Arendt Case Review

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Contents

Court of Appeal of Luxembourg
Judgment No. 108/21 - III - Exequatur of 2 December 2021
Docket No. CAL-2018-00013

which recalls that the recognition and enforcement of an arbitral award influenced by the use of fraudulent means, employed during the arbitral proceedings or in the exequatur proceedings, would be contrary to public policy within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

The Court recalled that according to Article V (2) b of said Convention "*recognition and enforcement of an arbitral award may be refused if the authority where recognition and enforcement is sought finds that such recognition or enforcement would be contrary to the public policy of that country"*.

In this case, the appellant appealed against an order declaring a foreign arbitral award enforceable and also filed a civil party petition ("*plainte avec constitution de partie civile*") against the opposing parties for the offences of forgery, use of forgery, fraud ("*escroquerie*") and money laundering. According to the appellant, the respondents used forgeries in the arbitral and exequatur proceedings. Consequently, the appellant asked the Court to stay the exequatur proceedings, in application of the principle of the primacy of criminal proceedings over the civil action (the adage *"le criminel tient le civil en l'état"*) as enshrined in Article 3 of the Code of Criminal Procedure.

The Court held that "*in the event that it should be shown, in the light of the final decision to be rendered by the national criminal court, that the arbitral award whose recognition and enforcement is sought in the Grand Duchy of Luxembourg was influenced by the use of fraudulent means or that such fraudulent means were used by the respondents in the exequatur proceedings, the recognition and enforcement of the arbitral award in question would be contrary to public policy, within the meaning of Article V (2) b [of the New York Convention]"*.

Since the decision to be taken in the criminal proceedings was therefore likely to influence the decision to be taken by the exequatur judge, the Court granted the appellant's request and stayed the proceedings on the basis of Article 3, paragraph 2 of the Code of Criminal Procedure.

which recalls that when a merchant ("*commerçant*") who is confronted with the tacit acceptance of an invoice contests its receipt, it is up to the party seeking payment to prove its receipt by the addressee.

The principle of the accepted invoice, derived from Article 109 of the Commercial Code, applies not only to commercial sales but also to other commercial contracts. Acceptance of an invoice may be express or tacit and "*constitutes an expression of agreement as to the existence and terms of the contract and, moreover, an expression of agreement as to the claim asserted by the supplier or service provider in performance of that contract"*. The Court recalled that "*according to the recent jurisprudence of the Court of Cassation, the prolonged silence of the addressee of the invoice gives rise to an irrebuttable presumption in the case of a sales contract and only to a simple presumption in the case of another type of contract"*.

In this case, the appellant sought to prove the conclusion of a business introducer agreement by relying on several invoices allegedly sent to the respondent that referred to a cooperation agreement. The Court noted that two letters subsequent to the date of the first invoice attested to the respondent's refusal to enter into contractual relations with the appellant, without referring to the first invoice. The Court thus held that the appellant had not provided evidence that the respondent had received the first invoice in question, and that the objection made to the appellant did not have to be repeated upon receipt of the two subsequent invoices, since the reason for the objection remained the same. The appellant's claim must be rejected insofar as it is based on the accepted invoice theory.

which recalls certain rules applicable to the offences of forgery, use of forgery and fraud ("*escroquerie*"). In this case, the defendant was accused of having committed forgery of a private writing in violation of Articles 196, 197 and 496 of the Criminal Code, in particular by falsifying a testimonial certificate and medical documents in order to justify his absence from work. He also transmitted these documents to several authorities in order to obtain financial compensation.

The Court recalls the four elements of the offence of forgery: 1. the writing must be a protected writing within the meaning of the criminal law, 2. an alteration of the truth, 3. fraudulent intent or intent to harm, and 4. harm or the possibility of harm.

In this case, all four elements were established.

