Arendt Case Review

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Contents

which recalls the principles applicable to the voluntary intervention of a third party in a proceeding.

The Court specified that voluntary intervention is "*the act of a person who, of their own accord, involves themselves in proceedings which they have not instituted or which are not directed against them, either to declare that the right at issue belongs to them, or to ensure the preservation of their rights which might be compromised by the outcome of the proceedings*".

The voluntary intervention of a third party is admissible "*as soon as the intervener has the status of a third party, i.e. they are neither a party nor represented, they have the capacity and power to bring legal proceedings, and they claim to have a legitimate, personal and sufficient interest, direct or indirect, material or moral, justifying their participation in the hearing*".

Luxembourg case law makes the same distinction between principal voluntary intervention and incidental voluntary intervention as the French Code of Civil Procedure, although this distinction has not been incorporated into the Luxembourg New Code of Civil Procedure, "*such that the solutions adopted in this respect by the French courts are in principle applicable in Luxembourg*". The Court nevertheless recalled that "*the condition of the intervening parties having a legitimate, existing and actual, direct and personal interest in intervening is however common to both types of intervention*".

As to the principal voluntary intervention

The principal intervention raises a claim specific to the intervener and, in order to be declared admissible, must be linked to the claims of the original parties by a sufficient connection. Indeed, "*the claim formulated by the intervener must proceed directly from the original claim and aim at the same ends*". Its author must have interest and standing to act and the court already seized of the main action must have jurisdiction over the intervention.

As to the incidental voluntary intervention

Incidental intervention supports the claims of an original party to the proceedings. The Court recalled, "*this interest in intervening incidentally is not identical to that required to act. Indeed, if it relates to the preservation of the intervener's rights, it is linked in advance to the claim of another person. The intervener must have an interest of their own in the principal party's claim being accepted by the court... incidental intervention does not raise the problem of the connection with the original claim, not because the condition is not required, but because it is, by assumption, fulfilled, the incidental intervention being all the more closely linked to the original claim as it is limited to supporting or opposing it".*

The Court specified that "*there is nothing to prevent an incidental intervention from becoming a principal intervention in the course of the proceedings; it is sufficient for the intervener to make their own claim*".

which recalls the principles applicable to the order for payment, a unilateral procedure governed by Articles 129 et seq. of the New Code of Civil Procedure and *"intended to enable a claimant who has a claim that is easily verifiable and therefore not contested to obtain a title quickly in order to recover their claim*".

As to the applicant's enhanced duty of loyalty

The Court pointed out that the unilateral nature of the procedure results in *"a reinforced obligation of loyalty on the part of the applicant to provide complete and honest information to the judge hearing the case".* This obligation of loyalty stems from the need for the judge to be fully informed of all the elements of the debate, and also from the rules of professional conduct specifying that *"the lawyer presenting a unilateral application or requesting a judgment by default, is required to provide the court seized with the essential factual and legal elements suitable for verifying the merits of their client's claim"*. An order obtained in breach of this obligation may be annulled.

The Court emphasised that *"it is not for the applicant to judge the usefulness or the necessity from a factual or legal point of view of submitting to the court any particular document in order to assert compliance with the obligations incumbent upon them. The applicant is obliged to submit all information that shows that there is a dispute or debate. Only the judge hearing the case is called upon to decide on the relevance and scope of these challenges with regard to the merits of the measure requested".*

In the present case, the party acting by unilateral application neglected to inform the judge seized of a letter of objection sent by the defendant, stating that the defendant's objections would be futile. The Court found that the applicant had therefore manifestly breached its enhanced duty of loyalty and that *"as the procedure was thus vitiated* ab initio*, the application (...) must be declared inadmissible and the conditional order for payment (...) annulled, making it therefore null and void"*.

As to the inadmissibility of the counterclaim

The Court referred to French and Luxembourg case law to clarify that the inadmissibility of the original claim does not necessarily result in the inadmissibility of the counterclaim. This is the case when a counterclaim fulfils a principal function in order to provide the counterclaimant with an entirely separate benefit, e.g. a counterclaim seeking damages for abusive and vexatious proceedings.

In this case, the defendant formulated a counterclaim that served as a defence to the main claim and sought a possible offsetting of the sums due. The Court found that this claim *"does not therefore fulfil a principal function, so that this counterclaim must follow the fate of the principal claim and be declared inadmissible"*.

which recalls the principles for assessing loss of income.

