

**Multi-Tiered Dispute
Resolution Clauses**

IBA Litigation Committee
October 1, 2015

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

From our experience, in Argentina, multi-tiered dispute resolution clauses are frequently used in order to solve disputes in an effective and rapid manner without having the immediate need to resort to litigation or arbitration.

There is a tendency in Argentina to encourage parties to attempt to resolve their disputes amicably. According to Argentine legislation (Law No. 26.589 and Decree No. 1467/2011), in some provinces, including the City of Buenos Aires, pre-trial mediation is mandatory; this means that before attempting to file a lawsuit before the courts, parties must comply with a mandatory mediation procedure in order to try to solve their disputes amicably.

As a result of this, there is not currently abundant case law from Argentinean tribunals relating to challenges to the enforcement of multi-tiered dispute resolution clauses.

Nonetheless, challenges to these types of clauses may arise when they are ill-drafted, revealing vagueness and uncertainty in its wording. In those cases, courts might interpret the real intention of the parties when drafting the clause, either making an interpretation pro-enforcement or directly declaring them non-binding for the parties.

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

There are certain guidelines that might be followed in order to avoid challenges to multi-tiered dispute resolution clauses in Argentina:

- Firstly, it is recommended that the clause include expressly and precisely the different stages that parties wish to undertake before litigation or arbitration. In other words, it is fundamental to establish a straightforward and clear procedure that allows the distinguishing of the different stages, their durations, and the steps to be followed. Moreover, the chances of enforcement are likely to improve if the drafting clearly provides that each of the stages is a condition precedent to arbitration or litigation.
- Including mandatory terms in the clause is of great importance to ensure its enforcement. In contrast to discretionary terms, the usage of mandatory language provides certainty as regards whether the previous stages agreed by the parties before arbitration or litigation are compulsory. Consequently, it is recommended to use such wording.
- Establishing deadlines and time limits for each of the stages is also likely to increase the prospects of the enforceability of these types of clauses. Incorporating such terms will facilitate the determination of whether each stage has been complied with or whether the period has already expired and the parties are able to continue with the next stage.
- Another element that could be included in the clause is a requirement to formally notify the other party once one of the stages has begun and has expired or has already been complied with. This formal notification could avoid a new conflict between the parties in relation to whether or not the previous stages have been met.
- In order to avoid a future conflict, parties may also include in the clause the consequences for a party of a failure to comply with one of the previous stages.
- Parties might agree to incorporate mediation as a prior stage to arbitration in multi-tiered dispute resolution clauses. That would not be necessary in cases where litigation is the last stage because parties will necessarily have to resort to mandatory mediation according to Argentinean Law, whether or not they include it in the clause.
 - In cases where parties eventually provide for arbitration and agree to incorporate mediation as a previous stage, it is advisable, in order to enhance its enforceability, to specify the institution or center that will be in charge of holding the mediation. It is also convenient for the parties to expressly choose the mediation rules from the same institution or center.
- Specifying the number of negotiation sessions that parties must undertake, or specifying the identity of negotiation participants, are not frequently used provisions of multi-tiered dispute resolution clauses in Argentina. Indeed, specifying the identity of negotiation participants could occasionally represent a risk for the parties as regards the enforceability of the clause if, for instance, the participant is then unable to attend negotiations for some reason.

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

The Buenos Aires Commercial Court of Appeals has indeed enforced multi-tiered dispute resolution clauses.

In 2006, the Commercial Court enforced a multi-tier clause providing that, if the parties could not resolve the dispute through negotiation, then the dispute would be resolved through arbitration. In that case, the claimant filed a lawsuit before the Commercial Court in order to determine the dispute that arose between the parties through litigation, alleging that the dispute was not capable of being arbitrated since it was not within the scope of the arbitral clause. However, the Commercial Court decided that it did not have jurisdiction to hear the case since the parties had expressly agreed to solve their disputes through the arbitration specified in the jurisdiction clause, and such voluntary and unequivocal consent expressed in the multi-tier clause had to be respected. The arbitral tribunal was the competent authority to determine the matter.

