Arbitration Review

French Committee for Arbitration

2013 – N°2

Decisions of the French Supreme Court of 12 June 2012 (*Sablon Leeman Berthaud Andrieu et al v Arnaud Andrieu et al*) and 13 September 2012 (*Bennani v Bellanger*)

I. The exclusive jurisdiction of the *bâtonnier*[1] arising from disputes relating to legal fees: The *bâtonnier's* decisions can be appealed before the First President of a Court of Appeal[2]

1. Disputes regarding legal fees are to be determined by the *bâtonnier* in France. Following the judgment of the French Supreme Court in *Bennani v Bellanger*[3], such disputes do not therefore fall within the remit of conventional arbitration (that is to say arbitration which is not brought before the *bâtonnier*). The case involved an inheritance issue in Morocco which was handled by a French lawyer admitted to the Paris Bar. The French lawyer sought the assistance of a Moroccan lawyer (who was admitted to both the Paris and Casablanca Bars) to advise on Moroccan legal aspects of the case. Thus the French and Moroccan lawyer essentially entered into a lawyer-client relationship. Subsequently, the French lawyer refused to pay the applicable legal fees[4] sought by the Moroccan lawyer. The latter sought to rely on a clause contained in their fee agreement, signed in Casablanca, according to which all disputes would be submitted to the exclusive arbitral jurisdiction of the *bâtonnier* of Paris. In the same fee agreement, the parties also waived their rights to any future appeal.

2. A case was subsequently brought before the *bâtonnier*. In spite of the provisions contained in the fee agreement (whereby the parties had waived their right to appeal), the French lawyer sought to appeal the *bâtonnier's* decision before the First President of the Court of Appeal. Permission to

[1] France is divided into 161 districts each of which has its own Bar Association. Each of the respective Bars has a head known as the *bâtonnier*. In this Article, the usage of the word *bâtonnier* refers to the *bâtonnier* of the Paris Bar.

[2] Each region of France has its own Court of Appeal. The "First President" presides over the Court of Appeal for that particular area.

[3] *Bennani v Bellanger*, Cour de Cassation, (2eme Ch. Civ.), 13 September 2012.

[4] According to the French rules regarding recoverability of legal fees, fees cannot be solely dependent on the outcome of the claim. However, in France the level of legal fees to be paid can be calculated depending on the result, such that a percentage can be applied to a particular level of damages which may decrease as the level of damages increases or decreases.

appeal was granted despite the aforementioned waiver contained in the fee agreement. In response, the Moroccan lawyer sought to challenge the jurisdiction of the First President of the Court of Appeal and submitted the case to the French Supreme Court. The Moroccan lawyer argued that the arbitration clause contained within the fee agreement was valid (thus the parties had voluntarily waived their rights to appeal), that the dispute was international (which meant that consequently the parties could waive their right to appeal unlike in French domestic claims) and that according to Article 2061 of the French Civil Code (pursuant to which contracts relative to the exercise of a professional activity can be arbitrated[5]), the parties had the right to choose arbitration to resolve any disputes, a choice which they had exercised[6].

3. The Moroccan lawyer submitted that the judgment of the First President of the Court of Appeal violated Articles 1442 and 1482 (articles as drafted at the time of the decision, these articles have since been amended) of the French Code of Civil Procedure. Article 1442 defined the rules for an arbitration clause while Article 1482 stated that "the [arbitral] award is subject to an appeal unless the parties waive this right in their arbitration agreement." Paradoxically, the Moroccan lawyer attempted to apply domestic arbitration rules while affirming the international nature of the dispute.

4. The French Supreme Court disagreed with the Moroccan lawyer's reasoning and confirmed the decision of the First President of the Court of Appeal, which had found that Articles 174 and following of the Decree of 27 November 1991 concerning disputes arising from the payment of legal fees, supersede the application of the articles of the French Code of Civil Procedure concerning a national arbitration. According to Articles 174 and following, claims concerning legal fees fall within the remit of the *bâtonnier* who, after hearing the arguments of both parties, has four months to reach a decision[7]. This decision can be appealed before the First President of the Court of Appeal within one month of its notification. Should the *bâtonnier* fail to reach a decision within the four months, the dispute can also be heard directly by the First President of the Court of Appeal.