In this case, the claimant suffered personal injury in an accident at work, which resulted in permanent partial disability after consolidation, and brought an action against the defendants to obtain damages for the injury suffered. The Court found his claim to be well founded and referred the case to an expert for assessment of the various heads of material loss and any other elements of loss suffered. Following the submission of a supplementary expert report, the claimant and the employers' liability insurance association for his sector of work both contested the amount retained by the expert for the average monthly salary. In their view, even if the claimant was a member of the insurance scheme in Germany, where wages are not indexed, the reference salary should take into account the normal evolution of salaries, cost of living increases, inflation and salary increases that the victim would have received if he had been able to continue working. The expert calculator took into account an overall gross annual salary up to the month after the work accident, including overtime and travel time.

First of all, the Court recalled that "*judges must only depart from the opinion of legal experts with great caution and when they have good reason to recognise that the legal experts were mistaken, or when the error of the latter is already apparent, either from the report or from other elements developed in the case at issue*".

The Court did not accept all of the claimant's arguments and rejected the claim that the reference salary should take into account any salary increases that the victim would have received, but it agreed with the claimant that the basic gross monthly salary should be re-evaluated according to the cost of living index. The Court recalled that the prejudice of the salaried victim corresponds to the loss of income during the period of disability. "*There is therefore no need for an assessment, but for a reassessment, at a date close to the judgment, which requires a double operation: adjustment according to the variation of the cost of living index and allocation of interest on arrears…when only the last salary received is available as a reference value, without being able to make a comparison with subsequent theoretical salaries, it is necessary to adapt the total loss of income to the index number in force on the day of the judgment, taking as a basis the index number of the day of the accident. This is especially the case for a total loss of earnings*. Variations in the value of money are relevant since *"insofar as the damages must enable the person entitled to compensation to obtain an asset equivalent to the injury value (...) the compensation must be adapted to variations in the cost of living*". Compensation is to be evaluated according to the ordinary law and not deducted from the amounts due to social security bodies.

Consequently, the Court referred the case back to the expert for re-evaluation of the gross monthly base salary in accordance with the cost of living index.

which recalls that under Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), the judicial suspension of an arbitral award in the State where it was made prevents not only its enforcement but also its recognition in the State where it is invoked.

In this case, the applicants applied to the judge sitting in summary matters for the lifting of an attachment levied against them on the assets they hold with various banking institutions in Luxembourg, pursuant to an arbitral award made in Belgium. They had filed an action for annulment of this arbitral award before a court in Belgium, according to which the Belgian court decided to stay the enforcement of the award until a decision on the merits of the application for annulment of the award was reached. Notwithstanding this Belgian judgment ordering the stay of enforcement of the award, the winning party in the arbitration levied an attachment in Luxembourg against the applicants.

Firstly, the Court recalled that the judge sitting in summary matters is competent to hear an application on the basis of Article 933 of the New Code of Civil Procedure ("NCCP") to put an end to a manifestly unlawful disturbance by ordering the lifting of an attachment "*notwithstanding the fact that proceedings to validate the said attachment are already pending before the judges on the merits*".

The Court recalled that even if "*it must be admitted that the lack of enforceability of a court decision or, as in this case, of an arbitral award, does not, in principle, make it impossible to freeze a debtor's funds as a precautionary measure, the fact remains that the arbitral award at issue, made in Belgium and invoked before the Luxembourg judge sitting in summary matters, presupposes, at the very least and in any event, that it is recognised in Luxembourg in order to constitute a title allowing an attachment to be carried out on the basis of Article 963 of the NCCP*".

According to Article 1251 of the NCCP, the judge shall refuse exequatur in very specific circumstances, and "*subject to the provisions of international conventions*". The Court noted that this phrase signifies exclusion of said article "*in all cases governed by an international convention*". In the present case, taking into account the fact that the New York Convention of 1958 is applicable, and in accordance with Article V of the said Convention, "*the judicial suspension of an arbitral award in the State where it was made (in this case Belgium) prevents not only its enforcement but also its recognition in the State where it is invoked (in this case the Grand Duchy of Luxembourg)*".

