Kluwer Arbitration Blog

2024 PAW: The French Concept of the Arbitration Autonomy

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As we reported earlier, the 2024 edition of the Paris Arbitration Week ("PAW") is the first to count the Paris Court of Appeal among is partners. The event organized by the International Commercial Chamber of the Paris Court of Appeal ("ICCP-CA") was held on 20 March 2024 in a form of a debate on the French concept of the arbitration autonomy. The event featured Jacques Boulard (Paris Court of Appeal), Daniel Barlow, (Paris Court of Appeal), and Fabienne Schaller (Paris Court of Appeal) as host speakers, and Eric Loquin (Université de Bourgogne), Franco Ferrari (New York University School of Law), Claire Debourg (Nanterre University), Claire Pauly (Jones Day), and Xavier Favre-Bulle (Lenz & Staehelin) as participants to the debate, moderated by Philippe Pinsolle (Comité français d'arbitrage) as well as Benjamin Siino (PAW co-President).

Introductory Remarks

After a short introduction by Benjamin Siino, French magistrates, including the President and senior judges of the ICCP-CA, and the President of the Paris Court of Appeal, gave their introductory remarks, emphasizing the importance of the dialogue between lawyers and judges that practice in the field of international arbitration.

In his speech, Jacques Boulard of the Paris Court of Appeal – an authority behind the bulk of French case-law on the issues of international arbitration – stressed the judiciary's firm commitment to making Paris an attractive jurisdiction for international arbitration.

Daniel Barlow recalled the milestones of the case law of the French Court of Cassation (*Cour de cassation*), that, since the 1960s pursued "a judicial policy aimed at promoting arbitration in France." He evoked, *inter alia*, the famous *Dalico* decision of the Court that expressly recognized the independence of an arbitration clause from any domestic law and highlighted the unique feature of the French legal system that allows the enforcement of the arbitral awards annulled at their seat, describing the arbitration autonomy as "the DNA of French arbitration."

Fabienne Schaller mentioned that, although a seemingly theoretic question, arbitration autonomy raises numerous complex legal questions in the day-to-day practice of counsel and judges, and saluted the efforts of the arbitration community, including the PAW, to enhance the dialogue, mentioning in this regard the Standing International Forum of Commercial Courts (SIFOC) which declares interaction with arbitral bodies as one of its core areas of work.

On a more practical note, Laure Aldbert praised the integrity and professionalism of the counsel pleading in the cases heard in the ICCP-CA, including an increasing practice of the common statement of the parties on the undisputed facts, which greatly contributes to the efficiency of judicial procedures.

Debate on the Arbitration Autonomy Principle

The debate itself was animated by Philippe Pinsolle who welcomed the initiative of the Paris Court of Appeal to participate in the PAW and admitted that for the first time in his career he witnessed an authority in charge of annulment of arbitral awards organizing an arbitration event.

French Professor Eric Loquin offered a retrospective into the theory of autonomy in French arbitration law. He discussed two cornerstone principles that help put the theory into practice. First, the substantive rule of international law that governs the agreement of parties to arbitrate, and, second, independence of an international arbitral award of any domestic legal system.

With regards to the former, the speaker recalled a 1972 decision of the Cour de cassation that went as far as declaring a "total legal autonomy" of the arbitration clause in international contract. The decision was heavily criticized on the grounds that a contractual provision's enforceability cannot be assessed independently of any legal system. This ultimately led to the *Dalico* case law that developed the contemporary approach of the French arbitration law where arbitration clause is governed directly by a substantive rule of international law, which, *inter alia*, prevents an arbitration clause from being deemed unenforceable on purely formal grounds.

Commenting on the international arbitral award being disconnected from any domestic legal system, Professor Loquin referred to the renowned *Putrobali* decision of the Court of cassation that confirmed the possibility of enforcement in France of the arbitral awards set aside by the courts of the seat of arbitration. In other words, whenever an enforcement of an international arbitral award is sought in France, the situation is arguably the same as if the arbitration clause and procedure were subject to the French arbitration law *ab initio*. In a discussion that followed the speaker recalled a suggestion of the late Professor Fouchard to renounce the possibility of annulment of an arbitral award by the courts of the seat – the proposal that goes in line with the idea of the award being autonomous from the legal order of the seat but an extreme one from the practical point of view.

Franco Ferrari, although after a caveat that he does not fully adhere to the "domestic" theory of international arbitration, responded with a critical point of view of the French theory, referring to the seat of arbitration as a connection point between an arbitral award and a legal system. He provided several references stating that such cornerstone international instruments as UNCITRAL Model Law and New York Convention point towards such approach, including Art. 1(2) of the Model Law providing for its domestic application and Art. V(1)(e) of the New York Convention allowing to refuse the enforcement of an award that was set aside at the seat.

Claire Debourg provided an exposé on negative effects of an arbitration clause, which include the elimination of the jurisdiction of state courts and grant an arbitral tribunal priority in deciding on its own jurisdiction (competence-competence principle). She specified that these principles are applicable irrespective of the legal seat of arbitration. An important practical outcome of the negative effects of arbitration clause is the coordination of jurisdiction between the arbitrators and

state judges and thus of potential parallel proceedings which may ultimately lead to the contradictory decisions.

Claire Pauly provided a brief insight into the interaction between the party autonomy and the due process considerations that mark the limits to such autonomy. She discussed several decisions rendered by the French judiciary that helped shape the legal framework, including a recent development that the violation of a procedural rule adopted by the parties does not automatically imply the violation of the due process that would justify the annulment of the award as long as both parties had equal opportunities to present their case. As to the parties' right to define their own terms of arbitral procedure, the general principle would be that, as long as the due process is complied with, and the parties are procedurally equal, they are free to shape their arbitration as they see fit.

A Swiss arbitration specialist Xavier Favre-Bulle spoke from the comparative perspective between French and Swiss arbitration laws. He touched upon several points of divergence between the two legal systems, starting with the assessment of the arbitrability of the dispute which, by nature, defines the limits of the autonomy. He then moved on to one of the unique features of French arbitration law, namely the assessment of the validity of arbitration clause, which in Swiss law, unlike in France, is established with reference to a particular national legal system (even though Swiss arbitration law provides for a very liberal approach and enshrines a general principle *in favorem validatis*). Swiss practitioner then reflected on several features of the Swiss arbitration law, including a relatively recent amendment to Art. 186 of the Private International Law Act that provides for the arbitral tribunal's right to rule on its own jurisdiction irrespective of any other pending proceedings on the same subject matter. Speaking of the developments in the case law of the Swiss Federal Tribunal, Favre-Bulle highlighted the differences in the approaches to the annulment for violation of the public policy – a ground that had never been successfully invoked before the Swiss Federal Tribunal, while being relatively often used by the French court. Finally, since under Swiss law international treaties undoubtedly prevail over domestic legal provisions, an award annulled at the seat of arbitration "would never be enforced" by Swiss courts.

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