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# Multi-Tiered Dispute Resolution Clauses: Can the Agreement to Mediate Prior to Commencing Arbitration Be Binding?

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On 12 July 2024, the Dutch Supreme Court (the "Supreme Court") rendered its much anticipated decision on whether clauses providing for mediation as a procedural step before arbitration (or court litigation) are binding upon the parties, requiring an arbitral tribunal (or court) to decline jurisdiction to hear the case or, at least, requiring a stay of the proceedings until mediation has been attempted.

The Supreme Court's earlier decision from 2006, which had been issued in a family law case, emphasised the voluntary nature of mediation but failed to clarify the binding nature of pre-suit mediation between professional parties. This had led Dutch courts to consider pre-suit mediation agreements as generally not binding. The present decision clarifies the position under Dutch law, at least in part.

The Supreme Court explained that mediation clauses included in multi-tiered dispute resolution clauses "can" oblige the parties to attempt mediation before initiating arbitration or litigation. Whether such an obligation exists and what it entails, is a matter of the interpretation of the clause. Non-compliance with a binding pre-arbitration mediation clause will, however, not affect the jurisdiction of the arbitral tribunal. Although the arbitral tribunal may stay the pending proceedings to allow the parties to mediate, it is explicitly not obliged to do so.

**Background of the Case**

In 2017, a Dutch company, Project Partner Search Beheer B.V. ("PPSB"), sold its shares in a subsidiary to another Dutch company, Lotamblau Investments B.V. (previously named Capabel Solutions Works B.V., "CSW"). The Share Purchase Agreement between PPSB and CSW contained the following dispute resolution clause:

> "Any disputes between the parties arising out of this agreement will be resolved by the parties initially through mediation. Should the parties be unable to resolve such disputes in this manner, they will be submitted to arbitration (by a single arbitrator) to the exclusion of the ordinary courts, unless the interim relief judge in the event of an urgent interest." (unofficial translation)

When a dispute arose in 2019, PPSB initiated arbitration and requested the Judge of the District Court of Rotterdam ("the District Court") to appoint an arbitrator in accordance with Article 1027(3) of the Dutch Arbitration Act ("DAA"). CSW opposed this request, arguing that mediation should take place first. The District Court nevertheless appointed an arbitrator.

The parties proceeded to arbitration where CSW opposed the arbitrator's jurisdiction on the same grounds and requested a stay of the proceedings until the parties had made a serious attempt to mediate. In his interim award, the arbitrator rejected CSW's request as a mediation would only result in unreasonable delay in view of the parties' attitude at the hearing. In his final award on the merits, the arbitrator granted PPSB's claims in part and denied CSW's counterclaims. CSW then commenced setting aside proceedings in the Court of Appeal of The Hague ("the Court of Appeal"), as the court of first instance in accordance with Article 1065 of the DAA, arguing that the arbitral award must be set aside for the lack of a valid arbitration agreement since the condition precedent for the arbitration agreement – i.e., a serious attempt to mediate – had not been met.

The Court of Appeal rejected CSW's application to set aside the arbitral award. It considered that the content and effect of mediation clauses must be established in accordance with the meaning that the parties could reasonably have attributed to such mediation clauses in the given circumstances, and what they could reasonably have expected from each other in this regard (the *Haviltex* standard). The Court of Appeal held that the two separate sentences composing the clause could be interpreted to allow an arbitrator to be appointed when it is anticipated that the dispute cannot be resolved through mediation, for example, due to one party's unwillingness to mediate. Considering the voluntary nature of mediation, PPSB could reasonably understand the arbitration clause as not containing a legally binding obligation to attempt mediation.

In cassation proceedings before the Supreme Court, CSW argued that the Court of Appeal's reasoning was incomprehensible because it was inherently contradictory. According to CSW, it follows unequivocally from the arbitration agreement that disputes can only be submitted to arbitration after it has become clear that they cannot be resolved through mediation; the agreement contains a binding obligation to first try to resolve the dispute through mediation, which would at least entail a non-binding first meeting of the parties with a mediator.

