Serbia

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1. What are the current challenges to enforcement of multi-tiered dispute resolution clauses?

Multi-tiered dispute resolution clauses are frequently present in agreements concluded by Serbian parties. Typically these are rather simple provisions, which provide for the parties to attempt to settle amicably any disputes arising out of or in connection with the agreement; in case amicable settlement is not possible the clause proceeds to specify the competent court. More complex clauses, which specify negotiation techniques or mediation, can be found in complex, high-end, high-value transactions, which usually involve sophisticated parties. It appears that alternative dispute resolution mechanisms (negotiation or mediation) are more often emphasised before resorting to litigation, than before arbitration.

However, enforcement of such clauses has not yet been tested before Serbian courts. There is no court practice in this regard. Likewise, there are no arbitral awards available that dealt with this issue. Thus it remains unknown how the courts and arbitration tribunals will interpret these clauses and what legal force and effect will be assigned to them. Serbian law does not contain specific provisions on multi-tiered dispute resolution clauses and their enforceability.

In the absence of express provisions and judicial practice the question of enforceability of multi-tiered dispute resolution clauses could be approached in the light of general rules of contract law, civil procedure and mediation.

One of the fundamental principles of the Serbian Obligations Act is that the parties should endeavour to resolve any dispute or controversy through negotiations or mediation. The Civil Procedure Act requires the court to educate parties about the possibility of resolving the dispute through mediation or other form of amicable settlement. Further, the newly adopted Mediation in Dispute Resolution Act emphasises that courts and other bodies must provide the parties with all necessary information to ensure full awareness about the possibility of recourse to mediation.

It can be argued that these principles should facilitate the enforceability of multi-tiered dispute resolution clauses and allow (or even require) the court to analyse their nature and effect. However, the courts would not perform this analysis *ex officio*, as the scope of such issues is defined by law, and multi-tiered clauses are not among them. The court would thus not be likely

to take any action regarding the enforceability of multi-tiered dispute resolution clauses in the absence of an express request, i.e. objection by a party.

Yet due to the above mentioned principles, there are reasonable grounds to expect that courts would not simply disregard a party's objection and treat these clauses as unenforceable without going into the "merits" of such agreement and analysing the effect the parties intended on achieving by way of such clauses.

This is truer still if the parties envisioned mediation as a first tier. Namely, the Mediation in Dispute Resolution Act provides that if the parties undertook the obligation to mediate before initiating litigation or arbitration, the future claimant must send the other party a written proposal for mediation. The other party must then respond within 15 days. The Act does not venture as far as to state the consequences of failure to comply with these rules. But it can be reasonably argued that sending a written proposal for mediation would be considered a condition precedent for the initiation of litigation or arbitration. The future claimant would then be able to proceed to court or arbitration only if the other party does not agree to mediation or fails to reply within 15 days of receipt of the claimant's written notice. However, the Mediation in Dispute Resolution Act entered into force on 1 January 2015 and has not yet had a chance to prove the efficiency of its provisions.

2. What drafting might increase the chances of enforcement in your jurisdiction?

Since there is no jurisprudence in respect of the application of multi-tiered dispute resolution clauses, there is no "tested" model that is deemed enforceable. Proper drafting may significantly affect its potential enforceability. This would depend on the goal parties want to achieve.

Parties may wish just to reaffirm their positive attitude towards a transaction and the counterparty and emphasise their preference for amicable settlement of any future disputes, without, however, introducing particular conditions that must be fulfilled before either of the parties may turn to court or arbitration. In such a case, a general clause that the "parties will try to settle the dispute amicably" without specifying the mechanism of the amicable settlement (negotiation, mediation) would suffice. This is an option they have in any event, even if it is not specifically stated in the agreement.

If the parties wish to introduce negotiation as a mandatory first step there are several aspects to consider for making such clause enforceable. The idea would be to make the clause as clear and as specific as possible to reduce or eliminate ambiguity. Ideally, it should be possible to reduce such a clause to a "checklist" which needs to be completed before filing a lawsuit or request for arbitration.

For example, a fixed time frame for negotiations. The time frame for negotiations will vary depending on the type of the contractual relationship. In simple commercial matters this period may be as short as five days, while in complex construction agreements it may be between 60 to 90 days. In the context of timing, it is advisable to specify the starting point for negotiations, e.g. a requirement that the party sends a written request for negotiations to the other party specifying

the dispute in sufficient detail; fixing the deadline for the other party to respond to the request, the number of rounds, etc.

