ARTICLE

ARBITRATION LAW

| 31/01/11 | Marie Danis

Arbitration Reform

Decree no. 2011-48 of January 13, 2011 on the reform of arbitration procedure carries some significant changes to French domestic and international arbitration law (new articles 1442 to 1527 of the Code of Civil Procedure, hereafter the "CCP"). This reform shall be welcomed because it narrows the gap which had appeared between arbitration practice in France, reflected by a modern case law favourable to arbitration procedure, and French legislation. By integrating a number of case-law principles, this reform provides foreign practitioners with an easier access to French arbitration laws and will enable France, and particularly Paris, to remain a leading international arbitration centre. With this in mind, the reform improves speed, transparency and good faith in the conduct of the arbitration proceedings. The Decree also reinforces the authority of the "arbitral tribunal", now the official term used in the law instead of the term "arbitrator", thereby clearly reflecting the jurisdictional nature of the institution.
We shall briefly present the highlights of this major reform for each type of regime: domestic arbitration and international arbitration.

DOMESTIC ARBITRATION

1. The Arbitration Agreement

The regimes for "arbitration clauses" ("clauses compromissoires") agreed upon prior to a dispute and "arbitration agreements" ("compromis d'arbitrage"), whereby the parties agree, after the dispute has arisen, to resort to arbitration to resolve their differences are partially unified under the general term of "arbitration agreement".
The Decree's main innovation in this respect is no longer to invalidate arbitration clauses that do not provide for the terms of the arbitral tribunal's appointment. If the parties do not provide for such terms, the new provisions allow them to seek the assistance of an assisting judge (the so called "juge d'appui") to appoint the arbitral tribunal (Article 1452) (i.e. the President of the Civil court ("Tribunal de grande instance") of the place chosen by the parties as the seat of the arbitration proceedings (Article 1459)).
Generally, the reform may be considered as relaxing the validity requirements for arbitration clauses but also as providing for stricter validity requirements for arbitration agreements. For example, the requirement of a document in writing (new Article 1443) did not previously exist for arbitration agreements. However, it is provided that an arbitration agreement "may result from an exchange of writings or a document to which the main agreement refers." (same Article).
Moreover, the principle of the autonomy of the arbitration agreement, in other words, that the validity of the arbitration agreement is not affected by the invalidity of the agreement in which it is inserted, is now written into Article 1447.
As regards the allocation of powers between judicial courts and the arbitral tribunal, an important clarification that had long been established by case law is inserted at Article 1449: "until the arbitral tribunal has been constituted, the arbitration agreement shall not preclude either party from applying to a state court of law for an investigative, provisional or protective measure."

2. The Arbitral Tribunal

The reform codifies the role of the "juge d'appui" in constituting the arbitral tribunal. In that respect, Article 1459 designates the President of the "Tribunal de grande instance" of the seat of the arbitration procedure as the "juge d'appui". The President of the Commercial court ("Tribunal de commerce") may also assist the parties in that role when they so specify (same Article).

3. The Arbitration Proceedings

Article 1466 consecrates the principle whereby: "A party which knowingly and for no legitimate reason refrains from asserting, in due time, an irregularity before the arbitral tribunal, is deemed to have waived its right to assert such irregularity". This principle, which encourages the parties to act in good faith from a procedural standpoint, had already been confirmed by case law on many occasions (for instance, Cour de cassation, 1st Civil Chamber, May 28, 2008, no. 04-13.999).
The arbitral tribunal's powers in terms of investigative measures are clarified. For instance: "If a party holds a piece of evidence, the arbitral tribunal may enjoin it to disclose the evidence according to such terms as the arbitral tribunal shall decide and, if necessary, subject to penalties." (Article 1467).
Another significant change should be welcomed: unless specified otherwise by the parties in this respect, the death, impediment, abstention, resignation, challenge or removal of an arbitrator shall merely stay the arbitration proceedings "until his/her mission has been accepted by the arbitrator appointed to replace him/her" and is no longer a cause for extinguishing the proceedings, as this was previously the case (Article 1473).

4. The Arbitral Award

A few details of interest for practitioners: the new provisions allow the parties to agree upon notifying the arbitral award by other means than official service of process, for example by registered mail with proof of delivery or electronic notification.

Also, the time limit for requesting a rectification of a material error has been reduced to three months (Article 1486) whereas under the current rules, the time limit is one year (Article 463 CCP, applicable by reference from the former Article 1475).
As regards obtaining exequatur, the new provisions confirm that the procedure is ex parte, as this has long been established by case law (Article 1487). From now on, the exequatur will be issued on a simple copy of the arbitral award, provided that it meets "the requirements for [its] authenticity", which should make the circulation of awards easier (same article).

