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Mediation and other combined ADR clauses: Still a long way towards true recognition and enforcement by Swiss Courts?

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On May 16, 2011, the Swiss Supreme Court confirmed a previous ruling on the content and interpretation of a dispute resolution clause that provided for a conciliation attempt prior to resorting to arbitration (decision No. 4A_46/2011, *X GmbH v. Y Sàrl*, accessible here in French).

The clause at stake was drafted as follows (free translation from French by the undersigned):

> "In case of a dispute arising out of the interpretation or performance of the contract, an amicable settlement shall be preliminary sought by the parties. Any dispute that may arises in connection with the interpretation or performance of the contract shall be submitted, after failure of the conciliation attempt, to an arbitral tribunal …"

The Court (para. 3.5.2 of its decision), from the reading of this clause, considered that it was difficult to ascertain what was – as a matter of process – the true meaning of the "conciliation attempt", especially whether it required the intervention of a mediator or whether conciliation had to be set in motion within a defined time-limit. The Court found, on this ground, that preliminary conciliation was not of a mandatory nature. The argument that conciliation was a necessary step before initiating arbitration proceedings was thus dismissed. The Supreme Court emphasised that conciliation obligations were to be invoked in good faith with fair prospect of a positive outcome (*see* Tavernier Tschanz report of August 12, 2011, *in* International Law Office). The Court also decided that it was not unreasonable for the arbitral tribunal to dismiss the pre-conciliation objection raised by one party on the finding that the relationship had deteriorated to such an extent that there was no other alternative but resort to arbitration (Tavernier Tschanz report, *idem*).

In a previous case (decision No. 4A_18/2007, *X Ltd. v. Y*, of June 6, 2007, accessible here in French) the Swiss Supreme Court had the occasion to set out some guiding principles that should govern the interpretation and enforcement of two-tier dispute resolution clauses that combine conciliation with arbitration.

Interestingly, the Court spends some time describing the evolution of ADR in Europe, specifically in Switzerland. The Supreme Court notes (para. 4.3.1. of its decision) that conciliation and mediation, clearly belong to ADR, have developed quite successfully and rapidly in these countries. These are, essentially, methods whereby parties, with the help of a neutral, attempt to

reach settlement by way of “assisted negotiations”. The Court, relying on leading legal scholars, points out that conciliation and mediation are similar in nature, although mediation calls for more developed techniques. The Court also emphasises the non-binding character of the solution “proposed to the agreement of the parties” that emerge from the use of said methods, as compared to State court litigation or arbitration.

The Swiss Supreme Court then focuses (same paragraph as above) on the consequences of the behaviour of a party that does not comply with the terms of a combined mediation-arbitration (“med-arb”) clause and the possible binding character of the mediation (conciliation) agreement. In another words, would a party be entitled to proceed with arbitration without having had recourse to mediation, respectively conciliation, as a preliminary process and, as the case may be, what would be the legal consequences (liability versus admissibility) for the violation of such a clause. The Court holds that such an issue is a very dispute one among legal scholars. For the Supreme Court, the first issue that arises under such med-arb clauses is to determine the possible mandatory nature of mediation, as a preliminary step before resorting to arbitration. The Court explains that the answer must be found on the interpretation of the clause based on legal principles that prevail for interpretation of the parties’ intent.

The clause in question had the following wording (free translation from French by the undersigned):

> “Any and all controversies and differences in connection to the present contract and which shall not be settled amicably (including conciliation under the WIPO World Intellectual Property Organisation Rules), shall be submitted to an arbitral tribunal … The arbitration shall take place according to the WIPO Conciliation and Arbitration Rules …”

Based on a strict interpretation of the wording of the said clause, the Court finds that it had not been clearly drafted. Conciliation – taken in a broad sense so as to encompass mediation – cannot be understood as a preliminary and mandatory step to be undertaken prior to the setting in motion of arbitration proceedings. The objection based on this ground was, like in the other subsequent matter mentioned above, dismissed.

These Swiss Supreme Court findings call for the following comments.

1. As a matter of both fact and law, the Court has only had a chance to deal with the narrow issue of the effect of clause providing for amicable settlement prior to litigation or arbitration and the possible legal consequence of its breach by one party. The Court has not yet ruled on the meaning, validity and effect of a pure mediation clause.

So far, the Court’s focus has been limited to “med-arb” clauses. It has not yet come to the Supreme Court’s attention that dispute resolution clauses may be drafted in other ways that may open broader avenues to settle disputes than standard clauses used so far.

2. Reading between the lines of these two decisions, one can perceive the Swiss Supreme Court’s concern to affirm the pre-eminence of arbitration over other methods providing for amicable resolution of disputes such as conciliation or mediation. This may be explained by the Court’s possible concern not to allow bad faith litigants to affirm mediation or conciliation in lieu of

litigation or arbitration as a dilatory tactic. In this sense, the Court's initiative is welcome.

3. More generally, it is worth pointing out that The Swiss Supreme Court is not at ease when attempting to define the concept of mediation and/or conciliation.

First of all, the Court shows, when expressing its understanding about ADR (which is based on leading scholars specialised in arbitration!), its lack of sufficient knowledge and experience on the real nature of mediation, often assimilating mediation to conciliation. Such a trend is not surprising when addressing the subject in local courts with judges having no real experience of what mediation can be. The entry into force of the Federal (Uniform) Code of Civil Procedure on 1st January of this year and which provides, in black letter rule, for a possible recourse of mediation in lieu of litigation at any stage of the proceedings has not had an effective impact yet.

Second the Supreme Court opposes Mediation to arbitration by ifs lack of binding nature. The Court shows its misconception on the possible effectiveness of mediation clause that can be achieved by seeking incorporation of the settlement agreement either in an arbitral award "by consent" or by Court ratification.

4. Lastly the med-arb clauses submitted to the Court's examination showed the inability of their authors to draft an enforceable two-tier ADR clause. Especially, the absence of any clearing mechanism that renders such a clause really effective.

The Time has not yet come …

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