

Arbitration and employment law - update (March 2017) to ELA survey response (May 2016)

Since the date of my response to the ELA survey on arbitration in employment law (May 2016), there have been two interesting developments.

Firstly, there has been a change in arbitration legislation which is favourable to the development of arbitration in employment law cases.

Secondly, the CNAT - *Centre National de l'Arbitrage du Travail* - referred to in my response has started to operate.

The legislative change

The legislative change consists in a modification of article 2061 of the French Civil Code.

The modification - actually a complete rewrite - of article 2061 was brought about by Law N° 2016-1547 of 18 November 2016 known as the Law on modernisation of justice in the 21st century.

The provision had not been contained in the original draft legislation and came as something as a surprise to the arbitration community.

The new article 2061 is not a model of parliamentary draftsmanship. However, it assumes general validity of agreements to submit future disputes to arbitration.

The key part wording in the article states:

"Lorsque l'une des parties n'a pas contracté dans le cadre de son activité professionnelle, la clause ne peut lui être opposée."

"Where one of the parties has not contracted within the framework of his professional activity, the clause is not enforceable against him."

In my response to the ELA questionnaire (Q. 10) I stated that:

- an agreement to submit an existing employment dispute to arbitration (known as a *compromis*) is valid;
- an agreement to submit future disputes to arbitration (an agreement known as a *clause compromissoire*) is valid but is unenforceable against the employee.

In relation to the *clause compromissoire*, despite suggestions that where the contract is not an international contract the clause is invalid, the rule stated above applied in my view whatever the nature of the contract.

The interest of the new article 2061 is that it now confirms in internal matters the above rule already applied by the courts in relation to the *clause compromissoire* in international matters.

There remain some suggestions on the part of some academics and practitioners that the new provision, which does not expressly deal with employment matters, does not apply to such matters, by reason of article 1411-4 of the French Employment Code (which ostensibly gives exclusive jurisdiction over disputes arising out of employment contracts to the Employment Tribunal (*Conseil de Prud'hommes*)).

However, as stated in my response to the questionnaire, the French courts have not applied this article so as to hold arbitration clauses entirely invalid.

I therefore think that the uniform rules as to the *compromis* and the *clause compromissoire* are as stated above.

CNAT - Centre National de l'Arbitrage du Travail

At the time of my response to the questionnaire, the CNAT had not effectively opened.

Since then, the website of the CNAT has gone online and its arbitration rules and cost scales appear on the website.

The Rules are fairly standard arbitration rules giving great latitude to the parties and the tribunal to organise the procedure.

Awards should normally be rendered within six months from the appointment of the tribunal, subject to extension by the CNAT. Provisions such as this are of course commonly seen in arbitration rules, and the actual turnaround time for arbitrations remains to be seen.

The costs provisions are interesting. The costs of the centre and the fees of the arbitrators are calculated on the basis of the amount at stake. Given the amounts levied by tranche according to the costs annex, it can be said that arbitrations administered by the centre will be inexpensive.

An example is provided of a case where the amount at stake is €200 000.

The administrative expenses would be €1900 and the fees of the tribunal either €3 000 for a sole arbitrator or €5 500 for a tribunal of three members.

The costs annex of the rules also provides for a splitting of the administrative costs and arbitrators fees in proportions which are intended to reflect, to some extent, the different tax and VAT statuses of the parties.

Thus, where the employer is a company registered for VAT, the employer pays three quarters and the employee quarter. Where the employer is a company not registered for VAT, the employer pays two thirds and the employee one third. Where both employer and employee are individuals, each pays half.

Article 23.5 of the Rules provides that the tribunal shall make the order for payment of administrative costs and arbitrator's fees in accordance with the costs annex.

Notwithstanding the absence of discretion of the tribunal in relation to the costs mentioned above, article 23.6 gives the tribunal power to make an order as between the parties for payment of other costs in the same way that an ordinary court would be able to (Specific reference is made to the powers of the courts under article 700 of the French code of civil procedure).

In practice, the losing party in French proceedings pays a contribution to lawyers' costs of the winning party. I do not believe that this provision represents any additional risk to a party to a CNAT arbitration compared with the position before the ordinary courts.

A further point of interest is that the Rules provide for scrutiny of the draft award by the CNAT, which can make "suggestions for modifications" of both form and substance. Whilst the content of the award will always be a matter for the tribunal, the language of the provision is quite strong in this context.

The CNAT is both an arbitration institution and an association of interested practitioners.

I have spoken to the President of the CNAT, Maître Hubert Flichy, who has kindly provided the following information.

The centre can be said to have been operational from September 2016.

To date, the CNAT has set in motion only one arbitration. The details of the case are confidential but I understand that the amounts involved are substantial and that the three arbitrators are from leading business law firms in Paris.

The CNAT has already attracted a fair amount of interest from employment practitioners: there are around 70 members, the overwhelming majority of whom are lawyers.

I understand that in the coming months, the CNAT will be making substantial efforts to perfect its website and generally to raise its profile.

It will also be promoting discussion within its membership on a number of practical preoccupations, notably the use of arbitration clauses in employment agreements and the selection of suitable arbitrator profiles.

On this latter point, the preoccupation is to try to find profiles which are as neutral as possible, in particular in relation to sole arbitrators.

My view is that the CNAT, although its gestation has been long and its beginnings rather hesitant, is likely to be an essential laboratory in the field of employment arbitration in France.

Paris, 8 March 2017

Richard Ryde

Avocat au Barreau de Paris

222 boulevard Saint Germain - 75007 Paris

Tel. + 33 (0)1 84 17 23 63 – Direct : + 33 (0)1 84 17 23 64

rryde@rydelaw.com

Also at Boulevard Saint Michel, 11, 1040 Bruxelles