

Macedonia

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

As to challenges to enforcement of multi-tiered dispute resolution clauses in Macedonia, the situation is very similar to other countries in the Balkans. The main challenge is that there has been no enforcement of multi-tiered dispute resolution clauses by either local courts or arbitral tribunals so far.

Such clauses are nevertheless found in various types of agreements. It is, therefore, reasonable to expect that this issue will surface eventually in litigation or arbitration in Macedonia. At this point it is unclear how the courts and arbitrators will interpret these provisions since Macedonian law does not specifically legislate the enforceability of these dispute resolution clauses.

In the absence of express provisions and jurisprudence 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.

Among others, a fundamental principle of the Macedonian Obligations Act is that the parties should endeavour to resolve any dispute or controversy through negotiations or mediation. The Civil Procedure Act stipulates that the court should inform the parties to the dispute in writing before the preparatory hearing about the possibility of resolving the dispute through mediation or other form of amicable settlement.

Further, the court may stay the proceeding if the parties decide to settle the dispute through mediation. It is worth noting that under amendments to the Civil Procedure Act proposed in 2013 the parties would be required to try to resolve disputes below a certain threshold through mediation. In this case the parties would be entitled to litigate only if a settlement is not reached through mediation. However, these amendments have not been adopted.

According to the applicable Mediation Act, mediation is voluntary and both parties may decide to terminate mediation at any time. The question arises as to whether the parties are obligated to try mediation if there is such a clause in their contract. Arguments may be put forward in favour of both the obligatory and non-obligatory nature of such clause. However, taking into account

that any party may terminate mediation at any time the court does not have a means to force parties to mediate.

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

As with other contractual provisions, a multi-tiered dispute resolution clause should be clear and precise leaving no room for ambiguity or vagueness. Not only because parties want to ensure they can enforce it but also because they will benefit from a straightforward business relationship. In addition to this, there are several aspects which are unique to the multi-tiered dispute resolution clause which the parties can consider adopting.

The time frame for first stage of dispute resolution could form the backbone of the multi-tiered dispute resolution clause. Parties could determine the time frame depending on the complexity of the transaction. On the one hand, disputes arising from simple transactions may be settled within shorter time frames (from 10 to 30 days), while, on the other hand, disputes related to complex transactions would need more time for negotiations (e.g. 90 days). Another consideration in connection with the complexity and type of transaction is which persons should be authorised to negotiate. 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 efficient to include technical staff in the negotiations.

Further the parties should include certain formalities regarding the opening of negotiations. For example, parties can agree that the party that intends to commence litigation/arbitration should first send a written request for negotiations to the other party. It could be required that such written notice specify the dispute in sufficient detail. Also, the parties should agree on the time period within which the other party must respond to the request for negotiations. Subsequently, the parties can agree on the number of sessions, meetings etc. to be held.

In summary, the dispute resolution clause that prescribes negotiation as a first tier for dispute resolution 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 terms. However, at the same time, it must not deny parties their right to bring their claim before a court as a fundamental constitutional right.

In case of mediation the parties should specify the mediator or mediator selection process or whether the parties are to refer their dispute to a specific institution for mediation.

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

Macedonian courts have few options when it comes to enforcement of multi-tiered dispute resolution clauses. These options have been deduced from some general provisions of the Civil Procedure Act which governs court proceedings.

The Civil Procedure Act expressly prescribes that the court will stay proceedings if the parties decide to bring their claim before the mediator. As the mediation cannot last longer than 45 days in accordance with the Mediation Act, if a settlement is not reached within that time frame the

court will continue the proceedings. There are grounds to argue that the court might also stay proceedings where the parties disregarded the first step and made no attempt to negotiate. Yet, such a decision by the court would largely depend on the parties' willingness to engage in the alternative dispute resolution mechanism. If the claimant is 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, the court would deny justice to the claimant and breach one of the most important judicial standards.

The second option for the court is to dismiss the claim on procedural grounds because the parties failed to fulfill the agreed pre-conditions that could be considered as procedural requirements for filing the lawsuit.

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

As has already been noted it is very difficult to provide an example of a multi-tiered dispute resolution clause which has been tested in practice and enforced by the courts. 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 [specify number] 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].