

Montenegro

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

It has become rather common for parties in Montenegro to stipulate to an obligation to negotiate or attempt to apply an alternative dispute resolution ("ADR") mechanism before commencing arbitration or litigation proceedings to settle disputes arising out of their contracts. However, there are no provisions in Montenegrin procedural statutes expressly regulating this or other types of multi-tiered dispute resolution clauses. There are likewise no settled court practices or available arbitral decisions referring specifically to the enforceability of such clauses. Thus, the enforceability of multi-tiered dispute resolution clauses in Montenegro is not subject to specific conditions established particularly for this purpose. However, the lack of specific criteria governing multi-tiered dispute resolution clauses does not automatically guarantee unrestricted enforceability of these so called "escalation clauses" or "waterfall clauses". Rather, the validity and enforceability of pre-litigation or pre-arbitration tiers in these clauses in Montenegro should be challenged against general legal principles applicable both with respect to contracts and dispute resolution, on a case-by-case basis and depending on the exact wording of each individual clause.

To put the foregoing into the perspective of the Montenegrin legal system, pre-litigation or pre-arbitration stages in these clauses should be construed the same way as any other contractual provision. As such, the initial stage of these clauses must satisfy the basic principles that make a contract provision susceptible to enforcement. These principles include in particular a requirement that the subject matter of a contract be possible, permitted, and sufficiently determinable.

Given that typical ADR procedures and amicable settlement of disputes are values that are not only admissible but to a certain extent even promoted in the Montenegrin legal system, multi-tiered dispute resolution clauses should generally be permitted. Further, the ADR stage of these clauses should be sufficiently clear and precise to allow for determining what steps must be taken in order to comply with the clause. In order to be construed as a positive obligation, it should be clear that the ADR phase in these clauses is a mandatory and unequivocal commitment to attempt the application of the relevant ADR mechanism prior to litigation or arbitration.

Having due regard to the basic principles of contract law, in order to be a valid contractual condition, the ADR tier should not be subject to further agreement of the parties. Since the aim of these clauses is to make recourse to a final and binding dispute resolution mechanism temporarily conditional upon the application of the agreed ADR mechanism, the length of such prerequisite stage should be unequivocally defined, i.e. it should be clear when and under what conditions the ADR stage in a particular multi-tiered dispute resolution clause comes to an end.

Finally, application of a particular multi-tiered dispute resolution clause in its actual effect should not foreclose access to justice for the parties, i.e. should not substantially prevent the parties from obtaining final protection of their rights by virtue of a binding court decision or arbitration award. Fixing a very long period of time for the ADR phase might be seen as actually foreclosing access to justice for the parties. Similarly, other particular conditions that may be found in some escalation clauses, such as negative injunctions when the prior stage is delayed or is not complied with, should also be carefully assessed, based on the circumstances of each particular case, and in the light of applicable general principles of law.

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

As noted above, given the lack of regulation and available dispute resolution practice addressing this issue, there are no criteria which would serve as reliable guidelines for drafting a multi-tiered dispute resolution clause with the certainty of enforceability in Montenegro.

The most common multi-tiered dispute resolution clauses refer the parties to amicable settlement negotiations before they have recourse to a court or arbitration. These provisions usually do not include any further details other than the time limit for reaching an amicable settlement. Although it could be argued that, in case of negotiations in the first tier of a dispute clause, even the aforesaid simple and short format may suffice, it could also be upgraded to increase the chances that such provision will be enforced as an actual prerequisite to further trial process. This could be done by adding further details on the operation of the relevant negotiation process, e.g. the contact details of persons authorised to lead negotiations, description of the form of such negotiations, conditions for the transition from the negotiations to the litigation or arbitration phase, the consequences of disregarding the first tier, etc.

More complex multi-tiered dispute resolution clauses should also be clearly drafted and detailed enough to sustain any challenge as outlined above under point 1. To reduce the risk of unenforceability, the clause should employ mandatory instead of discretionary language, thus showing the actual will of the parties to be bound by any such prerequisite to arbitration or court proceedings. The provision should clearly specify the start and end points of each such mandatory stage prior to arbitration or litigation. In order to facilitate enforcement and avoid delays in the dispute resolution process, the clause should further specify the procedural steps of the ADR phase including the method of selection of a mediator, expert, or any such third party in the context of the applicable ADR tier. It could be advisable also to indicate the consequences of failure to comply with such prior stage. One should, however, be cautious and ensure that any such negative inference of non-fulfilment of the preceding tier is not unreasonable and will withstand the test of general principles of law. The time period set for such pre-arbitration or pre-

litigation stages should not be too long, in order not to be construed as hindering the party from reaching justice.

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

Along with the absence of general regulation and practice in the enforcement of multi-tiered dispute resolution clauses, there are also no provisions or practice clearly indicating the exact procedural action through which the court would enforce such clauses.

As typical preliminary tiers in multi-tiered dispute resolution clauses oblige the parties to attempt negotiation or other ADR mechanism before referring the dispute to arbitration or litigation, under the Montenegrin procedural law, non-fulfilment of such a condition precedent may be qualified as a removable procedural impediment for the admissibility of a lawsuit (*otklonjiva procesna smetnja*). Taking into account the nature of this condition, it could be expected that the court would consider non-fulfilment of such condition only in response to an objection by one of the parties. If the court finds that a valid and enforceable preliminary tier of a multi-tiered dispute resolution has not been fulfilled it may either dismiss the lawsuit or stay the proceeding until such pre-litigation stage has been fulfilled, or, in case of a negotiation clause, until it was at least reasonably attempted. Given that pursuant to the Montenegrin Code of Civil Procedures the court may at any time stay the proceeding and refer the parties to mediation if it finds that such process could bring the parties to settlement, it could be argued that the stay of proceedings may be an even more appropriate solution when deciding on non-fulfilment of multi-tiered dispute resolution clauses.

The effect and enforcement of multi-tiered dispute resolution clauses, where breach of previous stages cannot be subsequently remedied, should be analysed separately and on a case-by-case basis.

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

The following could be a sample of a multi-tiered dispute resolution clause with negotiation in the first tier:

The parties shall endeavour to resolve any dispute, controversy or claim arising out of or in relation to or in connection with this agreement including any dispute in relation to its validity or interpretation ("dispute") by negotiation on the top level meeting held by the authorised executives of the parties. If the parties fail to resolve the dispute by negotiation within [number of days] as of either party's written notice requesting such negotiation of the dispute, any such dispute shall be finally resolved before the competent court in [country and the city to be added] /in arbitration in accordance with [rules, arbitral institutions, seat and other details to be added].