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Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective

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Mediation has gained much popularity in Croatia in the last several years, and the Croatian legislator regulated enforceability of mediation in Article 18 of the Croatian Mediation Act (Official Gazette No. 18/2011, "the MA"). The solutions provided in the MA are to a large extent resembling the solutions in the UNCITRAL Model Law on International Commercial Conciliation ("the UNCITRAL ML").

A significant number of commercial contracts in Croatia stipulate that mediation should be conducted before the dispute is submitted to arbitration. However, not all such stipulations fall within the scope of Article 18 of the MA and not all are enforceable. It follows from this Article that the following conditions have to be fulfilled in order for a particular multi-tiered clause to be enforceable:
i) the parties have to agree on mediation to be conducted before initiation or continuation of the arbitration; and
ii) the parties have to explicitly commit themselves not to initiate or continue arbitration proceedings during a specific period of time or until the fulfillment of a specific condition.

With regard to the first condition stipulated by Article 18 of the MA, the MA explicitly defines the notion of mediation in Article 3 as any procedure in which the parties try to resolve the dispute by reaching the settlement, with the assistance of one or more mediators who are helping the parties reach the settlement, without having any authority to impose a binding solution upon the parties. The definition of mediation provided in the MA is consistent with the notion of mediation in international commercial mediation, so there should not be much controversy in the practice whether a particular contract stipulates for mediation within the meaning of the MA or it provides for some other dispute resolution method (for example, negotiation or expert determination). Consequently, the first condition for the application of Article 18 of the MA is rather straightforward.

The second condition stipulated by Article 18 of the MA is not as straightforward and there may be some situations in which it might not be clear whether this condition is fulfilled and whether the multi-tiered clause should be enforced. International commercial arbitration practice and scholarly work have identified several criteria for enforceability of pre-arbitration mechanisms in general. These criteria could help in

determining whether the mentioned second condition of Article 18 of the MA is fulfilled and, consequently, whether the contracted pre-arbitration mediation should be enforced or not.

First Criteria: the Wording of the Multi-tiered Clause

According to the first criteria, if the wording of the multi-tiered clause indicates that the true intent of the parties was to have mandatory pre-arbitration mechanism, the tribunals and courts will generally be inclined to enforce such parties' stipulation. Such wording may be expressed by using any appropriate language which would indicate that submitting the dispute to pre-arbitration mechanism is an obligation rather than merely a right for the aggrieved party. For example, if the parties contracted that the pre-arbitration mechanism "shall" be used by the aggrieved party or that arbitration may start "only if" the pre-arbitration mechanism is employed by the aggrieved party or by providing that the aggrieved party has the "obligation" to use the pre-arbitration mechanism before employing arbitration (see for example, ICC Cases nos. 4230 and 10256, as cited in Kayali, Didem: *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Kluwer Law International 2010, Volume 27 Issue 6, p. 567 and in Dyala Jimenez-Figueres: *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, 14 ICC Bull. 71 (No. 1, 2003)).

Second Criteria: the Precise Mechanism with Clear Time Limits

According to this criteria, 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 (for example, 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 2009, Volume 1 Issue 4) pp. 363 – 367).

Third Criteria: General Principles of Law

Even in cases when courts and tribunals find that pre-arbitration mechanisms fulfill all the above-mentioned conditions, they nevertheless sometimes decide not to enforce them. For example, in cases when one party misuses the pre-arbitration mechanisms and is dragging the pre-arbitration procedure so that the other party's claim would become time-barred, tribunals and courts decided that in those circumstances the other party may be excused from employing all the contracted pre-arbitration mechanisms before submitting the dispute to arbitration, provided that it acted diligently and that the risk of the statute of limitation cannot be attributed to its behavior (for example, Case A. SA v. B. SA, no. 4A_124/2014, Swiss Federal Supreme Court, judgment of July 7, 2014). It is expected that the above criteria will be used as well by the Croatian courts and the tribunals in deciding on enforcement of mediation in multi-tiered clauses leading to arbitration pursuant to Article 18 of the MA.

Legal Consequences of Enforcing Mediation in Multi-tiered Clauses Leading to Arbitration — a Touch of Controversy in the Croatian Approach

If all conditions stipulated by Article 18 of the MA are fulfilled, arbitral tribunals shall

enforce the mediation clause by dismissing the motion for start or continuance of arbitration and terminating the arbitration proceedings. In this respect, the solution provided in the MA departs from the solution in the UNCITRAL ML. UNCITRAL ML provides for a stay of proceedings while the MA provides for a dismissal of the motion for start or continuance of arbitration and termination of the proceedings. This approach of the Croatian legislator has received some criticism and this was not without basis. It is widely accepted approach in international arbitration practice and scholarly work that arbitral tribunals should, when confronted with premature request for initiation or continuation of arbitration, stay the proceedings, and not dismiss the motion and terminate the proceedings, unless the parties have specifically stipulated that premature request shall result in dismissal of the motion and closing the proceedings (for example, Case Cable & Wireless plc v. IBM United Kingdom Ltd. [2002] C.L.C. 1319). Given that the MA provides that the arbitrators "shall dismiss" premature motion, the MA unfortunately gives no discretion to the arbitrators to decide to stay the proceedings.

There are several reasons for the tribunals and courts preferring to stay proceedings in international commercial arbitration. Staying the arbitral proceedings instead of terminating them is more time and cost effective. If the arbitral procedure is stayed, it will continue in front of the same tribunal. Therefore, there is no need to appoint a new tribunal, as would be the case if the proceedings are terminated. Also, costs will be reduced since the aggrieved party will not have to pay any additional fees when it submits the new motion for continuance of the arbitral proceedings. On the other hand, in case of a dismissal of the arbitral claim, the aggrieved party will need to pay registration and administrative fees again and a new tribunal shall have to be appointed, while the previous tribunal will request the appropriate amount of the fees to be paid as well.

Conclusion

So far, the Croatian legislator has followed the recent trends in regulation of the multi-tier clauses. For that reason, it is unfortunate that it deviated from the main trend in the international arbitration practice when it comes to the legal consequences of the enforceable multi-tier clauses. Therefore, there is no doubt that the international arbitral practice and the scholarly work should be taken into account by the Croatian courts and tribunals when deciding under the MA on enforceability of mediation in the multi-tier clauses. However, the Croatian solution which provides that the tribunal should dismiss the motion for start or continuance of the arbitration and terminate the proceedings requires the second look by the legislator, and possibly an adequate reform.

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