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The fate of multi-tiered arbitration clauses - welcome clarification of the consequences of a lack of compliance with multi-tiered arbitration clauses in Germany and in France

Less is more : February 2017

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Whereas multi-tiered arbitration clauses used to be rather exceptional two decades ago, they are increasingly used nowadays and can be found in a large number of contracts. These clauses aim to meet the growing need for the reduction of time and costs by foreseeing arbitration only as a last means in case the previous proceedings in the form of a mediation, an expertise, or a dispute resolution board fail.

Nevertheless, a still important number of cases with multi-tiered arbitration clauses ends up in arbitration. Also, the existence of multi-tiered arbitration clauses often gives rise to additional disputes regarding compliance with said clause.

Most arbitral tribunals would probably consider that this issue pertains to the admissibility of the claim and would therefore retain jurisdiction by means of an interim or partial award.

However, due to the fact that there is no uniform case law, many parties may be tempted to challenge the arbitral tribunal's interim or partial award, arguing that the issue of (non) compliance with the multi-tiered arbitration clause is a matter of jurisdiction and not a matter of admissibility of the claims.

In two recent decisions, the German *Bundesgerichtshof*[1] clarified that the issue of (non) compliance with multi-tiered arbitration clauses is a matter of admissibility and not a matter of jurisdiction. Consequently, arbitral tribunals have jurisdiction to decide on this matter. Also, since the issue of (non) compliance with the multi-tiered arbitration clause pertains to the admissibility of the claims, the arbitral tribunal's decision in that respect does not form part of the grounds to set aside

[1]Beschluss vom 14.1.2016, I ZB 50/15;
Beschluss vom 9.8.2016, I ZB 1/15.

awards and cannot be attacked either once the final award is rendered.

This is a very welcome clarification, which will no doubt help to reduce the temptation to challenge awards on jurisdiction or final awards on that basis. It may nevertheless be regretted that the *Bundesgerichtshof*, besides dismissing the claim as being currently inadmissible or currently unfounded, did not provide for a third option which would allow to keep the arbitration in abeyance pending the conduct of the first step proceedings. This would normally be the most cost effective way to proceed, bearing in mind that the likelihood that an agreement be found in the first step proceedings is relatively small, once the matter has gone to arbitration.

Almost in parallel, the *Paris Court of Appeal*[2] , based on previous case law, decided in similar circumstances and in line with the *Bundesgerichtshof* that the issue of (non) compliance with a multi-tiered arbitration clause is not a matter of jurisdiction, but a matter of admissibility of the claims.

German and French case law are therefore perfectly in line regarding this important issue and it may be hoped that other jurisdictions will follow the same path in order to achieve a uniform approach worldwide.

[2] Cour d'appel de Paris, 28 juin 2016, N° 15/03504.