Multi-Tiered Dispute Resolution Clauses

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France

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

After some hesitation reflected by conflicting decisions rendered by the various sections of the French Cour de cassation, the Supreme Court in France in civil and commercial law matters, the rule has now been established since 2003 (the "*Poiré v. Tripier*" decision of February 14, 2003: Rev. Arbitrage 2003, page 403; 19 Arbitration International 368 [2003]), that multi-tiered or escalation dispute resolution clauses will be enforced in France provided the prior conciliation or mediation stage is found mandatory and not simply optional (1.1.).

The few court decisions on that same issue that followed *Poiré v. Tripier* have all upheld the same rule, but have narrowed it to a rather restrictive interpretation of the facts or a restrictive reading of the clause at issue (1.2.).

More recent trends have advocated that litigation generally be preceded by attempts to negotiate or settle through conciliation or mediation, culminating very recently into a decree of March 11, 2015 that now requests an ADR approach in all civil and commercial litigation in France (1.3.).

1.1. The *Poiré v. Tripier* 2003 Decision

This 2003 decision was issued by a "Chambre mixte" of the Cour de cassation, i.e. a panel of Supreme Court judges from each of the various sections of the Cour de cassation and chaired by the presiding judge of the court, and accordingly prevailed over the earlier dissenting decisions rendered by separate sections of the court.

Specifically, the 1st civil section of the Cour de cassation had earlier resolved that conciliation language in a dispute resolution clause, even spelled out as being mandatory, could not be enforced because there was no remedy in the event of a party's non compliance (January 23, 2001, "*Clinique du Morvan*"). In contrast, the 2nd civil section of the same court had issued a conflicting ruling by finding, in a very similar contractual situation (in both cases these were mandatory conciliation clauses in contracts between doctors and private hospitals), that the action should be denied as it was not admissible when filed without having first complied with the mandatory conciliation clause (July 6, 2000, "*Polyclinique des Fleurs*": Rev. Arbitrage 2001, page 749).

Legal authors had strongly criticized the position of the 1st civil section of the Cour de cassation (Jarrosson, Rev. Arbitrage 2001, page 752), arguing that a contract clause had to be complied with and enforced, and could not be possibly dismissed as being without a remedy. But there remained uncertainty as to the type of remedy that should be applied. Damages were not practical because claimants would in most cases not be in a position to assess, and much less prove the quantum of their losses derived from their opponent's refusal to negotiate or attempt conciliation. Specific performance, such as by awarding a periodical (e.g. daily) fine until the defaulting party complied with the negotiation or conciliation clause, was equally impractical as there could be ceaseless disputes as to whether the defendant's conduct should qualify as satisfactory compliance with the prelude provided in the dispute resolution clause. Finally, a flat inadmissibility decision was also unsatisfactory as it could be held to prejudice the possible resumption of the court proceedings after negotiation or conciliation had, as a hypothetical, been carried out but proved unsuccessful.

The solution reached in 2003 by the Cour de cassation in a plenary session in *Poiré v. Tripier* has been hailed as quite reasonable, as it upheld the decision of the appellate judges who had denied the claim on the merits by finding it not admissible "*at this stage*" of the proceedings ("*en l'état*"), as this had been before a mandatory conciliation had been complied with. In other words, the "*at this stage*" cautionary language in the ruling by the court of appeals did not prejudice the claimant's right to reiterate proceedings in due course if needed, meaning after attempts at negotiation or conciliation had been conducted and failed:

> "*a contract clause that established a mandatory conciliation procedure prior to court proceedings, which in itself is lawful, and which when applied stops until its completion the period of limitations from running, constitutes a bar to proceedings which is binding upon the judge if invoked by the parties; by holding that the deed for the transfer of assets provided for conciliation in advance of any court action for disputes arising out of the performance of the contract, the court of appeals has appropriately found that the transferor of the assets should be barred from taking action in court on the merits of the contract before the conciliation procedure had been carried out*". (free translation from the French)

Accordingly, under the rule set forth by the Cour de cassation in *Poiré v. Tripier*, negotiation or conciliation clauses embedded in a dispute resolution mechanism will indeed be enforced by denying action on the merits before the negotiation or conciliation is carried out, without preventing further court action in due course, the only conditions being (i) that the negotiation or conciliation be expressed as being mandatory and not just optional, and (ii) that the parties invoke that clause, meaning that the judge will not deny the action on the merits *sua sponte* but only if the defendant claims that he had been defrauded of his rights to a conciliation or a negotiation as stated in the contract.

