or all of the pre-arbitration mechanisms as a *right* or as an *obligation* of the aggrieved party. When the parties

have contracted a particular pre-arbitration mechanism which represents the right of the Claimant, there will naturally be no obligation on the part of the Claimant to try to settle the dispute in the pre-arbitration mechanism. The parties may contract pre-arbitration mechanism as a right by, for instance, expressly stipulating that the aggrieved party has the right to try to settle the dispute through negotiations or mediation or simply by providing that the aggrieved party *may* try to settle the dispute by negotiating with the other party.¹¹⁴ In accordance with this, if the Claimant should submit the dispute directly to arbitration without employing the contracted pre-arbitration mechanism, the tribunal should nevertheless find that it has jurisdiction regardless of the fact that the claim was submitted without employing all the stipulated pre-arbitration mechanisms. This would be in accordance with the agreement of the parties since in this example the pre-arbitration mechanism would not be an obligation of the aggrieved party and would not represent a condition precedent for the start of the arbitration.

On the other hand, if the parties have contracted a particular pre-arbitration mechanism as mandatory, that is, as an obligation of the Claimant, the tribunal should give effect to the parties' stipulation and enforce their agreement by requiring the Claimant to refer the dispute to the mentioned pre-arbitration mechanism when the stipulation of the pre-arbitration mechanism may be considered as enforceable.¹¹⁵ The parties may contract a mandatory pre-arbitral dispute resolution mechanism by explicitly providing that it is an obligation of the parties to submit the dispute to, for example, pre-arbitration negotiation, or by using the word *shall* when contracting that the dispute should be submitted to pre-arbitration negotiation.¹¹⁶

It is important to underline that the parties may contract one or more different pre-arbitration mechanisms (e.g. negotiation, mediation and expert determination) or any

¹¹⁴ For examples of wording non-mandatory pre-arbitration mechanisms in international commercial arbitration which represent the Claimant's obligation for resolving disputes see Chapter 3 of this paper.

¹¹⁵ The criteria for determining an enforceable pre-arbitration mechanism are dealt with in the chapter 6.2.

¹¹⁶ For examples of wording mandatory pre-arbitration mechanisms for resolving disputes in international commercial arbitration see Chapter 3 of this thesis.

combination thereof. When there are more than one pre-arbitration mechanism, the court or the tribunal should determine which of the contracted pre-arbitration mechanisms are mandatory and enforceable. This is important since the general rule is that the Claimant is obliged to use all the stipulated pre-arbitration mechanisms which are mandatory and enforceable.¹¹⁷ Namely, employing one obligatory and enforceable tier for resolving a dispute as stipulated in the multi-tiered clause leading to arbitration cannot resolve the Claimant from its obligation to try to settle the dispute through other mandatory and enforceable tiers in the multi-tiered clause that the Claimant has contracted. Therefore, in order to establish whether the tribunal has the mandate to resolve the dispute or it should refer the Claimant to submit the dispute to contracted pre-arbitral mechanism, it will be important to determine whether the contracted pre-arbitration mechanism is mandatory and enforceable or not.

6.2. The Criteria for Determining Enforceable Pre-arbitration Mechanisms

In determining whether contracted pre-arbitration mechanism is enforceable or not, the court or the tribunal should first establish whether the parties have contracted the pre-arbitration mechanism as a mandatory or non-mandatory pre-arbitration mechanism. In order to establish whether the pre-arbitration mechanism is contracted as a mandatory pre-

