



Arbitration and Dispute Resolution Bulletin

The consumer, the arbitrator and the banker

There has been a sharp increase in the number of consumers entering into international financial contracts. This is due to an increasing liberalisation of international investment and capital flows along with the development of electronic means of communication.

Lawmakers are now faced with the challenge of knowing how best to protect these consumers (individuals concluding a contract for personal rather than business needs) given the fact that such people are generally neither specialists in international trade nor finance.

The first response to this issue came from the European Parliament and Council's Distance Marketing of Financial Services Directive [23 September 2002] and the French Edict No.2005/648 [6 June 2005], "Distance Marketing of Consumer Financial Services". However, both pieces of legislation focus predominantly on ground rules applicable to international consumer contracts and less to dispute resolution procedures.

The French courts have upheld the validity of arbitration clauses within international consumer contracts. Therefore consumers who enter into international contracts are primarily responsible for initiating arbitration proceedings; they must not refer them directly to the French courts. (Court of Cassation, 1st, 30/03/2004, Rado/Painewebber; Court of Appeal, Paris, 02/04/2003, Pourdieu/Merrill Lynch Pierce Fenner; Court of Appeal, Paris, 28/01/2004, Labalette/Merrill Lynch France; Court of Appeal, Paris, 28/04/2004, Mattei/Merrill Lynch Pierce Fenner).

The aforementioned cases involved French consumers, contacted in their homes by French offices/branches of US investment companies, who were persuaded to invest in the framework of an account opening agreement. The funds were invested in high risk markets, resulting in the accounts showing a debit balance. The affected consumers issued proceedings before the French courts, demanding compensation from the US investment companies. The latter argued that the account opening agreement contained an arbitration clause.

The Paris Court of Appeal thrice relied on a long line of precedents, dating back to the decision of the Court of Cassation in the Jaguar case (Cass, 1st Civ., 21/05/1997). The court concluded that an international arbitration clause shall remain independent from any domestic law. Further, it upheld the validity of arbitration clauses, regardless of the capacity of the people involved.

As a result the French courts consider that such arbitration clauses are not "patently void" (defined in Article 1458 of the French Code of Civil Procedure). The courts provide no jurisdiction on the matter and instruct parties to take proceedings in arbitration courts (see our comments in the PLG newsletter of Winter 2004 on the distribution of powers between judges and arbitrators).

The only reservation that the French courts have enforced in respect of arbitration clauses relates to the rules on international public order, which arbitration courts are obviously required to apply, and which are further controlled by the French courts (who are responsible for setting aside/enforcing an arbitration award).

In other words, although the French courts have a role in arbitration proceedings, they first and foremost require French consumers to initiate arbitration proceedings themselves, regardless of the cost or location.

Even though this stance is perfectly in line with established legal precedent, it has been criticised by some writers. The criticism stems from the fact that arbitration proceedings relevant to international consumer contracts are based in the United States (pursuant to the Arbitration Regulations of the National Futures Association). This is detrimental to the French consumer, at least from a financial point of view.

It is therefore important to note that so far as strictly domestic consumer contracts are concerned, French law still forbids the use of arbitration clauses.

As far as international employment contracts are concerned, employees cannot be bound by an arbitration clause regardless of the law applicable to the contract or even in a case where the contract is performed in a foreign country (Court of Cassation, Soc. Ch. 09/10/2001 and 28/06/2005). We may well have thought that the French courts would be minded to extend this protection to consumers.

This has not been the case. The only possibility of implementing harms length in international arbitration involving a French consumer, would be to introduce a law to modify Article 2061 of the French Civil Code or to modify the French Consumer Code. This would be a means, for instance, of invalidating arbitration clauses which provide for proceedings to be taken outside of France in financial investment contracts whereby French consumers have been contacted in their homes.

