# Multi-Tiered Dispute Resolution Clauses

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# Editors-In-Chief



# Editors

## Switzerland


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

In Switzerland, there is still to date very little published jurisprudence on the matter of multi-tiered dispute resolution clauses (MDR-clauses). Typically a matter of commercial litigation, the first cantonal judgments in Switzerland stem from the late 90'ies and early years of the new millennium. Only recently has the highest court of the country, the Federal Tribunal, dealt with certain aspects of MDR-clauses. However, the Federal Tribunal has to date not been required to make a pronouncement on the actual sanction of the non-compliance with MDR-clauses.

Since the first cantonal decisions there has been a remarkable shift from the earlier court stance that MDR-clauses constitute little more than substantive provisions that require parties to negotiate (but without procedural sanction if not adhered to) to a more progressive approach that clear and binding MDR-clauses actually constitute a condition precedent to litigation or arbitration.

In view of the Federal Tribunal decisions since 2007, the greatest challenge would therefore seem to lie in the actual drafting of MDR-clauses so that they are both unambiguously compulsory and sufficiently detailed to grant certainty about their adherence and exhaustion. At the same time, on the level of the behavior of the parties, the main challenge is ensuring that the aggrieved party has performed all necessary acts according to the MDR-provision to be entitled to invoke the court or arbitral tribunal after conclusion of the pre-trial stages.

The challenges are thus two-fold and may be split into two distinct phases: the pre-conflict phase of drafting and negotiating MDR-clauses and a second phase once a dispute has arisen and parties are confronted with the exigencies of the MDR-process.

**2. What drafting might increase the chances of enforcement in your jurisdiction? For example, in a number of jurisdictions the decision to enforce or not has come down to considerations such as the following:**

A. Does the clause expressly provide that prior stages are "conditions precedent" to litigation or arbitration?

In Switzerland, no single MDR-clause has evolved which could be said to be universally applicable to any contract and potential dispute. The limited jurisprudence of the Federal Tribunal on this matter has shown that MDR-clauses will be assessed on a case-by-case basis and no two may be equally suitable for different situations. Nevertheless, certain features have come to the fore in the recent decisions that may be analyzed here with a view to optimizing their chances of being enforced by the courts. One such consideration is the primary question of formulating the MDR-process as a condition precedent.

From the rulings by the Federal Tribunal it has become apparent that a party complaining that an MDR-clause has not been complied with by a responding party must be able to evidence that the intent of the parties at the conclusion of the MDR-clause was to establish a pre-trial conflict-solving mechanism that was to be adhered to by both parties unconditionally before arbitration or litigation could be pursued.

In order to ensure that the courts may find that the escalation process is mandatory, formulating the participation in prior stages as conditions precedent to actual litigation or arbitration is highly advisable and will go towards ensuring that the provision can be enforced by the courts.

B. Does the clause use mandatory language (e.g., "shall" or "must" negotiate or mediate) as opposed to discretionary language ("may" or "should")?

Choosing mandatory language will go towards ensuring that a court may find in favor of a party complaining of the non-adherence of a responding party to an agreed MDR-process. The Federal Tribunal has found that, MDR-clauses must be construed pursuant to the general interpretation rules governing contract (BGer. 4A_18/2007, consid. 4.3.2). Hence, formulating MDR-clauses in narrow, mandatory language will significantly increase a party's chances of securing a positive judgment forcing a responding party to take part in agreed early tier dispute resolution. Offering leeway and various options may on the other hand cloud the question whether the parties' intention was to avoid a direct lodging of the dispute with a court or arbitration tribunal.

In its most recent decision on the matter, the Federal Tribunal found that the term "shall", which the parties had used together, with a holistic appraisal of the MDR-process, led to the conclusion that it was a mandatory requirement before arbitration (BGer. 4A_124/2014, consid. 3.4.3.1).

C. Does the clause specify deadlines and time limits for each of the prior stages?

Although no general rule can be made that would adequately address all types of contracts and party situations, the use and effect of deadlines has been addressed by the courts.

In an earlier decision, the Federal Tribunal held that not including strict deadlines could be an indicator for the non-binding nature of the MDR-requirement (BGer. 4A_18/2007, consid. 4.3.2). Later, the Federal Tribunal confirmed that a lack of precision and clear steps in an MDR-clause would be interpreted as to mean that it was not intended to be mandatory (BGer. 4A_46/2011, consid. 3.5.2).

