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Arbitration of Consumer Disputes in France: Get Thee Behind Me Competence-Competence?

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On 30 September 2020, the French Supreme Court rendered a decision, that, on its face, appears to overturn its fabled 1997 *Jaguar* (95-11.427, 95-11.428 and 95-11.429) and 2004 *Rado* (02-12.259) decisions, which held that the principle of *competence-competence* applied even in the case of consumer disputes. In *PwC*, to the contrary, the Supreme Court refuses to refer the parties to arbitration, and holds that the arbitration agreement is not binding on the consumer. While this constitutes a major shift in the reasoning of the court, the court is not replacing one bright-line rule with another. Rather, it makes room for early-on case-by-case analysis of the arbitrability of consumer disputes by domestic courts.

A Little Bit of Context

The principle of *competence-competence* is enshrined in Article 1448 of the French Civil Procedure Code, which provides that "[w]hen a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable."

Over time, this arbitration-friendly principle has been tested in many contexts, but it is safe to say that no debate has been more heated than that surrounding the arbitrability of consumer disputes in light of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which provides that "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."

In two instances, *Jaguar* and *Rado*, the principle of *competence-competence* and the imperative of consumer protection butted heads, and in both instances, priority was given to arbitration – much to the satisfaction of arbitration practitioners and chagrin of others.

Jaguar

In *Jaguar*, three individuals had separately ordered limited-edition Jaguars from the British automaker, through a French subsidiary. The contracts provided that any dispute would be arbitrated in London. Each buyer then attempted to rescind the separate sales, and initiated proceedings in French courts. The individuals argued that the purchases were made in their individual capacities, and that international trade interests were not at stake as all payments were made to the French subsidiary. The Paris Court of Appeal declined jurisdiction, noting that the contracts "which contained a clear and legible arbitration agreement" covered an international transaction, and that it was irrelevant in this light that each individual had made the purchase "for his individual use." The Supreme Court endorsed this approach, noting that "the arbitration agreement should be enforced, by virtue of the independence of such agreement under international law, under the control of the set-aside judge as to his own jurisdiction, and notably as to the arbitrability of the dispute."

Rado

In *Rado*, a French individual had opened an account with a New York entity offering brokering services through a doorstep sale. Pursuant to that contract, the individual wired a substantial sum of money to an account in the United States. The contract provided for arbitration in the United States through the National Futures Association. Four months later, the balance of the account became negative, and the individual initiated proceedings in front of the French courts. This time, the individual did not contest the international nature of the transaction, but argued that because of the nature of the contract (entered into in her individual capacity and through a doorstep sale the legality of which was questioned), the court could hold that the arbitration agreement was manifestly void. The court refused to entertain this argument, and held that an examination of the arbitration clause showed no inequality of arms, such that it was not manifestly void, and the dispute should therefore be remanded to arbitration subject to review at the enforcement stage.

New Beginnings?

PwC

Following the passing of her father in Spain, a French woman retained the services of the Spanish arm of an international consultancy and legal services provider in the context of a dispute with her brother and the executor of the estate. The contract, in French, included an arbitration agreement which consisted in the translation of the consultancy's boiler-plate Spanish-language arbitration clause, and provided for CIMA arbitration, presumably in Madrid.

Evidently dissatisfied with the services provided, the consumer initiated proceedings against the consultancy in French courts. The consultancy objected to the jurisdiction of the court, pointing to the arbitration agreement contained in the contract, and arguing in the alternative that Spanish courts should hear the dispute.

Following the conventional *Jaguar/Rado* approach, the Versailles Court of Appeal should have remanded the case directly to arbitration. It did not. Rather, without regard to the principle of *competence-competence*, the court directly launched into its own analysis of the arbitration agreement, and held that it was unfair because it had not been negotiated and reflected the

standardized language used by the consultancy.

It was the perfect opportunity for the Supreme Court to revisit its prior rulings.