Firstly, the documents submitted by the defendant constituted protected writings within the meaning of the criminal law. The Court recalled that *"a private writing is protected as soon as it has, by reason of its content or form, a value of credibility, as soon as it benefits, by reason of the law or custom, from a presumption of sincerity. It must be capable of being used as evidence to a certain extent (...) This is the case in the present case, since the documents in question are documents intended to prove facts, and in particular the state of health of a person, the duration of a person's illness and the duration of a person's hospitalisation, which are ascertained and declared therein".*

Secondly, the defendant falsified or caused to be falsified the various writings at issue so that he committed an act of forgery as defined by Article 196 of the Criminal Code. The Court noted that "*the offence of forgery does not necessarily presuppose a writing intended as complete and absolute proof* erga omnes*, but that the writing must be capable to a certain extent of proving the facts set out in it for or against a third party and that it may cause prejudice to a public or private interest (...) It is therefore not necessary for the altered writing to form a title of right or obligation; it is sufficient that the writing is capable, to some extent, of proving, for or against someone, the altered fact and thus causing prejudice to a public or private interest, and that the alteration of the truth has been committed for this purpose"*.

Thirdly, the fraudulent intent of the defendant was established because he knew that by falsifying the documents justifying his absence from work, he would obtain benefits to which he was not entitled. "*The fraudulent intent does not relate to the end pursued but to the means used to obtain this end. Fraudulent intent is limited to the mere intention to introduce into legal relations a document which one knows to be inauthentic or untrue, in order to obtain an advantage (even a legitimate one) which one would not have been able to obtain, or which one would have less readily obtained by respecting the truth or the entirety of the writing. The fact that the truth or the entirety of the writing was deliberately altered in order to obtain the expected advantage constitutes fraudulent intent"*.

Lastly, the Court recalled that the harm caused by the alteration of the truth in a writing "*may be either material or moral in nature and affect either a public or collective interest or a private or individual interest"*. This condition is met "*if the writing is capable of misleading third parties to whom it is presented or if it is possible that third parties, in the presence of this writing, will conform their attitude to its content"*. In this case, this element is established because the defendant tried to use the disputed writings to obtain financial compensation.

CIVIL PROCEDURE
Powers of the judge sitting in summary matters

Court of Appeal of Luxembourg
Judgment No. 7/22-VII-REF
Docket No. CAL-2021-01058

which recalls certain principles applicable to summary proceedings under Article 933, paragraph 1 of the New Code of Civil Procedure. This article provides that "*the president, or the judge who replaces him or her, may always prescribe in summary proceedings the protective or restorative measures that are necessary, either to prevent imminent damage, or to put an end to a manifestly unlawful disturbance"*.

The Court recalled that imminent damage "*is the unlawful act which the circumstances show is about to occur in the immediate future and which must be prevented by appropriate measures. The unlawful act is constituted by a manifestly illicit and intolerable infringement of a certain and obvious right of another, regardless of whether the infringement is the result of positive acts or inaction. What matters is the finding of a manifestly unlawful and intolerable interference with a certain and obvious right of another"*. The plaintiff in the proceedings must characterise this right and show that it exists in a certain and obvious manner in their favour.

In this case, the appellant attempted to establish proof of a claim on the basis of a document granting power of attorney, the authenticity of which was disputed, and moreover by producing a report, the conclusion of which was contradicted by an expert report and the analysis of an expert. The Court recalled that it is not for the Court ruling in summary proceedings "*to proceed by way of verification of handwriting, the judge of summary proceedings being the judge of the obvious and the incontestable who cannot undertake important measures of investigation or instruction in order to resolve the dispute submitted to him or her*". Consequently, the Court confirmed the order insofar as it held that the appellant did not establish that he had a certain and obvious right to all or part of the claim.

CIVIL PROCEDURE
Rules of international jurisdiction

District Court of Luxembourg
Commercial judgment 2021TALCH02/01736 of 3 December 2021
Docket No. TAL-2018-07176

which recalls that the rules of international jurisdiction in civil and commercial matters "*do not appear, as such, in any text and in the absence (...) of an international convention regulating conflicts of jurisdiction (...), it is generally accepted that, at the international level, the competent jurisdiction is determined in accordance with the same rules as those defining territorial jurisdiction in domestic law"*.

