

Arbitration & Corporate law

The French experience
Legal issues & case law

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Arbitration & Corporate law

The context

- Corporate laws are often a field for public order: regulations are dedicated to protect various private or public interests against possible frauds
- Various conceptions of corporate law
 - Institutional analysis close to public order logics
 - Growth of de-regulation tendency in favour of flexible or contractual corporate law
- French laws on arbitrability
 - Art 2060 Civil code: « *one may not enter into arbitration agreements (...) in all matters in which public policy is concerned* »
- Is it possible to arbitrate or not?
 - French case law converges with the American Supreme court analysis regarding possibility to arbitrate issues under the Securities Act (Mitsubishi Motors Corp., 2juill.1985)



Favorable case law

Arbitration friendly attitude

First step: *Tissot case* (29 nov. 1955)

- « *non validity of the arbitration clause does not result from the litigated issue dealing with public order but from the breach of public order* »
- Case cannot be arbitrated when the issue at stake breaches a rule of public order
- According to this case, the arbitrator was supposed to analyse the contract in great details before deciding on his own ability to arbitrate (competence-competence principle)
- It was impossible for the arbitrator to deal with public order and decide that a contract was in contradiction with regulations of public order

Second step: *Labinal case* (19 mai 1993)

- « *the arbitrator has the power to apply principles of public order (...) and to rule their breach, under control of the judge in charge of analysing the validity of the award*»



Specific corporate law issues

Shareholders

- A regulation of the by laws of a company creating a squeeze out mechanism can validly be arbitrated
 - Sapc c./ Cep Color (Paris court of appeal, 17. january 1977)
 - Even for issues in connection with the property right of the shareholder on the shares it is possible to arbitrate
- Voting rights
 - No specific case law
 - The right to vote is a rule of public order protected by french corporate law
 - This rule varies from one type of share to another: difference between ordinary shares and preferred shares (the shareholder may be having no right to vote)



Specific corporate law issues

Corporate functioning

- Freedom to dismiss board members
 - This is a rule of public order
 - It is possible to arbitrate these issues
 - A contract between the company and one of its managers: abusive dismissal can be arbitrated as long as the contract contains a valid arbitration clause (5 november 1984)
- ICC case law about duration of board members mandate
 - Shareholder agreement preventing from a reduction of the mandate in contradiction with the maximum legal duration is not valid



Specific corporate law issues

Corporate functioning

➤ Corporate organs

- A contract cannot modify the powers of the corporate organs and breach the hierarchy between these organs (mainly board and general meeting separation of powers)
- *Juillard c. Roy case* (9 January 1979)
- A contract was organizing the liquidation of corporate assets in favour of three majority shareholders without authorisation of the minority shareholders vote
 - breach of the power of the general meeting to vote the liquidation of the company
- Award validating this agreement was cancelled by the French judge controlling the validity of the award as it was in breach with a principle of public order



Conclusion

- French case law converges with the general international trend in favour of the possibility to arbitrate questions of public order incorporate law
- The arbitrators mission is not so easy as they need to control the validity of the contract regarding internal rules of public order in corporate law and not general principles of international public order
- Always the same question: choose a skilled arbitrator regarding the issues to be dealt with





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