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ARBITRATION IN FRANCE: THE 2011 REFORM

On January 13, 2011, the French Ministry of Justice issued its Decree no. 2011-48 regarding reform of arbitration. The Decree implemented changes to the rules of civil procedure governing arbitration. These changes arguably represent the most important reform of French arbitration law since the early 1980s. The announced reforms will be codified in the French Code of Civil Procedure from Article 1442 to Article 1527 and entered into force on May 1, 2011. In a step rarely taken in France, the Ministry of Justice also published a Report to the Prime Minister explaining the new Decree and clarifying certain issues that may arise under the reformed provisions of the Code.[1]

The Decree confirms and reinforces the pro-arbitration philosophy of French law. France was one of the first countries to enact a modern arbitration law, by way of a series of reforms in 1980 and 1981. In the 30 years since those reforms were enacted, French courts have further strengthened the country's pro-arbitration legal regime by interpreting the Code of Civil Procedure in a manner that generally favors arbitration as a method of dispute resolution.

The reforms announced in January 2011 represent France's most recent step to remain a leading forum for international arbitration, with a modern, effective, and intellectually accessible legal regime governing the institution. To this end, the reforms collect and codify most of the principles of arbitration procedural law developed by French courts over the past 30 years. In effect, before the Decree of January 13 was issued, a large portion of French procedural law relating to arbitration could be found only in case law, not in the Code of Civil Procedure. By codifying these governing principles that were first developed in case law, the Ministry of Justice has made French arbitration law more accessible to international practitioners. The goal is that this added clarity in arbitration law will make France an even more attractive forum for international arbitrations.

1 The original text of the Decree no. 2011-48, published in the Official Journal on January 14, 2011, and the Report to the Prime Minister are both available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023417517&dateTexte=&categorieLien=id and at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023417498. An English translation is available at http://www.parisarbitration.com/.

The Decree also introduces a limited number of innovations in French arbitration law, some of which correspond to provisions in the arbitration laws of other countries. These changes generally tend to make France a more arbitration-friendly jurisdiction, with a court system that supports arbitration and effectively enforces arbitral awards.

The new French arbitration legislation contains provisions that apply exclusively to domestic arbitrations, provisions that apply exclusively to international arbitrations, and provisions that apply to both domestic and international arbitrations. This *Commentary* will focus on the provisions of the Decree governing international arbitration.[2] First, we discuss the provisions in the Decree of January 13 that codify—and clarify—preexisting jurisprudential principles. Next, we discuss various legal changes effected by the Decree. Finally, we address the specific issues of confidentiality of arbitral proceedings under the new law and the new Code provisions' entry into force.

CODIFICATION OF ESTABLISHED JURISPRUDENTIAL PRINCIPLES

One of the primary *raisons d'être* of the Decree and the revised Code provisions it contains is to consolidate and affirm French law governing civil procedure in the field of arbitration that has been developed by the French courts over the past 30 years. Some of the jurisprudential principles that will now be codified are as follows:

A Broad Interpretation of What Constitutes a Binding Agreement to Arbitrate. Article 1507 codifies a principle, already accepted in French case law, that international arbitration clauses are not subject to any requirement of form. That is, parties are free to agree orally to settle their disputes through arbitration.

This is important, as it is not a provision that may be found in other sources of arbitration law such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or in institutional rules.

Notwithstanding this liberal rule, it remains advisable for parties to express their intention to arbitrate in writing, so as to avoid unnecessary problems of proof.

An Expansive Set of Legal Duties Binding Arbitrators. Regarding the duties of the arbitrators composing the tribunal, Article 1457 states that the arbitrators shall perform the mission with which they have been entrusted until they have rendered an award. Pursuant to Article 1464(3), parties and arbitrators shall act diligently and in good faith during arbitration proceedings. These provisions aim at ensuring that arbitrators perform their duty with due care and efficiency. One may wonder to what extent these Articles broaden arbitrators' obligations and constitute a potential source of liability for arbitrators. Subsequent court decisions will doubtless provide answers to this question.

Arbitrators' Power to Order Interim Measures. The previous arbitration decree of 1981 did not include any provisions regarding the arbitrators' authority to order preliminary or interim relief or to impose daily penalties for a party's failure to comply with a tribunal's interim order. However, this power has been established by various court decisions.

The Decree now codifies the power of the arbitral tribunal to order interim measures, with daily penalties for any failure to comply with the measures ordered. The codification of these principles greatly strengthens the authority and powers of the tribunal and thereby favors arbitration. While an arbitral tribunal has no authority to ensure the enforcement of interim measures when a party refuses to comply voluntarily, the Decree will allow a counterparty to ask courts to order performance of such interim measures. In principle, French courts will enforce the measure without examining whether it is justified, this assessment being in the hands of the arbitral tribunal.

