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Commentary

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Thirty years have passed since the arbitration decrees of 1980 and 1981, which, at the time, were considered to provide a modern framework for arbitration.[1] These decrees contributed to making Paris one of the world's most favored seats for international arbitration. Nevertheless, the time had come for French arbitration law to codify the significant volume of precedent of the past thirty years in order to make French arbitration law more accessible to both foreign and domestic users.

Hence, on January 13, 2011, France issued a new decree amending the provisions of the French Code of Civil Procedure pertaining to arbitration (the "**Decree**"). However, the Decree is not limited to a mere codification of well-established French case-law. It also introduces very progressive provisions which aim at attracting arbitrations to French seats even if the case has no connection with France. The Decree increases the freedom given to parties to international arbitration to tailor the proceedings to their specific needs. The efficiency of arbitration proceedings in France is improved, and the parties are given the ability to isolate the arbitration from the intervention of state courts.

It is relevant first to note that the Decree maintains, for better or worse, the distinction between domestic and international arbitration.[2] The draftsman has chosen to follow the approach adopted by the 1981 decree and simply make a reference, under the provisions pertaining to international arbitration, to the specific provisions of domestic arbitration that are applicable to international arbitration (new Article 1506).

This article will provide an overview of the main changes introduced by the new Decree and their practical consequences for international arbitral proceedings. The Decree introduces changes and improvements within all the steps of the arbitration process, be it the arbitration agreement (I), the constitution of the arbitral tribunal (II), the arbitration proceedings (III), the arbitral award (IV), the recognition and enforcement of arbitral awards (V), or recourse against awards (VI). Finally, this article will provide a brief summary of the transitional provisions (VII).

I. The Arbitration Agreement

The distinction between international and domestic arbitration is first illustrated by the rules applicable to the arbitration agreement. While arbitration agreements in domestic arbitration must take the form of an arbitration clause or of a submission to arbitration and be in writing (new Articles 1442 and 1443), arbitration agreements in international arbitration are not subject to any mandatory formal requirements (new Article 1507). The rationale for the lack of mandatory formal requirement is to accommodate investment arbitrations, for which the investor's consent to arbitrate is often not contained in a prior written instrument.

It is worth mentioning that, for domestic arbitration, the Decree allows for the consent to arbitrate to take

the form of mere written correspondence or for the arbitration agreement to be included by reference (new Article 1443).[3] Furthermore, a significant improvement and novelty in domestic arbitration introduced by the Decree is the validity of "blank clauses", *i.e.* arbitration agreements that do not provide for the designation of the arbitrators or for the modalities of their appointment (new Article 1444).[4] Such a clause would have been invalid for domestic arbitration though acceptable for international arbitration under the decree of 1981.

The Decree codifies the now well-established principle of the autonomy[5] (or severability) of the arbitration clause, according to which such a clause is not affected by the defects or termination of the underlying agreement (new Article 1447).

The new Article 1448 confirms the now widely admitted concept of "competence-competence",[6] under which the arbitral tribunal has priority to rule on its own jurisdiction.[7] State courts will thus have no jurisdiction to hear claims subject to arbitration agreements unless the agreement is "manifestly void or manifestly inapplicable" (new Articles 1448 and 1465).

II. Constitution of the arbitral tribunal

The composition of the arbitral tribunal is yet another example of the freedom the draftsman intended to offer parties to international arbitration. The constitution of an arbitral tribunal in international arbitration is not subjected to the same requirements as in domestic arbitration.[8] Indeed, in international arbitration, arbitrators need not be natural persons, and the arbitral tribunal may be composed of an even number of arbitrators.