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Reform of arbitration in Italy

With the Act 80/2005, the Italian Parliament effectively delegated to the government the task of amending the provisions of the Civil Code governing arbitration. These amendments will have considerable repercussions on the management and effectiveness of International Arbitrations as:

- They will abolish the special procedure provided for by international arbitration which limited the right to appeal an award
- They will introduce new procedural rules, in particular in relation to the impartiality and responsibility of arbitrators, evidence, the calling of third parties in the arbitration proceedings and the terms and formalities for rendering the award
- They will widen the range of issues that can be subjected to arbitration
- They will confirm that the award has, from the date of its deposit, the same binding effects on the parties as a judicial decision but without any need for approval from the court.

Further, the reform should also abolish the distinction between “formal” and “informal” arbitration. Up to now an arbitration was “formal” if its proceedings followed the procedural rules of the civil code (art.816 and following) and only awards rendered in “formal” arbitration were enforceable in the same way as judicial decisions are. An award specifying that the arbitration process was “informal” could only have the force and legal effect of a contract.

The reform has generally been welcomed as a means of clarifying many grey areas which had caused much uncertainty. This new model of arbitration should provide for clearer rules and a smoother circulation of the award. An important point to note for practitioners is that, whilst drafting the arbitration clause, one has to keep in mind that, unless the clause specifically provides for an alternative procedure agreed by the parties, the rules governing the arbitration procedure will be exclusively those found in the reformed procedure code.



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Spain's new arbitration act: The swift enforcement of arbitration awards

The new Spanish Arbitration Act (Act 60/2003 passed on 23 December 2003) came into force at the end of March 2004 and has significantly changed the Spanish regulation of arbitration. It was enacted with the intention of encouraging the recourse to arbitration and developing it into a truly effective means of resolving disputes within the Spanish legal system. The Act is mainly inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration and seeks to harmonise the national proceedings with the international arbitration rules as well as to bring more flexibility and efficacy to the proceedings. The measures introduced are too numerous to list but, instead, we will provide an overview of the most innovative and important changes.

In the same way as the reforms of the civil judicial proceedings introduced under the Spanish Civil Procedure Act 1/2000 were intended to speed up the enforcement of legal judgments, a similar spirit of reform can be found in the new Arbitration Act, which is aimed at strengthening the enforcement of awards. Indeed, under the new Act, arbitral awards can only be challenged in the following cases:

- Where there is no arbitration agreement between the parties or where the existing agreement is invalid
- Where one of the parties has not been duly informed of the appointment of an arbitrator or of the commencement of the arbitration proceedings or is unable, for whatever reason, to exercise his/her rights
- Where the arbitrators have decided over

matters that were not submitted to their judgment

- Where the appointment procedures have not complied with the conditions agreed upon by the parties or have not complied with the law
- Where the arbitrators have decided over matters that were not subject to arbitration
- Where the award violates the public order.

Nevertheless, some of these procedures under which it is possible to challenge an award do not necessarily lead to the total revocation of the award. Instead the general idea is to, wherever possible, try and preserve all the pronouncements of the award that do not fall under the sword of revocation.

The most important reform appears to be the one allowing the immediate enforcement of the award, even if one of the parties has filed an application for it to be revoked. The party against whom the enforcement is sought can apply for the suspension of the enforcement proceedings until the revocation process is resolved. However, this party must offer a security in the amount of the award and any damages caused by the delay in the execution of the award. Obviously, this automatic enforcement process and the stringent financial requirements in relation to its suspension mean that objections to arbitration awards are often avoided. This will help to enhance the position of arbitration as a truly effective means of dispute resolution in Spain.

A significant amount of time will be needed to observe how these legal changes are applied in practice but there is no doubt that they will contribute to a wider and more pronounced use of arbitration in Spain.



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Alternative dispute resolution in The Netherlands

Currently, contrary to its neighbouring country, Belgium, the Netherlands does not yet have a separate piece of legislation on mediation. Mediation is a wide-ranging concept that can encompass many things. In Belgium, this concept has been put down in law. With this law, mediation has now become a more certain process for the mediator and the parties.