Although the wording of the clause as regards the negotiation stage –from our point of view– might be considered vague, as it lacks elements such as mandatory language, specificity and delimitation of time limits (“*Any controversy or claim... if not solved through the negotiation of the Parties...*”) the Court safeguarded the autonomy of the parties and enforced the multi-tiered dispute resolution clause [*Buenos Aires Commercial Court Of Appeals, Chamber “E”, “Vaccari, Julio Eduardo and other v. Compagnie Generale de Particip. Indu. et Financiere SAS and others”, 28/08/2006*].

In another case, in 2010, the Buenos Aires Commercial Court of Appeals enforced a multi-tiered dispute resolution clause that provided for three different stages in the event a dispute arose: negotiation, mediation and arbitration. The Commercial Court again decided that it did not have jurisdiction to hear the case since the parties had expressly consented to a clause providing that an arbitral tribunal would determine their disputes. The Court emphasized that ignoring such an unequivocal decision would contravene the principle that contracts should be interpreted and exercised according to the parties’ intent. Therefore, the Court interpreted that what parties understood was that they would resolve their disputes through arbitration and not through litigation [*Buenos Aires Commercial Court Of Appeals, Chamber “C”, “Cemaedu S.A. and other v. Envases EP S.A. and other about ordinary”, 19/10/2010*].

In 2005, the Buenos Aires Civil Court of Appeals decided a case where the interpretation of a multi-tiered dispute resolution clause was at stake. In that case, the jurisdiction clause stated that if there was a notorious and serious imbalance in the prices of certain properties, then the parties had a 30-day period to reach an “*equitable solution*” for both of them. In the event that the parties did not reach a resolution, then, in the same period of time, the parties had to fix their claims in “*due form*” in order to file a claim before the arbitral tribunal.

A dispute arose, the parties could not reach an “*equitable solution*” and they did not fix their claims in the period of 30 days. Therefore, the claimant filed a lawsuit before the judicial courts and the defendant challenged the jurisdiction of the judicial courts invoking the dispute resolution clause. While the claimant considered that the option to go to arbitration had been extinguished since the defendant did not exercise the option in the period of 30 days, the defendant considered that the 30-day period was established in order to fix the amount of the dispute, but that the lack of agreement had to be resolved through arbitration and not by judicial courts.

The Civil Court held that the 30-day period in which the parties had to fix their claims was an unavoidable requirement, and the fact that they had not done it in that period and neither had they done it afterwards, proved a tacit withdrawal from the arbitral jurisdiction, and therefore the extinction of the multi-tiered dispute resolution clause [*Buenos Aires Civil Court Of Appeals, Chamber "F", "Zavalía Myriam v. Scarinci, Jorge J.A. about execution of agreement", 13/10/2005*].

From the few cases where the Buenos Aires Courts of Appeal have had to enforce a multi-tiered dispute resolution clause, it could be said that they have not taken a consistent line of thought in relation to multi-tiered dispute resolution clauses. While in some cases the courts have enforced such clauses, in some others they applied a strict criterion even where the clause was extinguished due to non-compliance with one of the previous stages of the clause.

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

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination ("Dispute"), must be attempted to be solved through negotiation by the parties within [__] calendar days after either party notifies the other in writing of the existence of the Dispute.

Any Dispute not resolved in the term abovementioned, shall be finally settled by arbitration under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules.

The party that initiates the Dispute must submit a request for arbitration according to the said Rules, and must simultaneously appoint an arbitrator. The other party to the Dispute must appoint an arbitrator simultaneously with the submission of the response to the request for arbitration. The two appointed arbitrators must attempt to reach an agreement on the appointment of the third arbitrator who shall act as presiding arbitrator. In case the two appointed arbitrators fail to reach an agreement within 30 calendar days from the date of appointment of the second arbitrator or, if one of the parties fails to appoint an arbitrator as herein established, the arbitrator will be appointed according to procedure contained in the said Rules. To that effect, the appointing authority will be [indicate the appointing authority].

The place of arbitration shall be [...]. The language of arbitration shall be [...], and the arbitration will be [indicate whether the arbitration will be at law or amiable compositeur].

The arbitration award ("the Award") shall be final and binding upon the parties, and it could not be subject to any kind of appeal or revision. Each of the parties waives its right to appeal the Award before any tribunal. Any party to the Dispute

may request the recognition and enforcement of the Award to any competent tribunal, if the other party does not comply with it.