Parties to an international arbitration may request assistance from state courts in numerous cases. For instance, if difficulties arise before or at the time of the constitution of the arbitral tribunal, the parties may request the assistance of the President of the Paris *Tribunal de grande instance* (Paris First Instance Tribunal) (new Article 1506(2)).[9] In this respect, the new text consolidates the practice of assigning a specialized judge, the *juge d'appui* (supporting judge), to assist the parties throughout the arbitration process (within precisely defined limits).[10]

In particular, the *juge d'appui* may assist the parties in the event they encounter difficulties with the constitution of the arbitral tribunal. Of course, in the case of institutional arbitration, this assistance role belongs first to the institution chosen by the parties to administer the arbitration proceedings.

The Decree further increases the efficiency of the arbitration process by introducing a time limit for a party to appoint its arbitrator. Under the new Article 1452, a party may request the assistance of the *juge d'appui* if the other party has not appointed an arbitrator within one month of receiving the request to do so. Similarly, co-arbitrators have one month to appoint a chairman, after which the parties can request the assistance of the *juge d'appui*.

The Decree also remedies a major oversight in the decree of 1981, which failed to address the difficulties inherent in multi-party arbitrations. The new Article 1453 provides that where more than two parties are involved in a dispute and cannot agree on the constitution of the arbitral tribunal, the entity in charge of the arbitration,[11] or in the absence of such an entity, the *juge d'appui*, shall appoint the arbitrator(s). The new provision is the direct consequence of the *Dutco* ruling, in which the *Cour de cassation* (French Supreme Court in civil matters) held that the parties must have an equal right in the appointment of arbitrators.[12]

Overall, the role of state courts has increased with the Decree. State courts may be of assistance in challenging arbitrators. The new Article 1456 imposes on arbitrators the duty to disclose any information likely to give rise to justifiable doubts as to their impartiality or independence. The arbitrators are compelled to observe said duty not only before accepting their appointment but throughout the proceedings. In this regard, it is worth noting that an arbitrator may be removed only with the consent of both parties (new Article 1458).[13] If the parties disagree on whether an arbitrator who presents information pertaining to his impartiality and independence should be retained, they may turn for assistance to the institution overseeing the arbitration or, if there is no institution involved, to the *juge d'appui*. In addition, the new Articles 1457 and 1458 provide for the assistance of the *juge d'appui* should a dispute arise concerning the arbitrators' potential impediment, abstention or resignation. In order to further improve the efficiency of arbitration, the new Article 1473 provides that the impediment, abstention, resignation, removal or death of an arbitrator leads to the suspension

of the proceedings and no longer to their termination.[14] The proceedings shall resume once a new arbitrator is appointed.

More generally, the new Article 1505 lays down the circumstances in which the President of the Paris *Tribunal de grande instance* has jurisdiction to act in support of the arbitration.[15] In addition to the two sources of jurisdiction already provided by the decree of 1981, *i.e.* (1) when the arbitration takes place in France or (2) when the parties have agreed that the arbitration shall be governed by French procedural law, the new Decree has added two situations: (3) when the parties have expressly appointed French courts as the supporting court with respect to disputes pertaining to the arbitral procedure, or (4) one of the parties is likely to suffer a denial of justice. This fourth source of jurisdiction is a direct consequence of the landmark decision of the *Cour de cassation* in the *NIOC*[16] case. In fact, the Decree goes beyond the holding in *NIOC*. The *Cour de cassation* had accepted that the *juge d'appui* should have jurisdiction on the grounds that NIOC must not be deprived of access to justice and that there was a link, although tenuous, with France. However, the Decree, unlike *NIOC*, does not require any connection with France to authorize the assistance of the French courts in arbitration proceedings. In essence, the Decree provides French courts with universal jurisdiction and ensures that any party, regardless of its nationality or its connection with France, can request the assistance of French courts if no other state court is willing to salvage the arbitration process.

Much as was provided by the decree of 1981, under the new Article 1460, the President of the Paris *Tribunal de grande instance* shall rule by way of an order which may only be appealed if the court refuses to appoint an arbitrator or if it holds that the arbitration agreement is "manifestly void or manifestly inapplicable".