5. The previous position according to a ruling of the *Conseil d'Etat*[8], was that while acting under Articles 174 and following of the Decree of 27 November 1991, the *bâtonnier* was not considered a jurisdiction or tribunal as defined by Article 6 of the European Convention on Human Rights (ECHR), because the decisions rendered by the *bâtonnier* cannot be enforced until approved by the President of the *Tribunal de Grande Instance*[9]. Nevertheless, according to the French Supreme Court in a 2012 judgment, the fact that the *bâtonnier's* decisions require approval to be enforceable does not constitute an obstacle for recognition of the *bâtonnier* as a jurisdictional authority and thus Article 6 of the ECHR should now to be considered applicable to disputes regarding legal fees in which the *bâtonnier* has jurisdiction[10].

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[5] Article 2061 of the French Civil Code: "Save for the application of a particular text, an arbitration clause is valid in a contract concluded as a result of a professional activity." See Ph. Fouchard, « *La laborieuse réforme de la clause compromissoire par la loi du 15 mai 2001* », *Rev. Arb.*, 2001.397.

[6] As opposed to a domestic arbitration. Indeed, France has two different set of rules regarding arbitration: one for international arbitration and one for domestic arbitration.

[7] The legal fees of the *bâtonnier* are challenged before the President of the *Tribunal de Grande Instance* (art.179 of the Decree of 27 November 1991).

[8] The *Conseil d'Etat* is the French Supreme Court for public and administrative law issues.

[9] CE, 2 October 2006, n°282028. The *Tribunal de Grande Instance* is the lowest-level court which hears all types of cases except for those specially designated to be heard by other courts.

[10] Cass. 2e civ., 29 March 2012, *JCP*, 2012.632, note B. Travier et R. Guichard.

6. In *Bennani v Bellanger*, the waiver of the right to appeal contained within an arbitration clause in a fee agreement was deemed unenforceable because it concerned a dispute relating to legal fees and thus could only fall within the scope of the Decree of 27 November 1991[11]. The implications of the legal weight of the Decree will be considered below. The French Supreme Court provided therefore a veritable exclusive jurisdiction to the *bâtonnier* in ignoring the parties' arbitration clause in their fee agreement.

7. The French Supreme Court effectively confirms in its judgment of *Bennani v Bellanger* that the aforementioned Articles 174 and following, and in particular Article 176 regarding disputes before the First President of the Court of Appeal, permit appeals in the interests of public policy. The designation of "public policy" prevents any party from therefore waiving the possibility to appeal. By way of reminder, in international arbitration, an appeal against an arbitral award is not possible (one can only appeal against the enforcement of an award in certain circumstances, but not against the award itself) and the parties cannot influence by agreement the grounds of appeal regarding the enforcement of the award[12]. In this case, the assertions of the Claimant, based on the international nature of the arbitration, were therefore unfounded, as was the parties' attempt to waive their rights to appeal[13].

8. The French Supreme Court's judgment which confirms the ruling of the Court of Appeal on the impossibility of applying standard arbitration rules (national or international) to disputes relating to legal fees, goes further than simply noting the impossibility of waiving the right to appeal a *bâtonnier's* decision, to affirming the fundamental right to appeal which includes as provided for by French law, the right to have both the law and facts re-examined. The importance of public policy interests as specified by Articles 174 and following of the Decree of 27 November 1991 (which sets out the procedure applicable to the *bâtonnier)***,** effectively prohibit the application of normal arbitration rules to disputes arising over the payment of legal fees of a lawyer who is a member of a French Bar, including the possibility to agree an arbitration clause[14]. However, the Decree only concerns costs disputes between a lawyer and client. Jurisprudence has confirmed this principle in a recent case of the French Supreme Court where a third party was to pay the costs arising from an arbitration but was neither the client nor the beneficiary of the legal services provided[15]. In such circumstances, one can consider that a conventional arbitration would have been possible.