Depending on the type of transaction it could be useful to specify the persons who will take part in the negotiations. Some disputes of a commercial nature may be settled swiftly by top management. However, in some cases where the dispute deals with technical matters it may be more productive to include technical staff in the negotiations (e.g. engineers).

Thus, the clause should be precise enough to facilitate its implementation by the parties and to enable the court to easily determine if the parties fulfilled the agreed requirements. However, at the same time, it must not be overly burdensome or complicated. The clause must not deny parties their right to bring their claim before a court as a fundamental constitutional right. The objective of the clause is to expedite resolution of the dispute resolution, not to obstruct it.

The importance of precise wording of the multi-tiered dispute resolution clause is particularly noticeable when reading the new Mediation in Dispute Resolution Act. Namely, the act provides that if, when concluding the agreement, the parties *undertook* to mediate before initiating litigation or arbitration, the future claimant *must* send a written proposal for mediation to the other party. However, the potential claimant would not be obliged to send this written proposal if the agreement states that the parties *may* try to resolve the dispute by mediation. This would be an option for the parties but not an obligation required by the Act.

Additionally, in the case of mediation it would be very useful to specify the mediator or the mediator selection process or or which institution the parties should refer their dispute to.

3. If your courts have enforced such clauses, how have they done so?

The absence of jurisprudence in this area points to a certain (high) level of uncertainty as to how the courts will enforce multi-tiered dispute resolution clauses. The current framework of the Civil Procedures Act suggests several ways as to how a court may proceed in the event a defendant raises an objection that the plaintiff failed to undertake prior stages.

One option is to stay the proceeding and direct the parties to follow preventative-stage procedure. The court is authorised to do so in cases where special laws require the parties to attempt mediation or the parties agreed to try to mediate in the course of the proceeding. Thus, the court might use this authority where the parties have skipped the first stage and made no attempt to negotiate. Yet, such an order by the court would largely depend on the parties' willingness to try an alternative dispute resolution mechanism. If the claimant is clearly not interested in negotiations, and does not wish to seek an amicable settlement, the court has no other option but to continue the litigation. Otherwise, it could be argued that it unnecessarily prolonged the dispute and denied the claimant an efficient court proceeding.

Another option is for the court to dismiss the claim on procedural grounds because the parties did not fulfill the agreed pre-conditions which indicate that the procedural requirements for filing the lawsuit have been met. This approach has been suggested in some commentaries on resolution of disputes arising from collective bargaining agreements that contain multi-tiered dispute

resolution clauses and negotiations as a first tier. Additionally, this approach appears to be more in line with the provisions of the Mediation in Dispute Resolution Act which states that if the parties in their agreement undertook the obligation to attempt mediation, the potential plaintiff must send written notice to the other party. Otherwise, the potential defendant would be deprived of its right to try mediation. In such case, if no agreement on mediation has been reached or the mediation was unsuccessful, the party may refile the lawsuit.

4. Please give an example of a clause that has been found to be, and remains, enforceable in your jurisdiction.

As explained above, it is difficult to provide an example of a multi-tiered dispute resolution clause which has proved its enforceability and remains to be enforceable. Moreover, this applies to the clauses which provide for mediation as the Mediation in Dispute Resolution Act has been recently adopted. The following are suggestions of the initial draft which should be further amended to the transaction at hand and the parties' intentions.

Where the parties wish to make negotiations the first tier of dispute resolution:

> *"Any dispute arising out of or in connection with this Agreement, the parties will endeavour to resolve by negotiation [consider specifying who will participate in the negotiations]*.
>
> *If the dispute is not resolved within [number] days from the day of receipt of the written proposal for negotiations by the other party, such dispute shall be finally resolved by the competent court in [specify the city]/arbitration [include valid arbitration clause]*.

In the case of mediation, the multi-tiered dispute resolution clause may be drafted to read as follows:

> *"In the event of a dispute arising out of or in connection with this Agreement, the parties shall first seek settlement of that dispute by mediation [specify rules of mediation of the institution in question, or specify the mediator, mediator selection process]. A party requesting resolution of the dispute is obliged to send a written proposal for concluding an agreement to mediate to the other party. The other party must respond within 15 days.*
>
> *If the dispute is not settled by mediation within [.....] days of the commencement of the mediation, or such further period as the parties shall agree in writing, or if the other party rejects the proposal for mediation or fails to reply to the proposal within 15 days, such dispute shall be finally resolved by the competent court in [specify the city]/arbitration [include valid arbitration clause]".*