III. The Arbitration Proceedings

One of the principles of French arbitration law is to avoid submitting international arbitration proceedings to rigid procedural rules. For instance, international arbitration proceedings are not subject to the six months' time-limit imposed on domestic arbitration. However, in the event the parties fail to extend the time-limit contractually agreed upon for the arbitration, the *juge d'appui* may order such an extension (new Article 1463).[17]

As under the former regime, an arbitration taking place in France is not automatically deemed to be governed by French procedural rules. Parties to an international arbitration remain free to choose the law applicable to the arbitration procedure. In the event the parties fail to do so, the arbitral tribunal will be free to select the applicable rules of its choice, by referring to either a set of arbitration rules, e.g. UNCITRAL Rules, or to any procedural rules (new Article 1509).

One of the most controversial issues is probably the decision of the draftsman not to automatically subject international arbitration to confidentiality, unlike domestic arbitration. The rationale for the reluctance to provide for confidentiality in international arbitration lies in a view that France should offer a proper environment for international investment arbitrations, which are frequently made public.[18] Another justification is that draftsman took into account the fact that several foreign laws do not subject arbitration to confidentiality. Hence, a bolder measure could discourage foreigners from selecting Paris as a seat for arbitration.

In our view, these justifications are unconvincing. The new Article 1464 applicable to domestic arbitration provides that the arbitration shall be covered by confidentiality unless the parties have decided otherwise. A similar wording could have been adopted for international arbitration. Given the importance of confidentiality in international arbitration,[19] and the higher number of commercial arbitrations compared to investment arbitrations, it would have been sensible to extend confidentiality to international arbitration while allowing the parties to international investment disputes the option not to have the arbitration covered by confidentiality. Indeed, from a practitioner's point of view, unlike a large number of commercial arbitrations, investment arbitration often involve sophisticated parties and experienced counsel, well-aware of the confidentiality implication and the possibility of waiving it.

It is fortunate, however, that the Decree takes the opportunity to codify, under the new Article 1464, two elements that are at the very heart of arbitration. Parties and arbitrators will now be required to act speedily and to observe a duty of loyalty. This loyalty duty may well serve as a safety net to prevent a party from taking undue advantage of the absence of a confidentiality restriction in international arbitration. However, only time will tell how French courts will deal with this issue.

A major improvement introduced by the Decree is the codification of the principle of procedural estoppel by silence (new Article 1466).[20] A party that knowingly and without justification refrains from raising in a timely manner a procedural irregularity before the arbitral tribunal is to be deemed to have waived its right to do so later on. Hence, under the new Article 1466, the very silence of a party may be considered to contradict a subsequently expressed position.

As to the arbitral tribunal's authority, it is substantially reinforced by the ability to order parties, under the threat of penalty if necessary, to produce evidence that they have in their possession (new Article 1467). The arbitral tribunal may also authorize a party to request from state courts (from the President of the *Tribunal de grande instance*) an order against third parties to obtain evidence they have in their possession (new Article 1469).[21]

The arbitral tribunal may also order provisional or conservatory measures, except attachments of movable property or judicial liens, both of which remain under the exclusive jurisdiction of state courts (new Article 1468).[22]

Furthermore, the decree of 1981 failed to provide the parties with any solution should they need to obtain interim or conservatory measures prior to the constitution of the arbitral tribunal. However, French courts have in practice accepted jurisdiction provided it can be shown that there is urgency. The Decree consolidates this solution by expressly providing that parties may turn to state courts to rule on provisional or conservatory measures in case of urgency when the arbitral tribunal has not yet been constituted (new Article 1449).[23]

IV. The arbitral award

The arbitral award is subject to the same formal requirements as previously provided by the decree of 1981, *i.e.* inclusion of the names of the parties, their counsel and the arbitrators; the date of the award and place it is rendered; a statement of the reliefs sought; a summary of the parties' arguments; and the reasoning of the Tribunal (new Articles 1481 and 1482). However, contrary to the position in domestic arbitration,[24] failure to fulfill these requirements will not lead to the invalidity of the award. The draftsman has thereby yet again chosen not to subject international arbitration to rigid formal requirements.