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2 The French Code of Civil Procedure continues to distinguish between rules applicable to domestic arbitration and rules applicable to international arbitration, based on a very broad definition of international arbitration. This dualist approach has been followed in other civil law jurisdictions in Europe and Asia, although most of the time based on a more limited definition of international arbitration.

Procedural Estoppel. Article 1466, applicable to international arbitration pursuant to Article 1506, confirms the principle of procedural estoppel developed by French courts. This principle bars a party from alleging, before a court, that an arbitral award is procedurally defective after the award has been issued if that party failed to raise the procedural issue during the arbitral proceedings.

Increased Flexibility in Enforcement Proceedings. The Decree introduces some flexibility in the *exequatur* procedure that must be followed for recognition and enforcement of international arbitral awards in France. The *exequatur* procedure is the procedure by which a party seeks a court order to enforce an arbitral award. New Article 1515 stipulates that the party seeking an *exequatur* must submit the original award and the parties' arbitration agreement, or copies thereof. As before, if these documents are not in the French language, the party must produce French translations of them. However, at least initially, these translations need not have been done by a registered translator. A translation by a registered translator may still be required at a later stage of the proceedings (*e.g.*, if a question is raised regarding the accuracy of a translation that has been submitted).

***Juge d'Appui* ("Support Judge").** The new provisions of the Code of Civil Procedure relating to arbitration employ, for the first time in French codified law, the term "*juge d'appui*." The term was often used in learned commentaries as well as in court decisions prior to appearing in the January 13 Decree, but it now has an official status as a codified principle of law.

The term *juge d'appui* refers to the French judge with authority to issue orders related to a particular arbitration. (The term "*appui*" means "support.") In essence, the *juge d'appui* has the role of acting on behalf of the state to support an arbitration within the bounds of the law. In international arbitrations, the role of *juge d'appui* will be performed by the President of the *Tribunal de Grande Instance* (Civil Court of First Instance) of Paris.

The *juge d'appui* will prove in practice to be most important in *ad hoc* arbitrations, *i.e.*, when the parties have not agreed to an institutional arbitration (by reference to rules such as the ICC Rules), since most of the functions of the *juge d'appui* are generally performed by the administering institution. For example, in the event that there are difficulties in an *ad hoc* arbitration in the constitution of the arbitral tribunal, the *juge d'appui* may determine the procedure for the constitution of the arbitral tribunal and appoint the arbitrators. The *juge d'appui* may also rule upon the *prima facie* validity of the arbitration clause or the challenge of an arbitrator.

The powers of the *juge d'appui* have been extended under the Decree. However, the Decree appears to preserve successfully the delicate balance that must exist between judicial assistance and interference in the arbitration context. This balance is reflected in the fact, for instance, that the *juge d'appui* may issue orders related to arbitral procedure but cannot make a decision regarding the outcome of the case. The *juge d'appui* also has the power to extend the six-month period allotted to the arbitral tribunal to render its award pursuant to Article 1463(2), which is applicable to international arbitration pursuant to Article 1506, unless the parties have provided otherwise.

The role now officially attributed to President of the *Tribunal de Grande Instance*, with simple and logical rules for the constitution of the arbitral tribunal, will allow arbitral tribunals to be constituted as promptly as possible, thereby facilitating arbitrations taking place on French soil.

PROCEDURAL INNOVATIONS

The Decree also announced a number of legal rules that are entirely new and that are designed to support and facilitate arbitration as a method of dispute resolution.

Increase in the Power of the Chair of the Arbitral Tribunal. Article 1513 allows the chair of an arbitral tribunal to decide an issue if no majority can be reached among the members of the arbitral tribunal. This provision is inspired by foreign arbitration laws (for instance, Belgian Judicial Code, Art. 1701.2; English Arbitration Act, 1996, s. 20.4; Swiss Statute on Private International Law, Art. 189.2; Swedish Arbitration Act, Section 30) and institutional rules (ICC Rules, Art. 25.1; LCIA Rules, Art. 26.3). Such a provision ensures a prompt issuance of awards, when the members of the arbitral tribunal

cannot reach an agreement regarding the decision to be made. Nonetheless, this possibility can be seen as a last resort that the chair should use only in true deadlock situations. This provision should not be interpreted as giving the chair the power to make discretionary decisions, without consulting co-arbitrators.

Decrease in the Time Period for Challenging an Arbitral Award. The Decree has shortened several deadlines:

- Articles 1486 and 1506 decrease the length of time during which a party may request that the arbitral tribunal interpret its award or correct an alleged error or omission. Previously, parties had one year from the day that the award was rendered to make such a request. Now, a party must make such a request within three months of the party's notification of the award, unless the parties have agreed otherwise.