¹¹⁷ In international commercial practice, when more tiers were contracted in the scheme stipulated in the multi-tiered clause leading to arbitration, tribunals have found that the Claimant has the obligation to use all the mandatory and enforceable mechanisms. For instance, in the ICC case no. 6276 from January 1990, multi-tiered clause provided for a two-tiered scheme for dispute resolution, the first tier being negotiation between the parties, and if the dispute could not be resolved through negotiations, it should be resolved through expert determination via decision of the Engineer. In this case the Claimant employed only the first tier mechanism as it tried to negotiate the dispute with the Respondent. However, the Claimant failed to employ the second tier and submit the dispute to Engineer but rather it directly launched arbitration. Upon Respondent's objection, the tribunal found that the second tier in the multi-tiered clause leading to arbitration was not used and the Tribunal decided to enforce the multi-tiered clause leading to arbitration. It found that the claim was premature and required from the Claimant to submit the dispute to the Engineer; if this procedure before the Engineer would not resolve the dispute, then the Claimant would be entitled to submit the dispute to arbitration. ICC case no. 6276 from January 1990, a Swedish contractor v The Secretary of the People's Committee for a municipality of an Arab State and the Secretary of the People's Committee of Health of that municipality, Partial Awards, ICC Case Nos. 6276 and 6277, 1990, International Journal of Arab Arbitration, (© International Journal of Arab Arbitration; International Journal of Arab Arbitration 2009, Volume 1 Issue 4) pp. 363 – 367.

arbitration mechanism, the court or the tribunal should apply the general rules on contract interpretation.¹¹⁸ This is a general rule accepted in both international arbitration practice and by legal scholars, as elaborated in more detail in Chapter 3 of this paper. International practice and legal scholars have identified several factors in determining whether the parties have contracted mandatory multi-tiered clause leading to arbitration and whether the clause should be enforced or not, and these are:

- a) the wording of the multi-tiered clause leading to arbitration (for details see Chapter 3.1 of this paper);
- b) whether the parties foreseen a precise mechanism with determined time limits (for details see Chapter 3.2 of this paper); and
- c) whether the parties behaved in good faith (for details see Chapter 3.3 of this paper).

It seems that it would be a well-based approach if these factors should also be considered by Croatian courts and tribunals in determining the mandatory nature of the multi-tiered clause leading to arbitration.

One may ask why courts and tribunals should enforce the pre-arbitral mechanisms in the multi-tiered clause leading to arbitration, especially having in mind the completely voluntary nature of negotiations and mediation. There are several important reasons why the courts and tribunals should enforce the pre-arbitration mechanisms stipulated in the multi-tiered clause leading to arbitration. First of all, one should bear in mind that arbitration is a

¹¹⁸ This is in line with the position of the Swiss Federal Supreme Court taken in the case A. SA v. B. SA, no. 4A_124/2014, judgment of July 7, 2014, where the court said:

The interpretation of an arbitration agreement in Swiss law takes place according to the general rules on the interpretation of contracts. The Court must first learn the real and common intent of the parties, empirically as the case may be, on the basis of clues without stopping at the inaccurate names or words they may have used. Failing this, it will apply the principle of reliance and determine the meaning that, according to the rules of good faith, the parties could and should give to their mutual statements of will in each circumstance. Even if it is apparently clear, the meaning of a text signed by the parties is not necessarily decisive, as purely literal interpretation is prohibited (Art. 18(1) CO11).

creature of contract.¹¹⁹ If the parties have validly contracted a mandatory dispute resolution mechanism which should be employed in order for the Claimant to have the right to submit the dispute to arbitration, this parties' agreement will should be respected by the courts and tribunals.¹²⁰ Every other approach would leave parties' agreement meaningless. Also, if the court or the tribunal would not enforce a mandatory pre-arbitration clause and order the Claimant to go through the pre-arbitration mechanisms before submitting the dispute to arbitration, the Claimant would be awarded for his breach of the obligation to employ the mandatory pre-arbitration mechanism since no sanction would be imposed upon him for the said breach of its obligation. At the same time, the Respondent would be punished since it would not be able to exercise and enforce its valid right to require from the Claimant to submit the dispute to the pre-arbitration mechanisms before going to arbitration.¹²¹ This approach would obviously be contrary to the principles of good faith and fair dealing and duty to perform obligations from the contract, which are applicable to all contractual obligations in Croatia pursuant to Articles 4 and 9 of the Croatian Obligations Act¹²².

