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Arbitration in Employment Relationships in France

Beatrice Castellane★

French labour law mainly protects the needs of the employees and consequently takes precedence over private agreements. Bearing this in mind, arbitration is rarely used in labour disputes in France and whenever it is used, it is essentially restricted to disputes arising out of collective agreements between national or local unions of employers and national or local unions of employees.

I. Arbitration Between Employer and Employee

The Social Chamber of the Cour de cassation (French Supreme Court) holds that, notwithstanding the existence of an arbitration clause in an employment contract, an employee remains free to go to court to litigate an employment dispute. In the case of *Château Tour Saint Christophe*, decided in 1999,[1] a Swedish employee hired by a French company with a contract signed in Sweden was permitted to sue the employer before the *conseil des prud' hommes* (industrial tribunal) notwithstanding the arbitration clause in the contract giving authority to the Stockholm Chamber of Commerce. The decision was based on the fact that the employee's workplace was in France, which was a ground for the international jurisdiction of the *conseil des prud' hommes*,[2] a specialized tribunal for disputes between employees and employers. The Social Chamber specified that the law governing the contract was irrelevant to the obligatory force of the arbitration clause regarding the employee.[3] The Social Chamber held that the employee could choose between an arbitration clause or domestic French jurisdiction if his or her workplace was in France. The same held true for a contract between a Belgian employee (working in France) and his Swiss employer, where the employment contract was governed by Swiss law with an arbitration clause providing for arbitration in Lausanne.[4] As a result, even if the law governing the contract made the arbitration clause enforceable, the clause would only apply if the employee chose to be bound by that clause. The option to choose domestic court jurisdiction was always open to the employee. In light of the foregoing, one can easily understand that arbitration is not frequently used to resolve individual employment disputes. However, if the employee wished to avail himself of the arbitration clause, this would naturally bind the employer.

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[1] Cass. soc. February 16, 1999, Sté Château Tour Saint Christophe v. Aström, 1999 Rev. Arb. 290, commentary M.-A. Moreau.

[2] C. Trav. arts. L1411(1) and R1412(4). Under EC Regulation 44/2001 of December 22, 2000, differences apply when the employer is the plaintiff or when the employee is the plaintiff (Regulation 44/2001, arts. 19–20).

[3] *See* Cass. soc. February 16, 1999; *see also* October 9, 2001, 2002 Rev. Arb. 347, commentary Th. Clay.

[4] Cass. soc. May 4, 1999, 1999 Rev. Arb. 20, commentary M.-A. Moreau.

The spirit of French labour law is marked by the dominance of protection of the employee, who is deemed the weaker party to the contract. Arbitration can easily be seen as an attempt by the employer to deprive the employee of the protection which is afforded him or her by the *conseil des prud' hommes*, which is granted exclusive jurisdiction. Within the French judicial system, parties cannot elect to choose any other court.[5] In one particular instance, however, the Labour Code provides for compulsory arbitration, exclusive of the jurisdiction of the *conseil des prud' hommes*, regarding the calculation of redundancy pay for journalists.[6] The Labour Code speaks of the "*commission arbitrale des journalists*," but this body is actually a specialized tribunal falling short of all requirements pertaining to voluntary arbitration.[7] The Law on the organization of the Bar also provides that disputes between associates (*collaborateurs*) and law firms regarding their employment contracts are submitted to arbitration before the president of the Bar. Because in this situation there is no declaration from the parties to go before an arbitrator designated by them, those provisions cannot be regarded as voluntary arbitration.[8]

French law banned arbitration clauses in the Code civil[9] although this clause, under Article 2061 of the Civil Code, was relaxed in 2001.[10] As a consequence, arbitration of future disputes is forbidden, but an arbitration agreement (*compromis*) can be validly concluded once the dispute has arisen. In the context of domestic employment relationships, this means that an agreement to arbitrate may only be validly entered into after the individual contract of employment has terminated.[11] The 2001 amendment to Article 2061 of the Civil Code refers to contracts relating to professional activities as a condition for the validity of an arbitration clause. It is generally held that this provision would not apply to employment contracts.[12] It can, however, be discussed whether the statutory provisions of Article L1411(1) of the Labour Code, giving exclusive jurisdiction to the *conseil des prud' hommes* but not mentioning arbitration as a prohibited dispute settlement method, should be regarded as falling within the scope of those statutory provisions mentioned in Article 2061, which are an exception to the validity of the arbitration clause.[13] If this is right, domestic arbitration clauses in employment contracts should then be held valid.

