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GLOBAL DEVELOPMENTS

COMMENTARY

arbitral tribunal held that, under Chapter 7, Section 10 of the Finnish Procedural Code, where so requested by a party, the costs of ancillary interim relief proceedings shall be decided at the same time as the substantive issues in the main proceedings. The arbitral tribunal then added that Section 11 of the same Chapter provides that an applicant who has unnecessarily sought precautionary measures shall be liable to compensate the opposing party for the damage caused by such measures and their enforcement, and to cover the expenses incurred. The arbitral tribunal concluded that the question of which party is liable to pay the costs arising from ancillary proceedings for interim measures depends on which party prevails on the main issue and whether or not the interim measure proceedings were necessary in light of the outcome on the main issue.

The arbitral tribunal also noted that, under Finnish law, the binding effect of court decisions is limited to the operative part of the decision and does not cover its reasoning, and the findings of a court in ancillary proceedings for interim relief are not legally binding on the court or arbitral tribunal that is competent to decide on the main issue. Thus, the findings of a court in ancillary interim measure proceedings are not legally binding on an arbitral tribunal seised of the main issue.

Accordingly, the arbitral tribunal concluded that the decisive matter was whether or not the interim measure proceedings initiated by A were necessary in light of the outcome of the arbitration. Finding that they were,[7] the arbitral tribunal decided that A's claims were justified and awarded A the costs it had incurred in the interim measure proceedings.

Comment

Under Finnish law there is no doubt as to the arbitral tribunal's authority to award costs incurred in ancillary proceedings for interim relief brought in the courts. What the recent FAI case clarifies is that the test for recovering such costs in the main proceedings is one of necessity. Provided the application for ancillary interim relief was not unnecessary, and the claiming party prevails in the main proceedings, that party can even recover the costs of an application for ancillary interim relief that was refused. What the award leaves unanswered, however, is how the necessity test should be applied where a party seeks interim relief from both a court and an arbitral tribunal.

7 B had terminated the agreement without cause and therefore A's attempt to obtain an injunction to try to prevent unlawful termination was necessary.

EUROPE

France:

Does the Recent Law Modernising Justice Have Any Real Impact on Arbitration Clauses?

Nathalie Meyer Fabre and Damien Devot
Respectively, founding partner and partner at Meyer Fabre Avocats, Paris.

In November 2016, France passed a law intended to improve the functioning of the French judicial system. It contains a few provisions relating to arbitration, the most notable of which is an amendment designed to encourage the inclusion of an arbitration clause in all types of civil contracts, subject to the 'weaker' party's right to opt out of arbitration if and when a dispute arises. The new rules raise a number of unanswered questions, which will no doubt surface in upcoming cases.

Introduction

On 18 November 2016, France's President promulgated a new law which purported to modernise 21st-century justice ('Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle'). The law aims to make the French judicial system simpler, more efficient, more accessible and more independent. As part of the reform, it was deemed necessary to make some changes to the Civil Code's provisions on arbitration. Apart from some welcome formal clarification (e.g. removal of the word '*arbitrage*' in Article 1592 to describe the task of the third-party appraiser of the price of a sale, and its replacement

with '*estimation*'), the new law's substantive point of interest as regards arbitration is the revision of Article 2061 of the Civil Code, which relates to arbitration clauses.

Originally, Article 2061 read as follows (translations by the authors):

> An arbitration clause is null and void except where the law provides otherwise.

In 2001 this was changed to:

> Subject to particular legislative provisions, an arbitration clause is valid in contracts entered into on account of a professional activity.

Following the 2016 amendment, Article 2061 now provides as follows:

> An arbitration clause must have been accepted by the party against which enforcement of the clause is sought, unless that party succeeded to the rights and obligations of the party that had initially accepted the clause.
>
> When one of the parties did not contract in the context of its professional activity, the clause cannot be enforced against that party.

While the former Article 2061 (both in its original wording and in the 2001 version) dealt with the *validity* of the arbitration clause, the new version shifts the focus onto the *enforceability* of the clause, which depends on two conditions: acceptance of the clause (first paragraph); its conclusion in the framework of a professional activity (second paragraph).

Article 2061, first paragraph

It may seem surprising that the legislator suddenly found it necessary to mention that the arbitration clause had to be accepted to be enforceable. This requirement is indeed not new. Moreover, it applies to any contractual clause. Likewise, the second part of the sentence, which contemplates the transfer of rights and obligations, introduces nothing new or specific to arbitration clauses.

The first paragraph of the new Article 2061 is thus a completely unnecessary piece of legislation. It is probably a relic of a preliminary version of the new law, which required the arbitration clause to have been 'expressly' accepted by the person against whom it is to be enforced. Far from illustrating the pro-arbitration approach heralded by the legislator, the requirement of express consent would have collided with well-established case law, which, at least in international cases, recognises the binding effect of arbitration clauses well beyond the circle of the initial signatories by virtue of tacit, or even presumed, acceptance (Court of Cassation, Civil Chamber No. 1, 27 March 2007, *Alcatel Business Systems*, No. 04-20842; Court of Cassation, Civil Chamber No. 1, 26 October 2011, *CMN v FMS*, No. 10-17708).