The mentioned reasons are equally valid for all of the mandatory pre-arbitration mechanisms which the parties may contract, e.g. negotiation, mediation and expert

¹¹⁹ Redfern and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London, p. 6

¹²⁰ English courts have been traditionally reluctant to recognize enforceable pre-arbitration mechanisms, so it is valuable to note their attitude on why multi-tiered clauses should be enforced. One of the most famous cases involving multi-tiered clause was the Channel tunnel case, Channel tunnel being Europe's biggest infrastructure project financed wholly by private capital. In this case the court stated:

Those who make agreements for the resolution of disputes must show good cause for departing from them ... Having promised to take their complaints to the experts and if necessary to the arbitrators, this is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purposes is to my way of thinking quite beside the point.

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd., ICC case n.º 6276 (1993), 2 WLR 262 at p. 276 et seq.

¹²¹ As explained in Chapter 4.1 of this paper, the Respondent would, in theory, still have the right to claim damages from the Claimant arising from the fact that the Claimant did not fulfil its obligation and submit the dispute firstly to stipulated pre-arbitration mechanisms in the contract. However, such right is impractical since in most cases it will be impossible for the Respondent to prove any actual damage suffered which leaves the Claimant's breach unsanctioned.

¹²² According to the Article 4 of the Croatian Obligations Act (Official Gazette nos. 35/2005, 41/2008, 125/2011, hereinafter: Croatian Obligations Act), in creating obligations and exercising the rights and obligations resulting from such obligations, parties shall act in accordance with good faith and fair dealing. Article 9 stipulates that parties to obligations shall perform their obligations and they are liable for their performance.

determination. Additionally, with regard to mediation as a pre-arbitration mechanism in the multi-tiered clause leading to arbitration, there is an additional argument for the tribunals, when presented with a premature arbitral claim, to order the Claimant to submit the dispute to mediation before the dispute may be resolved through arbitration. Namely, according to the Croatian Mediations Act, when the parties have stipulated that they should settle the dispute by mediation and have expressly obligated themselves not to start or continue arbitration proceedings before contracted condition has been fulfilled or contracted period has passed, such contractual stipulation *shall* have binding effect and *shall* be enforced by the courts and tribunals.¹²³ It follows that the mandatory language of the said provision of the Croatian Mediations Act does not allow the tribunals to deviate from the provision and decide not to enforce pre-arbitration mediation if it fulfills the said requirements of the Croatian Mediations Act. For further analysis on how to proceed in such case, see below section 6.3 of this paper.

6.3. The Legal Consequences of Submitting Premature Arbitral Claim to the Arbitral Tribunal in Croatia and Who Should Decide on these Consequences

With regard to the consequences of a premature arbitral claim, it is notable that the Croatian legislator has passed the Mediations Act and regulated that when the contracted pre-arbitration mediation has not been followed through, the arbitral tribunal shall dismiss the request for initiation or continuation of the proceedings.¹²⁴ At the same time, there is no legal

¹²³ Article 18 of the Croatian Mediation Act (Official Gazette No. 18/2011).

¹²⁴ This is stipulated in the Article 18 of the Croatian Mediation Act (Official Gazette No. 18/2011), which reads as follows:

If the parties have agreed on the implementation of the mediation and explicitly committed themselves during a specific period of time or until the occurrence of the specific conditions will not initiate or continue a court, arbitration or other proceedings, such an agreement has binding effect. In this case, the court, arbitrators or other bodies before which the proceedings are initiated in the same matter of dispute, will reject upon the request of the other party, motion by which proceedings are instituted or continued.

provision which would expressly govern legal consequences of premature arbitral claim when negotiation and expert determination are contracted as pre-arbitration mechanisms.