What is at stake, however, is the scope of application of the so-called principle of validity of international arbitration clauses developed by the Cour de cassation (although not by its Social Chamber, but by the First Civil Chamber) in a long line of cases, the

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[5] C. Trav. art. L1411(4).

[6] *Id*. art. L7112(4) (former art. L761(5)(4)).

[7] CA Paris, 1e ch., March 10, 2005, Index No. 2004/00197; Ch. Jarrosson, La notion d'arbitrage (1987); J.-M. Olivier, *Arbitrage et droit du travail*, 104 Droit et Patrimoine 52 (2002); Th. Clay, *L'arbitrage, justice du travail*, *in* Procès du travail, travail du procès 99 (Bibliothèque de l'Institut André Tunc, 2008).

[8] Law No. 71-1130 of December 31, 1971, art. 7. *See* G. Flécheux, *L'arbitrage du Bâtonnier*, 1990 Rev. Arb. 101.

[9] C. civ. art. 2061. An arbitration clause is null and void unless the law provides otherwise.

[10] C. civ. art. 2061. Unless provided otherwise in statutory provisions, an arbitration clause is valid in contracts which are concluded in relation to professional activities.

[11] Cass. soc. November 5, 1984, 1986 Rev. Arb. 47, commentary M.-A. Moreau-Bourlès. *See* ICC Award 2558 of 1976, S. Jarvin & Y. Derains, Collection of ICC Awards, 1974–1985, 305 (1990).

[12] Ph. Fouchard, *La laborieuse réforme de la clause compromissoire par la loi du 15 mai 2001*, 2001 Rev. Arb. 397.

[13] Clay, *supra* note 7; G. Augendre, *La réforme de l'arbitrage: de nouveaux territoires?*, Revue de Jurisprudence Commerciale (Nos. 7–8, 2002).

most recent being the 1999 *Zanzi* case.[14] In this case, the Cour de cassation ruled that an international arbitration clause is valid without any requirement that the issues submitted to the arbitrators be of a commercial nature and regardless of the law applicable to the arbitration agreement. The pronouncement of the court in *Zanzi* is, however, limited to international arbitration, which is defined by Article 1492 of the French Code of Civil Procedure as an arbitration involving the interests of international commerce. This definition, as exemplified in a line of decisions of the Cour de cassation and the Cour d'appel de Paris, rests exclusively on the existence of an economic condition, that of an underlying transaction which involves the economies of more than one state.[15] As can be seen from the above, the Social Chamber has, through case law, limited the favourable rules developed by the First Civil Chamber in the field of international arbitration.

In light of this situation, parties have shown more enthusiasm for conciliation and mediation, where the settlement agreement can quickly be enforced by courts.[16] The requesting party presents a written request to the president of the court of first instance (*tribunal de grande instance*). The court does not play a part in the compromise itself. Finally, the court stamps and signs the relevant documents and the enforcement is executed, except where there is an obvious breach of law. In practice, it takes between one and fifteen days to receive an answer from the court. The enforcement of the compromise gives it the same effect as a judgment or award (with exequatur).

A distinction should, however, be drawn between the dispute resolution method and the protection of the employee in the Labour Law Code. In the first case, the question is whether the *conseil des prud' hommes* really protects the employee more than arbitration, and in the second case, whether the arbitrators would pay attention to the protective rules for employees. The *conseil des prud-hommes* is composed of lay judges elected by both employees and employers and it is hoped that an amicable settlement will be reached in the first stage of the proceedings.[17] A tribunal where employees and employers are equally represented may well work for the majority of individual labour disputes, but may be less efficient when the employee is, for example, an executive or other high ranking officer of the company. In such a case, as the *Messier v. Vivendi* award demonstrates,[18] the "employee" is much more interested in arbitrating the dispute with the company as his or her interests are likely not to be properly represented by the judge elected on the employee list. Similarly, arbitration is used for employment disputes in the field of professional sport activities.[19] Although there is only one known example in the

[14] Cass. 1e civ. January 5, 1999, Zanzi v. J. de Coninck, 1999 REV. ARB. 260, commentary Ph. Fouchard; RTD com. 1999.380, commentary E. Loquin.

[15] FOUCHARD, GAILLARD, GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION, note 107 (E. Gaillard & J. Savage eds., 1999).

[16] C.P.C. art. 1441(4).

[17] C. TRAV. arts. L1411(1) and L1411(4).

[18] *See* Dispute Between Vivendi Universal and Mr. Messier, Business Services Industry (Business Wire, June 30, 2003), *available at* <http://findarticles.com/p/articles/mi_m0EIN/is_2003_30/ai_104524686>.

