

# Arbitration Review

## French Committee for Arbitration

2015 – N°4

### French Supreme Court Judgment dated 9 July 2014

*Lewis v/ Hunkeler et al*<sup>1</sup> was a dispute involving a British lawyer (Mr Lewis) who was a Partner in the Paris office of British firm Thomas Cooper. Mr Lewis submitted a dispute relating to his pay to the Paris *bâtonnier*<sup>2</sup> on the basis of Article 21 of the law of 31 December 1971 (said article provides the *bâtonnier* with jurisdiction in disputes arising between lawyers in the exercise of their profession). Thomas Cooper objected to the jurisdiction of the *bâtonnier* due to an arbitration clause contained in its Partnership agreement which provided that disputes were to be brought before an arbitrator in London. On that basis, the firm had in fact commenced its own arbitration proceedings in London. In a decision of 12 April 2011, the *bâtonnier* effectively considered that he lacked jurisdiction to hear the claim, a decision which was challenged but confirmed by the Court of Appeal of Paris<sup>3</sup>. Mr Lewis subsequently brought an appeal before the French Supreme Court which in turn, rejected the appeal.

#### **I. Confirmation that disputes falling within the scope of Article 21 of the law of 31 December 1971 (disputes between lawyers) can be resolved by conventional arbitral proceedings**

1. In the ruling of *Lewis v/ Hunkeler et al*, the French Supreme Court confirmed recent jurisprudence regarding arbitrations involving the *bâtonnier* arising pursuant to Article 21 of the law of 31 December 1971. According to Article 21, any dispute between lawyers arising from the practice of their profession should, where a reconciliation is impossible, be submitted to the *bâtonnier* for arbitration. The *bâtonnier* therefore enjoys, a priori, exclusive jurisdiction to resolve professional disputes between lawyers of the same Bar<sup>4</sup>. Nevertheless, Article 21 also provides the possibility of appealing against a *bâtonnier's* decision before the Court of Appeal. According to Clay, conventional arbitration arising from common law (that is to say arbitration which is not brought before the *bâtonnier*), is only possible when the parties have agreed to an arbitration agreement<sup>5</sup>.

---

<sup>1</sup> *M. L. Lewis v/ M. Ch. Hunkeler et al.*, Cour de Cassation, (1<sup>re</sup> Ch. Civ.), 9 July 2014.

<sup>2</sup> 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*.

<sup>3</sup> Court of Appeal of Paris, 30 January 2013, *Gaz. Pal.*, 28-30 April 2013, p.14, note D. Bensaude.

<sup>4</sup> In this context, if necessary, the *bâtonnier* can appoint an expert to evaluate the ownership of shares of a firm.

<sup>5</sup> Th. Clay, « *L'arbitrage du bâtonnier : perseverare diabolicum* », *D.*, 2007.28.

Evidently, this is not the case when a mandatory arbitration is commenced before the *bâtonnier* pursuant to Article 21. The French Supreme Court has, therefore, accepted that disputes between lawyers which normally fall under the jurisdiction of the *bâtonnier*, can be subject to a conventional arbitration but only when the parties have agreed to an arbitration clause<sup>6</sup>.

2. In the case of *Lewis v/ Hunkeler et al*, the arbitration clause in the Partnership agreement stated: “any dispute, or issue, whatever it may be, between the Partners or one of them or their personal representative, arising from the Partnership, the accounting, the termination or dissolution of the Partnership, or the interpretation of this agreement or the rights and duties of the Partners by virtue of this Partnership, will be submitted to a sole arbitrator in accordance with the Arbitration Act of 1996, or any subsequent legal modification and in case of a dispute, such an arbitrator will be chosen by the accountants of the firm and may be one of the Senior Partners of this firm”. The *bâtonnier*'s decision of 12 April 2011 (which concluded that a *bâtonnier* does not have jurisdiction if a conventional arbitration clause exists) is confirmation that professional disputes between lawyers may be resolved via conventional arbitration in certain circumstances. Disputes arising under Article 21, can therefore be withdrawn from the *bâtonnier*'s jurisdiction to be submitted to conventional arbitration should the parties choose to do so.
3. The French Supreme Court in *Lewis v/ Hunkeler et al*, approved the *bâtonnier*'s decision of 12 April 2011 in accepting that the arbitration clause in Thomas Cooper's Partnership agreement “excluded the application of Article 21 of the law of 31 December 1971 which provides for the jurisdiction of the *bâtonnier*.” The French Supreme Court's decision confirms its previous jurisprudence<sup>7</sup> and the arbitration rules adopted by the Paris Bar in 2012<sup>8</sup> which provide parties with the possibility of using an arbitration clause to resolve disputes between lawyers arising pursuant to Articles 7 and 21 of the law of 31 December 1971 as well as in Articles 142 and 179-1 and following of the decree of 27 November 1991. Indeed, it follows that the *bâtonnier*'s jurisdiction is only exclusive when it comes to claims brought before public jurisdictions. The *bâtonnier*'s jurisdiction is not, therefore, exclusive when it comes to claims commenced before private jurisdictions. In spite of this, the practical implication of this ruling alone does not seem to have been sufficient for it to be published in the *Bulletin civil*, the *Bulletin d'information* or on the French Supreme Court's website<sup>9</sup>.

