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INTERNATIONAL ARBITRATION LAW

Expert Analysis

France Adopts New Law On Arbitration

By **Emmanuel Gaillard**

On Jan. 13, 2011, France adopted a new law on arbitration (see Decree No. 2011-48 of Jan. 13, 2001, reforming the law governing arbitration, with an English translation soon available; for a full commentary, see Emmanuel Gaillard and Pierre de Lapasse, "Le nouveau droit français de l'arbitrage interne et international," RECUEIL DALLOZ, Jan. 20, 2011, No. 3, at 175). The new law, which will be embodied in Articles 1442 through 1527 of the French Code of Civil Procedure (CCP), governs both domestic and international arbitration. French law has thus maintained the dualist approach which distinguishes between domestic and international arbitration, continuing to allow a more flexible regime for international arbitration.

This reform had long been advocated by the French Arbitration Committee (CFA), which issued a first draft in 2006 (see 2006 REVUE DE L'ARBITRAGE 499, with a commentary by Jean-Louis Delvolvé, the chair of the Working Group, with Professor Pierre Mayer chairing the group's international arbitration subcommittee). The process gained a new momentum in 2009 after the French Ministry of Justice took up the effort. The draft underwent a number of further amendments and benefited from the feedback of the Council of State (Conseil d'Etat) before it was adopted in January 2011.

Reasons for Reform

France was one of the first states to have adopted a very favorable law on arbitration in 1981, soon followed by the Netherlands in 1986, Switzerland in 1987, and England in 1996. The admittedly more conservative UNCITRAL Model Law was adopted in 1985. French courts had in turn shown an extreme pro-arbitration bias as regards all aspects of an arbitration. While assisting, when required, in the constitution of an arbitral tribunal, French courts adamantly refused to interfere in the arbitral process or to exercise anything other than limited scrutiny of the award when seized of an action to set aside or an action to enforce an award.

The primary impetus for the reform was therefore not so much the necessity of improving the existing rules—which had already made France one of the preferred places where an international arbitration can be conducted—but the perceived need, after 30 years of abundant case law, to render French law on arbitration even more readily accessible to foreign practitioners. At the same time, the reform was seen as an opportunity to further refine French law on international arbitration by introducing a number of innovations. With these changes, French law can arguably be characterized today, alongside Swiss law, as the law that has implemented the pro-arbitration policy to its fullest extent.

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With this philosophy in mind, the new French law has broadened the scope of the parties' freedom with respect to all aspects of an arbitration. It also has implemented more consistently the rejection of the outdated notion that arbitral tribunals and national courts somehow compete in the exercise of their respective judicial function. Save for the instances where the parties have decided otherwise, in their arbitration agreement directly or through their choice of arbitration rules providing for a different regime, French law has shown no resistance to the notion that the courts' involvement in arbitration matters is subordinate to the authority of the arbitral tribunal.

Court Support

Perhaps the most symbolic indicator of the necessity of court assistance in arbitration is the instance where the setting up of the arbitral tribunal is hindered by the conduct of a party. When one of the parties refuses to appoint an arbitrator, thus blocking the entire arbitral process, the other party may feel the need to seek outside assistance, be it that of national courts or the arbitral institution under whose auspices the arbitration is conducted.

Most modern laws, including French law prior to the reform, provide some form of court assistance for the purposes of the constitution of the arbitral tribunal. In this respect, four features of the new legislative regime are worthy of note. First, as a matter of vocabulary, the president of the Paris Tribunal de grande instance, who has centralized jurisdiction in France to rule on motions relating to the appointment of arbitrators, is now characterized as the 'judge acting in support of the arbitration' ("juge d'appui") following an expression used in Swiss arbitral practice (see Article 1505 CCP).

Second, the parties' recourse to French courts is open only on a subsidiary basis, namely in instances where the parties have not chosen a "person responsible for administering the arbitration" (Article 1452 (1) CCP). When the arbitration is conducted under the auspices of an institution such as the International Chamber of Commerce or the International Centre for Dispute Resolution, or pursuant to the UNCITRAL Rules, French courts will not intervene at all. The administering authority will hear any challenges to the arbitrators and, unlike what would happen in the Netherlands for example, French courts will not second-guess its decisions regarding the arbitrators' independence and impartiality prior to the review of the award at the end of the arbitral process.

Third, in performing its assistance function, the judge acting in support of the arbitration will not make any substantive assessment on the validity or scope of the arbitration agreement. It will simply appoint an arbitrator in the defaulting party's stead or resolve the difficulty relating to the constitution of the arbitral tribunal after having verified that the arbitration agreement is not "manifestly void" or "manifestly non-applicable."

Fourth, French law now formally recognizes that the jurisdiction of French courts acting in support of the arbitration extends not only to the traditional instances where the parties have selected

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France as the place of the arbitration, French law as the law applicable to the procedure or French courts as the courts having jurisdiction in these matters, but also to circumstances in which a party "is exposed to a risk of denial of justice" even when the case at hand has no connection whatsoever with France (see Article 1505(4) CCP) (for a first recognition of this original jurisdictional ground in French case law, see *State of Israel v. NIOC*, Court of Cassation, Feb. 1, 2005, 2005 REVUE DE L'ARBITRAGE 693).