The word 'expressly' was finally deleted during the legislative process, while the rest of the provision, now devoid of any real substance, was maintained. It can be expected that existing case law allowing arbitration clauses to be binding on non-signatories will be upheld under the new law. However, the legislator's failed attempt to curb the Court of Cassation's extensive interpretation of the effect of arbitration clauses reveals a lack of consensus, and the opponents of the prevailing case law may not have had their final say.

Article 2061, second paragraph

The second paragraph of the new Article 2061 is more reformative. Under the previous law, arbitration clauses were limited to contracts concluded in connection with a professional activity. The new law seeks to permit and promote the inclusion of arbitration clauses in all kinds of civil contracts (e.g. insurance contracts, lease agreements) signed by private individuals in a personal capacity. The use of arbitration to settle disputes arising out of such contracts is seen as a way of decongesting the courts.

However, giving consumers, insureds, leaseholders and other 'weak' parties (i.e. parties contracting in a non-professional capacity) easier access to arbitration is quite different from obliging them to arbitrate any dispute arising out of their contract. The new law stops short of that. Hence the shift from validity to enforceability: the validity of the arbitration clause is no longer an issue, but the clause cannot be enforced against a party who did not contract in the context of a professional activity. Article 2061 allows that party to choose between arbitration and litigation when a dispute arises.

This approach corresponds to the solution previously adopted by French courts in relation to employment contracts. Without questioning the validity per se of an arbitration clause in such a contract, the courts held that it could not be enforced against the employee. In other words, the employee can validly submit to arbitration under the clause, but cannot be deprived of his or her right to proceedings in the labour courts (see e.g. Court of Cassation, Chamber for Social and Labour Matters, 28 June 2005, No. 03-45042).

The innovative nature of the new provision should not be overestimated, however. It was already possible to arbitrate all sorts of disputes by signing a *compromis* (i.e. an agreement to submit an existing dispute to arbitration). The novelty of the new Article 2061 lies in the fact that the 'weak' party now has the possibility, when a dispute emerges, to confirm or retract the consent to arbitration it previously gave by signing a contract containing an arbitration clause. Whether this provision will actually lead to more disputes being resolved outside the judicial system remains to be seen. It is highly likely that the success of the reform will largely depend on the development of arbitration techniques and practices suited to lower-value and simpler cases. In this regard, the expedited procedure recently introduced into the ICC Arbitration Rules for cases where the amount in dispute does not exceed US$ 2 million may prove a timely response to users' needs.

The success of the reform will also depend on how the courts clarify a number of legal issues that the new law has left open.

- First of all, it will be necessary to determine how and when the 'weak' party should exercise its option. For example, does a party waive its right to opt out of arbitration by choosing an arbitrator without questioning the enforceability of the arbitration clause?
- Second, where employment contracts are involved, could it be argued that the employer and the employee both acted 'in the context of a professional activ.ity' and that the arbitration clause is therefore binding on the employee as well as the employer?
- Third, one of the stated aims of the new Article 2061 is to develop arbitration in the field of consumer disputes. However, the French Consumer Code contains provisions rendering arbitration clauses in consumer contracts void unless it is proven that the clause is not unfavourable to the consumer (Articles L. 212-1 and R. 212-2-10°). It is unclear how these provisions are supposed to be combined with the new Article 2061 of the Civil Code.
- Fourth, the courts will have to determine whether the new rule, applicable 'when one of the parties did not contract in the context of a professional activity', also applies in cases where none of the parties acted in a professional capacity.
- Fifth, the courts should confirm whether they will continue to consider that the provisions of Article 2061 apply only in the domestic arena and do not affect the more arbitration-friendly rules developed in case law on international contracts.
- Finally, the new law does not regulate the temporal applicability of the new Article 2061. It could be argued that the new provisions apply only to arbitration clauses signed after the entry into force of the new law. However, when Article 2061 was amended in 2001, the new provisions were applied to ongoing contracts because they were regarded as being of a procedural nature (Court of Cassation, Civil Chamber No. 1, 22 November 2005, No. 04-12655).

Concluding comments

The changes made to Article 2061 under the new law were enacted without any significant prior consultation of arbitration specialists. There is every reason to doubt that they will make any significant contribution to the progress of arbitration law in France, subject, of course, to the resolution of the many questions they leave unanswered.

There are other matters related to arbitration that may require legislative reform in the near future, such as arbitration involving French public entities and administrative contracts. It is hoped that on that occasion more careful consideration will be given to the legal and practical issues at stake, and that there will be a broad consultation of users, practitioners and academics, who are only too eager to contribute to a law modernising 21st-century arbitration