Therefore, it follows that, when presented with a premature arbitral claim regulated by Croatian law, tribunals should proceed as follows:

- if the parties contracted an enforceable pre-arbitration mediation which fulfills conditions set by the Croatian Mediations Act, the tribunal should dismiss the claim, as regulated by the Croatian Mediations Act; and
- if the parties contracted an enforceable pre-arbitration negotiations and/or expert determination, the tribunal may either dismiss the claim or stay the proceedings until all the mandatory pre-arbitration mechanisms have been used pursuant to stipulation in the multi-tiered clause leading to arbitration.¹²⁵

It seems that when tribunals are presented with pre-mature arbitral claim, and if enforceable pre-arbitration negotiations and/or expert determination have been contracted between the parties, the tribunal should stay proceedings, since such approach has advantages in comparison to dismissing the claim. As explained in detail in Chapter 4.2 of this paper, this is the approach which is taken by most tribunals and legal scholars as the most appropriate. Of course, this is a valid approach only if the parties have not contracted otherwise (for example, that the premature claim submitted to arbitration shall be inadmissible). This approach is considered to be more in both parties' interests since by staying the proceedings the Respondent's interests are validly protected — the arbitral proceedings shall not be continued at all until the Claimant does not fulfill its duty to try to amicably settle the dispute arising from the multi-tiered clause leading to arbitration. On the other hand, the Claimant's

¹²⁵ According to the opinion of the author of the thesis, the substantial approach (according to which pre-mature arbitral claim should have no consequences on the arbitral procedure whatsoever) is abandoned in the comparative arbitration practice and is not suitable for dealing with the pre-mature arbitral claims for reasons described in the Chapter 4.1 of this thesis. Therefore, according to the prevailing attitude of the practice in the international commercial arbitration, only the procedural approach should be applied by the tribunal, which means that the tribunal should either stay proceedings or dismiss the claim as premature.

interests are also protected since it will not have to pay double fees for the arbitration proceedings and there will be no risk of lapse of statute of limitation (since the claim will not be dismissed). Furthermore, both parties will benefit from swift justice since it will not be necessary to appoint another tribunal, which in some cases may be time consuming and incurs additional costs.

With regard to the enforceable pre-arbitration mediation, from Article 18 of the Croatian Mediations Act it follows that the Croatian legislator has decided to adopt the procedural approach, which is generally preferred in the international commercial practice, and has stipulated that the tribunal shall dismiss the pre-mature arbitral claim and close the proceedings. The mentioned provision does not give the option for the court or tribunal to stay the proceedings until the mediation is finished (which would be the preferred version of the procedural approach in international commercial arbitration practice) and has been criticized in Croatian scholarly work¹²⁶. Even though the language of the mentioned provision is clearly mandatory (use of the word “shall”) the practical implications of this provision with regard to arbitration are nevertheless questionable. Namely, it is conceivable that there may be situations where the circumstances of the case require swift acts from the tribunal and the parties since closing of the proceedings altogether would harm justice. In such situations, when the arbitrators deem that it would be justified to stay the proceedings (and not to dismiss the claim and close the arbitral proceedings pursuant to the Mediations Act) until the Claimant fulfills its obligation to submit the dispute to pre-arbitral mediation, it seems that there would be little room for the dissatisfied party to attack such arbitrators’ decision. Namely, from all the stipulated grounds to seek set aside of the tribunal’s award pursuant to the Croatian Arbitrations Act (Official Gazette no. 88/2001, hereinafter: Arbitrations Act), only two provisions could be applicable to this situation, and those are:

¹²⁶ See Prof.Dr. Davor Babić: “Mediation Law in Croatia: When EU Mediation Directive met the UNCITRAL Model Law on Conciliation”, German Arbitration Journal (SchiedsVZ) (1610-322X) 11 (2013), 4; p. 220

- a) Article 36 paragraph 2 subparagraph 1 point e) of the Croatian Arbitrations Act, according to which an arbitral award may be set aside by the court only if the party making the application furnishes proof that the arbitral procedure was not in accordance with the Arbitrations Act or a permissible agreement of the parties and that fact could have influenced the content of the award. This would hardly be applicable when the tribunal decides to stay proceedings instead of dismissing the arbitral claim and closing the arbitral procedure since it is hard to imagine how tribunal's decision to stay proceedings instead of closing the proceedings would influence the content of the award. The only difference between these two scenarios is that when the tribunals decides to stay the proceedings and the proceedings continue, there will be no need to establish a new tribunal, as the proceedings will continue before the same tribunal; and
- b) Article 36 paragraph 2 subparagraph 2 point b) of the Croatian Arbitrations Act, according to which an arbitral award may be set aside by the court only if the court finds that, even if a party has not raised these grounds, the award is in conflict with the public policy of the Republic of Croatia. This would hardly be applicable in the case where the tribunal decides to stay proceedings instead of dismissing the procedure since the provision of the Croatian Mediation Act cannot, in the opinion of the author of this paper, be considered as a provision of the public order. Public order has been dealt with in several court decisions and a decision from the High Commercial Court of the Republic of Croatia has given a particularly useful definition. The court elaborated the term public order as follows:

