Case law comments

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Another example of the exceptionality of the manifest nature of the invalidity or inapplicability of an arbitration clause

ALEXANDRE BAILLY
Partner
Morgan Lewis

XAVIER HARANGER
Associate
Morgan Lewis

In a ruling dated 21 September 2016, the first civil chamber of the Court of cassation, based on Article 1448, paragraph 1, of the Code of Civil Procedure, considered that "*by conducting a substantial and thorough examination of the contractual negotiations between the parties to establish the absence of commitment*", the court of appeal had ruled "*on grounds unfit to sustain the manifest inapplicability of the arbitration clause*".

This decision confirms the case law of the Court of cassation which insists on the manifest nature of the invalidity or inapplicability of the arbitration clause.
Cass. 1st civ., 21 Sept. 2016, No. 15-28.941, P+B

The facts were the following:

Two foreign companies belonging to the same group, that we represented, had entered into negotiations with a French company for the signature of a medical technology development agreement. The negotiations were ultimately unsuccessful. The French company was subsequently placed into liquidation.

The liquidator then served summons on the foreign companies on the basis of their contractual liability, on the grounds that there had been an agreement between the parties and that the draft agreement had been performed.

Yet, this draft agreement contained an arbitration clause.

At first instance, the foreign companies put forward the lack of jurisdiction of the French courts on the basis of Article 1448, paragraph 1, of the Code of Civil Procedure. However, the commercial court of Cannes assumed jurisdiction on the grounds that the agreement had not entered into force, since it was not signed, thus implying that the arbitration clause was manifestly invalid or manifestly inapplicable.

The defendant companies lodged an objection before the court of appeal of Aix-en-Provence which, in a ruling of 5 November 2015[1], upheld the judgment on the grounds that if the French company's action had "*actually been initiated with overall reference to the agreement* (...), *only the clauses thereof other*

[1] CA Aix-en-Provence, 5 Nov. 2015, No. 14/24336.

than the arbitration clause had already been discussed and accepted and were binding on the parties" and that, hence, there was no "*contractual commitment in respect of an arbitration clause*".

It was in this context that the foreign companies lodged the appeal contemplated by the Court of cassation's ruling of 21 September 2016.

After having recalled the rule laid down in article 1448, paragraph 1, of the Code of Civil Procedure, we will address the specificity of the outcome reached by this ruling.

I. – Reminder of the rule relating to the manifest nature of the invalidity or inapplicability of an arbitration clause

Article 1448, paragraph 1, of the Code of Civil Procedure, provides that "*where a dispute referred to a court pursuant to an arbitration agreement is brought before a State jurisdiction, such jurisdiction must declare that it lacks jurisdiction unless the arbitration court has not yet been referred to and the arbitration agreement is manifestly invalid or manifestly inapplicable*."

The jurisdiction of the State court can therefore be accepted only if, cumulatively, an arbitration court has not yet been referred to and if the arbitration clause is manifestly invalid or manifestly inapplicable. This is the negative effect of the competence-competence principle according to which "*it is the arbitrator's responsibility to rule, in priority, under the control of the juge de l'annulation (cancellation judge), upon the existence, validity and scope of the arbitration clause*"[2].

Case law has given many examples where the jurisdiction of the State court must be set aside when the manifestly invalid or manifestly inapplicable nature of the arbitration clause is not demonstrated.

For instance, it has been found that:

- it is for the arbitrator to rule on his own jurisdiction and he is sole entitled to decide whether the pre-contractual nature of the alleged defect falls within his jurisdiction or not[3]. Thus, the fact that the suit is based on a triggering event that occurred prior to any contractual relationship between the parties to a franchise contract containing an arbitration clause is not likely to establish the manifest invalidity or inapplicability of the clause[4];

- the manifest invalidity or inapplicability of the arbitration clause is not established by the sole fact that there would be a doubt as to whether the dispute is contractual or tortious in nature[5]

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[2] Cass. 1st civ., 11 Jul. 2006, No. 05-18.681, Bull. civ. I, No. 365. See also Cass. 1st civ., 24 June 2015, No. 14-17.547; CA Paris, 27 Jan. 2015, No. 14/06977; Cass. 2nd civ., 20 Dec. 2001, No. 00-11.852.