9. In an international context therefore, are Articles 174 and following of the Decree of 27 November 1991 mandatory rules which prevent the application of an arbitration clause? Indeed, the *Dalico* case of the French Supreme Court outlines again today the limits of a valid international arbitration clause in that in order to be valid, international arbitration clauses must comply with French mandatory rules and international public policy[16].

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[11] As modified by the Decree of 15 May 2007.

[12] Court of Appeal of Paris, 19 February 2004, *Rev.Arb.*, 2004.859 (4e esp.), note L. Jaeger.

[13] Since the reform of 13 January 2011, Article 1522 of the French Code of Civil Procedure allows parties to choose to waive their right to appeal against an international award made in France.

[14] Article 174 and following have already been interpreted as excluding arbitrations (Court of Appeal of Paris, 20 November 2000, *BICC*, 15 April 2001, n°430).

[15] Cass. civ. 2e, 16 June 2011, n°1024371.

[16] Cass. civ. 1ère, 20 December 1993, *Rev. Arb.*, 1994.116, note H. Gaudemet-Tallon, *JDI*, 1994.332, note E. Gaillard, *Rev. crit. DIP*, 1994.663, note P. Mayer.

10. A definition of international arbitration is provided by the French Code of Civil Procedure as involving international trade interests[17] and disputes concerning operations economically linked to more than one country[18]. In the decision of *Bennani v Bellanger*, the arbitration clause in the agreement between the French lawyer and the Moroccan lawyer only concerned the Moroccan lawyer's legal fees for advice and assistance either before the Moroccan and French tribunals, or regarding the preparation of an agreement as part of an eventual settlement regarding the disputed inheritance. One might consider that given the place the fee agreement was signed, the fact the lawyer was a member of both the Casablanca and Paris Bars, or even the international nature of the inheritance issue in question which necessitated the legal services in the first place, the international character of the fee agreement and the arbitration could reasonably have been established. Yet the French Supreme Court in *Bennani v Bellanger* refused to consider the lawyer's arguments in this regard.

11. It is of note that fees arising from a French result-based fee agreement[19] notwithstanding the relevant regulations and in particular Article 10 of the law of 31 December 1971, are only permitted as supplementary fees as in the present fee agreement. Such fees have been recognised as consistent with international public policy considerations, as long as they do not result in a manifestly abusive level of fees being imposed on the client[20]. In this context one might wonder whether the public policy criteria provided for by Articles 174 and following of the Decree of 27 November 1991 should remain limited to domestic cases. The French Supreme Court however disagreed and responded to this question by affirming that in terms of domestic and international arbitrations, "*the rules of national or international arbitration, contained in Articles 1442 and following of the French Code of Civil Procedure, do not apply to the disputes relative to legal fees, which are governed by the specific rules of public policy as defined by Article 10 of the law of 10 July 1991 and in Articles 174 and following of the Decree of 27 November 1991*". Thus, to use the classic terminology from private international law, the French Supreme Court considers Articles 174 and following of the Decree of 27 November 1991 involve public policy considerations. This decision prevents disputes arising between a lawyer and client regarding legal fees being submitted to arbitration given the particular status of the *bâtonnier* established by these texts, even if the only justification given to the *bâtonnier's* competence is the need to ensure professional confidentiality[21].

12. However, there is no obvious reason why, *de lege ferenda*, this concern would prevent a dispute regarding alienable rights[22] from being submitted to a conventional arbitration[23]. Naturally, the necessary conditions required to establish an arbitration clause should be fulfilled. In any case, applying Article 1447 of the French Code of Civil Procedure, an agreement between parties should

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[17] Article 1504 of the French Code of Civil Procedure.

[18] Court of Appeal of Paris, 29 March 2001, *Rev. Arb.,* 2001.541, note D. Bureau; RTD com; 2001.649, obs. E. Loquin.

[19] See footnote 4.