[19] *See*, *e.g.*, TAS No. 2005/A/876, December 15, 2005, Y v. Chelsea Football Club, 2007 J.D.I. 207, commentary E.L.; TAS No. 2004/A/791, October 28, 2005, Le Havre A.C. v. FIFA, Newcastle United & Charles N'Zogbia, 2007 J.D.I. 216, commentary E.L.

case law of French courts,[20] there is no doubt that an arbitration agreement in an international employment contract should be upheld as not "manifestly invalid" pursuant to the case law concerning the negative effect of the competence-competence principle.[21]

According to this principle, arbitrators are entitled to decide in the first place on the validity of the arbitration agreement, while the court's decision on the same issue is postponed until the time of review of the award.[22]

It would therefore be for the arbitrators to decide in the first place whether the arbitration clause is enforceable or not for the employee. Mandatory rules of law or international public policy which chart the limits of the validity of an international arbitration clause[23] should therefore not apply to arbitration clauses in international employment contracts.

The application of the protective rules for employees set out in the Labour Law Code raises the question of the application of mandatory rules of law by the arbitrator. The Rome Convention of 1980 declares that the parties' choice of law may not deprive the employee of the protection accorded by the mandatory rules of an otherwise applicable law.[24] In the *Labinal* case, the Cour d'appel de Paris held that arbitrators have power to decide mandatory provisions of law.[25] Arbitrators can therefore rule on the merits of a dispute and apply the protective rules of employment law.

II. Collective Employment Conflicts

A. Arbitration to stop strikes

The situation is sharply different regarding collective conflicts between employers' and employees' unions. In France, the right to strike is provided by the Constitution.[26] Nevertheless, regulations are not very definite, especially in the private sector. In the case of a strike, the conflict can always be resolved in the courts. Some collective agreements provide alternative dispute resolution clauses.[27] In practice, negotiation is almost always carried out directly between employers and unions. Sometimes it is possible to ask a third neutral, a conciliation commission,[28] a mediator,[29] or even to refer the matter to arbitration.[30] Arbitration is often the last choice after having attempted conciliation and/or

[20] Cour d' appel (regional court of appeal) Grenoble, September 13, 1993, 1994 Rev. Arb. 337, commentary M.-A. Moreau.

[21] *See* Jean Louis Delvolve, Jean Rouche, & Gerald H. Pointon, French Arbitration Law and Practice 76 (2003).

[22] Cass. 1e civ., June 7, 2005, ABS, 2006 Rev. Arb. 945, commentary E. Gaillard.

[23] Cass. 1e civ., December 20, 1993, Dalico, 1994 J.D.I. 432, commentary E. Gaillard.

[24] Convention on the Law Applicable to Contractual Obligations art. 6, 1980 O.J. (L 266) 1.

[25] Cour d' appel (regional court of appeal) Paris, May 19, 1993, 1993 Rev. Arb. 645, commentary Ch. Jarrosson, 1993 J.D.I. 957, commentary L. Idot; 1993 R.T.D. com. 494, commentary E. Loquin.

[26] The Constitution of 1958 provides the reference to the Preamble to the Constitution of 1946, which gives the right to strike the character of a fundamental right (*droit fundamental*). Nevertheless, this Preamble specifies that the right to strike is bound by the regulations.

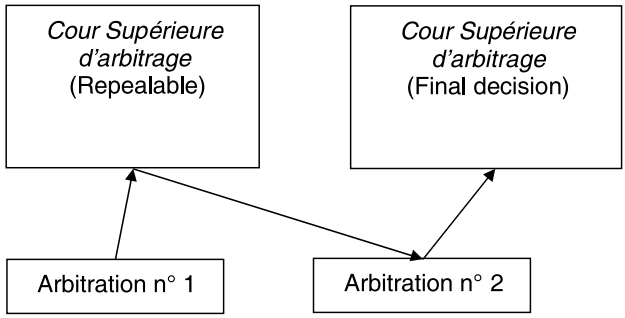
[27] C. Trav. art. D2261(2); *see* B. Teyssiér, Droit du travail, relations collectives 569 (5th ed. 2007).

[28] C. Trav. art. L2522(1).

[29] *Id*. art. L2523(1).