[3] CA Paris, 30 June 2004, *Revue de l'arbitrage* 2005, p. 673.

[4] Cass. 1st civ., 4 Jul. 2006, No. 05-17.460, Bull. civ. I, No. 338.

[5] CA Paris, 2 June 2004, *Revue de l'arbitrage* 2005, p. 673. See also Cass. 1st civ., 8 Nov. 2005, No. 02-18.512, Bull. civ. I, No. 402 (for a case of unfair competition); Cass. 1st civ., 25 Apr. 2006, No. 05¬15.528, Bull. civ. I, No. 196 (for a case of breakdown in

or on the grounds that the dispute does not relate to the interpretation of the contract which was the only subject of the arbitration clause[6];

- the terms of an agreement which imperatively designate two arbitral institutions[7] or an appointed arbitrator's refusal to accept his duties[8] are not likely either to establish the manifest inapplicability of the arbitration clause.

Or again recently that:

- the mandatory provisions of Article 1843-4 of the Civil Code (relating to the sale of a partner's shares) could not prevent the application of the arbitration clause[9];

- the manifest inapplicability of the arbitration clause could not be inferred from the alleged impossibility for the court liquidator to meet the cost of the arbitration proceedings[10];

- a clause contained in an application form for sharing the profits of the 2010 football world cup conferring jurisdiction on the Court of Arbitration for Sport could not have its scope limited only to disputes relating to such sharing[11].

In fact, the cases of manifest inapplicability or invalidity of the arbitration clause are so extremely rare that, in 2012, professor Thomas Clay counted only six[12].

However it should be noted that, very recently, an arbitration clause has been found manifestly inapplicable in a case where a matter had been referred to the judge by the minister of the economy as authorized under Article L. 442-6, III of the Commercial Code. In this dispute, the first civil chamber of the Court of cassation approved the court of appeal's decision to establish the manifest inapplicability to the dispute of the arbitration clause of the distribution agreement by stating that the minister did not act as "*a party to the agreement or on the basis thereof*" and that this action, "*granted in respect of a mission as law enforcement officer to ensure the proper functioning of the market and competition is an autonomous action which is to be heard by the State courts considering its nature and subject matter*"[13].

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negotiations). Likewise, an arbitration clause inserted in a contract is not manifestly inapplicable when the dispute relates to a sudden termination of an established business relationship, which is a tort action: CA Paris, 18 March 2014, No. 12/13601.

[6] Cass. 1st civ., 29 Jan. 2014, No. 12-29.086.

[7] Cass. 1st civ., 20 Feb. 2007, No. 06-14.107, Bull. civ. I, No. 62.

[8] Cass. 1st civ., 21 Oct. 2015, No. 14-17.056.

[9] CA Paris, 14 June 2016, No. 15/11083.

[10] Cass. 1st civ., 13 Jul. 2016, No. 15-19.389, published in the Bulletin. See also, for an invalidity claimed on the basis of a breach of the right to access the floor of the court and a denial of justice: CA Paris, 18 March 2014, No.12/13601.

[11] Cass. 1st civ., 6 Jul. 2016, No. 15-19.521, published in the Bulletin.

[12] JDI 2012, p. 443, "'*Liberté, Égalité, Efficacité': la devise du nouveau droit français de l'arbitrage*" ("Freedom, equality, efficiency": the motto of the new French arbitration law), comment on Article 1448 of the Code of Civil Procedure. For an example: Cass. com., 13 June 2006, No. 03-16.695.

[13] Cass. 1st civ., 6 Jul. 2016, No. 15-21.811, published in the Bulletin.

