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## The Breach of a Mediation Clause Can Go Unpunished Under French Law: What to do?

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The French Supreme Court (“*Cour de cassation*”) has ruled (1<sup>st</sup> February 2023, No. 21-25.024) that the breach of a mediation clause is not a matter of jurisdiction and as such cannot lead to the annulment of an award in which a tribunal has retained its jurisdiction, even though the mediation process has not been implemented prior to the arbitration procedure.

One may think that after this ruling, the breach of a mediation clause cannot receive proper sanction. However, several grounds can be raised in order to enforce a mediation clause.

### Factual Background

In the case at hand, several partners of a French company agreed to a med-arb clause. A dispute arose and a domestic arbitration procedure was initiated. One of the parties invoked the failure to conclude a prior mediation in order to dismiss the other parties’ claims.

After inviting the parties to go through a mediation in parallel to the arbitration, the arbitral tribunal rendered a partial award on 10 September 2018, by which it retained its jurisdiction.

This partial award was challenged before the Paris Court of Appeal, which annulled the award by a [decision of 23 November 2021](#), on the ground that the arbitral tribunal should not have retained its jurisdiction since the prior mediation procedure had not been carried out properly. It should be reminded that in the case at hand, the party who challenged the award had already raised the breach of the mediation clause before the arbitral award, thus complying with article 1466 of the French Code of Civil Procedure (“CCP”), according to which “a party who knowingly and without just cause fails to raise an irregularity before the arbitral tribunal in good time shall be deemed to have waived its right to do so.” When annulling the award, the Paris Court of Appeal considered that the non-observance of the mediation clause is not a matter of admissibility not falling within the jurisdiction of the Court of Appeal, but constitutes a circumstance of the case that must be taken into account in order to assess the violation of [Article 1492\(1\) of the CCP](#) which allows annulment if “the arbitral tribunal has wrongly declared itself competent or incompetent.”

## Decision of the French Supreme Court

The Court of Appeal's decision was recently overturned by the French Supreme Court which ruled that the failure to comply with a mediation clause is a matter of admissibility, not of jurisdiction. As such, an award cannot be annulled on this mere ground insofar as the challenge of an award under French law can only be based on limited grounds provided for under [Article 1492 of the CCP](#), among which the admissibility of a claim is not listed.

## Discussion

This solution is well established under French law (see e.g., [Court of Appeal of Paris, 28 June 2016, n° 15/03504](#); the *Rusoro* case and *Cengiz v. Lybia*), especially in investment arbitration. On this latter point and more precisely, the *Cour de cassation* has refused to consider that the issues related to the date of the investment (see the *Oschadbank* case), to its lawfulness (see the *Cengiz* case and the *Nurol* case), or its legality (see the *Aboukhalil* case) are a matter of jurisdiction and considered instead that they relate to the admissibility of the claim.

This position of the *Cour de cassation* is in line with the major principles of civil procedure, insofar as from a technical standpoint and in accordance with [Articles 122 to 126 of the CCP](#), the breach of a mediation clause is indeed a plea in bar (“fin de non recevoir”). This position is also in line with the strict interpretation of the annulment grounds and the principle of prohibition of the review of the award on the merits by the annulment judge, who cannot reevaluate whether or not a claim is inadmissible. Such assessment lies exclusively within the hands of the arbitral tribunal.

However, this position is in clear breach of the parties' explicit will to resort to a mediation as a preliminary step before arbitration, and more particularly of the binding force of the contract.

## Implications for Practitioners

Concretely, the case entails that a party who has agreed to a med-arb clause can breach the mediation clause without the opposing party being able to challenge the award on the grounds that the mediation clause has not been implemented.

The question that arises therefrom is the following: how can it be possible to sanction the breach of a contractual mediation clause?

It can be argued that a tribunal that has deemed admissible a party's claim even though a prior mediation process has not been initiated has exceeded its mandate, in the sense that it did not give full effect to the party's will. In fact, an arbitral tribunal's mandate stems from the parties' will, who, in the presence of a med-arb clause, have agreed for the dispute to be adjudicated by an arbitral tribunal only after a mediation has been attempted. Arbitrating the dispute prematurely hence constitutes a violation by the tribunal of its mandate.

It can also be argued that the binding nature of the contract, as well as the principle requiring good faith performance of the contract (both principles being recognized under all legal systems whether of civil law or of common law) are of (transnational) public policy, and as such, an arbitral award

that overrode a contractual mediation clause is in breach of public policy.

To date, and to the best of our knowledge, the *Cour de cassation* has not deemed that the breach of a mediation clause constitutes either a breach of the tribunal's mandate or of the public policy. It could be therefore of interest for the *Cour de cassation* to adopt one of those interpretations in order to safeguard the enforcement of a prior mediation clause.

## Conclusion

One could also be tempted to suggest amending articles 1492 and 1520 of the French Code of Civil Procedure in order to include the inadmissibility among the grounds of annulment but this could lead to the reviewal on the merits of the award by the annulment judge. Consequently, and awaiting an amendment of the French Code of Civil Procedure and/or a reversal of the current French case law, arbitrators should be exclusively entrusted with the implementation of a mediation clause (without any subsequent control by the annulment judge) and should be encouraged to declare a claim inadmissible whenever a mediation clause has not been properly implemented.

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