[20] Court of Appeal of Paris, 10 July 1992, *D.*, 1992.459, note Ch. Jarrosson.

[21] A. Damien, H. Ader, *Règles de la profession d'avocat,* Dalloz, Action, 2011-2012, p.214, n°24.102.

[22] As opposed to inalienable rights, natural rights.

[23] In accordance with Article 2059 of the French Civil Code which states that "*any person can opt for arbitration upon his or her alienable rights.*"

remain possible[24]. The foregoing only applies if Articles 174 and following of the Decree 27 November 1991 are not questions involving public policy considerations.

II. Disputes involving administrative issues cannot be subject to arbitration: Decisions subject to a *recours grâcieux*[25] and the possibility of appeals before the Court of Appeal

13. In the matter of *Sablon Leeman Berthaud Andrieu et al v Arnaud Andrieu et al*[26] the French Supreme Court considered a case involving a dispute between Partners of a firm[27] regarding the withdrawal of one of the Partners, following a ruling of the *Conseil de l'Ordre*[28] (hereafter referred to as the *Conseil*) and later the Court of Appeal, authorising the relevant Partner to join another firm. The appeal brought before the French Supreme Court attacked the decision of the Court of Appeal which had ruled that the case concerned an administrative issue of public policy. It was argued that this amounted to a violation of Article 21 of the law of 31 December 1971 which states that disagreements between lawyers arising as a result of their profession, are in the absence of a reconciliation between the parties, to be submitted to arbitration before the *bâtonnier.* The French Supreme Court rejected this appeal.

14. The law of 31 December 1971 entrusts the *Conseil* with ensuring that lawyers respect their professional responsibilities as well as also ensuring the protection of lawyers' rights. The *Conseil* is also effectively the head of its own bar and decides which lawyers are permitted to register with its Bar[29]. Nevertheless, as highlighted by Damien, the distribution of powers between the *Conseil* and the *bâtonnier* is more obscure than ever before, obfuscating even the guiding principles which govern the attribution of powers to one or the other[30].

15. The Decree of 27 November 1991 states that any lawyer who considers his or her professional interests are prejudiced by a ruling or decision of the *Conseil* can after seizing the *bâtonnier*, bring a claim before the same *Conseil*. If the decision is upheld, the prejudiced party can then submit an appeal before the Court of Appeal[31]. In the case of *Sablon Leeman Berthaud Andrieu et al v Arnaud Andrieu et al*, it was "*not a dispute between parties, but a request for authorisation, presented by the lawyer withdrawing from the* [firm] *in order to work as a self-employed lawyer*." The Court of Appeal, as affirmed by the French Supreme Court, determined that the authorisation sought by one of the parties did not fall within the arbitral jurisdiction of the *bâtonnier* as defined by Article 21 of

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[24] Article 1447 of the French Code of Civil Procedure: "*an a posteriori agreement by which the parties to a dispute which has already occurred, submit said dispute to arbitration.*"

[25] A *recours grâcieux* is a type of administrative appeal in French law used when an administrative decision causes personal prejudice.

[26] *Sablon Leeman Berthaud Andrieu et al v Arnaud Andrieu et al*., Cour de Cassation, (1re Ch. Civ.), 12 June 2012.

[27] The particular dispute involved an "SCP" which is a type of French company which requires a minimum of two partners who practice in the same profession.

[28] The *Conseil de l'Ordre* is the deliberative, legislative and disciplinary organ of a Bar. It is presided over by the *bâtonnier.*

[29] Article 17 of the law of 31 December 1971, Article 102 of the Decree of 27 November 1971.

[30] Op cit, A. Damien, H. Ader, *Règles de la profession d'avocat,* n°23.45.

[31] Article 15. See Article 19 of the law of 31 December 1971.

the law of 31 December 1971, but rather within the administrative remit of the *Conseil*, which has exclusive jurisdiction over such matters. Furthermore, since the claim was ultimately determined to be an individual administrative matter, the *Conseil* was not obliged to respect the principle of *audi alteram partem*, according to which each party should be given the opportunity to respond to evidence raised against them[32].