Another significant difference between domestic and international arbitration is the role of the chairman in rendering the award. With regard to international arbitration, unless otherwise agreed by the parties, the decision is taken by a majority of the arbitrators (new Article 1513(1)). However, if the arbitrators fail to reach a majority, the chairman may render the decision on his own, and his decision will have the same authority as if it had been rendered by a majority (new Article 1513(3)). The chairman will thus no longer be in a situation of having to choose the position of one his co-arbitrators if the two co-arbitrators are in disagreement.[25]

Furthermore, the arbitral tribunal's deliberations are to be confidential (new Article 1479). Once the award is rendered, the arbitral tribunal's jurisdiction over the dispute comes to an end (new Article 1485(1)), and the matter resolved becomes *res judicata* with regard to that dispute (new Article 1484(1)).

Another innovation introduced by the Decree is the ability of the parties to an international arbitration to request from the arbitral tribunal an interpretation of the award, the correction of clerical errors, or to have the arbitral tribunal hold on issues it failed to address (new Articles 1485(2) and 1486). In domestic arbitration, if the arbitrators cannot be reconvened to address the request for interpretation, correction or completion, the request is brought before the state court that would have had jurisdiction in the absence of an arbitration agreement (new Article 1485(3)).

Parties may also request revision of an award in specific cases, *i.e.* when the award was rendered on the basis of forged documents.[26] Such a request is brought before the arbitral tribunal that rendered the award. Whenever the arbitral tribunal cannot be reconvened, the request will be heard by the Court of Appeals that has jurisdiction over the potential appeal or request to have the award set aside (new Article 1502).

However, in international arbitration, if the arbitral tribunal that rendered the award cannot be reconvened to address requests under the new Articles 1485 or 1502, recourse to state courts is excluded by new Article 1506 (4) and (5).[27] It is relevant to note that the current ICC Rules of Arbitration are also silent in the case the arbitrators would be unable to reconvene. The draftsman's decision not to submit the requests under the new Articles 1485 and 1502 to state courts in

international arbitration is merely another illustration of the intent to isolate international arbitration from the intervention of state courts.

We believe that in such situations the parties would refer their request under Articles 1485 and 1502 to a newly constituted arbitral tribunal. There is no ground preventing a new arbitral tribunal from having jurisdiction to rule on this type of request.[28] This solution would be similar to that adopted by the ICSID Arbitration Rules.[29]

V. The recognition and enforcement of arbitral awards

Adjustments introduced by the Decree unquestionably improve the efficiency of French arbitration law with regard to the recognition and enforcement of arbitral awards.

As previously established by the decree of 1981, international arbitral awards are to be recognized and enforced in France provided they are not "manifestly contrary to international public policy" (new Article 1514).

The public policy requirements differ according to whether the courts are reviewing a domestic or international award. While the appraisal of international arbitration awards is performed solely in light of international public policy requirements (new Article 1514), a domestic arbitral award must comply with domestic public policy to be granted *exequatur*, which is now expressly established by the Decree (new Article 1488).

Although already well recognized in practice,[30] the Decree now also expressly provides that the procedure to have both domestic and international awards recognized and enforced in France is *ex parte* (new Articles 1487(2) and 1516(2)).

A series of practical improvements make the applicant's life much easier when enforcement is sought: now in both domestic and international arbitration, parties no longer need to provide the court with an original of both the award and the arbitration agreement; a copy is now sufficient, provided it meets the requirements to establish its authenticity (new Article 1515(1)). In practice, this is one of the major improvements in domestic arbitration, as parties often struggle to obtain additional copies of the award after it is rendered.