The general rule will be the jurisdiction of the court of the defendant's domicile (*actor sequitur forum rei*) and in the case of several defendants, Article 30 of the New Code of Civil Procedure (NCCP) provides that the case will be brought before the court of the domicile of one of the defendants, at the choice of the plaintiff.

The Court further stated that "*for this so-called co-defendant rule to be applicable, the claim against the defendant sued in the court where he is domiciled must be serious and there must be a sufficient connection with the claims against the other defendants (who may be resident abroad) for the court seized to have jurisdiction over them as well"*.

In this case, the Court declared itself incompetent on the basis of Article 30 of the NCCP because no serious and genuine claim was formulated against the only defendant domiciled in Luxembourg who was only summoned "in the presence" of the other co-defendants, who for their part were not domiciled in Luxembourg.

by which the President of the Administrative Tribunal of Luxembourg issued an order partially granting the request made by Amazon Europe Core S.AR.L. ("Amazon") for a stay of execution of the decision of 15 July 2021 of the National Data Protection Commission ("CNPD").

It should be recalled that on 15 July 2021, under the European cooperation and consistency mechanism as provided for in Article 60 of the General Data Protection Regulation ("GDPR"), the CNPD had imposed on Amazon an administrative fine of EUR 746,000,000 (to date, the highest penalty imposed under the GDPR) and also required Amazon to take remedial action within six months of notification (i.e., by 15 January 2022) under pain of a daily penalty of EUR 746,000 (the “Decision”).

Following the Decision, Amazon filed two motions: (i) the first dated 15 October 2021, in order to bring an action for reversal or annulment before the administrative tribunal, sitting as a panel as judge of the merits, and (ii) the second dated 29 October 2021, requesting the introduction of interim measures (more specifically a stay of execution) in relation to the contested Decision.

In the latter application, Amazon considered that the legal requirements for the imposition of interim measures were indeed met insofar as the enforcement of the Decision would risk causing it serious and definitive damage and that the grounds for reversal or annulment in support of its action on the merits were serious.

In his order, the President of the Administrative Tribunal partially granted the request, holding that the various injunctions issued by the CNPD to Amazon under pain of penalty in order to bring its advertising system into compliance with the GDPR had not been formulated in clear, precise and uncertainty-free terms, in conditions that would have enabled it to comply with the injunctions within the given time limit.

However, the order does not address the issue of the fine of EUR 746,000,000, in principle and in amount. Indeed, the recovery of this fine is currently suspended by the State insofar as the first appeal filed by Amazon is still pending.

EMPLOYMENT LAW
Supplementary pension

Labour Court of Luxembourg
No. 2226/21 of 13 July 2021

which notes that, in the absence of proof to the contrary, an employer company is no longer liable for the pension of a former employee after the outsourcing of the pension scheme with the transfer of all vested rights to a third party.

In the present case, the claimant had his former employer summoned before the Labour Court in order to order it to pay him an amount by way of vested pension rights. The defendant did not dispute the fact that, in accordance with the employment contract, an internal pension scheme was in place at the time of the employee's hiring. On the other hand, the documents produced by the defendant showed that it had opted to outsource its pension scheme and transfer all vested rights to a pension savings association (an ASSEP) after the employee was hired and that it was therefore no longer the debtor of the obligation.

The Court recalled that, in accordance with Article 1315 of the Civil Code, "*it is for the person claiming the performance of an obligation to prove it. Conversely, the person who claims to be discharged must justify the payment or the fact that the obligation has been discharged*". In the absence of evidence from the claimant to contest in detail the established outsourcing of the pension scheme, the Court held that the claimant had not proved the debtor status of the defendant company.