In the opinion of this court, even the former provision of Article 485, point 6 of the CPA [i.e. Civil Procedure Act] ([the mentioned provision was regulating the] violation of the Croatian Constitution and the established foundations of the social system) did not proscribe the conflict with all mandatory norms, and

certainly not all positive laws and regulations, as the legal basis for the annulment of the arbitral tribunal's award, as the trial court mistakenly concluded. The concept of public order of the Republic of Croatia should be applied in this manner as well. The concept of public order certainly, among other things, includes most fundamental legal and moral principles on which the system of the Republic of Croatia rests. [...] Not every violation of regulations makes an award necessarily contrary to the public order of the Republic of Croatia, even if it is an obvious violation of a mandatory regulation. For example, violation of a procedural rule does not in itself represent a reason for which an award would necessarily be contrary to the public order of the Republic of Croatia. In such a case, the court must, within the circumstances of the case, assess the importance of that provision to the legal system of Croatia, but also the impact of the consequences of the violation of that provision in relation to the public policy of Croatia.¹²⁷

Two conclusions may be drawn from the above cited decision of the High Commercial Court of the Republic of Croatia. Firstly, the mere fact that Article 18 of the Croatian Mediations Act uses mandatory language when proscribing that the arbitral tribunal *shall* dismiss the pre-mature arbitral claim does not mean that the mentioned norm represents the public order of the Republic of Croatia. Secondly, given the narrow understanding of the term *public order*, it does not seem likely that the courts would interpret the mentioned Article 18 of the Croatian Mediations Act as a provision which represents “fundamental legal and moral principles on which the system of the Croatia rests.”¹²⁸ This is especially true if we have in mind that in the scenario proposed in this paper, the arbitral tribunal would disregard Article

¹²⁷ Decision of the High Commercial Court of the Republic of Croatia, case no. Pž-4486/02-3 dated March 1, 2005, published in the Collection of the Croatian Commercial Courts' decisions (Vol. 10), pp. 188-189.

¹²⁸ *Ibid.*

18 of the Croatian Mediations Act only if, according to circumstances of the case, it would be a justified and appropriate step to do (for instance, when the dismissal of the claim and closing the proceedings altogether would harm justice since circumstances of that particular case would require swift action from the tribunal).¹²⁹ In such cases, it would be hard to argue that the dismissal of the premature arbitral claim would harm “fundamental legal and moral principles on which the system of the Croatia rests.”¹³⁰

With regard to the question who decides on the pre-mature arbitral claim, there are several reasons why arbitral tribunal should decide on such issue. Firstly, such an approach would be in accordance with the will of the Croatian legislator. Namely, it is obvious from the mentioned Article 18 of the Croatian Mediations Act that the arbitral tribunal has jurisdiction to decide on the premature arbitral claim. This follows from the wording of the Article:

If the parties have agreed on the implementation of the mediation and explicitly committed themselves during a specific period of time or until the occurrence of the specific conditions will not initiate or continue [...] arbitration [...] proceedings, such an agreement has binding effect. In this case [...] *arbitrators* [...] in the same matter of dispute, will reject upon the request of the other party, motion by which proceedings are instituted or continued.¹³¹

Therefore, it clearly follows from Article 18 of the Croatian Mediations Act that the arbitrators have jurisdiction to decide on the pre-mature arbitral claim if the mandatory pre-arbitral mediation has been contracted between the parties. There is no reason why the same principle should not be applied when the parties have also contracted for other mandatory pre-arbitral dispute resolution mechanisms (e.g. negotiation and/or expert determination).