In its latest judgment, the Federal Tribunal has however also noted that the mere absence of particular time lines could not of itself be interpreted to mean that an MDR-process was not mandatory (BGer. 4A_124/2014, consid. 3.4.3.4). The Federal Tribunal held that the MDR-process as a whole needed to be assessed in gauging whether such a clause was intended to be mandatory or not. In view of this jurisprudence, it seems advisable to use clear language identifying periods during which parties must comply with certain actions in order to underline the compulsory nature of the MDR-process.

D. Does the clause specify the number of negotiation sessions?

As noted above, a court will be more readily inclined to accept a party's plea that an MDR-clause is mandatory and order the recalcitrant party to comply with the requirements under the provision if there are clearly indicated steps both with regard to timing and the process. Therefore, identifying the number of negotiating sessions and a deeming provision based on which a party may justly claim to have participated in all required sittings is helpful for parties to know when they have complied with all necessary conditions precedent. This limits the legal uncertainty and enables parties to end, from their own accord, any suspended proceedings and to promote a conclusion of the dispute by initiating the next step.

E. Does the clause specify the identity of negotiation participants? E.g., project engineers, company officers, etc.

No general rule can be made on this question. Generally, the contract parties will be free to identify in advance whom they wish to contact to mediate in case a dispute arises.

F. Does the clause specify mediation pursuant to specific rules?

In a few of the published cases in Switzerland where state courts have had to deal with the question of MDR-clauses, the provision included specific rules governing the mediation / conciliation proceedings and also the institutions competent to perform the mediation (see below under section G). Adding such a specification is advisable since it goes towards setting a discernable framework for the parties and enables them to establish where in the process they are and what the options are. Agreeing on certain rules may assist in establishing whether or not a party has been fully compliant and entitled to escalate the dispute further.

G. Does the clause specify mediation using a particular dispute resolution institution?

The inclusion of dispute resolution institutions, although useful, will depend on the industry sector the parties are engaged in. However, some of the published cases included MDR-clauses that referred to the specific rules of an industry institution. In an earlier decision by the High Court of the Canton of Thurgau (ASA Bulletin 2/2003, p. 418-420) the dispute was to be submitted to the legal department of Gastrosuisse, the Swiss professional association of hospitality services. In the Federal Tribunal case of 2007 (BGer. 4A_18/2007) the dispute was to be submitted to the WIPO arbitration institution while in the most recent Federal Tribunal decision (BGer. 4A_124/2014), claims were to be subject to FIDIC arbitration.

H. Does the clause specify consequences for failure to undertake the prior stages?

Including timelines and actions required by the parties is advisable. Consequently, setting out what rights a party shall have if the other party fails to partake in the MDR-process is also vital to avoid a stale-mate situation, where the matter cannot be progressed. Therefore including language that clearly identifies the factors which entitle a party to commence litigation or arbitration after the recalcitrant party has reneged on its undertaking to negotiate or mediate, is evidently helpful and advisable.

In the most recent case, the Federal Tribunal dismissed a claim by a party complaining that an obligatory MDR-process had not been finalized because it found that the proceedings had dragged out for too long. Although it found that the MDR-clause sought to establish a compulsory MDR-process the frustration of the claimant was severe enough to warrant the commencement of arbitration proceedings (BGer. 4A_124/2014, consid. 3.5).

**3. If your courts have enforced such clauses, how have they done so? For example, the courts of some jurisdictions have enforced such clauses by:**

A. Dismissing litigation where the parties have failed to undertake the prior stages.

As noted, the jurisprudence on the enforcement of MDR-clauses in Switzerland is very limited. This has two reasons: Firstly, MDR-clauses which have become subject to review in Swiss courts seem not to have been implemented much before the later part of the 1990s. Secondly, international arbitration awards are hardly ever successfully challenged in Switzerland since the reasons for appealing an award to the sole instance, the Federal Tribunal, are very limited and the jurisprudence by the court very strict. Therefore, no absolute guidelines are established yet.

In the first reported case in 1999, the Court of Cassation of the Canton of Zurich found that an MDR-clause could not be construed to be of a procedural nature thus concluding that the non-adherence to MDR-proceedings did not lead to the court finding that it was not competent to hear a matter (ZR 99/2000 no. 29, p. 86-87). The Court of Cassation thus dismissed the action by the party claiming that the MDR-process had not been adhered to by the other party. Rather than dismissing the claim of the party having failed to comply with the MDR-clause, it actually sanctioned the behavior.

