



# **The Non-Compliance with Multi-Tier Dispute Resolution Clauses: Switzerland and Germany**



ASA Conference

Bern, 15 September 2017

Dr. Christian Oetiker, LL.M., Attorney at Law, VISCHER AG



Switzerland



# Overview

- Legal nature of Multi-Tier Dispute Resolution ("MDR") clauses.
- Requirements for enforcement of MDR-clauses.
- Consequences of non-compliance with an MDR-clause.
- Challenge of an arbitral award dealing with the non-compliance of an MDR-clause.





# Nature of MDR-clauses

- Proposed approaches:
  - Agreement of substantive nature.
  - Agreement of procedural nature.
  - Agreement of substantive nature, but with procedural effects.
- Interpretation in accordance with the general principles of contract interpretation (DFSC 142 III 296, c. 2.4.1.1; DFSC 4A\_18/2007, c. 4.3.2).
- The Federal Supreme Court held that any sensible remedy for non-compliance may be only of procedural nature (DFSC 142 III 296, c. 2.4.4.1).





# Requirements for enforcement of MDR-clauses

- Compulsory nature of the MDR-clause (DFSC 142 III 296, c. 2.4.4.1; DFSC 4A\_18/2007, c. 4.3.2):
  - Inclusion of a clear time-limit.
  - Wording of the MDR-clause.
- Non-compliance.
- No abuse of rights:
  - Party invoking the non-compliance must have proposed to hold the pre-arbitral tier (DFSC 142 III 296, c. 2.4.3.1; DFSC 4A\_18/2007, c. 4.3.3.1; DFSC 4P.67/2003, c. 4).
  - If the other party initiated the pre-arbitral tier, the party invoking non-compliance with an MDR-clause must have participated, or offered to participate (DFSC 142 III 296, c. 2.4.3.2).



# ● Consequences of non-compliance with an MDR-clause

## **Four proposed approaches**

- Substantive remedies.
- Arbitral tribunal should decline jurisdiction.
- Arbitral tribunal should find the claim inadmissible "for the time being".
- Arbitral tribunal should stay the proceedings.



# Consequences of non-compliance with an MDR-clause

## **First approach: Substantive remedies**

- Non-compliance triggers only substantive remedies:
  - Specific performance.
  - Damages.
  - Rescission of the contract.
  - Contractually agreed consequences of non-performance (e.g. penalties).
- The Swiss Federal Supreme Court has explicitly stated that damages are not an appropriate and satisfactory means to sanction the non-compliance with an MDR-clause (DFSC 142 III 296, c. 2.4.4.1).





# Consequences of non-compliance with an MDR-clause

## **Second approach: Arbitral tribunal should decline jurisdiction**

- Such approach would raise a number of issues:
  - Could the same arbitrators be appointed by the parties again?
  - The need to constitute a new arbitral tribunal would lead to a significant delay and to additional costs for the parties.
  - The question of whether a statute of limitation was validly interrupted could arise.
- The Swiss Federal Supreme Court found that, in view of these issues, declining jurisdiction cannot be the appropriate remedy (DFSC 142 III 296, c. 2.4.4.1).





# Consequences of non-compliance with an MDR-clause

**Third approach: Arbitral tribunal should find the claim inadmissible "for the time being"**

- The arbitral tribunal makes no finding on jurisdiction.
- The arbitral proceedings are closed.
- The claimant may re-initiate new arbitral proceedings after having complied with the MDR-clause.
- Same issues as in case of declining jurisdiction.



# Consequences of non-compliance with an MDR-clause

## **Fourth approach: Arbitral tribunal should stay the proceedings**

- The arbitral tribunal stays the proceedings.
- The parties are set a time-limit to proceed to the agreed pre-arbitral tier.
- The Swiss Federal Supreme Court concurs that this approach is indeed the preferable solution

(DFSC 142 III 296, c. 2.4.4.1):

- The suspension of the arbitral proceedings needs to be requested.
- The arbitral tribunal needs to set the conditions under which the arbitral proceedings will be continued.



## Challenge of an arbitral award dealing with the non-compliance of an MDR-clause

- The violation of an MDR-clause can be challenged based on Art. 190(2)(b) PILS which deals with jurisdictional issues (DFSC 142 III 296, c. 2.2; DFSC 4A\_46/2011, E. 3.4).
- No violation of public policy.





# Conclusions

- An MDR-clause may only be enforced if it is compulsory and if the reliance on such clause does not constitute an abuse of rights. Non-compliance must be established.
- A Swiss arbitral tribunal may not find that the non-compliance with an MDR-clause excludes its jurisdiction.
- The arbitral tribunal will need to stay the proceedings and set the claimant a time-limit to comply.
- The Swiss Federal Supreme Court has left open the door for different approaches in particular situations.





Germany



## Position of the German courts

- The non-compliance with MDR-clauses cannot be challenged invoking the lack of jurisdiction of the arbitral tribunal (BGH, 14.1.2016, I ZB 50/15, confirming OLG Hamburg, 27.5.2015, 6 Sch 3/15; BGH, 9.8.2016, I ZB 1/15, c. II.3).
- Not a question of jurisdiction, but of the admissibility of a claim.
- The arbitral tribunal would need to reject the claim for the time being.





# Findings

- A German arbitral tribunal may uphold jurisdiction although a multi-tier dispute resolution clause was not complied with.
- In case of non-compliance, the arbitral must deny the admissibility of the claim for the time being.
- It is unclear whether the arbitral tribunal may instead stay the proceedings.
- Non-compliance is not an issue of jurisdiction. A challenge of an award dealing with non-compliance must, therefore, be based on a different ground.





Thank you.

**Zürich**

Schützengasse 1

CH-8021 Zürich

Tel +41 58 211 34 00

Fax +41 58 211 34 10

**Basel**

Aeschenvorstadt 4

CH-4010 Basel

Tel +41 58 211 33 00

Fax +41 58 211 33 10