¹²⁹ This argument should not be understood as advocating that the arbitrators should deviate from the Article 18 of the Croatian Mediations Act and order a stay of proceedings simply because such a decision could not be contested before the Croatian courts. Namely, arbitrators have a mandate to handle and adjudicate the case in accordance with the applicable legal rules. Therefore, deviation from the Article 18 of the Croatian Mediations Act should be made only in the said, special circumstances when strict application of Article 18 of the Croatian Mediations Act would harm justice in that particular case.

¹³⁰ *Ibid.*

¹³¹ Article 18 of the Croatian Mediations Act, (emphasis added).

Secondly, such an approach would be in accordance with the generally accepted the *Kompetenz-Kompetenz* principle, which is stipulated as a valid and applicable legal principle by Croatian statutes.¹³²

In conclusion, even though there is no published practice or legal scholarly work on multi-tiered clauses leading to arbitration in Croatia, the solutions introduced by international commercial practice and legal scholars' writing on international commercial practice may serve as a good guide for Croatian courts and tribunals. As explained in Chapter 6 of this paper, those solutions represent a very practical and balanced approach to the enforceability of multi-tiered clauses leading to arbitration.

Accepting the approach offered in international commercial practice and jurisprudence, Croatian courts and tribunals would not only be in line with the mainstream international commercial arbitration practice but would appropriately enforce the parties' agreements in multi-tiered clauses furthering the filtering effect of multi-tiered clauses, which is one of the main reasons why businessmen decide contract these clauses in the first place.

¹³² According to Article 15 paragraph 1 of the Croatian Arbitrations Act (Official Gazette no. 88/2001):

The arbitral tribunal may rule on its own jurisdiction, including any objections with deciding on the existence or validity of the arbitration agreement. For this purpose, an arbitration clause which forms part of a contract shall be treated as an agreement separate from the other terms of the contract. The decision of the arbitral tribunal that the contract is null and void shall not on itself mean that the arbitration clause is invalid.

7. CONCLUSION

In today's international business practice it has become a general trend to try to amicably settle disputes before they go to court or arbitration. There are numerous advantages of such practice, the most notable are cost efficiency, avoiding court or arbitration proceedings which may be time consuming, and enhanced possibility of future business relationship between the business partners that amicably settled the dispute.

Multi-tier arbitration clauses enable parties to engage in such amicable settlement before the arbitration proceedings and therefore use the advantages which mentioned mechanisms offer. When properly drafted, arbitrators and courts generally tend to enforce multi-tier arbitration clauses.

This paper suggests that the procedural approach to multi-tier arbitration clauses when the arbitrators and courts decide to enforce multi-tier arbitration clauses by, on one hand, referring the Claimant to engage into amicable settlement of dispute pursuant to multi-tier arbitration clauses, and on the other hand, staying the proceedings (instead of dismissing the claim) until the mechanism provided in multi-tier arbitration clause has been complied with by the Claimant, serve best to the purpose of multi-tier arbitration clauses.

BIBLIOGRAPHY

Legal sources

- Croatian Arbitrations Act (Official Gazette no. 88/2001)
- Croatian Obligations Act (Official Gazette nos. 35/2005, 41/2008, 125/2011)
- Croatian Mediations Act (Official Gazette No. 18/2011)
- Fourth Edition from 1987 with the 1992 amendments of the FIDIC Rules
- ICC Mediation Rules, also available at:
<http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>,
 accessed 25 March 2015
- The ICSID Conciliation Rules, also available at:
https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, accessed
 25 March 2015
- UNCITRAL Conciliation Rules, also available at:
<http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>, accessed
 25 March 2015
- WIPO Mediation Rules as in force from June 1, 2014, also available at:
<http://www.wipo.int/amc/en/mediation/rules/>, accessed 25 March 2015

Legal Books and Articles

- **Babić**, Davor: “Mediation Law in Croatia: When EU Mediation Directive met the UNCITRAL Model Law on Conciliation”, German Arbitration Journal (SchiedsVZ) (1610-322X) 11 (2013), 4; pp. 214 – 223.