Only two years later, in 2001, the High Court of Zurich noted that the question of whether an MDR-clause provided for a compulsory conciliation hearing prior to the commencement of arbitration was up to the arbitration tribunal seized with the matter to decide (ZR 101/2002 no. 21, p. 77-81). In the case at hand, the High Court did not have to decide this question itself since it had only been approached to appoint an arbitrator. The finding seemed to indicate, at the time, that the court was sympathetic to the notion that an MDR-clause constituted a procedural condition and that litigation by a non-complying party might well be dismissed.

Also in 2001, the High Court of the Canton of Thurgau held in a similar vein that an ordinary court seized with the question whether the claimant had complied with all conditions precedent and would have to dismiss – upon application by the claimant – proceedings until the MDR-proceedings had been concluded (ASA Bulletin 2/2003, p. 418-420.).

Whilst the Federal Tribunal has to date not been required to address the core question of how to sanction non-compliance of an MDR-requirement, it would seem from two more recent obiter dicta that it would support the notion of the majority of Swiss legal scholars that not taking part in MDR-proceedings would lead to the court temporarily staying proceedings until the responding party engaged in the prior phases of dispute settlement to the minimum degree required (BGer. 4A_18/2007, consid. 4.3.3.2, BGer. 4A_124/2014, consid. 3.5). In the latter judgment, the Federal Tribunal also held that the law applicable to the ensuing arbitration proceedings shall equally be applicable for the interpretation of the MDR-proceedings (BGer. 4A_124/2014, consid. 3.2).

B. Staying litigation or arbitration until the parties have completed the prior stages.

As noted above, the Swiss courts seem to be moving towards the view that staying proceedings is the most adequate result when approached by a party complaining that a respondent party has not engaged in the requisite MDR-process (BGer. 4A_46/2011, consid. 3.1.3.). Scholarly opinions support this approach and note that this type of ruling most adequately protects the intent and expectation of the parties which have concluded an MDR-clause at the outset.

C. Awarding attorney fees and costs to a party that commenced litigation or arbitration without first undertaking the prior stages.

We would expect such a procedural order to accompany a judgment by a state court ordering a party to take part in MDR-proceedings.

D. Vacating arbitration awards or reversing court judgments where the parties failed to undertake the prior stages.

To date, no arbitration award has been lifted by the Federal Tribunal for reasons of non-compliance with MDR-proceedings because it has never been confronted with a clearly mandatory MDR-clause.

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

Since there is no single formula for an MDR-clause in Switzerland we note below aspects that ought to be included in such a clause if parties wish for a potential dispute to be subject to an MDR-process, the adherence of which would fall in the competence of a Swiss court.

- Include language that unmistakably states that the MDR-process is binding and compulsory and a condition precedent for any later arbitration or litigation,
- Include a definite time line which will be applicable for the complaining party to bring its grievance to a specified panel or body and which constitutes the beginning of the MDR-process,
- Include and identify the persons responsible for progressing the MDR-proceedings in which specific timeframes,
- Identify a final outcome or latest point in time after which an aggrieved party may rightfully find that the MDR-process has been complied with and ended without a solution entitling it to approach the courts or an arbitration tribunal,
- Nominate a set of rules governing other aspects of the MDR-process.

As an illustrative example, we add a free translation of the applicable clause of the standard planning and construction management contract of the Swiss Association of Engineers and Architects (SIA):

> *"[…]*
> *Disputes arising between the parties shall be resolved amicably by direct discussions. If required, the parties shall call upon an independent and competent person whose duty it will be to mediate between the parties and resolve the dispute. Each party may notify to the other party in writing that it is willing to enter into the dispute resolution proceedings (e.g. by direct discussions, mediation or conciliation through a competent third party, who will propose an own solution). The parties shall agree in writing on the appropriate proceedings and applicable rules with the help of the mediator or intermediary.*
>
> *If no dispute resolution proceedings are agreed upon or if the parties cannot resolve the matter or agree on the choice of mediator or intermediary within 60 days after receipt of the written notification or where such mediation / conciliation fails after within 90 days after receipt of the written notification, each party shall be entitled to pursue the matter*
>
> - *before the ordinary courts*
> - *before an arbitral tribunal pursuant to SIA-Guideline 150 (most recent edition).*
>
> *[…]"*