

Kluwer Arbitration Blog

French Supreme Court, Arbitration Agreements and Jurisdictional Challenges: Parties Cannot Have Their Cake and Eat It

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On 9 February 2022, the French Supreme Court (*Cour de cassation*) [held that](#) a respondent party in arbitration cannot sabotage proceedings by refusing to pay its share of the advance on costs, then subsequently challenge the jurisdiction of national courts in favour of arbitration. Such behaviour, according to the French Supreme Court, constitutes a breach of the parties' duty of procedural loyalty, and will prevent a successful jurisdictional challenge in favour of arbitration (*Cour de cassation*, n° 21-11.253).

While in line with the French Supreme Court's previous approach to this question, this decision – when compared with the approach taken across the channel – raises some important questions about not only the limit of dilatory tactics often adopted by respondent parties, but also the wider issue of harmonisation of interpretation of widely adopted institutional rules.

Background

In 2011, Pastificio entered into a franchise agreement with Taglia'Apau. After a few years, Taglia'Apau requested (i) a revision of the contract and (ii) compensation for losses suffered due to a lower margin than anticipated. In 2016, Taglia'Apau became subject of insolvency proceedings and commenced ICC arbitration proceedings (under the 2012 ICC Rules). Due to Pastificio's refusal to pay its share of the advance on costs pursuant to Article 36 of the 2012 ICC Rules (and Taglia'Apau's inability to cover Pastificio's share), the ICC brought an end to the arbitration proceedings in accordance with [Article 36.6 of the 2012 ICC Rules](#).

In 2018, Pastificio terminated the franchise agreement with Taglia'Apau. The same year, Taglia'Apau went into liquidation and its administrator commenced proceedings before the local commercial court in the southern French town of Pau.

Before the commercial court, Pastificio challenged the jurisdiction of the national courts; claiming that the existence of an arbitration agreement prevented Taglia'Apau from initiating proceedings before national courts. Taglia'Apau replied that Pastificio could not (by refusing to pay its share of the advance on costs) actively prevent arbitration proceedings from taking place and subsequently claim the dispute could only be settled in arbitration proceedings.

Pastificio argued that Taglia'apau had grossly inflated its claims, leading to a high advance on costs, which justified its refusal to pay. Pastificio said it would accept to pay the advance on costs, should Taglia'apau reduce its claim or pay the full advance.

The commercial court declined jurisdiction over the dispute due to the presence of the arbitration agreement and considered that Pastificio had not waived its consent to the arbitration agreement. It concluded that Taglia'apau could commence new arbitration proceedings to pursue its claims.

Taglia'Apau filed an appeal against the decision of the commercial court and claimed that Pastificio had breached its obligation not to contradict itself (a type of French procedural estoppel).

The Pau Court of Appeal dismissed this argument, holding that the obligation not to contradict oneself was only applicable to claims within the same proceedings.

The Court of Appeal also addressed the Kompetenz-Kompetenz argument raised by Pastificio and decided that, absent any manifest invalidity of the arbitration agreement, only an arbitral tribunal could decide on its own jurisdiction.

The Court of Appeal dismissed Taglia'Apau's argument that dismissing the proceedings would amount to a denial of justice, due to the fact that Taglia'Apau had no funds left to commence new proceedings. It held that the advance on costs was set by the ICC in consideration of the amount of Taglia'Apau's claims which can act as a sanction for a party inflating its claims.

The Pau Court of Appeal therefore decided that it did not have jurisdiction to hear the dispute. Taglia'Apau raised the case before the French Supreme Court.

Decision

Unsurprisingly, the French Supreme Court quashed the Court of Appeal's decision and referred the case to a differently constituted Court of Appeal in Bordeaux.

This is not the first time that the French Supreme Court has sanctioned an inconsistent respondent who refused to pay its share of the advance on costs. In a case dated 19 November 1991 (n° 90-14.869), the French Supreme Court held that a party could not derail arbitration proceedings by refusing to pay its share of the advance on costs and subsequently try to rely on the arbitration agreement to challenge the jurisdiction of national courts.