[30] *Id*. art. L2524(2).

mediation. Collective agreements between unions' representatives of employees and employers can provide for arbitration and also for a list of arbitrators, and the arbitration agreement is valid and enforceable.[31] Minutes are drawn up setting out the powers of the arbitrator. The arbitrator applies the legal regulations (legal texts and collective agreements) but especially the arbitrator must decide as *amiable compositeur* (mediator) in all other respects, particularly when the conflict concerns salaries or work conditions.[32] The award, which must be a reasoned decision, can be challenged before the Cour supérieure d'arbitrage (higher arbitration court) for excess of power or violation of the law.[33] The Cour supérieure d'arbitrage is composed of state judges and sits in the Conseil d'Etat, which is the Supreme Administrative Court.[34] If the award is annulled by the Cour supérieure d'arbitrage, the parties have to nominate new arbitrators. If the second award also comes before the Cour supérieure d'arbitrage and is annulled, the Cour then, according to the Labour Law Code, makes the final decision which is also called an award.[35] Although the Labour Law Code speaks of arbitration, the true nature of this process, notwithstanding the initial will of the parties to elect it, is questionable.[36] The scheme is illustrated in Figure 1.



In the above discussion, we have examined the relationships between employers and employees. However, arbitration can be beneficial in another kind of dispute arising out of difficulties within unions.

[31] C. Trav. art. L2524(1). *See* J.-M. Olivier, *Arbitrage et droit du travail*, 104 Droit et Patrimonie 52 (2002).
[32] C. Trav. art. L2524(4).
[33] *Id*. arts. L2524(6) and L2524(7).
[34] *Id*. art. L2524(8).
[35] *Id*. art. L2524(9).
[36] Ch. Jarrosson, La notion d'arbitrage (1987).

B. Specific case of unions

In France, there are several unions: as regards employers, the main national unions include the Mouvement des enterprises de France (MEDEF) and Confédération générale du patronat des petites et moyennes enterprises (CGPME); as regards employees, the main national unions are the Confédération générale du travail (CGT), Force Ouvriére (FO), Confédération française démocratique du travail (CFDT), and Confédération générale des cadres (CGC). Generally, these unions work without a centralized organization or a clear hierarchy. Therefore, they often suffer from internal conflicts. For instance, unions have to nominate representatives who often exercise considerable power as they negotiate collective agreements which will be applicable to all employees and employers who work in France, in all areas of activity, including the civil service.

Sometimes, there can be a problem in the nomination of the representatives by the unions. The reason for this is that the nomination can be made by the upper bureau of the union, or by the branch federation, or by the local union based in each corporation. Generally, all of these bodies have the authority to appoint. Consequently, many internal conflicts arise and many of these internal squabbles come before state courts in public hearings. Naturally, this is not to the benefit of the unions' members. In addition, trade unions may also argue one against another regarding matters such as their respective representation in the branch or industry, the allocation of subsidies, or professional elections.[37]

Unions do not benefit from litigating in open hearings. In order to solve their various problems, arbitration is a convenient solution for at least the following three main reasons:

(a) free choice of the arbitrator (who must have knowledge of the specific field);
(b) confidentiality; and
(c) possibility to empower the arbitrators to act as *amiable compositeur*, therefore taking into consideration the political and social interests of the union beyond a strict interpretation of the union's bylaws.

An arbitration clause in the bylaws of a union is valid under Article 2061 of the Civil Code as it falls within its professional activities.[38] Arbitration has to be clearly provided in the union's articles and the decision of the arbitrator would be binding on the parties.

III. Conclusion

Protection of the parties, and of the employee, is necessary when the arbitration agreement would not allow the parties to bring their case before an arbitral tribunal because of the expenses incurred in doing so, or because of lack of financial resources. If the arbitration agreement provides for an efficient arbitration process which is easily affordable by the employee, the arbitration agreement should be held enforceable, even

[37] J. Pelissier, A. Supiot, & A. Jeammaud, Droit du travail 550 (2004).
[38] *See* Ch. Jarrosson, *Le nouvel essor de la clause compromissoire après la loi du 15 mai 2001*, 1 J.C.P. (No. 333, 2001).

when the employee is the defendant. Arbitration can also be of benefit in solving conflicts between or within employers' and employees' unions. Therefore arbitration deserves to be used more often in labour relations.

Annex: Collective Agreement

The Labour Code establishes the general applicable rules dealing with industrial relations. In this framework, the social partners of private industry (i.e., employers and trade unions) negotiate contracts and agreements. Collective agreements define the work conditions and social guarantees applicable to the employees of the relevant sectors. Collective contracts apply only to specific matters (salaries, work hours, etc.). The collective contracts or agreements can be concluded at the level of a branch (group of enterprises having the same activity on a determined territory), of an enterprise, or of an establishment. The collective agreement can be "extended" by the Ministère de l'emploi et de la solidarité or the Ministère de l'agriculture so that it applies to all levels of the activity concerned.

The "collective agreement" section of Legifrance provides access to national collective agreements that have been published in the *Official Journal*. The collective agreement eventually applicable in a sector must imperatively be mentioned in the salary newsletter.

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