EMPLOYMENT LAW
Unfair dismissal

Labour Court of Luxembourg
No. 1382/21 of 6 May 2021

which recalls that the employer may dismiss an employee "*for economic, technical and organisational reasons involving changes in employment, provided that such reasons are real and serious (...) the fault thus envisaged falls somewhere between minor grounds, exclusive of termination of the contract, and serious fault, depriving the employee of notice and severance pay. The decisive criterion of this fault, justifying dismissal with notice, is the impairment of the proper functioning of the company*".

In this case, in its letter of motivation for the dismissal, the employer company invoked the reorganisation of a department and the outsourcing of a service to justify the loss of the dismissed employee's position. Notwithstanding the reasons stated in the letter, documents submitted in the case showed that only one month after the employee's dismissal, the employer had resorted to a temporary worker due to an increase in workload in the same department.

The Court found that in this case the elimination of the post did not constitute a real and serious reason for the dismissal, but an abuse of rights, as the alleged reorganisation served as a pretext for the employer to get rid of its employee. Consequently, the dismissal must be considered as unlawful.

which holds that the General Court of the European Union erred in law when it held that the European Commission lacked competence to adopt a decision on whether damages paid to investors by a Member State in compliance with an award rendered by an arbitral tribunal constituted state aid.

In the present case, Sweden and Romania had concluded a bilateral investment treaty (BIT) that provided for investor-State dispute settlement through arbitration including in accordance with the ICSID Convention and Arbitration Rules. After conclusion of this treaty, and in the context of preparation for Romania's accession to the European Union, the Romanian government repealed measures granted under a tax incentives schemes that benefited certain investors in disadvantaged regions prior to their original term. Certain Swedish investors impacted by this repeal considered that Romania had breached its obligations under the BIT and initiated arbitral proceedings to obtain compensation for damages. The arbitral tribunal awarded approximately EUR 178 million to the investors. The European Commission, however, classified such payment as State aid incompatible with the internal market and ordered Romania not to pay the amount of damages awarded to the investors and to recover any sums already paid.

The General Court of the European Union annulled the European Commission's decision, finding that the European Commission lacked competence to adopt this decision and to classify the payment of damages as an advantage and aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union (TFEU) deeming that the purported advantage had been granted when the event giving rise to the damages occurred, namely before Romania's accession to the EU.

The Court of Justice (CJEU) found that the General Court erred in its assessment because *"the decisive factor for establishing the date on which the right to receive State aid was conferred on its beneficiaries by a particular measure is the acquisition by those beneficiaries of a definitive right to receive that aid and to the corresponding commitment, by the State, to grant that aid. It is at that date that such a measure is liable to distort competition and affect trade between Member States, within the meaning of Article 107(1) TFEU"*. Although the repeal of the tax incentives scheme may have been the event giving rise to the damage, the arbitral award was rendered after Romania's accession to the EU, and *"the right to the compensation in question was granted solely by the arbitral award issued by that court, which, having upheld the claim brought by the arbitration applicants, not only found the existence of that right, but also quantified the amount thereof"*.

The CJEU also disagreed with the General Court's finding that the judgment of the CJEU in the *Achmea* case was irrelevant. The CJEU instead reasserted that the ICSID arbitral tribunal was not part of the EU judicial system, and *"since, with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, the consent given to that effect by Romania, from that time onwards, lacked any force"*. The compensation sought by the Swedish investors related, at least in part, to damage suffered after Romania's accession to the EU and therefore the dispute was not confined to the pre-accession period.

The CJEU therefore set aside the General Court's judgment and referred the case back to the General Court for adjudication of the parties' remaining pleas and arguments concerning the merits of the Commission's decision. While the CJEU's clarification of the temporal application of EU State aid law is consistent with international law and the arbitral award, its controversial assertion that Romania is no longer bound by its consent to arbitrate its dispute with the Swedish investor due

to its accession to the EU leaves much to be debated since the ICSID Convention prohibits parties to a dispute from unilaterally withdrawing their consent to arbitration once it has been granted and accepted by the other party.

NEWS & EVENTS

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- 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/