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Multi-tiered dispute resolution clauses, a friendly Miranda warning

Gregory Travaini (Herbert Smith Freehills LLP) · Tuesday, September 30th, 2014 · Herbert Smith Freehills

On 29 April 2014, the French *Cour de cassation* made a decision on the criteria a multi-tiered dispute resolution clause ("multi-tiered clause") should meet to render claims inadmissible if disregarded.[1)]

In this case, Medissimo, a pharmaceutical company, entered into a contract with Logica, an IT company, to outsource the maintenance of a software program and the writing of two others. Alleging breaches in the performance of the contract, Medissimo initiated proceedings before the French courts against Logica for damages. Logica argued that Medissimo's claim was inadmissible on the basis that it had failed to comply with the amicable dispute resolution clause in the contract prior to initiating proceedings.

The French *Cour de cassation* held that a mere mutual agreement to attempt to resolve a dispute without any particular conditions as to its implementation is not a mandatory condition precedent to the right to refer the claim to a judge, which thus does not render the claims inadmissible if disregarded.[2)]

This article provides a brief overview of the current trend as regards multi-tiered clauses in France.

1. Freeze!

By way of background, multi-tiered clauses (or escalation clauses) are means by which parties to a contract can resolve amicably – or at least try to – a dispute without going to court or before an arbitral tribunal. The idea is to "*freeze*" a situation and take the time to negotiate, with or without the help of a third party, prior to the commencement of litigation or arbitration proceedings.

Multi-tiered clauses "*help to facilitate dispute management and reduce time and costs*"[3)] to the extent that if successful, litigation or arbitration can be avoided; and if unsuccessful, negotiation/conciliation encourages the parties to think over their dispute, on what they really want, what they need, what they can agree to, and may help them to keep a cool head before resorting to formal, time-consuming and costly proceedings.

In *Medissimo v. Logica*, the questions put before the French *Cour de cassation* were as follows:

1. Is an escalation clause mandatory? If so, to what extent?
2. If a party does not comply with a multi-tiered clause, how should the breaching party be sanctioned.

The Court answered these questions by looking at the wording of the clause agreed upon by the parties.

2. You have the right to remain silent

If the parties have agreed to submit their dispute first to "*conciliation*" without specifying the procedure in relation to it, the clause may be considered binding upon the parties but may not lead to the inadmissibility of claims brought by a party who has failed to comply with the escalation clause by bringing the dispute directly before a judge.

Part of the doctrine[4)] considers that *Medissimo v. Logica* supplements a landmark decision made by the *Cour de cassat*ion in 2003 holding that the claims of a party who failed to comply with an amicable dispute resolution clause set as a mandatory condition precedent to initiating proceedings before a judge are inadmissible.[5)] From now on, though, only certain multi-tiered clauses will be truly binding and others will not.[6)] The inadmissibility of the claims would be dependent on the wording of the multi-tiered clause in relation to the following questions:

- Is the amicable dispute resolution clause mandatory?
- Is the amicable dispute resolution clause a condition precedent to the right to refer a claim to litigation or arbitration?
- Is the amicable dispute resolution clause procedure sufficiently detailed?

Another part of the doctrine asserts that the 2003 decision already acknowledged implicitly that the amicable dispute resolution procedure needed to be sufficiently detailed as to its implementation for the claims to be considered inadmissible, and that the 2014 decision does not represent a new development.[7)]

In any event, the conditions have now been clearly and expressly set out by the *Cour of cassation*.

Recently, on 16 May 2011, the Swiss Federal Tribunal also ruled that for a conciliation clause to be mandatory, the wording of the clause should be sufficiently detailed to express the parties' intention that conciliation should be considered a condition precedent to the right to refer their dispute to litigation or arbitration.[8)] In this case, the Federal Tribunal noted that the conciliation clause only stipulated a "*conciliation attempt*" without any precision as regards its procedure. It thus found that it was impossible to know what should have been the nature of the procedure and came to the conclusion that the conciliation was only subsidiary in nature.

In light of the above, one can conclude that even if the parties have willingly undertaken to resort to conciliation, without further detail, before initiating arbitration or litigation proceedings and made it a condition precedent to any legal action, this clause may have no real effect in practice if it is not sufficiently detailed. Indeed, even if a judge were to consider the clause mandatory, he would not be in a position to hold, as it currently stands, that the claims are inadmissible and/or allow the aggrieved party to claim damages for this contractual breach.[9)]

The solution is quite different if the parties have elaborated on the procedure applicable under the multi-tiered clause.

3. What you write can and will be used in a court of law

Together, the 2003 and the 2014 decisions of the *Cour de cassation* make it clear that when the escalation clause provides for a detailed procedure, the claims would be inadmissible if the clause is not complied with.