In its more recent decision, the French Supreme Court reviewed several of the arguments raised before the Court of Appeal.

Regarding the advance on costs, the French Supreme Court disagreed with the Court of Appeal's interpretation of Article 36 of the 2012 ICC Rules. The French Supreme Court held that, pursuant to the terms of Article 36, Pastificio had a clear obligation to pay its share of the advance on costs. By failing to do so, Pastificio breached the ICC Rules it had accepted when entering into the contract containing the arbitration agreement, which provided for arbitration proceedings under the ICC Rules.

In quashing the Court of Appeal's decision, the French Supreme Court based its decision on the

duty of procedural loyalty (“*devoir de loyauté procédurale*”). It decided that a party cannot cause arbitration proceedings to be brought to an end due to its failure to pay its share of the advance on costs and subsequently invoke the arbitration agreement to challenge the national courts’ jurisdiction.

Key Takeaways: A Clear Lack of Harmonisation and a Word of Warning to Respondent Parties

This decision is a strong shot across the bow to respondents who, as a delaying tactic, refuse to pay their share of the advance on costs in the hopes of paralysing (or even sabotaging entirely) the arbitration proceedings.

Where the Court of Appeal had refused to apply the French principle of estoppel across separate proceedings, the French Supreme Court took a broader view, through the lens of the duty of procedural loyalty. The French Supreme Court did not provide much detail in its reasoning, except for the observation that Pastificio could not refuse to pay its share of the advance on costs and subsequently invoke the arbitration agreement to challenge the jurisdiction of French national courts.

It is unclear if the French Supreme Court’s aim was to sanction an inconsistent respondent or whether the purpose was to establish a new principle akin to repudiation of the arbitration agreement. As things stand, we are inclined to think it is the former rather than the latter. Nevertheless, it is clearly in line with the French Supreme Court’s previous approach to this question.

At this stage, we will have to wait to see what the Bordeaux Court of Appeal will decide, but the message is clear and should be heeded by respondent who adopt the all-too frequent tactic of refusing to pay their share of the advance on costs (either because they know the financial burden might lead the claimant to negotiate or because they know the claimant cannot afford to pay the entire advance on costs, which was the case at hand). Doing so could result in a national court finding that the respondent has repudiated the arbitration agreement and impliedly accepted that the dispute can be settled by national court instead of by an arbitral tribunal as originally contemplated in the contract.

It is interesting to note that on the other side of the channel, the question of a respondent not paying its share of the advance of costs under the ICC Rules has also been addressed by the English High Court, albeit with a markedly different result. In *BDMS Ltd v Rafael Advanced Defence Systems* ((2014) EWHC 451 (Comm)), a respondent party had refused to pay its share of the advance on costs until the claimant party provided a bank guarantee covering the respondent party’s costs.

The English High Court, contrary to the approach of the French Supreme Court, declined jurisdiction in considering that a failure to pay its share of the advance on costs by a respondent party does not constitute a repudiatory breach of the arbitration agreement, as it does not substantially deprive the claimant of the benefit of the arbitration agreement. In arriving at this conclusion, the English court stressed a number of workarounds, including but not limited to (i) challenging the application of Article 36.6, and (ii) having the arbitral tribunal determine the respondent party’s request for a bank guarantee before any application of Article 36.6.

The result is an approach that is almost diametrically opposed to that of the French courts, which raises a number of questions in terms of the harmonisation of interpretation of widely adopted institutional rules such as the ICC Rules.

Nevertheless, it is important to stress that these cases are influenced by their specific facts, and an interesting (and not insignificant) difference between the factual matrixes of these two cases, is the insolvency of the claimant party. Whether this would impact the reasoning of the English court's approach remains to be seen. In any case, the lack of harmonisation, and varying approaches means that respondent parties seeking to employ dilatory tactics at arbitration should take considerable care.


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This entry was posted on Wednesday, April 20th, 2022 at 8:00 am and is filed under [Annulment, France](#)

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