The provisions regarding international arbitration now take into account the international character of the proceedings. Hence, a request to have an award recognized and enforced no longer needs to contain a translation of the award by a certified translator. A free translation is now sufficient. The court may nevertheless subsequently request a translation certified by a translator, if deemed necessary (new Article 1515(2)).

The Decree now includes a confirmation of the jurisdiction of the Paris *Tribunal de grande instance* to rule on the recognition and enforcement of foreign awards, thereby consolidating case law and putting an end to any doubts raised by the previous omission of this jurisdiction (Article 1516(1)).[31]

Another significant improvement introduced by the Decree concerns the notification of awards and enforcement orders. First, the Decree simplifies the notification requirements. The parties may agree to the manner in which an award or an enforcement order may be notified to the parties (new Articles 1519, 1522 and 1525).[32] Hence, the parties may consent to requirements much less stringent than those imposed for the formal notification of a court decision by a bailiff thereby saving considerable time. However, this provision is unlikely to be considered as an exception to the obligations set forth in the Hague Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil and Commercial Matters of 1965 as well as those provided in Regulation (EC) n° 1393/2007 on the Service in Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters.[33] Although the Treaty and Regulation will govern the notification of the enforcement order, it is unclear whether they will apply to the notification of arbitral awards. However, the European Court of the European Community has so far shown itself to have a broad understanding of extrajudicial documents.

Finally, there is no longer any need to submit the award to a court for enforcement prior to its notification, as of which the one month's time limit to launch set aside proceedings begins to run (new Article 1519). This requirement was overly burdensome, especially in cases where the award was not to be enforced in France.

VI. Recourses against awards

The Decree attempts to clarify the available recourse against awards by distinguishing awards rendered in

France from awards rendered abroad, but sought to be enforced in France.

As previously provided by the decree of 1981, an action to set aside may be brought against an international arbitral award rendered in France (new Article 1518).[34] A major innovation introduced by the Decree is the ability for the parties to international arbitration to waive their right to request that the award be set aside (new Article 1522(1)).[35] Such waiver is perfectly sensible in a context where no enforcement is to be sought in France. If the award were to be enforced in France, the parties would still have the ability to appeal against an order enforcing the award on the same grounds as those on which an award may be set aside (new Article 1522(2)). However, the consequences of the setting aside of an award are much greater than those of the annulment of an enforcement order as most foreign states will refuse to grant recognition and enforcement to an award that has been set aside.

Since the Decree was published, practitioners have raised the question of whether the ability for parties to waive their right to have the award set aside will have any consequences for the interpretation of Article 28(6) of the ICC Rules, under which the parties are deemed to have waived any recourse "insofar as such waiver can validly be made". However, the new Article 1522 specifically provides that the right to have the award set aside must be waived by an express agreement. It thus seems unlikely that the current provisions of Article 28(6) will automatically cover the waiver of Article 1522.

The grounds provided for setting aside an award or refusing recognition and enforcement remain unchanged, but have been redrafted. According to the new Article 1520 the Paris Court of Appeals will set aside an award in cases where: "(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy."[36]

In addition, the Decree introduces a significant change regarding set aside procedures. In order to prevent delaying tactics by the unsuccessful party, a request to have an international arbitration award set aside no longer automatically suspends its enforcement.[37] However, if the enforcement of the award were to cause significant harm to a party, state courts may adjust or prevent such enforcement (new Article 1526).

VII. Transitional provisions

The Decree modifying the provisions of the Code of Civil Procedure will enter into force on 1 May 2011. Regarding international arbitration, the following transitional provisions will apply: (i) the provisions of the new Article 1505 regarding the jurisdiction of French state courts to act in support of the arbitration will only be applicable to arbitration agreements entered into after 1 May 2011 (Section 3(1) of the Decree); (ii) the provisions of the new Articles 1486 (three months' limit to request the interpretation, correction or completion of an award), 1502 (possibility to request the revision of an award), 1513 (ability of the chairman to render a decision alone when a majority cannot be met) and 1522 (waiver of the right to request that the award be set aside) will apply to arbitrations in which the arbitral tribunal has been constituted after 1 May 2011 (Section 3(2) of the Decree); and (iii) actions to set aside an award and appeals against enforcement orders will not suspend the enforcement of arbitral awards rendered after 1 May 2011 (Section 3(3) of the Decree).