- Article 1519 shortens the time period during which a party may file an action seeking the annulment of an arbitral award. Previously, a party had one month from the date when the party received notification of the decision of *exequatur* to file an action seeking annulment. Now, a party must file an action seeking annulment within one month of the day upon which a party is notified of the award. This change is significant, since it leaves little time to the losing party to analyze the award and to file annulment proceedings before the Paris Court of Appeal. The additional two-month time period applicable to notifications sent to companies headquartered outside of France should apply, pursuant to Articles 643 to 645 of the French Code of Civil Procedure.

Such shortening strengthens the legal certainty and the authority conferred upon arbitral awards. Arbitration is supposed to be a final and speedy manner to resolve a dispute. By shortening deadlines for challenging awards, the Decree will reduce delays in proceedings and, as a consequence, promote the overall efficiency of arbitration.

Increase in Party Autonomy to Waive Annulment Proceedings. Article 1522 grants parties the right to waive the possibility of annulment proceedings, giving up their right to challenge the validity of an arbitral award before French courts. Given the consequences of such a choice, the waiver must be expressed in a "special agreement" ("*convention spéciale*"). Thus, it is understood that this requirement would not be satisfied by a general waiver of the right to seek annulment. For example, the waiver provision of Article 28.6 of the ICC Rules, which provides that by submitting a dispute to arbitration under the ICC Rules, parties "shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made," is most likely insufficient to constitute a waiver under new Article 1522.

The second paragraph of Article 1522 states, however, that notwithstanding the fact that parties agreed to waive their right to pursue an annulment action, they can still challenge the enforcement of an arbitral award in France on any of five grounds provided for annulment proceedings. Thus, enforcement of an award in France can still be challenged, even though the validity of the award itself may not be challenged if parties waived that right by special agreement.

Taken as a whole, Article 1522 allows parties that choose France as a place of arbitration to strengthen the finality of the award. Yet, the article protects parties' due process rights in the event of enforcement proceedings. This makes Article 1522 one of the most important innovations of the Decree.

Increase in the Certainty of Enforcement. Probably the most significant change implemented by the Decree is that, pursuant to Article 1526, if a party seeks to have an award annulled in court or appeals an *exequatur* order, this challenge or appeal will no longer automatically result in a stay of enforcement of the award. This will doubtless result in the speedier enforcement of arbitral awards in France.

However, Article 1526 contains an exception to this principle, whereby a court may suspend or modify the enforcement of an award, pending annulment or enforcement proceedings, if enforcement would seriously prejudice one of the parties.

This new provision is a welcome development since, in practice, annulment proceedings are rarely successful. However, an application for a suspension of enforcement can still be submitted in the (presumably) rare cases where it is necessary.

CONFIDENTIALITY

The fourth paragraph of Article 1464 states that the principle of confidentiality applies to arbitral proceedings, and the Ministry's Report to the Prime Minister describes confidentiality as a "major characteristic" of domestic arbitration. However, according to Article 1506, this provision does not apply to international arbitration.

There is a legitimate rationale for not automatically applying the principle of confidentiality to international arbitration. Namely, confidentiality may be inappropriate or explicitly excluded in some international arbitrations where public interests are at stake and/or where state-owned entities are involved, especially in investment treaty arbitrations.

Thus, where parties are not precluded for reasons of public interest from agreeing to keep arbitral proceedings confidential and want their proceedings to be confidential, they should include an appropriate provision in their arbitration clause, taking into account—in the case of institutional arbitrations—whatever confidentiality provisions may be included in the institution's rules.

ENTRY INTO FORCE

The Decree entered into force on May 1, 2011. In domestic arbitrations, provisions dealing with arbitration clauses will apply only to arbitration agreements entered into after May 1, 2011. The same principle applies for the provisions excluding the possibility of appeal proceedings. In international arbitrations, provisions pertaining to the jurisdiction of the *juge d'appui* with regard to the constitution of arbitral tribunals will apply to arbitration agreements concluded after May 1, 2011. Furthermore, all provisions affecting the arbitral proceedings *per se* will apply only in cases where the arbitral tribunal has been constituted after May 1, 2011. Finally, the rule that a court action challenging an arbitral award or an enforcement proceeding does not result in an automatic stay of enforcement will apply only if the award has been rendered after May 1, 2011.

CONCLUSION

To conclude, the Decree is a good step toward making French arbitration law more accessible to international actors, although in some ways it remains structurally complex. As to the substance, the Decree codifies with more clarity significant principles that already existed in French case law and also introduces some important innovations that should strengthen France's position as a premier forum for international arbitration.

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