In addition, the ruling in *Poiré v. Tripier* solved another issue, which is the statute of limitations, as the court found that the implementation of the negotiation or conciliation clause stops the period of limitations from running until the end of the negotiation or conciliation procedure. Admittedly, there is some uncertainty as to when an unsuccessful negotiation process should be held to have been completed, for the purposes of the statute of limitations; however, by

mentioning the limitations period the court addressed one of the main objections expressed by opponents of the conciliation phase, which is that by forcing parties into a negotiation or conciliation preamble to litigation, litigation on the merits may be delayed for a time-period which is beyond the plaintiff's control, which entails that the plaintiff incurs the risk of being barred from action if the limitations period stops running only when filing an action on the merits.

1.2. The More Recent French Court Decisions

The few French court decisions that followed *Poiré v. Tripier* have all acknowledged the same rule, but often narrowed it to a rather restrictive interpretation or a restrictive reading of the clause at issue.

(i) Proving the existence of the conciliation clause: the clause must be in writing in the contract:

In a decision of May 6, 2003 ("*Clinique du Golfe v. Le Gall*", Semaine Juridique, G, Feb. 11, 2004, II 10021), the Cour de cassation ruled that the clause had to be written in the contract between the parties and could not be inferred from model contracts even if these were commonly used in the trade. That case also dealt with a dispute between a doctor and a private hospital, like the 2000 and 2001 earlier cases by the Cour de cassation discussed above, but while in those earlier matters the conciliation clause was written in the contract at issue, in *Clinique du Golfe* the clause derived from model contracts prepared by Unions and commonly used, but had not been incorporated into the contract even by reference.

The *Clinique du Golfe* decision was criticized as authors commented that these model contracts were commonly used in the medical profession, and particularly that conciliation in advance of litigation was an established usage for doctors and private hospitals, such that they should have been enforced under the general Civil Code rule (section 1135) that provides for contract obligations to be enforced in accordance with the terms of the contract and any additional implication deriving from the law or applicable usages of trade. Accordingly, the *Clinique du Golfe* decision should be read as a narrow interpretation of the *Poiré v. Tripier* rule, because a duty to a prior conciliation operates as an exception from the ordinary situation where, until the issuance of the March 2015 decree mentioned in 1.3 below, judges may be referred to immediately as the dispute arises, and exceptions are applied restrictively.

In contrast, however, a multi-tiered dispute resolution clause in an architect's contract that provided for the prior submission of the dispute to the architects' regional association structure for their opinion, was found enforceable against the purchaser of a property who inherited his seller's rights against the architect by way of subrogation, although that same clause had not been reiterated or even incorporated by reference in the agreement between the buyer and the seller of the property (Cour de cassation, April 28, 2011, comments by M. Billiau, Semaine Juridique, G, Sept. 26, 2011, doctr. 1030, §8).

(ii) To be enforceable, the escalation clause must provide for mandatory and not optional conciliation or mediation:

In a decision of February 6, 2007 ("*Placoplâtre v. SA Eiffage TP*", 1st civil section of the Cour de cassation, comments by J. Béguin, Semaine Juridique, E&A, Aug. 30, 2007, 2018, §16), the Cour de cassation upheld a court of appeals that had denied the enforcement of an escalation clause which in its view did not provide for a mandatory duty to engage into conciliation. The clause, which derived from a professional standard rule for constructors, provided that "*for the settlement of disputes likely to arise in relation to the performance or the payment of the construction contract, the contracting parties have to consult each other in order to submit their dispute to arbitration or to reject arbitration*". Applying, as in the few cases mentioned above, a restrictive reading of the language of the clause, the courts found that failing the reference to "conciliation", a "consultation" which on the face of the clause appeared limited to deciding whether or not to resort to arbitration, could not be equated to a mandatory "conciliation" which would have been aimed at resolving the dispute altogether.

In the same vein, in a more recent decision of January 29, 2014 ("*Knappe Composites v. Art Métal*", 3rd civil section of the Cour de cassation, n°13-10833), the Cour de cassation reached the same ruling for a clause from another professional standard rule for constructors with language nearly identical to the clause in *Placoplâtre*.

However, in a March 28, 2012 decision ("*Hainan Yangpu Xindadao Industrial Co Ltd*", 1st civil section of the Cour de cassation, n°11-10.347,393), the Cour de cassation ruled that the escalation clause should be enforced, although it was confronted with two conflicting French translations (one from the English text, the other from the Chinese version) of a clause that stated, in English, that "*disputes arising out of the performance of the agreement between the parties shall be settled by amicable consultation*", and "*disputes that could not be so settled shall be submitted to the China International Economic and Trade Arbitration Commission (CIETAC) for mediation or arbitration*" (free translation back into English of the French translation of the English version), and in Chinese, that "*in case of dispute, the parties shall endeavour to reach an amicable solution*" and "*failing so, this dispute must first be referred to CIETAC for settlement*" (free translation into English of the French translation of the Chinese version).