The Decree has met practitioners' high expectations. It successfully introduces innovative provisions that will significantly improve the efficiency of international arbitration proceedings in France. The Decree also codifies the contributions of years of arbitration-friendly case-law, thereby providing France with a new arbitration law easily accessible to foreigners. Finally, it succeeds in offering the parties the ability, if they wish to do so, to keep their arbitration immune from state court intervention. There is no doubt that the Decree will allow France to successfully preserve and even improve its position as one of the most favorable seats for international arbitration.

Endnotes

1. Decrees of 14 May 1980 and 12 May 1981.

2. The definition of international arbitration, now under Article 1504, remains unchanged and is

defined as an arbitration where international trade interests are at stake.

3. The new Article 1442 provides that the arbitration clause may be contained in another contract in the case of a group of linked contracts, so that a clause can be extended to other contracts if there are sufficient connections amongst the group of contracts.

4. In such a case, the parties may now request the assistance of state courts in order to constitute the arbitral tribunal (new Article 1444, which refers to the new Articles 1451 to 1454).

5. The principle of autonomy of the arbitration clause was recognized in the 1963 *Gosset* ruling, Cass. 1ère civ. 7 May 1963, *Ets. Raymond Gosset v. Carapelli*: JCP, Ed. G., Pt. II, No. 13,405 (1963), commented by B. Goldman; 91 J.D.I. 82 (1964), commented by J.-D. Bredin; 1963 Rev. crit. DIP 615, commented by H. Motulsky. *See* also Phocion Francescakis, *Le principe jurisprudentiel de l'autonomie de l'accord compromissoire après l'arrêt Hecht de la Cour de Cassation*, Rev. arb. 1974.67.

6. The principle of "competence-competence" had already been set forth by the decree of 1981, which codified the *Caulliez-Tibergien v. Caulliez-Hannart* ruling, Cass. Com. 22 February 1949: JCP, Ed. G., Pt. II, No. 4899 (1949), commented by Motulsky; Motulsky, Ecrits – Vol.2 – Etudes et notes sur l'arbitrage, 222 *et seq*. (1974). *See* also Cass. 1ère civ. 26 Juin 2001: Bull. civ. I, No. 183; JCP 2001. IV. 2551; Gaz. Pal. 26-27 July 2002, p.11, commented by Rusquec; Rev. arb. 2001.529, commented by Gaillard.

7. Paragraph 2 of the new Article 1448 provides that state courts may not decline jurisdiction on their own motion.

8. Under the new Articles 1450 and 1451, arbitral tribunals in domestic arbitrations must be composed only of an odd number of natural persons.

9. The new Article 1506(2) provides that the new Articles 1452 to 1458 and 1460 are applicable to international arbitration.

10. Cass. 1ère civ. 6 December 2005: Bull. civ. I, No. 462, D. 2006.274, commented by P.-Y. Gautier; *ibid.* 2006.3026, commented by T. Clay; RTD civ. 2006.144, commented by P. Théry; RTD com. 2006.299, commented by E. Loquin; Cass. 1ère civ. 22 September 2010, No. 08-21.313, *CFCMNE v. Banque Delubac et Cie*, D.2010.2235, commented by X. Delpech. *See* also Fouchard, *La Coopération du président du TGI à l'arbitrage*, Rev. arb. 1985.5; Cass. 2ème civ. 22 November 1989: Bull. civ. II, No. 209, Gaz. Pal. 1990. 1 Pan.34; TGI Paris, 25 October 1983, Rev. arb. 1984.372; TGI Paris, 22 March 1983, Rev. arb. 1983.480, commented by Moreau; JCP 1983.II.20004, commented by Antin and Lacorne; RTD civ. 1984.545, commented by Normand; TGI Paris, 22 February 1984, Rev. arb. 1985.91; TGI Paris, 12 July 1989, Rev. arb. 1990.176, commented by Kahn.