- **Baizeau**, Domitille; Anne-Marie Loong: Chapter 13, Part X: Multi-tiered and Hybrid Arbitration Clauses in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide, Kluwer Law International (2013) pp. 1451 – 1461, also available at:
<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Arroyo-Ch13-P10&query=content%3A%226276%22>

- **Berger**, Klaus Peter: “Law and Practice of Escalation Clauses” Arbitration International, (2006), Vol. 22, No. 1, pp. 1-14

- **Boog**, Christopher: How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court, also available at:
<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn30113>

- **Born**, Gary B.: International Commercial Arbitration, Kluwer Law International, Second Edition, Kluwer Law International, (2014)

- **Bühning-Uhle**, Christian, Lars Kirchhoff, et al.: Arbitration and Mediation in International Business, Chapter 6 - Alternative Dispute Resolution Techniques, Kluwer Law International (2006) pp. 169 – 210, also available at:
<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn30871>

- **De Argumedo Piñeiro**, Álvaro López: “Multi-Step Dispute Resolution Clauses”, Miguel Ángel Fernández-Ballesteros and David Arias (eds), Liber Amicorum Bernardo Cremades, Wolters Kluwer España; La Ley (2010) pp. 733 - 745, also available at:
<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-1039040-n>

- **Fouchard**, Gaillard, Goldman: „On International Commercial Arbitration“, Kluwer Law International, 1999

- **Gomm Ferreira Dos Santos**, Mauricio: “The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements”, *Revista Brasileira de Arbitragem*, Comitê Brasileiro de Arbitragem & IOB, (2013), Volume X, Issue 38, pp. 7 - 15, also available at:

[http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-RBA-1038002-n&query=AND\(content%3A%22multi%22,content%3A%22tiered%22\)](http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-RBA-1038002-n&query=AND(content%3A%22multi%22,content%3A%22tiered%22))

- **Jimenez-Figueres**, Dyala: “Multi-Tiered Dispute Resolution Clauses in ICC Arbitration”, 14 ICC Bull., pp. 71-88, No. 1, (2003), also available at:

<http://djarbitraje.com/pdf/Multi-Tiered%20Dispute%20Resolution%20Clauses%20in%20ICC%20Arbitration%20%28intro%20and%20comment%29.pdf>

- **Jollies**, Alexander: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement“, 72 *Arbitration* 4, Sweet and Maxwell, London, (2006), pp. 329–338

- **Kayali**, Didem : “Enforceability of Multi-Tiered Dispute Resolution Clauses”, *Kluwer Arbitration site*, *Journal of International Arbitration*, Kluwer Law International (2010), Volume 27 Issue 6, pp. 551 – 577

- **Percel**, Damir: “Croatian Continued Collapse of the Construction Sector Exception to the EU”, *Poslovni Plus* dated February 9, 2015, also available at:

<http://www.poslovnipuls.com/2015/02/09/nastavak-urusavanja-hrvatskog-gradevinskog-sektora-iznimka-u-eu/>

- **Pryles**, Michael: „Multi-Tiered Dispute Resolution Clauses“, Volume 18, no. 2 (2001), *Journal of International Arbitration*, pp. 159–176, also available at:

[http://www.kluwerarbitration.com/CommonUI/document.aspx?id=IPN22362&query=AND\(ONEAR/0\(content%3A%22multi%22,content%3A%22tiered%22\),content%3A%22dispute%22,content%3A%22resolution%22,content%3A%22clauses%22\)#note*](http://www.kluwerarbitration.com/CommonUI/document.aspx?id=IPN22362&query=AND(ONEAR/0(content%3A%22multi%22,content%3A%22tiered%22),content%3A%22dispute%22,content%3A%22resolution%22,content%3A%22clauses%22)#note*)