5. Remedies

The new Article 1489 provides that: "An arbitral award is non-appealable unless the parties agree otherwise." Therefore, the principle whereby an appeal is the rule and an annulment request is the exception has been inversed.
The time limit for filing an annulment request no longer runs from the official service of the award for which exequatur has been granted, but from its notification (Article 1494).
The possibility of applying for a stay of enforcement or for the provisional enforcement of the award is set forth in the new Article 1497. The stay or adaptation of the provisional enforcement is possible when it might give rise to manifestly excessive consequences, whereas the judge may also order such provisional enforcement when it was not ordered by the arbitral tribunal. This is an important change because it allows for an adaptation of the provisional enforcement to the specific situation of the parties.
An application for a review of the award will now be brought before the arbitral tribunal (Article 1502 § 2).
It should be noted that the most significant changes are also applicable to international arbitration (for instance, the possibility of submitting a copy of the award for the purpose of the exequatur, etc.).

INTERNATIONAL ARBITRATION

1. International Arbitration Agreements

The principle whereby "the arbitration agreement is not subject to any requirement of form" is strongly reaffirmed in the new Article 1507. Nevertheless, the reform could have been more audacious by writing in the substantive rule upheld by French case law as regards the validity of international arbitration agreements by which the proof of the parties' mutual consent to arbitrate their dispute is the sole requirement (Cour de cassation, 1st Civil Chamber, July 8, 2009, no. 08-16025).

2. Jurisdiction of the "juge d'appui"

The Decree adds two additional cases where the French "juge d'appui" (i.e. the President of the Civil court of Paris for international arbitration cases) has jurisdiction (unless agreed otherwise): cases where there is a possible denial of justice and cases where the parties have chosen to give jurisdiction to the French courts of law for disputes relating to the arbitration procedure (Article 1505). Previously, a matter could only be referred to the "juge d'appui" in international arbitration proceedings taking place in France or when the parties had agreed to apply French procedural law to the arbitration.

3. The Arbitral Award

One key point of the reform is to confirm that the arbitral award is rendered with a majority of the arbitral tribunal's votes or, failing this, by the chairperson of the arbitral tribunal. Article 1513 § 3 provides: "In the event of no majority, the president of the arbitral tribunal shall rule alone. Where the other arbitrators refuse to affix their signatures, the chairperson shall note this in the arbitral award which he alone shall sign." This challenge to the principle of a decision based on the majority appears justified by the need to facilitate the arbitral tribunal's making of the award. This modification writes in Article 25.1 of the ICC Rules of Arbitration and affirms the paramount role of the chairperson of the arbitral tribunal.
In addition, pursuant to the new Article 1515 § 2, the award no longer has to be translated by a certified translator strictly speaking in order for it to be recognised by the French legal system. This reform is also intended to facilitate the recognition and enforcement of international arbitral awards.

4. Remedies

The Decree draws a clearer distinction between the provisions applicable to awards rendered in France and those applicable to awards rendered abroad (respectively Section 1 – Articles 1518 through 1524 and Section 2 – Article 1525) but also sets forth common provisions (Section 3 – Articles 1526 through 1527).
Arbitral awards rendered in France may be notified by other means than official service of process and, like in domestic arbitration, the time limit for bringing an annulment action is thus de facto reduced.
An important change is also that the parties may decide to waive their right to request the annulment of the award, under the new Article 1522: "By way of a special agreement, the parties may at any time expressly agree to waive their right to request annulment of the award.
In this case, they may still appeal an exequatur order for any of the reasons specified in Article 1520 (…)." This modification strengthens the efficiency of arbitral awards.
Finally, the new provisions expressly grant the possibility of requesting an annulment during an appeal of an exequatur order, when the award was rendered in France (Article 1523).
Whereas before, an action against an arbitral award or an exequatur order stayed the enforcement of the arbitral award (former Article 1506 CCP), the Decree provides that appeals and annulment requests shall not stay the enforcement of the arbitral award, provided that the enforcement is not likely to cause serious harm to any of the parties (Article 1526).

Otherwise, the Decree provides that the party concerned may initiate summary proceedings before the first President of the court of appeals in order to stay or adapt the enforcement of the arbitral award (Article 1526). Once again, these provisions shall improve the efficiency of international arbitration.

Arbitration practitioners thus impatiently expect the entry into force of this Decree on May 1, 2011.
However, the new rules will only apply to the whole procedure for arbitration agreements signed after May 1, 2011.
Indeed, for arbitration agreements signed before May 1, 2011, only some of the new rules will apply in cases where the arbitral tribunal is constituted or the arbitral award rendered after May 1, 2011. The consequences of the coexistence of these provisions are yet to be grasped.

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