My ILO

French court rules that mandatory expert determination provisions do not render arbitration clauses inapplicable

16 May 2019 | Contributed by Freshfields Bruckhaus Deringer LLP

Arbitration & ADR France

Introduction

The arbitral tribunal's power to determine its jurisdiction (known as '*compétence-compétence*') is a fundamental principle of French arbitration law. Pursuant to Article 1465 of the French Civil Procedure Code, "[t]he arbitral tribunal has exclusive jurisdiction to determine challenges to its jurisdiction".(1) Thus, arbitrators have the exclusive power to determine the scope of their jurisdictional powers (and their validity), including with respect to the subject matter of disputes covered by an arbitration agreement. The practical consequence of this exclusivity is that a court seised of a dispute that is subject to an arbitration agreement must decline jurisdiction. That is unless, as set out in Article 1448 of the Civil Procedure Code, an arbitral tribunal has not yet been seised of the dispute and the arbitration agreement is "manifestly void or manifestly inapplicable".

The exception of manifest nullity or inapplicability is interpreted restrictively by the French courts; it must be evident on a *prima facie* basis. Failing this, the arbitral tribunal

has priority to determine any question relating to the existence, validity or scope of the arbitration agreement. The exception is rarely established in practice.(2) However, it has recently been tested by the Court of Cassation in the context of a dispute arising out of the valuation of shares owned by a shareholder, which is a matter normally devolved to an independent expert, by operation of a mandatory provision of French law. The question was whether this mandatory rule of law rendered an arbitration clause manifestly void or inapplicable.

Facts

Following a decision during a shareholder meeting, the company *Société Civile des Mousquetaires*, which held interests in a French supermarket chain, removed the claimant shareholder and assessed that the compensation due for his shares was €123,750. The shareholder disputed this valuation and applied to the Paris Court of First Instance for the appointment of an independent expert to value the shares, in accordance with Article 1843-4 of the Civil Code.(3) This provision forms part of French public order and, as such, mandatorily applies.

However, by order of its president, the Paris Court of First Instance declared itself incompetent in light of the arbitration clause contained in Article 35-2 of the company's bylaws.(4) This referred to arbitration disputes concerning the valuation of shares held by exiting or excluded shareholders and stated that the arbitral tribunal thus appointed would exercise the powers of an expert appointed pursuant to Article 1843-4 of the Civil Code.

The shareholder appealed to the Paris Court of Appeal, seeking to have the order quashed for excess of powers (this being the only available recourse). He argued that, by declaring itself incompetent, the court had misconceived the scope of its power. Moreover, the arbitration clause in Article 35-2 of the company's bylaws was manifestly void, in that it violated the mandatory provision in Article 1843-4, conferring the power on the arbitral tribunal to appoint a third-party expert and to undertake the valuation of the shares itself. In this regard, the shareholder contrasted the adjudicative function of the arbitral tribunal with that of the expert under Article 1843-4, limited to fixing the price of shares.

Decision

The Paris Court of Appeal dismissed the shareholder's appeal against the order of the Paris Court of First Instance.(5) Emphasising the contractual status of the arbitration clause, the court stated that the mandatory nature of Article 1843-4 as a rule of public order did not, in and of itself, preclude the arbitrability of the dispute; therefore, the arbitration clause was not manifestly void. Moreover, the fact that the arbitration clause empowered the tribunal to value the shares did not render it manifestly inapplicable. The court further observed that these questions of arbitrability and scope of arbitral jurisdiction were for an arbitral tribunal to determine, by virtue of the principle of *compétence-compétence*. Accordingly, by declaring itself incompetent, the Paris Court of First Instance had not exceeded its powers. The shareholder appealed to the Court of Cassation.

In an October 2018 decision the Court of Cassation dismissed the appeal, upholding the analysis of the Paris Court of Appeal.(6) In particular, the Court of Cassation confirmed that the mere circumstance that the arbitration clause conferred on the arbitral tribunal the power to value the shares and adjudicate the dispute (as distinct from the expert's power to value shares without adjudication) did not render the arbitration clause manifestly inapplicable or void. Like the Court of Appeal, the Court of Cassation considered that these questions were for the arbitral tribunal to determine as the judge of its own jurisdiction.

Analysis

The decisions of the Court of Cassation and the Paris Court of Appeal before it emphasise the pre-eminence of the principle of *compétence-compétence* in French law. Provisions of French public order (eg, Article 1843-4 of the Civil Code) are mandatory and cannot be derogated from by contract.(7) However, they cannot, in and of themselves, operate to render an arbitration agreement manifestly void or inapplicable and thus prevent an arbitral tribunal from examining its jurisdiction under the arbitration agreement.