The Advocate-General – the Supreme Court's formal adviser whose advice is followed more often than not – advised to annul the Court of Appeal's judgment. According to the Advocate-General, (professional) parties can agree on a legally binding obligation to try to resolve a dispute through mediation. The voluntary character of mediation does not stand in the way of such a binding obligation. A binding mediation clause may be beneficial to the parties because mediation has also proven successful in cases where (one of) the parties were initially unwilling to mediate. The Advocate-General stated that a binding mediation clause as part of a multi-tiered arbitration clause may qualify as a condition precedent to the validity of the arbitration agreement. Non-compliance with the mediation clause would then result in the absence of a valid arbitration agreement.

**The Supreme Court's Decision**

The Supreme Court partially agreed with the Advocate-General but refused to annul the Court of Appeal's judgment.

First and most importantly, the Supreme Court confirmed that the (voluntary) nature of mediation

does not prevent the parties from agreeing on a binding mediation clause. The meaning of such clause must be determined by interpretation in accordance with the *Haviltex* standard. The fact that the mediation clause is part of a commercial contract between professional parties may be relevant for the interpretation, but does not necessarily lead to the conclusion that the mediation clause is binding.

The Supreme Court did not specify the scope of the parties' obligations under a binding mediation clause, but merely stated that this scope must also be determined by interpretation.

The Supreme Court further stressed that a binding pre-arbitration mediation clause may not be enforceable if it would unacceptably prejudice a party's right to access an independent and impartial tribunal, as guaranteed by Article 6 of the European Convention on Human Rights ("ECHR") and referred in that regard to the European Court of Justice's case law (i.e. ECLI:EU:C:2010:146 (*Alassini*) and ECLI:EU:C:2017:457 (*Menini*)).

Finally, the Supreme Court considered the situation in which a party, regardless of a binding mediation clause, initiates arbitration without having tried to resolve the dispute through mediation. Without responding to CSW's argument that a binding mediation clause is a condition precedent and that non-compliance stands in the way of a valid arbitration clause, the Supreme Court ruled that the arbitral tribunal "may" stay the proceedings at the request of the other party to give the parties an opportunity to comply with the binding mediation clause. The Supreme Court explicitly stated that the tribunal is not obliged to do so, and provided by way of example two reasons for deciding not to stay the proceedings: if the matter is too urgent or if the tribunal deems the mediation to be pointless.

Applying these considerations to the case at hand, the Supreme Court upheld the Court of Appeal's decision because its (factual) interpretation that the mediation clause at hand is not binding was not based on an erroneous understanding that mediation clauses in general cannot be binding under Dutch law. The mere fact that another interpretation of the mediation clause is also possible does not render the Court of Appeal's interpretation incomprehensible. CWS's appeal in cassation was therefore rejected.

**Analysis and Conclusions**

While providing some welcome clarity on the fact that mediation clauses under Dutch law can be binding upon (professional) parties, the Supreme Court's decision still leaves full discretion to arbitrators to decide how to deal with such mediation clauses. The arbitral tribunal may – upon request and not *ex officio* – stay pending proceedings to give the parties an opportunity to attempt mediation, but is not obliged to do so. It will therefore, in principle, not be possible to challenge such (procedural) decisions by an arbitral tribunal in setting aside proceedings. This may be seen as a reflection of the "pro-arbitration" stance generally taken by the Dutch courts.

Ignoring a mediation clause will not lead to the inadmissibility of the claim or lack of jurisdiction of the arbitral tribunal. It can however result in a (short) delay in the proceedings if the other side insists upon pre-arbitration mediation and the tribunal considers that (1) the mediation clause is indeed binding upon the parties, and (2) there are no reasons for not attempting mediation before pursuing the arbitration.

The questions of whether the mediation clause is binding and what kind of efforts or attempts can be expected from the parties bound by a mediation clause will have to be answered on a case-by-case basis by interpretation of the contract. Relevant case law will be scarce as arbitral decisions regarding mediation clauses will generally not be the subject of judicial review. The Supreme Court's decision serves as a general reminder for practitioners that the drafting of dispute resolution clauses is crucial as it all boils down to interpretation.

Finally, this decision reminds the parties that mediation is a valid choice and a reasonable alternative for lengthy and costly arbitration proceedings or court litigation, which may efficiently resolve the dispute or narrow the issues to be decided prior to arbitration.

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