III. The mandatory arbitration of the *bâtonnier* in cases involving disputes between Partners: Decisions which can be appealed before the Court of Appeal

16. In disputes arising between lawyers belonging to the same Bar (and where Article 21 of the law of 31 December 1971 applies[33] which provides that all disputes arising between lawyers shall be submitted to the *bâtonnier*) a conventional arbitration is not possible. Indeed, the law imposes a compulsory set of rules on lawyers, specially designed for disputes arising from the practice of the profession. Consequently, a decision of the *bâtonnier* in such circumstances can thus be appealed before the Court of Appeal[34].

17. It is of note that the evolution of the *bâtonnier's* jurisdiction is linked to the increase in disputes between lawyers[35]. The jurisdiction of the *bâtonnier* granted by law regarding such issues, is commonly thought to be justified as a result of the need to protect a lawyer's independence[36]. In spite of this, it is worth noting that the role of the *bâtonnier* has nonetheless been long established and Article 21 simply codifies the position as traditionally understood[37].

18. Jurisdiction relative to disputes arising from the exercise of the legal profession is reserved exclusively for the *bâtonnier* according to the law. Indeed, a ruling of the Court of Appeal of Paris on 13 December 2011 serves as a reminder that an agreement to submit an arbitration to the *bâtonnier* on the basis of Article 21 is redundant[38]. The possibility of requesting a conventional arbitration before the *bâtonnier* for disputes arising pursuant to Article 21 remains, however, open. The decision of the French Supreme Court on 27 April 1988 confirms the need for a pre-existing arbitration clause in order to submit such disputes to normal arbitration rules which would otherwise fall under the mandatory arbitration rules of Article 21[39].

19. Following on from this, the Paris Bar on 4 December 2012, adopted a set of special arbitration rules which apply to the *bâtonnier* of Paris that explicitly provide for the possibility of submitting a dispute falling within the scope of Article 21 of the law of 31 December 1971 to the *bâtonnier*, as a

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[32] Audi alteram partem is "*le principe du contradictoire*" in French, requiring a judge to hear the arguments of each party to a dispute.

[33] Court of Appeal of Paris, 30 January 2013, *Gaz. Pal.*, 28-30 April 2013, p.14, spec. p.18, obs. D. Bensaude.

[34] Ch. Jarrosson, *La notion d'arbitrage*, LGDJ, 1987, n°25, 379; B. Oppetit, *Théorie de l'arbitrage,* PUF, 1998 See also, Th. Clay, « *L'arbitrage du bâtonnier: perseverare diabolicum », D*, 2007.28 (regarding arbitrations involving the *bâtonnier* for disputes relating to lawyers, Article 7 of the law of 31 December 1971). See also B. Moreau, "*L'arbitrage du bâtonnier", Rev. Arb.,* 1993.361.

[35] G. Flécheux, « *L'arbitrage du bâtonnier, un exemple d'arbitrage forcé* », *Rev. Arb.*, 1990.101.

[36] B. Vatier, « *Le Bâtonnier dans tous ses états…ou comment un arbitre de touche est également un arbitre de champ* », *Mélanges Buffet, LPA*, 2004, p.445.

[37] J. Lemaire, « *Les règles de la profession d'avocat et les usages du barreau de Paris* », LGDJ, 1975.

[38] Court of Appeal of Paris, 13 December 2011, *Gaz. Pal.*, 6-8 May 2012, p.18., obs. D.Bensaude.

[39] Cass. civ. 2e, 27 April 1988, *Rev. Arb.*, 1988.293, note Ch. Jarrosson.

result of an arbitration clause or an arbitration agreement[40]. In this situation, the *bâtonnier* assumes the role of a normal arbitrator and therefore, the parties can benefit from the regime applicable to a conventional arbitration.

