

litigation lawflash

18 October 2013

Useful Facts on French Jurisdiction

Recent cases offer practical applications of jurisdiction clauses or jurisdictional competence clauses.

Several recent cases decided by the *Cour de cassation* (the French Supreme Court for Judicial Matters) offer some useful reminders regarding the issue of jurisdiction. These cases are summarised below.

One should be wary of optional dispute resolution clauses (Cass. Civ. 1st, 12 June 2013, No. 12-22.656).

This case involved an agreement between two companies in which the agreement contained a dispute resolution clause whereby each party could opt either for arbitration or for proceedings before the court of the jurisdiction where the purchaser had its headquarters. In evaluating the clause, the *Cour de cassation* determined that the reference made in the clause to an arbitration center did not call the optional nature of the arbitration into question. Therefore, the *Cour de cassation* specified that the disputed clause was not an arbitration clause within the meaning of Article 1442 of the French Code of Civil Procedure and held that it was a dispute resolution clause authorizing the parties to refer the matter either to arbitration or to a state court. Hence, the arbitration rules and principles, especially the doctrine of “competence-competence”, were not applicable to the case at hand. Such optional dispute resolution clauses—which can increasingly be found in international business contracts and are recognized under domestic law—bind the parties to make a choice between a state court and an arbitral tribunal once the dispute has occurred, even though it is a decision they did not make at the time of entering into the agreement. **The problem with such a clause is that it can complicate the implementation of the agreement after the dispute has arisen**—given the nature of the parties’ relationship at the relevant time—and is thus likely to entail a new dispute related to the interpretation of the clause, **creating an additional legal uncertainty.**

Choice-of-jurisdiction clauses are unenforceable against third parties (Cass. Civ. 1st, 11 Sept. 2013, No. 09-12.442).

This dispute concerned air conditioning units that had been installed by a company in a housing complex. The manufacturer of the compressors was an Italian company, and such compressors were assembled by another company in air conditioning units, which were supplied by a third company. The insurer that took over the rights of the subpurchaser claimed indemnification from the manufacturer and the supplier. The *Cour de cassation*—based on the authors, according to whom the consensus is the decisive factor in the efficiency of a choice-of-jurisdiction clause—recalled that such a clause, in an agreement between a manufacturer and a purchaser, cannot be enforced against the third-party subpurchaser if the latter has not directly consented thereto. If the third-party subpurchaser had given its express consent thereto, this clause would have been enforceable against it.

In that respect, this decision is identical to that of the Court of Justice of the European Union, which had been called upon by the *Cour de cassation* to give its interpretation as to whether a choice-of-jurisdiction clause between a manufacturer and a buyer in a set of agreements between EU countries could be effective vis-à-vis the subpurchaser in light of Article 23 of Regulation No 44/2001 of 22 December 2000.

The Court of Appeal where an application for invalidation of an arbitral award is filed cannot modify the decision on the merits of the award (Cass. Civ. 1st, 11 Sept. 2013, No. 12-26.180).

In this case, a sole arbitrator, ruling on a dispute between two companies that related to the determination of the transfer price of shares in a third company, issued an arbitral award that sentenced the transferor to repay part of the transfer price. The transferring company filed an action for invalidation. The Court of Appeal dismissed the action and sentenced the transferor to pay an amount increased by the contractual interest rate as from the date of the arbitral award. After the transferor lodged an appeal, the *Cour de cassation* overturned the Court of Appeal's judgment, holding that the Court of Appeal had erred in **modifying the amount ordered by the arbitrator by adding the contractual interest rate as from the date of the award.**

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