Consequently, the arbitral award does not constitute a valid title within the meaning of Article 693 of the NCCP and "*the disputed attachment being in this case constitutive of a manifestly illicit disturbance, it is appropriate to purely and simply order its lifting on the basis of Article 933 paragraph 1 of the NCCP*".

which states, "*although nothing in Luxembourg law opposes the coexistence of the jurisdiction of the judge sitting in summary matters with the existence of an arbitration clause, this jurisdiction is only justified in the context of an interim payment order if there is an urgent need for the judge to intervene*".

In this case, the parties had entered into two contracts containing the same arbitration clause, which states that "*all disputes arising out of or in connection with this contract shall be definitively settled in accordance with the Rules of Arbitration of the Arbitration Centre of the Chamber of Commerce of the Grand Duchy of Luxembourg by one or more arbitrators appointed in accordance with those Rules*". Following the termination of these contracts by the respondent, the respondent served a summons on the appellant to appear before the judge sitting in summary matters in order to compel the appellant to pay a provisional amount to the respondent. The appellant argued that the judge sitting in summary matters did not have jurisdiction to hear the application for a provisional payment due to the arbitration clause. Notwithstanding the arbitration clause, the judge sitting in summary matters declared himself competent and ordered the appellant to pay the amount requested at first instance.

On appeal, the Court recalled that "*insofar as in Luxembourg law both the reform of the texts applicable to summary proceedings and Luxembourg case law are inspired by French texts and case law in this area, it is necessary to follow the development of French law in this area, in order to reconcile the same legal principles existing in [Luxembourg] law, namely, respect for the will of the parties, and the need to grant the holder of a claim that is not seriously contestable the possibility of recovering this sum rapidly and provisionally*". The French Code of Civil Procedure specifies that the judge has jurisdiction to hear applications for interim or protective measures in the presence of an arbitration clause, but only in cases of urgency. The Court observed, "*French case law is particularly rigorous in assessing the condition of urgency in the case of interim payment orders*".

In the absence of proof that the condition of urgency was met in this case, the Court found that the judge sitting in summary matters lacked jurisdiction to hear the application for provisional payment.

Constitutional Court
Judgment of 22 January 2021
Docket No. 00152

which enshrines the constitutional value of the principles of legitimate expectation and non-retroactivity of laws.

Following a judgment of 26 November 2019 (docket no. 42582C), the Administrative Court had seized the Constitutional Court for a preliminary ruling on the retroactive application of the law of 23 December 2005 introducing a final withholding tax on certain interest income produced by movable assets (RELIBI law) as amended by the law of 23 July 2016. Indeed, the RELIBI law provided, following an amendment by the law of 17 July 2008, for the extension of the scope of the final withholding tax on certain interest paid to Luxembourg resident individuals to interest paid by paying agents located in the European Union, the European Economic Area or a State which has concluded an international convention linked to Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments. The law of 23 July 2016 amended the RELIBI law by removing paying agents located in a State that has concluded an international convention related to the Directive from the scope of the final withholding tax with effect from 1 January 2016.

In this case, the taxpayer received interest payments from a Swiss paying agent and was deprived of the option of the final withholding tax by the amendment of the RELIBI law retroactively to 1 January 2016. The Constitutional Court concluded that this retroactive legislative amendment is not in conformity with the constitutional principles of legal certainty, legitimate expectation and non-retroactivity of laws.

Although the ruling of the Constitutional Court will only be of historical interest with regard to the amendment of the RELIBI law, the fact remains that the enshrinement of the principles of legitimate expectation and non-retroactivity of laws strengthens the arsenal available to taxpayers to defend their positions in other types of litigation.

which recalls that in the event of dismissal of an employee deemed fit to return to work by the Social Security Medical Board but who is still covered by a medical certificate, "*it is a matter of principle that the medical certificate provided by the employee to establish his or her incapacity to work constitutes a simple presumption that can be overturned by any evidence to the contrary and that it is up to the employer to provide such evidence to the contrary*".

In this case, the employee who was unable to work had complied with his obligation to inform his employer on the first day of the impediment and to submit the medical certificate within three days in accordance with L.121-6 (1) and (2) of the Labour Code. During the period covered by his last medical certificate, he was informed that the medical advisor of the Social Security Medical Board considered him capable of returning to work the next day and that his financial compensation would be cancelled. The employee formally objected to this decision but reported to work the next day, before his medical certificate ended, and was dismissed the same day with immediate effect. Subsequently, the employee summoned his former employer to appear before the labour court to have the employer ordered to pay compensation, damages and interest for unfair dismissal.