II. – The ruling of 21 September 2016 and the confirmation of the importance of the manifest nature of the invalidity or inapplicability

In this ruling, to dismiss the plea of lack of jurisdiction, the Court of cassation first noted that "*the ruling holds that the arbitration clause has never been discussed or considered between the parties throughout 2004 and 2005, that its inclusion into the agreement of 4 February 2005 is totally new, that the fact that this agreement has not been signed unquestionably establishes a lack of willingness of the parties to resort to arbitration, which excludes referral to the arbitrator in the absence of any contractual commitment*".

In other words, the Court of cassation considered that the court of appeal of Aix-en-Provence had engaged in a real analysis of the contractual negotiations to consider that the parties had not expressed their intent to resort to arbitration, which, according to the court of appeal, excluded referral to an arbitrator.

The Court of cassation indicates that "*in so ruling, on grounds unfit to establish the manifest inapplicability of the arbitration clause contained in the agreement by conducting a substantial and thorough examination of the contractual negotiations between the parties to establish the absence of commitment, the court of appeal breached the aforementioned text*".

In that respect, the Court of cassation points out that the thorough examination conducted by the court of appeal actually shows that the inapplicability was not manifest in nature since, to establish the same, the court of appeal had to delve into the interpretation of the pre-contractual negotiations.

It should be noted that the Court of cassation fails to analyse whether the draft agreement had been signed or not, since this fact alone does not suffice to render an arbitration clause manifestly inapplicable[14].

The Court of cassation based itself exclusively on the lack of manifest nature of the inapplicability of the clause, by stating that it is only by conducting a "*substantial and thorough examination of the contractual negotiations between the parties*" that the court of appeal managed to decide on the absence of commitment of the parties in respect of the arbitration clause.

Yet, if there could have been a doubt as to the parties' agreement on the arbitration clause, this doubt was necessarily in favour of the foreign companies which claimed the existence of an arbitration clause.

As recalled by doctrine, "*the doubt necessarily favours the jurisdiction of the arbitration court to assess the inapplicability of the clause, which is deprived of its manifest nature*"[15]. In other words, "*the manifest inapplicability is established prima facie. It does not raise any doubt because it is so obvious*"[16].

[14] CA Rennes, 12 May 2009, No. 09/00052.
[15] J.-Cl. *Procédure Civile*, Fasc. 1034 *Arbitrage*, No. 107, 30 Sept. 2009 updated on 24 February 2016, Pr. Éric Loquin.
[16] J.-Cl. *Procédure Civile*, Fasc. 1034 *Arbitrage*, No. 105, 30 Sept. 2009 updated on 24 February 2016, Pr. Éric Loquin.

Therefore, the Court of cassation provides a new illustration of this principle here, by implicitly stating that the inapplicability of the clause could actually not be manifest since it has required a "*substantial and thorough examination of the contractual negotiations*".

The first civil chamber had already supported this approach, by a ruling of 24 February 2016, validating an opposite stand of a court of appeal which considered that "*the inapplicability put forward was not manifest*", in particular because the assessment thereof required "*an interpretation of the agreement and a search of the parties' common intent*"[17].

The outcome is somewhat reminiscent of case law in terms of interim payment orders according to which a serious challenge defeating the request for interim payment exists when the *juge des référés* (interim relief judge) must look into the interpretation of the contract and the parties' intent[18].

Just like the *juge des référés*, the judge entrusted with hearing the issue of the manifest invalidity or inapplicability of an arbitration clause is a *juge de l'évidence* (judge ruling on obviousness) and any interpretation of the contract or of the pre-contractual negotiations defeats the manifest nature of the invalidity or inapplicability of the arbitration clause.

By this ruling, the Court of cassation sends a clear signal to the *juges du fond* (judges dealing with the substance of the case) who would think they can infer the inapplicability or invalidity of an arbitration clause from a substantial and thorough examination of the lack of agreement between the parties on the said arbitration clause.

[17] Cass. 1st civ., 24 Feb. 2016, No. 14-26.964, published in the Bulletin.

[18] For an example, see Cass. 3rd civ., 22 May 2013, No. 12-18.925; Cass. com., 19 Jan. 1988, No. 85-17.918, Bull. civ. IV, No. 45; Cass. com., 9 Apr. 2013, No. 12-15.556.