The New French Arbitration Law

Thirty years since the last reform of French arbitration law, new laws will apply to international arbitration agreements entered into after 1 May 2011 which provide for proceedings to be seated in France. French arbitral tribunals appointed and arbitral awards rendered after this date will also be affected.

The substance of the new law was contained in a decree dated 13 January 20111 and replaces the existing text of Book IV of the French Civil Procedure Code (the "CPC") (collectively, the "New Law").2 The spirit of the New Law is faithful to the French policy of favor arbitrandum. It seeks to strengthen the French arbitration law by including new provisions, incorporating a significant number of contributions from French case law from over the last thirty years, and clarifying and simplifying provisions that were open to interpretation.

The New Law represents a significant development for international arbitration, not least because France is a leading seat for international commercial arbitration (competing with England, Switzerland, Singapore and Hong Kong, amongst other jurisdictions). In this regard, it is noteworthy that an overwhelming number of respondents to the Queen Mary University of London 2010 International Arbitration Survey rated Paris "very good" or "excellent" as a place to arbitrate. In addition to France’s pro-arbitration laws, an obvious reason for this is that the headquarters of the International Chamber of Commerce, one of the leading arbitral institutions,3 are based in Paris and seem likely to remain there.4

The New Law therefore demonstrates France’s determination to enhance its position as a leading choice of arbitral seat and reflects its intention to maintain its role at the forefront of international arbitration. In this newsletter, we set out the new elements of this reform, dealing in turn with (i) arbitration agreements; (ii) the involvement of the national courts; (iii) issues relating to the arbitration proceedings and the arbitrators; and (iv) the enforcement of an award.

Arbitration Agreements

The most significant change implemented by the New Law is the abolition of any formal requirement (such as writing) for arbitration agreements.5 It also enshrines in French national law the principle of the severability of arbitration clauses, according to which an arbitration clause will not be affected by the avoidance or invalidity of the contract in which it is included.6

Minimal Court Involvement

Whilst the New Law reaffirms the independence of the arbitral process from French court influence, it also recognizes and reinforces the role and powers of French courts to take measures in aid of arbitration.

The "supporting judge"

The New Law provides for the President of the High Court of Paris to act as a "supporting judge" to support the arbitration process. The supporting judge will have jurisdiction in an international arbitration (including in matters that have no relationship to France if there is

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1 A translation of the Decree will be available in due course, with the Herbert Smith Paris office providing guidance on the Decree and its accompanying report by the French Minister of Justice in advance.
2 The décret no2011-48 portant réforme de l’arbitrage was published on 14 January 2011 in France’s Official Journal. The new provisions will comprise Articles 1442 to 1527 of the CPC.
3 The Queen Mary UoL survey reported that 50% of respondents indicated the ICC as their preferred arbitral institution, and ICC arbitrations represented 56% of arbitrations over the past 5 years.
4 According to a 28 January 2011 report on the website of a French law journal, the Gazette du Palais, the French government has apparently made an offer of new premises and a tax exemption for employees.
5 Article 1507 of the CPC.
6 Article 1447 of the CPC.
a risk of denial of justice to one of the parties): 7

- where there is a disagreement between the parties or a problem regarding the appointment of the arbitral tribunal; 8
- where there are issues regarding the challenge of an arbitrator which are not settled by the arbitral institution; 9 and
- where there are issues surrounding an arbitrator's failure to act or the resignation of an arbitrator, subject to any applicable institutional rules chosen by the parties. 10

The French courts generally

The scope of possible intervention by French courts in international arbitration is limited to areas in which, by definition, the arbitral tribunal does not have the necessary power, namely:

- measures of inquiry, or interim or protective measures sought by a party before the appointment of an arbitral tribunal; 11
- interim attachments and interim or provisional charges on property; 12 and
- a party’s application, at the arbitral tribunal’s invitation, for the production of notarised or private documents to which it is not a party. 13

Arbitration Procedure

The New Law aims to speed up arbitration procedures while ensuring the arbitral process is fair, with enhanced procedural protection for parties and the prevention of conduct by parties or arbitrators intended to disrupt the arbitration procedure.

One important provision is Article 1446 of the CPC, which provides that a party who refrains from alleging an irregularity in a timely manner, with full knowledge thereof and without legitimate reason, is deemed to have waived the right to rely on that irregularity before the arbitral tribunal or the reviewing court. 14 This rule, which has emerged in case law, is the French "estoppel" rule.

The New Law also provides arbitrators with the express power to:

- order a party to produce documentary evidence "using methods to be determined by the arbitrator and if necessary, subject to penalties for non compliance"; 15 and
- order any provisional or protective measures "deemed appropriate," applying penalties if necessary. 16

Arbitral Awards

The principle whereby arbitral awards cannot be revised on their merits, and are only subject to very limited judicial review, remains in force. The most notable changes brought in by the New Law are those designed to improve the speed of enforcement of awards.

First, parties to an international arbitration may now waive their right to apply to the courts to set aside arbitral awards. This was previously impossible under the old French arbitration regime, and in common with certain other jurisdictions, this waiver option aims

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7 Article 1505 of the CPC.
8 Articles 1451 to 1454 of the CPC.
9 Article 1456 of the CPC.
10 Article 1457 of the CPC.
11 Article 1449 of the CPC.
12 Article 1486 of the CPC.
13 Article 1468 of the CPC.
14 Article 1446 of the CPC.
15 Article 1467 of the CPC.
16 Article 1468 of the CPC.
to modernise French law by giving greater autonomy to parties. If the option is exercised, the award will be final as soon as it is handed down.\textsuperscript{17} Challenges may, however, still be available during the course of any subsequent enforcement proceedings.

Second, applications to set aside an award will no longer stay the enforcement of the award. Parties will therefore be able to enforce an award despite a challenge being before the French courts.\textsuperscript{18} Further, the one-month time limit for filing an application to set aside no longer runs from the date of "service" of the award, but from the date of "notification" of the award itself, which reduces the time during which the award is exposed to the risk of being set aside.\textsuperscript{19}

**Conclusion**

French arbitration law was already very favourable to arbitration, particularly international arbitration. The New Law strengthens French arbitration law and confirms it as one of the most modern, keeping in step with the changes in arbitration over the last 30 years. Evidently, it is intended to maintain France’s status as a preferred venue for international arbitration.

For Japanese clients, France therefore remains as an attractive option for arbitration clauses in their commercial agreements, particularly if the counterparty is based in the Americas or even other European countries. However, we would always recommend seeking the advice of experienced arbitration counsel before deciding on the seat for arbitration proceedings. Should you wish to discuss such matters further, or have any queries concerning this newsletter, then please do not hesitate to contact the authors.

\textsuperscript{17} Article 1522 of the CPC.

\textsuperscript{18} Article 1526 of the CPC.

\textsuperscript{19} Article 1519 of the CPC.