French courts will also be available to assist in evidentiary matters given that arbitral tribunals are, by definition, constrained to address their orders to the parties to the arbitration only. In this context, third parties who may withhold evidence relevant to the dispute brought to arbitration can be ordered by French courts to produce such evidence at the request of one of the parties. However, courts will order such production only when the party requesting the measure has obtained the "arbitral tribunal's invitation" to seek the courts' assistance (see Article 1469 CCP). The primacy of the arbitral tribunal's authority with respect to the dispute submitted to arbitration could not have been expressed any clearer.

No Court Interference

Other than to assist in the constitution of the arbitral tribunal or in evidentiary matters vis-à-vis third parties, French courts will not interfere in the conduct of the arbitral process. Article 1465 thus reinforces the long-standing rule according to which arbitral tribunals have the power to decide on any matter relating to the arbitration, including issues relating to the constitution of the tribunal or their own jurisdiction ("The arbitral tribunal has exclusive jurisdiction to rule on objections to its authority").

This also means that, prior to any determination by the arbitral tribunal itself, courts that would have jurisdiction in the absence of an arbitration agreement will refrain from deciding the matter and will defer to the arbitral tribunal (see Article 1448: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been vested to hear the dispute and if the arbitration agreement is manifestly void or manifestly not applicable"). In other words, when no arbitral tribunal has been constituted yet, the courts will be entitled to rule on the dispute only where a prima facie examination of the arbitration agreement establishes that such agreement is manifestly void or manifestly not applicable.

When an arbitral tribunal has been constituted, the courts shall automatically defer the dispute to the tribunal, without prejudice to the parties' right to seek a review of the award at the end of the arbitral process. This is nothing more than a recognition of the rule of priority in favor of the arbitrators (on this notion, see Emmanuel Gaillard and Yas Banifatemi, "Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators" in "Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice," 257 (Emmanuel Gaillard and Domenico Di Pietro eds., Cameron May, 2008)).

Enforcement and Review

Under the new regime, French courts may, as before, review awards rendered in France in international matters and awards rendered abroad on the basis of five limited grounds. The new law has not introduced any substantive change in this respect, but has slightly rephrased those grounds that are now contained at Article 1520 CCP and which cover circumstances where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; (2) the arbitral tribunal was not properly constituted; (3) the arbitral tribunal ruled without complying with its mandate; (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.

Two more significant changes were introduced by the new law in relation to the enforcement and review of arbitral awards.

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The first concerns the effect of an action to set aside or challenges to enforcement orders on the enforceability of the award. Under Article 1526, "neither an action to set aside an award nor an appeal against an enforcement order suspends enforcement of an award." As a result, an award rendered in France will now be immediately enforceable even where it has been subjected to an action to set aside. Only in rare circumstances may the president of the Court of Appeal, when seized of an action to set aside, suspend the enforcement of the award or subject its enforcement to certain conditions, namely when such enforcement would seriously prejudice the rights of one of the parties.

The second modification introduced by the reform concerns the possibility offered to the parties, provided they so state specifically, to waive any action to set aside the award (see Article 1522 CCP). Unlike the law in Switzerland, Belgium or Sweden—where such waiver is available only when none of the parties has its domicile, habitual residence or business establishment in that country—French law does not limit the parties' right to waive an action to set aside.

The exercise of such right, however, is without prejudice to the French courts' review of an arbitral award when a party seeks to enforce such award in France, in which case the five limited grounds of Article 1520 CCP will apply. In granting to the parties to an arbitration, without any limitation based on localization, the freedom to waive an action to set aside, French law thus manifests once more its philosophy according to which the place where the arbitration is conducted, as opposed to the place where enforcement of the award is sought, is not the most relevant feature of an international arbitration.

Confidentiality Presumption

A final noteworthy modification introduced by the new law is that relating to the confidentiality of arbitral proceedings. Article 1464(4) CCP provides, in relation to domestic arbitration, that "subject to legal requirements and unless otherwise agreed by the parties, arbitral proceedings shall be confidential." This provision has no equivalent in international matters, which means that French law (unlike English law, for example) has made the choice to assume as a matter of principle that international arbitration is not confidential as far as the parties are concerned.

Should the parties conducting an international arbitration in France wish to benefit from a confidentiality regime, they must so agree in the arbitration agreement or at the outset of the proceedings—perhaps more importantly, they should also determine contractually the consequences of any failure by one of the parties to abide by the agreed confidentiality requirement.

This reversal of the traditional confidentiality presumption as regards the arbitral process, which would apply in all international matters, commercial or otherwise, constitutes a significant change in the context of the increasing demand for transparency, in particular in investment arbitration. It remains to be seen if other legal systems will follow suit (for a reflection on the public availability of arbitral awards in the broader context of the furtherance of a true arbitral case law, see Emmanuel Gaillard, LEGAL THEORY OF INTERNATIONAL ARBITRATION, Martinus Nijhoff, 2010).