11. The introduction of Article 10 by the 1998 ICC Rules was also a direct consequence of *Dutco* ruling. Under Article 10 of the ICC Rules, if the parties (multiple claimants or multiple defendants) fail to make a joint nomination and all parties cannot agree on a method for the constitution of the arbitral tribunal, the ICC Court of Arbitration may appoint every member of the tribunal. *See* note from the Secretariat of the ICC International Court of Arbitration on the Constitution of Arbitral Tribunals in Multi-Party Cases, ICC Bulletin, Vol. 4, No. 2, 6 (1993).

12. Cass. 1ère civ. 7 January 1992, *Siemens & BMKI v. Dutco*: Bull. civ. I, No. 2; Rev. arb. 1992.470, commented by P. Bellet; 119 J.D.I. 707 (1992), 2nd decision commented by C. Jarrosson; RTD com. 1992.796, commented by J.-C. Dubarry and E. Loquin.

13. Article 1452(2) of the decree of 1981 provided that the arbitrator who was aware of a ground for his recusal would only be appointed with the consent of both parties.

14. *See* Cass. 2ème civ. 17 November 1993: Bull. civ. II, No. 324; JCP 1994, IV, 129; Gaz. Pal. 1994. 1. Pan.51.

15. The international jurisdiction of French courts remains non-mandatory as per the new Article 1505 language: "unless otherwise stipulated". In this respect, *see* Fouchard, Gaillard, Goldman.

International Commercial Arbitration, Kluwer Law International, 1999, §§ 847 *et seq*.

16. Cass. 1ère civ. 1 February 2005, *Etat d'Israël v. société NIOC*: Bull. civ. I, No. 53; D.2005.2727, commented by Hotte; *ibid.* 2005. Pan. 3054, commented by Clay; *ibid.* 2006. Pan. 1503, commented by Jault-Seseke; RTD com. 2005.266, commented by Loquin; JCP 2005.II.10101, commented by Kessler; Gaz. Pal. 27-28 May 2005, p. 37, commented by Train; Rev. arb. 2005.693, commented by Muir Watt; JCP E 2005.676, commented by Béguin.

17. Cass. 2ème civ. 7 November 2002: Bull. civ. II, No. 242; D. 2002. IR 3241; JCP 2003. I. 164, No. 5, commented by Ortscheidt; Gaz. Pal. 4-5 July 2003, p. 18, commented by B. Moreau; Paris, 29 June 2006: RTD com. 2006.760, commented by Loquin.

18. Emmanuel Gaillard and Pierre Lapasse, *Le nouveau droit français de l'arbitrage interne et international*, Recueil Dalloz, 20 janvier 2011 – n°3, § 28.

19. Gaillard, *Le principe de confidentialité de l'arbitrage commercial international*, Dalloz, Chron. 153(1987). *See* also Paris Court of Appeals, 18 February 1986, *Aïta v. Ojjeh*: Rev. arb. 1986.583.

20. Cass. 1ère civ. 6 July 2005, *Golshani v. Government of the Islamic Republic of Iran*, n°01-15.912: Rev. arb. 2005.993, commented by Philippe Pinsolle. *See* also Cass. 1ère civ. 6 May 2009, *SELA Mandataires judiciaires associés v. société Intenational Company for Commercial Exchanges*, n°08-10.281.

21. However, this request will not fall within the jurisdiction of the *juge d'appui* but within that of the President of the *Tribunal de grande instance*, which has jurisdiction under the normal procedural rules of jurisdiction of Article 42 *et seq* of the Code of Civil Procedure.