At first instance, the labour court declared his claim partially well founded and ordered the employer to pay him compensation and damages. The employer appealed against this judgment on the grounds that the employee was no longer protected against dismissal because the medical advisor had declared his fitness for work. Moreover, the employee had confirmed his return to work to his employer by SMS and came to the workplace before his medical certificate had expired.

On appeal, the Court recalled that according to Article L.121-6 (3) of the Labour Code "*The period of prohibition of notification of the termination of the employment contract or of convocation to the preliminary interview (...) ceases upon expiry of the forty-day appeal period running from the notification of the decision of the National Health Fund to the insured. The National Health Fund shall inform the employer in the event of an appeal by the employee against the decision, in which case the period of prohibition on notifying the termination of the employment contract or convocation of the employee to the preliminary interview referred to in the preceding paragraph shall continue (...) Termination of the contract in breach of the provisions of this paragraph shall be deemed to be unfair*".

The Court found that the employer had not provided the evidence required to rebut the presumption linked to the medical certificate provided by the employee. The fact that the employee came to work the day after the National Health Fund decision was communicated, which decision was contrary to the decision of his treating physician, in order to clarify the situation with his employer, did not establish that he was capable of working on that date. He still enjoyed the protection granted by Article L.121-6 (3) and therefore the Court confirmed the judgment of the labour court that the dismissal was unfair.

Labour Court of Luxembourg
No. 3014/20 of 19 November 2020

which recalls that an employee who is a staff representative and who has been dismissed has a period of three months from the notification of the dismissal to bring a legal action for compensation for possible unfair termination of the employment contract.

In this case, the claimant was a member of the staff delegation at the time of his dismissal with immediate effect. He applied to the labour court to have his dismissal declared unfair and requested payment of compensation in lieu of notice, severance pay and damages.

In response, the defendant argued that the claim was inadmissible, invoking Article L.415 (2) paragraph 4 of the Labour Code, which states that, in the context of the dismissal of a delegate, *"legal action for compensation for any unfair termination of the employment contract must be brought before the labour court, under penalty of foreclosure, within three months of the notification of the dismissal*". As the application was filed almost five months after the date of dismissal, the claimant was barred from bringing the action. The claimant, on the other hand, considered that the registered letter he had sent the month following the issuance date of the letter of dismissal to contest the reasons for the dismissal interrupted the time limit and started a new limitations period of one year, in application of ordinary law.

The Court recalled that "*since the law of 23 July 2015 on the reform of labour relations, the legislator has only allowed the dismissed staff representative to choose between two options, namely either to ask the President of the labour court to declare the dismissal null and void and to ask for reinstatement within the company in accordance with Article L.415-10 (2) paragraph 2 of the Labour Code, or he may choose to waive reinstatement by asking the labour court to recognize the termination of the employment contract and claim damages in accordance with Article L.415-10 (2) paragraph 4 of the Labour Code*.

In the present case, the Court noted that the claimant chose the procedure provided for in Article L.415-10 (2) paragraph 4 and is therefore bound to respect the three-month time limit, which can be neither interrupted nor suspended, contrary to ordinary dismissal law. The claims for payment of compensation in lieu of notice, severance pay and damages were therefore inadmissible.

This decision is currently under appeal.

NEWS

- Arendt is pleased to invite you to participate in the webinars of the **Arendt Case Law Forum** series. Three to five recent and particularly interesting cases in specific areas of expertise will be presented in each session.

  The **Arendt Case Law Forum** was launched on **Wednesday 19 May 2021**, with a first webinar on labour law. The team of our experts **Louis Berns** and **Philippe Schmit** shared the latest insights from the Luxembourg labour jurisdictions and summarised their primary lessons for the day-to-day management of human resources, taking into account the current health crisis.

  The second webinar will take place **on Wednesday 9 June 2021** and will focus on financial law. Our experts **Philippe Dupont**, **Evelyne Lordong**, **Emmanuelle Mousel** and **Karin Spitz** will share on the theme "Insights into the latest trends and developments in financial case law: key takeaways for regulated firms".

  In order to participate in this free webinar, **please register by clicking here on the registration button**. You will then receive a registration confirmation with a personalized link.

  If you have any questions, please do not hesitate to contact our Events team (**events@arendt.com**).

Read **Philippe-Emmanuel Partsch**'s blog on the case law of the Court of Justice of the European Union by clicking on the following link: http://eucaselaw.com/