These decisions finally settled a question which had been debated among the different chambers of the *Cour de cassation* over the years. For instance, the first civil Chamber of the *Cour de cassation*[10] and the social Chamber[11] ruled, on the one hand, that a court action initiated by a party without first complying with a conciliation clause would not be inadmissible. On the other hand, the second civil Chamber[12] held the exact opposite.

The 2003 decision of the mixed Chamber of the *Cour de Cassation* and the 2014 decision of the commercial Chamber put an end to this debate on the basis of articles 122 and 124 of the French Code of Civil Procedure. A contractual clause establishing a mandatory conciliation procedure is lawful and binding upon the parties until the end of the conciliation procedure. Failing to comply with the clause would constitute a "*fins de non-recevoir*".[13] The claims could be declared inadmissible without entering into the merits of the case and without requiring the party raising the plea to prove any damage. The parties would still need to raise this plea, as a judge cannot raise this defence on his own motion.[14]

Yet, the *Cour de cassation* failed to indicate what wording would lead a judge to consider that (i) an escalation clause is mandatory and (ii) the procedure contained therein is sufficiently detailed to render the claims inadmissible if a party does not comply with it. Authors and practitioners can only guess which criteria could be relevant, for example: (i) the use of the word "shall" to suggest that the amicable dispute resolution clause is mandatory, (ii) a third party's intervention (either as a mediator or conciliator), including the nomination process or appointing authority, (iii) the starting point of the conciliation (notification), and (iv) a period of time that the conciliation should last before resorting to litigation/arbitration.[15]

Across the Channel, the Commercial Courts have dealt with this question this year in *Emirates Trading Agency LLC v Prime Mineral Exports private Limited*.[16] Their approach was slightly different.

The dispute resolution clause in that case provided as follows:

> "*In case of any dispute or claim arising out of or in connection with or under this LTC […], the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration*".

The Court found on the basis of the wording of the clause that:

1. The use of the word "*shall*" indicated that the obligation is mandatory. Such "*friendly discussions*" were thus a condition precedent to the right to refer a claim to arbitration;
2. Any party had the possibility to notify the other of its desire to enter into consultation to resolve a claim. The use of the word "*may*", in distinction from the word "*shall*" in the first part of the clause, indicated that this was not a mandatory obligation;
3. If, notwithstanding the friendly discussions to resolve the dispute required by the first part of the clause, no solution could be found for a continuous period of 4 weeks, then arbitration could be invoked; and
4. Such an agreement is enforceable in the public interest, first, "*because commercial men expect the court to enforce obligations which they have freely undertaken*" and, second, "*because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration*".

These recent decisions highlight the need to grant special attention to escalation clauses for parties contemplating first resorting to an amicable dispute resolution before resorting to litigation or arbitration, particularly regarding the level of detail in drafting them.

References

?1 Cass. com. *Medissimo v. Logica*, 29 April 2014, n° 12-27.004.

?2 *"Attendu que la clause contractuelle prévoyant une tentative de règlement amiable, non assortie de conditions particulières de mise en œuvre, ne constitue pas une procédure de conciliation obligatoire préalable à la saisine du juge, dont le non-respect caractérise une fin de non-recevoir s'imposant à celui-ci"*.

?3 https://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Standard-ICC-Arbitration-Clauses/

?4 N. Dissaux, "Sur les conditions d'efficacité d'une clause de médiation", *La Semaine juridique – Entreprise et affaires*, n°21-22, 22 May 2014, p. 1290.

?5 Cass. ch. mixte, 14 February 2003, *Poiré v. Tripier*, JurisData n° 2003-017812 – "*la clause d'un contrat instituant une procédure de conciliation obligatoire et préalable à la saisine du juge, dont la mise en oeuvre suspend jusqu'à son issue le cours de la prescription, constitue une fin de non-recevoir qui s'impose au juge si les parties l'invoquent*".

?6 O. Sabard, "Force obligatoire du contrat vs droit au juge : quel sort pour les clauses de conciliation ?", *La Semaine juridique – Edition générale*, n°25, 23 June 2014, p. 711.

?7 H. Croze, "Notion de procédure de conciliation obligatoire préalable à la saisine du juge", *La Semaine juridique – Edition générale*, n°21-22, 26 May 2014, p. 607.

?8 Swiss Federal Tribunal, first civil Chamber, 16 May 2011, *X. GmbH v Y Sarl*, 4A_46/2011.

?9 Sabard, *op. cit.*

?10 Cass. civ. 1ere, 23 January 2001 and Cass. civ. 1ere, 6 March 2001.

?11 Cass. soc., 26 January 1994.

?12 Cass. 2ème civ., 6 July 2000.

?13 Plea of non-admissibility.

?14 T. Clay, "Vive la Chambre mixte !", *Recueil Dalloz*, 2003, p. 2480; L. Cadiet, JCP 2003, I, n° 128, n° 17, obs.

?15 This list is not exhaustive.

?16 *Emirates Trading Agency LLC v. Prime Mineral Exports private Limited* (2014) EWHC 2104.

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