22. The arbitral tribunal's authority to order provisional and conservatory measures has been already recognized by French case-law under the decree of 1981. *See* Paris Court of Appeals, 7 October 2004: JCP 2005.II.10071, commented by Jacquet; Rev. arb. 2005.737, commented by Jeuland.

23. Cass. 2ème civ. 7 Mars 2002: Bull. civ. II, No. 31, D. 2002, IR 1113; Cass. 1ère civ. 6 December 2005: Bull. civ. I, No. 463, RTD com. 2006.297, commented by Loquin. *See* also Cass. 2ème civ. 20 Mars 1989: Bull. civ. II, No. 84; Gaz. Pal. 1990. 1 Somm. 1, commented by Guinchard and Moussa; Cass. 1ère civ. 21 October 1997: Rev. arb. 1998.673, commented by Degos; Cass. 2ème civ. 13 June 2002: Bull. civ. II, No. 130, D. 2002.2439, commented by Najjar.

24. See new Article 1483.

25. In domestic arbitration, the award shall be made by majority decision (new Article 1480). Hence, in practice, the chairman will thus need to agree with at least one of his co-arbitrators.

26. The Decree codifies, once again, previous important case-law. *See* Cass. 1ère civ. 25 May 1992, *Fougerolle v. SA Procofrance*: 1992 Rev. crit. DIP 699, commented by B. Oppetit. *See* also M. de Boisséson, *L'arbitrage et la fraude (à propos de l'arrêt Fougerolle, rendu par la Cour de cassation le 258 mai 1992)*, Rev. arb. 1993.3.

27. In this respect, the new Article 1506(4) and (5) concerning the applicable provisions to international arbitration does not refer to the new Articles 1485(3) and 1502(3) regulating the situation where the arbitrators cannot be reconvened.

28. *See* ICC Award No. 6233 (1992), Yearbook Commercial Arbitration, Vol. XX, 1995, 58. In this case, the newly composed arbitral tribunal found that the different composition of the arbitral tribunal would not affect the admissibility of the request for interpretation: "[the] question remains whether the request for interpretation must be decided by the same arbitral tribunal. It needs to be pointed out in this respect that the ICC arbitration rules do not provide for this. Arbitral jurisdiction by definition is ephemeral and occasional; many difficulties may impede the recomposition of the same tribunal. Moreover, by the effect of the award, the first arbitral tribunal is discharged of the case, so that nothing stands in the way of the composition of a new arbitral tribunal. It therefore need not be the same arbitral tribunal that deals with the request for interpretation."

29. *See* Article 51(3) of the ICSID Arbitration Rules: "If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as

soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one."

30. Cass. 1ère civ. 9 December 2003, *Féderation de Russie v. Noga*: Rev. arb. 2004.337, commented by Bollée.

31. Paris Court of Appeals, 10 July 1992: D. 1992. IR 243; Rev. arb. 1994.142, commented by Level; Paris Court of Appeals, 22 February 2001: D. 2001. IR 978; RTD com. 2002. 662, commented by Loquin; Paris Court of Appeals, 18 January 2001: Rev. arb. 2002.723.

32. The Decree has made a similar modification with regard to domestic arbitration (new Article 1494).

33. *See* Emmanuel Gaillard et Pierre Lapasse, *Le nouveau droit français de l'arbitrage interne et international*, *op. cit.*, § 34.

34. In domestic arbitration, parties may no longer appeal an award unless they have specifically agreed to do so. Thus, an action to set aside an award has become the rule and an appeal the exception (new Article 1489).

35. However, parties to a domestic arbitration may not waive their right to seek the setting aside of an award.

36. *See* the translation of the Decree provided by the International Arbitration Institute at http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf.

37. Conversely, under the Decree, a request to have a domestic award set-aside suspends its enforcement, thereby keeping the door open to frivolous actions against the award in order to delay its enforcement. ■

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