20. In a case decided by the Court of Appeal of Paris on 30 January 2013, the Paris Bar had attempted to require a foreign law firm seeking to register itself in Paris, to include within its articles of association a clause which superseded its existing arbitration clause and instead provided for mandatory arbitrations before the *bâtonnier* for cases involving French lawyers practising in France[41]. The foreign law firm had already previously included an arbitration clause in its statutes regarding litigation involving French lawyers practising in France, but the said clause did not provide for mandatory arbitration before the *bâtonnier*. The Court of Appeal dismissed the Paris Bar's claim and confirmed the possibility of conventional arbitration between parties should disputes arise. The new arbitration rules set out in paragraph 19 above have therefore provided clarification and confirmed that a party can thus freely submit to an arbitration in a voluntary and non-mandatory manner when it comes to disputes arising from Article 21 of the law of 31 December 1971, that is to say disputes relating to lawyers and the exercise of their profession.

21. On 27 February 2013, the French Supreme Court ruled on the nature of public policy in disputes arising between lawyers on the basis of articles 179-1 and following of the decree of 27 November 1991[42]. The nature of public policy is considered in this case uniquely from the point of view of Article 47 of the French Code of Civil Procedure, in cases involving locally based legal professionals and mandatory arbitrations[43]. This ruling was limited to mandatory arbitrations which should not therefore, preclude the possibility of resorting to a conventional arbitration in order to deal with a dispute. The parties here found themselves subject to a mandatory arbitration, therefore by no means does this case relate to an ordinary request for conventional arbitration (which would have been denied on the basis of public policy considerations). In any case, the principle of a party's freedom to submit disputes to conventional arbitration should they wish to do so was confirmed in the case of 27 April 1988. This point was not reconsidered in the case of 27 February 2013.

22. Thus one can appreciate the reasoning of the French Supreme Court in *Bennani v Bellanger*. It follows that once a case has been considered to fall within the scope of texts applicable to the legal profession, such texts are applicable in their totality including in relation to any public policy issues. One might conclude that this judgment prevents two lawyers engaged in a dispute from pursuing ordinary arbitration. However, the ruling of the French Supreme Court in this case only applies to situations of mandatory arbitration by the *bâtonnier* where no arbitration agreement has been agreed by the parties. It does not exclude the possibility of two lawyers relying on a pre-existing arbitration clause or pursuing ordinary arbitration, should the parties so wish, as affirmed by the French Supreme Court's decision of 27 April 1988.

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[40] RIBP Annex XIX.

[41] Op cit, Court of Appeal of Paris, 30 January 2013.

[42] Cass. civ 1ère, 27 February 2013, judgment n°218, judgment made in the same case as that which gave rise to the decision of 12 June 2012 which is commented on in this article.

[43] Article 47 of the French Code of Civil Procedure: "*When a judge or an agent of the Law is involved in a dispute which falls within the jurisdiction where this person exercises its profession, the Claimant has the possibility of bringing his or her claim before an adjacent jurisdiction.*" The non-application of Article 47 of the French Code of Civil Procedure has previously been affirmed for special cases involving disputes regarding legal fees in view of Articles 174 and following of the Decree of 27 November 1991 (Cass. civ. 1èr, 9 October 2001, *D.*, 2001, IR.3089).

23. To conclude, a further issue which arises following on from the above involves the choice of judge in arbitration disputes. It must be remembered that in France, it is not necessary to practice as a lawyer to become a judge. Indeed, a separate route of study exists for those seeking to immediately become judges rather than practising as lawyers. Given a judge and lawyer in France have distinct professional obligations, judges are often unable to truly consider cases involving professional ethics and practising lawyers[44]. Nevertheless, the need to ensure that the independence of lawyers is protected, is maintained even when a judge is chosen by the parties in arbitration proceedings. In such cases as discussed above, mandatory arbitration rules which should be applied by the *bâtonnier* are not applied and such an arbitration is instead conducted as a conventional arbitration. The arbitrator's knowledge of lawyers' professional ethics must also therefore be a key factor in the selection of an arbitrator in order to ensure the parties have confidence in the arbitration itself.

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[44] Op cit, B. Vatier, « *Le Bâtonnier dans tous ses états…ou comment un arbitre de touche et également un arbitre de champ* ».