Kluwer Arbitration Blog

Paris Court of Appeal Confirms Reluctance to Invalidate Lockdown Awards

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As discussed on the Blog, the international chamber of the Paris Court of Appeal issued on 30 November 2021 a ruling in Boralex Energie France v. Innovent, on a set-aside request based on alleged irregularities related to the signing and dating of the award caused by the pandemic.

To the authors' knowledge, this decision is the first national decision ruling on the permissibility of arbitrators to remotely sign an arbitral award. Not only does it show the endorsement of a flexible approach by the Paris Court of Appeal, but overall, it also confirms its reluctance to overturn lockdown awards, as further analyzed in the present post.

In a nutshell, the Tribunal had not been able to meet in person to sign the final award because of the lockdown in effect in France. Thus, each co-arbitrator signed their copy of the award and sent a separate signature page to the chairwoman. She signed the award on a third signature page and sent them to the ICC Secretariat which eventually collated the signature pages. As a result, Boralex argued that the award should be set aside, as it could not be proven that the arbitrators deliberated collegially or that they signed the same document, and that the date of the award was uncertain. The Court nonetheless dismissed Boralex' action, and held that French law does not require the simultaneous signature, on the same page and on the same date, of the award.

For a precise description of the factual background, challenge and the Court's ruling, reference is made to the previous discussion of the case.

Courts' Reluctance to Endorse Covid-Related Considerations as Procedural Excuses

The Covid-19 crisis massively impacted the conduct of business and legal disputes throughout the world. Its aftermath will necessarily entail that courts and arbitral tribunals will need to adapt and to take it into account when making their decisions. In particular as the Covid-19 will likely not be the last large-scale pandemic to affect arbitration proceedings.

Thus, courts and tribunals will take it into account in their decisions on the merits (we have seen that litigants have routinely tried to claim that the pandemic constituted a *force majeure* event rendering the performance of their contracts impossible). But they will also need to factor the impact of the pandemic in their organisation of arbitration proceedings and in decisions on procedural matters.

As such, a risk that arises in return is that opportunistic litigants could exploit the Covid-19 crisis

to their own benefit, namely by bringing dilatory challenges against decisions which did not suit them. Boralex' annulment action could be construed as a typical case of an unsuccessful litigant relying on Covid-19 to challenge the award that was issued against it.

As mentioned in the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, multiple adjustments have had to be made to the arbitration process to accommodate the Covid-19 pandemic, such as the electronic filing of submissions and documents, e-signing of terms of reference and awards, or the organisation of remote hearings, conducted entirely by video-conference. Thus, one can easily imagine how awards rendered from early 2020 onwards could be challenged on the basis of Covid-related considerations, in particular by claiming a violation of the parties' right to be heard.

In addition to the Boralex decision, for example, challenges have been brought by litigants who have claimed that remote hearings breached the parties' due process rights, notably their right to be heard. However, such challenges have for now not tended to find success. For instance, as previously discussed on the Blog, the Austrian Supreme Court recently had to decide whether an arbitral hearing held via video-conference complied with the principles of a fair trial as enshrined in Article 6 of the ECHR. It dismissed the challenge brought against the award, noting that the use of video-conferences is an accepted and widespread tool to conduct arbitral proceedings, which, particularly during a pandemic, offers the possibility to combine the parties' right to effective access to justice and their right to be heard. In any event, challenges to remote arbitration awards have been scarce. To the author's knowledge, no jurisdiction has ever set aside an award because the hearing was held remotely, or because witnesses or experts were heard remotely.

In the *Boralex* decision, the claimant did not rely on a breach of its right to be heard, as is most common is Covid-19 challenges, but requested the award to be set aside on the basis that the date of the award was uncertain and the circumstances of the signature did not ascertain that the arbitrators deliberated collegially, that a majority decision was made, or that they signed the same document. It is the first-known French decision to rule on, and reject, a Covid-related request to set aside an award but it will most probably not be the last. Courts seem reluctant to accept Covid-related challenges to awards. In this case, the Paris Court of Appeal shows flexibility and has set a high standard for parties to demonstrate how their rights or the validity of the award were put in jeopardy by the procedural difficulties arising out of the pandemic and Covid-induced restrictions.

Courts might be more prone to be flexible when Covid-considerations are raised by the parties in the context of an application for an extension of time, an adjournment of hearings, or an application for relief from sanctions. But even in such cases, the difficulties caused by Covid-19 will be balanced with the impact on the hearing of taking the Covid-consideration into account. As a matter of fact, national jurisdictions have tended to be reluctant to excuse parties who failed to meet deadlines because of the pandemic, or to grant extensions of time because of the impact of the Covid-19 crisis on law firms. For instance in Municipio De Mariana v. BHP Group, the Court reminded that « *wherever possible, hearings should not be adjourned by reason of the pandemic* », and developed a strict set of principles to be taken into account to determine if an extension of time should be granted.

The Development by Arbitral Institutions of Covid-Related Guidance to Reduce Procedural Uncertainty and Avoid the Challenge of Awards

Since the Boralex ruling, the ICC issued on 9 April 2020 a Guidance Note on Possible Measures

Aimed at Mitigating the Effects of the COVID-19 Pandemic, acknowledging that the pandemic will disrupt many arbitrations and generate new disputes and expressly allowing for signing in counterparts. This now settles the issue of the signature of the award.

Many other institutions, such as the ICDR, CIArb, or the German Arbitration Institute, have enacted more specific rules to factor Covid-related considerations into the arbitration process. In order to manage arbitrations in a fair, expeditious and cost-effective manner, it is likely that this trend will continue in order to avoid further challenges of awards.

Potential Difficulties Arising out of the Application of the Law of the Place of Enforcement

However, the institutions' new rules and rapid changes in the arbitration practice may also run up against the applicable law at the place of enforcement. Indeed, they may very well risk the enforceability of the upcoming award. As in the *Boralex* decision, Parties might for instance exploit the fact that they did not expressly agree upon remote hearings, or that the institutions' new rules do not comply with the enforcing domestic court's law, to challenge their awards.

As previously discussed on the Blog, some jurisdictions remain attached to the traditional method of signing awards in wet ink. For instance, it has been highlighted that under Italian law, doubts arise as to the validity of the signature if the handwritten signature has been simply scanned into a pdf document. In the same vein, some Latin American countries such as Argentina or Costa Rica, even though they recognise the possibility to electronically sign the award, condition it to the existence of a reciprocity treaty. It is also uncertain whether electronic signatures will fulfill the authentication requirements under the New York Convention on the Recognition and Enforcement of Arbitral Awards before the Dubai and Dubai International Financial Center (DIFC) courts. It thus remains to be seen if the alternatives granted by the new arbitration rules will not undermine the enforceability of the awards in some jurisdictions.

Concluding Remarks

The relatively scarce case law scrutinizing the permissibility of Covid-related adjustments to procedural matters, and *a fortiori* challenges of an award on that basis, seems to confirm that litigants will need a clear-cut case to succeed. As of yet, the importance of the administration of justice and ensuring the effectiveness of the arbitral process remains the courts' priority, and they will therefore, most certainly, be reluctant to yield to future challenges based on the pandemic.

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