More broadly, these decisions reflect the expansive conception of arbitrability under French law, even when French rules of public order are in play. The presence of rules of public order is not an obstacle to the arbitrability of the dispute, and arbitral tribunals have the power to apply and adjudicate on rules of public order (subject to the exclusions of Article 2060 of the Civil Code, which are interpreted restrictively by the French courts).(8) In addition, as the facts of this case illustrate, disputes relating to corporate law are, at least *prima facie*, arbitrable. It is not the first time that the Court of Cassation has upheld arbitration clauses covering disputes between shareholders under a company's bylaws, notwithstanding the mandatory rules of public order that may arise in this context.(9)

Whether the arbitral tribunal actually had jurisdiction to value the shares was a question over which the Court of Cassation and the Paris Court of Appeal expressed no opinion, leaving it entirely to the arbitral tribunal to determine in view of the principle of *compétence-compétence*. In this regard, as the Court of Cassation recalled in its decision, the expert's mandate under Article 1843-4 is to value the shares without adjudicating on the related dispute.(10) This power is that of a third-party evaluator, as distinct from the tribunal's general adjudicative power.(11) Moreover, the Paris Court of Appeal has previously held that "Article 1843-4 may not be avoided in arbitration, as the arbitrator is equated with a state court as being subject to substantive rules, whether mandatory or supplementary".(12) Since the role of the state court under Article 1843-4 is not to value shares but to appoint an expert to this end, it is debatable whether an arbitral tribunal has the power to act as evaluator itself.(13) However, the arbitration clause in this case explicitly empowered the arbitral tribunal to value shares in lieu of an expert under Article 1843-4 of the Civil Code, acting as amiable compositeur. The arbitral tribunal, once appointed, would need to assess the effectiveness of this provision, having regard for the mandatory nature of Article 1843-4 and its interpretation.

Comment

The Court of Cassation confirmed the quasi-absolute priority given to the arbitral tribunal to determine questions relating to its jurisdiction, even when this involves rules of French public order. Although this is well established in French case law, it is the first time that the court has upheld an arbitration clause that conferred on the tribunal the statutory power to value shares in lieu of a party-appointed or judicially appointed expert.

The court's decision was limited to allowing the arbitral tribunal to determine its own jurisdiction. As such, it does not pre-judge whether the arbitration clause should ultimately be given effect by the tribunal, and it remains open for a reviewing court, in the course of annulment or enforcement proceedings, to sanction any violation of public order arising from the application of the arbitration clause by the arbitral tribunal. However, given the limited scope of review of arbitral awards (both domestic and international) on public order grounds, the risk of the award being set aside on such a ground is more theoretical than real.(14) Ultimately, the application of mandatory rules of French law in disputes submitted to arbitration rests largely in the hands of the arbitral tribunal.

For further information on this topic please contact Gisèle Stephens-Chu or Nora Bellec at Freshfields Bruckhaus Deringer by telephone (+33 1 44 56 44 56) or email (gisele.stephens-chu@freshfields.com or nora.bellec@freshfields.com). The Freshfields Bruckhaus Deringer LLP website can be accessed at www.freshfields.com.

Endnotes

(1) Article 1465, French Civil Procedure Code: "*Le tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel*."

(2) C Seraglini and J Ortscheidt, "*Droit de l'arbitrage interne et international*", *Domat Droit Privé*, Montchrestien, 2016, Paragraph 169, pp 191-193.

(3) In situations of forced buy-back or transfer of shares, where the value of the shares is disputed, Article 1843-4 of the French Civil Code provides for the appointment of an expert by agreement of the parties or, failing this, by order of the president of the competent first-instance court tribunal through an emergency legal proceeding.

(4) Order dated 8 April 2015, president of the Paris Court of First Instance (RG 15/51413).

(5) Paris Court of Appeal, 15 June 2016 (15/11083).

(6) Court of Cassation, Commercial Chamber, 10 October 2018 (16-22.215).

(7) Articles 6 and 1162 of the French Civil Code.

(8) E Loquin, "*L'ordre public et l'arbitrage*", Association of Law and Commerce Conderence, Commercial Court of Paris, 5 March 2018, *La Revue de Jurisprudence Commerciale*, Thomson Reuters, July/August 2018, 4 and C Seraglini and J Ortscheidt, pp 120-122.

(9) Court of Cassation, Commercial Chamber, 9 April 2002 (98-16829).

(10) Court of Cassation, Commercial Chamber, 10 October 2018 (16-22.215).

(11) X Delpech, "*La fixation du prix de rachat de parts sociales par un expert confronté à l'arbitrage*", *Dalloz Actualité*, 25 October 2018, emphasising the duality of the clause in the Mousquetaires company's bylaws as both an arbitration clause and a price determination clause.

(12) Paris Court of Appeal, 21 May 1996 (94/25296).

(13) R Mortier, "*Cession de droits sociaux - Licéité de la clause d'évaluation des droits sociaux par voie d'arbitrage*", *Droit des sociétés*, January 2019 (1), observing that the tribunal does have the power to act as an evaluator when acting as amiable compositeur, as was the case under the arbitration clause in the Mousquetaires company's bylaws and M Laroche, "*Arbitrabilité des litiges relevant de l'article 1843-4 du Code civil*", *La Semaine Juridique Edition Générale*, 10 December 2018 (50), 1303.

(14) C Seraglini and J Ortscheidt, p 121 and E Loquin.

Authors

Gisele Stephens-Chu

Nora Bellec