## II. Equality of the parties during the constitution of the arbitral tribunal: Issues regarding the appointment of sole arbitrators

4. In *Lewis v/ Hunkeler et al*, in order to challenge the jurisdictional argument relied on by the Partnership, Mr Lewis attempted to demonstrate that the arbitration clause violated French procedural public policy due to a failure to respect the principle of equality of the parties during the constitution of the arbitral tribunal. Mr Lewis added that the arbitral awards in relation to the proceedings started by the Partnership in London, were made by a sole arbitrator whose appointment was sought by the Partnership. This, argued Mr Lewis, was contrary to public

<sup>6</sup> Cass. Civ. 2è, 27 April 1998, *Rev. Arb.* 1988,293, note Ch. Jarrosson. See also Ch. Jarrosson, « *La notion d'arbitrage* », LGDJ, 1987.

<sup>7</sup> *Ibid*, Jarrosson's note on Cass. Civ. 2è, 27 April 1998; See also the note of Béatrice Castellane on Cass. Civ. 1ère, 12 June 2012 and Cass. Civ. 2è, 13 September 2012. *Rev. Arb.* 2013.393. See also J-M. Durigneux, « *L'arbitrage du bâtonnier ou l'illusion du vocabulaire* », *Dalloz Avocats*, n°8-9 August-September 2014, p.274.

<sup>8</sup> RIBP Appendix XIX.

<sup>9</sup> *Rev. Arb.* 2014.807. Of note, the *Bulletin civil* and *Bulletin d'information* are French publications which summarise the most significant case law (whether it be an affirmation or departure from existing jurisprudence) arising during the year.

international order since the nomination of the arbitrator did not respect the principle of equality of the parties. Mr Lewis in his appeal, sought to apply the reasoning of the *Dutco* case according to which the equality of the parties during the appointment of arbitrators was found to be an issue of public policy and could only be waived once the claim had commenced<sup>10</sup>.

5. As a general rule, when it comes to arbitration and the issue of inequality between parties, parties may seek to appeal against the appointment of a sole arbitrator. In effect, an unjust constitution of the arbitral tribunal may occur if one party is free to choose a co-arbitrator whereas the other party, or parties, are constrained to a particular choice for the other co-arbitrator<sup>11</sup>. When using a sole arbitrator there is of course, no frustration of the right to appoint a co-arbitrator. Until recently, it had been held following a ruling of the Court of Appeal of Paris, that the principle of equality was not an issue which could be raised in situations involving the appointment of a sole arbitrator<sup>12</sup>. Recent jurisprudence, however, suggests that the Court of Appeal's finding is no longer the current position. In effect, the ruling of *Lewis v/ Hunkeler et al* does not explicitly preclude the equality issue arising during the appointment of a sole arbitrator, on the basis of the appointment conditions specified in an arbitration clause. For example, there are cases where the arbitration agreement contains a list of names from which the party initiating the arbitration must choose the sole arbitrator<sup>13</sup>. In reality, these cases give rise in themselves to a certain inequality as a result of the mechanism used to appoint the sole arbitrator, given the names of potential arbitrators featured on the list are in fact imposed by one party on the other.
6. In *Lewis v/ Hunkeler et al*, the arbitration clause in the firm's Partnership agreement gave rise to several issues. The relevant clause provided that save for where there was agreement between the parties as to the choice of a sole arbitrator "*the sole arbitrator will be chosen by the firm's accountants and may be one of the Senior Partners of this firm*", the appointment of the sole arbitrator was therefore influenced by only one party i.e. the Partnership. Nevertheless, the Court of Appeal's ruling of 30 January 2013 regarding the selection of the sole arbitrator appointed by the chief accountant, who was not a Senior Partner but a third party, did not discuss the issue of independence which arose as a result of the method of selection used. Mr Lewis' appeal before the French Supreme Court therefore relied on the lack of guarantees regarding the independence and impartiality of the sole arbitrator, appointed in accordance with the conditions set out by the arbitration clause in the firm's Partnership agreement. Independence and impartiality are important considerations when it comes to equality as set out in the *Dutco* case. Previously, the Court of Appeal of Paris had ruled that given arbitrators are independent, the equality of parties is automatically ensured regardless of the manner in which the arbitral tribunal is constituted<sup>14</sup>. However, the *Dutco* case established new guidance regarding equality and the constitution of arbitral tribunals.
7. It is accepted that the Partner in the case of *Lewis v/ Hunkeler et al* did not challenge the arbitral awards made in London before the relevant national courts. The said Partner also did not submit his argument regarding the breach of equality during the appointment of the sole arbitrator to the national courts. When examining the case, the French Supreme Court's response to the issue was "*the supposed irregularities in the appointment of the arbitrator have no effect on the validity of the arbitration clause itself*". Even if the Court did not rule on the issue of independence in the

---

<sup>10</sup> Cass. Civ. 1<sup>ère</sup> 7 January 1992, *Dutco*, *Rev. Arb.*, 1992.470, note P. Bellet; *JDI*, 1992.707, note Ch. Jarrosson.