(iii) Courts also have a narrow interpretation of the scope of the conciliation clause:

Transactions for the sale of real property are ordinarily broken into two stages: first an option agreement, followed by the final deed of transfer. In a decision of October 20, 2009, the court of appeals in Montpellier found that a clause that provided for a mandatory conciliation procedure but only appeared in the option agreement and had not been reiterated or cross referenced into the final deed of transfer would not apply to disputes arising out of that deed of transfer, but only to disputes relating to the option agreement (comments by J. Béguin, Semaine Juridique, E&A, Feb. 10, 2011, 1109, §9).

As an illustration of an equally narrow reading of the scope of a conciliation clause, the court of appeals in Douai found in a May 15, 2007 decision ("*Mitsui Sumitomo Insurance Company Europe Limited*", n°05/04204), that a mandatory conciliation clause in a contract only applied to

disputes bearing on the language of the contract rather than disputes arising out of the performance of the contract.

Finally, the Cour de cassation ruled in a June 12, 2012 decision ("*SAS Eurauchan v. Sté Moyrand Bally*", Semaine Juridique, E&A, Oct. 4, 2012, 1585), that a mandatory conciliation clause in a distribution agreement would not apply to a liability action grounded in tort rather than based on the contract, although the clause stated that it applied to all disputes relating to the termination or expiration of the contract "*for any cause whatsoever*".

Specifically, the clause read as follows: "*In the event that a dispute should arise as to the validity, the interpretation, the performance or the termination for any cause whatsoever of this agreement, the parties agree to look for an amicable solution. In the event that such dispute should be unable to be resolved amicably, the parties agree to refer their dispute to mediation under the aegis of the Center for Mediation and Arbitration of the Paris Chamber of Commerce and Industry*" (free translation from French). But the action was grounded in tort, on the basis of a statute providing for tort liability in the event of "brutal termination of an established commercial relationship" (section L.442-6 of the French Commercial Code), and accordingly was based on the termination not just of that specific distribution agreement, but of the parties' overall relationship made of a stream of consecutive distribution agreements. Therefore, using a narrow reading of the scope of the clause, the courts denied enforcement of that same clause in the context of that specific dispute.

1.3. The Decree of March 11, 2015

Following a trend in favor of ADR procedures, particularly as expressed in the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on mediation, the French government has just issued a decree on civil procedure that now requests an ADR approach in all civil and commercial litigation in France.

Specifically, decree n° 2015-282 of March 11, 2015 requires under sections 18 and 19 that, save in case of a documented emergency, every summons and complaint filed in civil or commercial matters state the action taken towards an amicable resolution of the dispute. The decree further states that its effective date is April 1, 2015.

Because this statute is extremely recent and unexpected, comments have yet to be published as to its true implications in civil practice. Initial reactions concur in finding that there is no remedy in case the claimant should fail to have taken any action towards amicable settlement of the dispute, or should fail to identify such action on the face of the complaint: in other words, the claim will not be denied or found not admissible at law for that reason. That being so, this might influence the judges towards a more flexible approach to escalation clauses rather than the narrow interpretation standards reviewed under 1.2 above.

2. What drafting might increase the chances of enforcement in your jurisdiction?

Based on the case law reviewed above, we would briefly summarize as follows the issues to be kept in mind when drafting a multi-tiered dispute resolution clause from the perspective of its enforcement by French courts.

(i) the clause must be spelled out in writing in the contract, as the defendant may not rely on a clause deriving from another contract or a model clause or existing usages of trade;

(ii) the clause must contain unambiguous mandatory rather than optional or discretionary language;

(iii) it would help if the clause spelled out that failure to comply with the terms of the clause bars the filing of proceedings on the merits, until full compliance with the same;

(iv) it would also help to specify a time-limit;

(v) if the parties have in mind not just open attempts at negotiating but specific conciliation or mediation procedures, the clause should identify specific rules or a particular dispute resolution institution;

(vi) the purpose of the clause must clearly state that it is geared towards the amicable resolution of the dispute and not just whether or not to refer to arbitration or to courts;

(vii) the scope of the clause must be as large as possible, and refer, illustratively, to disputes arising out of or in connection with the contract, or its validity, interpretation, performance, termination or non-renewal, and whether claims are based in tort or in contract liability.

3. If your courts have enforced such clauses, how have they done so?

As stated above, this was by dismissing litigation where the parties have failed to undertake the prior stages, but dismissal was specified as being correlated to the status of the dispute, meaning that claimant is free to reinstate proceedings ultimately in due course, and the limitations period will stop running pending compliance with the pre-litigation clause.

Also, dismissal only applies to claims on the merits, and is without prejudice to claims brought in summary proceedings for transitory or provisional relief dictated by emergency situations.