MEYER FABRE
AVOCATS

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1st of May 2011: A new French arbitration law comes into force

The Decree No. 2011-48 of 13 January 2011 reforming French arbitration law (the Decree) came into force on the 1st of May 2011.

Thirty years after the preceding reforms of domestic (1980) and international (1981) arbitration, as codified in Book IV of the French Code of Civil Procedure (CCP), an overhaul of these rules was felt necessary in order to consolidate the considerable corpus of judge made law developed over this period and to introduce several innovations intended to reinforce further the "efficiency" of the arbitral process – a constant and overarching objective of the French approach to arbitration.

A "restatement" exercise

One of the Decree's valuable achievements is to make French arbitration law more accessible, especially to foreign readers, by codifying rules and practices elaborated over the years by French courts.

The Decree keeps the preexisting "dualist" system, dedicating a specific set of rules applicable to international arbitration (Title II) – although a long list of provisions contained in Title I, governing domestic arbitration, also apply to international arbitration, unless the parties otherwise agree (Article 1506 CCP). The traditional definition of international arbitration is reaffirmed (Article 1504 CCP: "*Arbitration is international when international trade interests are at stake*").

As far as the arbitration agreement is concerned, two principles accepted by the French courts are now expressly codified: the first is the "separability" principle, i.e., the arbitration agreement shall not be affected if the contract to which it relates is void (Article 1447 CCP); the second is that an international arbitration agreement "*shall not be subject to any requirements as to its form*" (Article 1507 CCP).

The principle of "competence-competence" is reasserted, both in its positive effect – conferring "*exclusive jurisdiction*" to the arbitral tribunal to rule on objections to its "*jurisdictional power*" (Article 1465 CCP), and in its negative effect – obliging French courts to decline jurisdiction when the dispute is subject to an arbitration agreement. Exceptions to this latter rule are admitted only before the arbitral tribunal has been seized, "*if the arbitration agreement is manifestly void or manifestly inapplicable*" (Article 1448 CCP) or when an application is made to the court for measures relating to the taking of evidence or, where the matter is urgent, for provisional or conservatory measures (Article 1449 CCP).

Confirming French practice, the reformed law officially adopts the terminology of the "supporting judge" ("*juge d'appui*") to designate the judicial authority whose role is

to solve problems relating to the constitution of the arbitral tribunal (arbitrator's appointment and replacement, challenges) and the extension of the time limit for the arbitration, subject to the powers of the arbitration institution the parties may have chosen. In international arbitration, unless otherwise specified by the parties, the "*juge d'appui*" shall be the President of the *Tribunal de grande instance* of Paris when any of the following conditions is met: "*(1) the arbitration takes place in France; or (2) the parties have agreed that French procedural law shall apply to the arbitration; or (3) the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or (4) one of the parties is exposed to a risk of a denial of justice*" (Article 1505 CCP). The reference to denial of justice echoes a ruling of the *Cour de Cassation* in *Minister of Finance of the State of Israel v. NIOC* (Civ. I, 1st February 2005, Bull. N° 53), although the new provisions no longer require any connection with France.

The Decree expressly codifies the arbitral tribunal's authority to take fact finding steps, to hear any person's testimony, to order a party to produce evidence, subject to penalties if necessary (Article 1467 CCP) and to order conservatory or provisional measures, except attachments and freezing orders which may only be granted by the courts (Article 1468 CCP). Applications to the courts must also be made if there is a need to obtain evidence held by a third party (Article 1469 CCP).

Article 1466 CCP confirms a rule adopted by the French courts, akin to the common law estoppel, pursuant to which "*a party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity*".

The Report to the Prime Minister relating to the Decree makes it clear that two important principles established in French case law remain untouched. The first principle is that a State or one of its emanations cannot rely on its own law in order to evade an obligation to which it has consented (Civ. I, 2 May 1966, *Galakis*, Bull. N° 256). The second is that an international award is not dependent on any domestic legal order and that its validity must be reviewed under the rules applicable in the country where its recognition and enforcement are requested (as opposed to the law of the place of the seat of the arbitration, even if the award has been annulled there) (see esp. Civ. I, 29 June 2007, *Putrabali v. Rena Holding*, Bull. N° 250). It was not possible to restate these principles in the Decree because, as a matter of French constitutional law, legislation passed by the Parliament would have been necessary to do so.

Several significant innovations

The reform also introduces several significant innovations, especially in respect of enforcement and annulment proceedings. As far as international arbitration is concerned, three modifications should be mentioned.

First, the aim behind Article 1519 CCP is to accelerate the enforcement process, by providing that an action to set aside an award shall be admissible "*within one month*

following notification of the award", thus shortening the previous delay which started to run only from the date of service of a judicial order declaring the award enforceable ("*ordonnance d'exequatur*"). Although nothing is said in this respect, it seems that the two month extension benefiting parties domiciled abroad should continue to apply.

Second, Article 1522 CCP now provides that the parties can agree at any time to waive their right to seek annulment of the award made in France. Such a waiver does not affect the parties' right to resist enforcement of the award. The grounds on which an award can be denied enforcement are the same as the grounds for annulment. These grounds, listed in Article 1520 CCP are substantively the same as in the old law subject to various drafting improvements.

Third, a significant improvement on the previous law concerns the immediate enforceability of the award. Article 1526 CCP provides that "*neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award*". This rule reverses the previous situation and is intended to discourage purely dilatory challenges. Where immediate enforcement of the award could severely prejudice the rights of a party, Article 1526 CCP preserves the possibility to apply for a stay or for an order subjecting the enforcement to certain conditions.

Finally it should be noted that parties to an international arbitration who wish to keep their arbitration confidential should adopt an express provision to that effect, whether directly or by reference to appropriate arbitration rules, given that the Decree's new rule regarding the confidential nature of arbitration proceedings is limited to domestic arbitrations (Article 1464 CCP, last paragraph).

Conclusion: The Decree does not revolutionize French arbitration law, but it confirms and clarifies many important decisional law principles and practices. Dilatory recourses to French courts are clearly discouraged, whilst the judge's role in support of the arbitration process is reaffirmed and systematized. Consistently geared towards the promotion of the "efficiency" of the arbitration process, the Decree strengthen the traditional pro-arbitration French approach.

An English translation of the Decree is available on the IAI website (http://www.iaiparis.com/pdf/french_law-on-arbitration.pdf).

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Should you wish further information about French arbitration law, please do not hesitate contact us:

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