<sup>11</sup> *Ibid*, note P. Bellet.

<sup>12</sup> Court of Appeal of Paris, 7 October 1999, *Rev. Arb.*, 2000.288, note D. Bureau.

<sup>13</sup> Court of Appeal of Paris, 3 July 2012, *Rev. Arb.*, 2013.160, note J. Barbet.

<sup>14</sup> Court of Appeal of Paris, 5 May 1989, *Rev. Arb.*, 1989.723, note P. Bellet.

appointment of the sole arbitrator, this decision remains of relevance as it has implications regarding the role of a judge<sup>15</sup> in such circumstances.

### III. The separability of unenforceable parts of an arbitration clause: The role of the judge

8. The remit of judges which has gradually been increased by jurisprudence, was concretised in the arbitration law reforms of 2011<sup>16</sup>. Article 1453 of the French Code of Civil Procedure principally concerns multiparty arbitration and puts judges (or the relevant arbitration body) in charge of the appointment of arbitrators where parties fail to reach agreement as to the constitution of an arbitral tribunal. Although the issue of equality of the parties is most likely to arise in multiparty arbitrations as was seen in the *Dutco* case, multiparty arbitrations are not the only situation where this issue arises as the present case demonstrates. Article 1454 of the French Code of Civil Procedure states that disputes arising from the constitution of the arbitral tribunal are settled, when the parties fail to reach agreement themselves, by the body in charge of organising the arbitration or, failing that, by the relevant judge. Even though Article 1454 of the French Code of Civil Procedure is not mentioned in the present French Supreme Court's judgment, the decision illustrates a judge's role in such a context.
9. As a principle of natural inalienable rights<sup>17</sup>, equality between parties is required throughout an arbitration, including in the constitution of the arbitral tribunal as highlighted by the *Dutco* case. Failure to respect this fundamental principle during the appointment of arbitrators amounts to a violation of public policy. On this basis, the lawyer in *Lewis v/ Hunkeler et al* was effectively counting on the arbitration clause being found to be invalid as a result of the conditions specified to appoint the sole arbitrator ("*the arbitrator will be chosen by the accountants of the firm and may be one of the Senior Partners of this firm*"). In finding that "*the supposed irregularities of the conditions to appoint the arbitrator have no effect on the validity of the arbitration clause itself*", the French Supreme Court implicitly refers to Article 1454 of the French Code of Civil Procedure to support its decision, which allows parties to rectify the parts of an arbitration clause which violate the principle of equality.
10. In this case therefore, the French Supreme Court separates the valid parts of the arbitration clause from the parts which could be considered to be contrary to public policy. The judgment therefore permits the separation of the arbitration agreement from other clauses in a contract which is arguably invalid<sup>18</sup>. The separability applied to the arbitration clause itself thus preserves the arbitrator's jurisdiction despite the potentially invalid parts of the same clause given the relevant judge is able to permit the rectification of such issues.

---

<sup>15</sup> In French this is a « juge d'appui ». This judge specifically assists parties in the appointment of the arbitral tribunal. In France it is usually the President of the *Tribunal de grande instance* of the place chosen by the parties for the arbitration proceedings.

<sup>16</sup> Ch. Jarrosson, J. Pelerin, « *Le droit français de l'arbitrage après le décret du 13 janvier 2011* », *Rev. Arb.*, 2011.5.

<sup>17</sup> E. Loquin, « *A la recherche du principe de l'égalité des parties dans le droit de l'arbitrage* », *Gaz. Pal.*, 2 July 2008, n°184, p.29.

<sup>18</sup> Cass. Civ. 7 May 1963, *Rev. Crit. DIP*, 1963.615, note H. Motulsky. *JCP*, 1963 II 13405, note B. Goldman, E. Loquin, « *L'arbitrage du commerce international, Pratique des affaires* » 2015, Ed. Joly, n°115 et s, pages 118 et s.

11. By way of reminder, an international arbitration clause is not subject to national laws<sup>19</sup>. In the case of a domestic arbitration agreement subject to French law, it thus remains possible that Article 1172 of the French Civil Code (which provides that a clause which is contrary to public policy or prohibited by law should be considered invalid and result in the nullity of the contract to which it applies), could be invoked.
12. To conclude, it is clear from the above that the impact of the presently commented ruling goes well beyond cases involving a breach of the principle of equality between the parties.

**Béatrice Castellane**  
*Avocat at the Paris Bar*  
*International Arbitrator*  
*Former Member of the Council of the Bar*

---

<sup>19</sup> Cass.civ., 5 January 1999, *Zanzi*, note Ph. Fouchard, *Rev. Arb.*, 1999.260.