The Supreme Court first engaged in a lengthy recitation of the principles of European and domestic consumer laws to reach the conclusion that the procedural rule contained in Article 1448 (the principle of *competence-competence*) cannot result in a party being effectively deprived of the consumer-protection provisions of European law. Consequently, the court upheld the decision of the Court of Appeal, holding that "the court of appeal which, **after having examined the applicability of the arbitration agreement by looking at all appropriate factual and legal elements at its disposal**, declined to apply the arbitration agreement, performed its obligation as a domestic judge to ensure the full effectiveness of European consumer protection laws **without disregard to the provisions of Article 1448**" (emphasis added). The court then briefly endorsed the finding of the lower court that the arbitration agreement was an unfair term, reiterating that that finding was in the full discretion of the lower court "taking into account the nature of the services described in the contract, as well as all circumstances surrounding the conclusion of the contract."

Potential impact of the decision

Much could be said about a potential spill-over effect of the decision and corresponding weakening of the negative effect of the principle of *competence-competence* even beyond the scope of consumer disputes, or on the desirability of further alignment between labor and consumer cases in domestic and international settings.

Likewise, the actual foundation for the result reached by the Supreme Court in *PwC* remains open to interpretation: Is the court holding that the arbitration agreement was manifestly void because the dispute involved a consumer, or is the court completely side-stepping *competence-competence*? The wording of the decision strongly suggests the latter. If that is indeed the case, on what ground? Some sort of public policy exception? If so, why only hint at it and not say so explicitly?

Focusing on the practical impact of the decision and how courts are likely to apply it going forward actually provides a good approximation of the court's thinking. It also puts to rest any temptation to read *PwC* as a pure reversal of *Jaguar* and *Rado*.

First, in *Jaguar* and *Rado*, affluent individuals entered into international transactions for highly specific goods and services, eliciting little of the sympathy usually directed at individuals in need of the shield of consumer laws. They were sent directly to arbitration. In *PwC*, a consumer sought the services of a consultancy to address an intricate and delicate family matter. She was spared having to go to arbitration as a prerequisite to the adjudication of her dispute. Overall, an equitable – if not intellectually satisfactory – result seems to have been reached in all three cases.

Second, the 1997 *Jaguar* court limited itself to noting the international nature of the arbitration, and giving full effect to the principle of *competence-competence*, while refusing to engage into any discussion as to the nature of the underlying dispute. For its part, the 2004 *Rado* court already moved away from that bright-line rule to usher in a more factual analysis, noting that the court of appeal "**having analyzed the arbitration agreement** […] held that [it] presented **all the necessary guarantees as to equality of arms** in the appointment of the arbitrators and the

independence of the arbitrators" (emphasis added).

The fact that the same result was reached in *Jaguar* and *Rado* should therefore not obfuscate the fact that *Rado* already endorsed a factual analysis going well beyond a *prima facie* review of the arbitration agreement and blind application of the negative effect of *competence-competence*.

With *PwC*, the court goes one step further: in consumer disputes, a full analysis of the applicability of the arbitration agreement by looking at all appropriate factual and legal elements at the disposal of the court becomes possible, without recourse to Article 1448, and without having to wait for a hypothetical set aside or enforcement action.

In other words, the same practical result reached in *PwC* could also have been reached by applying a *Rado*-like Article 1448 enquiry to the *PwC* set of facts. Conversely, auto-enthusiasts and aspiring financiers might not fare much better in 2020 than they did in 1997 or 2004. In this light, the evolution in reasoning presented by *PwC* comes across more as a recasting than a repudiation of the *Rado* test.

Finally, if anything, this evolution is oddly reminiscent of the French courts' willingness in recent years to apply a more stringent level of scrutiny to awards where issues of jurisdiction and public policy are concerned (even if, to be fair, issues of public policy usually arise in the more familiar settings of fraud or corruption). In other words, by side-stepping Article 1448 in consumer cases, where the issues of jurisdiction and public policy are ultimately one and the same, *PwC* makes it possible for any domestic court to seize the opportunity to opine on the jurisdiction of an arbitral tribunal straight away, rather than having to wait for hypothetical set aside proceedings to do so.

PwC therefore constitutes more of an evolution than a revolution. The trade-off, of course, is that domestic courts now have the option to side-step Article 1448 in consumer disputes. Whether this is the right price to pay for consumer protection is a question for another day. At the very least, this new rule of thumb approach tackles the issue with nuance *Jaguar* did not provide.

This entry was posted on Thursday, November 12th, 2020 at 7:50 am and is filed under Arbitrability, Consumer disputes, France
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