However, we are now witnessing a myriad of developments stemming from the EU. Indeed one can find European rules of conduct for mediators - pushed for by the European Commission and presented in Brussels in mid-2004 -, an EU-Green Paper on alternative dispute resolution and a draft Directive on mediation in civil and commercial matters prepared by the European Commission and which is on the agenda to be dealt with later on.

The Dutch Ministry of Justice wishes to pursue a policy of deregulation, to help its citizens access the legal system more readily as well as to improve the parties' capacity to negotiate and agree on a solution more in line with the commercial reality than one reached through legal proceedings would be.

In the meantime, the so-called "reference provisions" have become operational. These are provisions which provide for parties to be referred on to mediators by courts and by subsidized legal assistance sources.

Referrals in the administrative procedure can occur in different ways. During the court hearing the court highlights the option of mediation to the parties, but the parties' attention can also be drawn to mediation by a letter sent to them prior to the court hearing. However, mediation cannot be imposed on the parties, as it is always up to them to decide whether or not to resort to mediation.

Also on the agenda is a debate in relation to warranties for the quality of mediators and mediations. According to the Ministry of Justice, the following provisions must be taken as a bare minimum:

- Objective and transparent requirements regarding the mediator's professional competence with a system of certification and accreditation put in place
- A national public mediators quality register
- A procedure allowing for enhanced awareness and constant supervision
- Professional rules for mediators, a complaint regulation and independent disciplinary rules
- A feedback mechanism.

Our office already has a mediator. In view of the fact that parts of the "regular" procedural routes in the Netherlands appear to be clogged up, we will closely watch the developments regarding mediation and contribute to them. The same can be said for other forms of alternative dispute resolution, such as arbitration and binding recommendation. All these aspects are incorporated in our advices and services. We make every effort to see to it that disputes are resolved quickly and efficiently.



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Arbitration in Brazil - a useful tool to solve disputes

Arbitration was first introduced in Brazil in 1850 with the Commercial Code. However, compared to the majority of developed countries, Brazil is only just beginning to resort to arbitration as standard practice.

One of the major advantages to be found in the Brazilian Arbitration Act, enacted in 1996, was the judicial recognition of arbitration awards (including the foreign ones). However, this generated a lot of controversy about the constitutionality of such a measure and led the Brazilian Federal Supreme Court (STF) to confirm that the Arbitration Act was indeed constitutional and should therefore be applied in its entirety.

Then, on 23rd July 2002 by the Decree 4311/2002, Brazil finally ratified and incorporated into its legal system the Recognition and Enforcement of the Foreign Arbitration Awards, better known as the "New York Convention" elaborated in New York in 1958. This Convention is used within the ambit of the United Nations and promoted by the International Chamber of Commerce. Such ratification is considered to be a positive step

in developing arbitration and in consolidating its acceptance in Brazil. Many commentators, practitioners and arbitrators are hoping to have arbitration procedures more widely accepted within Brazilian society. Besides, many of them are proud of the high level of acceptance that the arbitral awards are beginning to gain in the country after it ratified this Convention.

However there are still challenges ahead, especially concerning the effectiveness of arbitration awards. One of those is whether or not to maintain as a pre-condition for the execution of decisions rendered by foreign arbitrators the requirement for previous approval by the STF. Once the national decision secures a similar status to that of a judicial decision, following its constitutional precepts, it could immediately be enforced according to the aforementioned Law, excepting any ratification or rectification.

In conclusion, international arbitration occurs when national and foreign parties are involved, but the decision given in such arbitration will not necessarily come under any one of the parties' jurisdictions. Indeed, it is well accepted that the parties are free to choose the applicable law that will govern the issues in dispute. This is so without the need for interference by the judiciary of such countries, which only step into the proceedings in case of nullity of the arbitral award.



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TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of law relating to arbitration and dispute resolution which is of general interest to all of our clients. It is jointly written and produced by PLG's Litigation Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Arbitration and Dispute Resolution Bulletin. Further information is available on all topics but nothing in PLG Arbitration and Dispute Resolution Bulletin is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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