- **Pryles**, Michael: „Limits to Party Autonomy in Arbitral Procedure“, (2007) 24(3) Journal of International Arbitration 327-339, also available at:
http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf
- **Redfern** and Hunter: „Law and Practice of International Commercial Arbitration“, 2004, Sweet & Maxwell, London
- **Stipanowich**, Thomas and Lamare, J. Ryan “Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations (2013)”. 19 Harvard Negotiation Law Review 1; Pepperdine University Legal Studies Research Paper No. 2013/16, available at
[SSRN:http://ssrn.com/abstract=2221471](http://ssrn.com/abstract=2221471) or <http://dx.doi.org/10.2139/ssrn.2221471>
- **Travaini**, Gregory: “Multi-tiered dispute resolution clauses, a friendly Miranda warning”, available at: <http://kluwerarbitrationblog.com/blog/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/>
- **Vaibhay**, Verma: „Enforceability of Multi-tiered Dispute Resolution Clauses“, available at:
http://www.academia.edu/4468123/Enforcement_of_Multi_Tiered_Arbitration_Clauses
- **Várady**, Tibor, John J. Barcelo III, Arthur T. Von Mehren: International Commercial Arbitration, a Transnational Perspective, Fifth Edition, 2012, American Casebooks, p. 14

CASE INDEX

- Biloune (Syria) and Marine Drive Company Ltd. (Ghana) v. Ghana Investment Centre and Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95, ILR, 184, XIX Yearbook Commercial Arbitration 11 (1994)
- Candid Prod. Inc. v. International Skating Union, 530 F.Supp. 1330 (S.D.N.Y. 1982)
- Cassation Court of the Canton of Zurich on March 15, 1999, published in ZR 99 (2000) No.29.
- Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd., ICC case n.º 6276 (1993), 2 WLR 262
- Emirates Trading Agency LLC v Prime Mineral Exports private Limited, High Court Of Justice, Queen's Bench Division, Commercial Court, [2014] EWHC 2104 (Comm), Case No: 2013 Folio 1559
- Cass. com. Medissimo v. Logica, 29 April 2014, nº 12-27.004., decision from the French *Cour de Cassation* from 29 April 2014, as cited by Gregory Travaini in: “Multi-tiered dispute resolution clauses, a friendly Miranda warning”
- High Commercial Court of the Republic of Croatia, no. Pž-4486/02-3 dated March 1, 2005
- Him Portland, LLC v. Devito Builders, INC., 317 F.3d 41, decided by the United States Court of Appeals, First Circuit on 17th January 2003
- ICC case no. 4230 as cited in Kayali, Didem: “Enforceability of Multi-Tiered Dispute Resolution Clauses”, © Kluwer Law International; Kluwer Law International 2010, Volume 27 Issue 6, pp. 567
- ICC case no. 6276 from January 1990, a Swedish contractor v The Secretary of the People's Committee for a municipality of an Arab State and the Secretary of the People's

Committee of Health of that municipality (© International Journal of Arab Arbitration; International Journal of Arab Arbitration 2009, Volume 1 Issue 4) pp. 363 – 367

- ICC case no. 8445 of 1996, Manufacturer v Manufacturer, in Albert Jan van den Berg, Yearbook Commercial Arbitration 2001-Vol XXVI, Yearbook Commercial Arbitration, Vol 26 (Kluwer Law International; Kluwer Law International 2001) pp. 167 – 180
- ICC case no. 9977 as cited in Dyala Jimenez-Figueres: Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14 ICC Bull. 71 (No. 1, 2003)
- ICC case no. 10256 as cited in Dyala Jimenez-Figueres: Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14 ICC Bull. 71 (No. 1, 2003)
- International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd and Datamat, Supreme Court of Singapore, High Court, 12 November 2012, Summons No 636 of 2012
- Kemiron Atlantic Inc. v. Aguakem Int'l Inc., 290 F.3d 1287, 1291 (11th Cir. 2002)
- Swiss Federal Supreme Court case no. 4A_124/2014, judgment of July 7, 2014
- Swiss Federal Supreme Court case no. 4A_46/20111, judgment of May 16, 2011
- Swiss Federal Supreme Court case no. 4A_18/2007, judgment of June 6, 2007
- Weekley Homes Inc. v. Jennings, 936 SW 2d 16, 18, Tex. App. 1996