

France Revises Arbitration Law

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A new arbitration law was adopted in France by Decree No 2011-48 of 13 January 2011 ("the new law"), replacing the 1980 and 1981 texts. The new law, which came into force 1 May 2011, aims to enhance efficiency in the arbitral process and enforcement of arbitral awards, to clarify French arbitration law and make it more accessible to practitioners worldwide.

France, home of the Court of Arbitration of the International Chamber of Commerce (ICC), is one of the longest established centers of international arbitration, and ICC Arbitration Clauses are widely adopted in international contracts. As a result, changes in French arbitration law are of direct interest to parties engaged in cross-border commerce wherever they are from.

This *Client Alert* provides a summary of the major innovations of the new arbitration law with respect to international arbitration, with passing reference to the ICC Arbitration Rules, and concludes with an outline of some practical steps to be considered in light of the new law.

1. Autonomy of the arbitration agreement

The revised law codifies the well-established principle of the autonomy of the arbitration agreement. Pursuant to article 1447 Code of Civil Procedure (CCP), an arbitration agreement is independent of the contract it relates to, and is not affected if the underlying contract is found to be void.

2. Formal requirements of arbitration agreements

Under the new law, an arbitration agreement is not subject to any requirements as to its form (article 1507 CCP). Thus, for example, the new law recognises oral arbitration agreements. However, the New York Convention, which governs the cross-border recognition and enforcement of arbitration agreements and awards, applies only to written arbitration agreements. Accordingly, it is important to continue to execute written arbitration agreements and to comply with any other applicable formal requirements in order to protect the enforceability of the arbitration agreement and any award under it.

3. Confidentiality

While the new law expressly provides for confidentiality in domestic arbitration (article 1464 CCP), it remains silent with respect to international arbitration. Consequently, and in light of the growing calls for greater transparency notably in investment arbitration, parties who wish to preserve the confidentiality of such arbitral proceedings should expressly provide for confidentiality in the arbitration agreement or in the submission to arbitration. The same applies to ICC arbitration, as the ICC Rules impose no specific obligation of confidentiality on the parties in connection with the arbitral process.

4. Court intervention in the arbitral process

The new law determines the scope of the French state courts' power to intervene in the arbitral process.

Insofar as the arbitral tribunal has not yet been constituted, the new law allows the parties to apply to the French courts for measures relating to the taking of evidence or for provisional or conservatory measures (article 1449 CCP). Upon constitution of the arbitral tribunal, articles 1467 and 1468 CCP give the arbitral tribunal the authority to order such measures and to attach penalties to its orders.

Also, the new law reserves the power to decide any question regarding the constitution of an arbitral tribunal sitting in France to a single judge, the president of the Paris *Tribunal de grande instance* ("*Juge d'appui*"), on the basis of a *prima facie* examination of the arbitration agreement. This is expected to streamline the appointment process where the parties have failed to designate an appointing authority.

It is worth noting that the new law, in line with existing case law, gives the *Juge d'appui* universal jurisdiction to provide assistance in support of arbitration proceedings. Pursuant to article 1505 CCP, the jurisdiction of this judge is established not only when the arbitration takes place in France, or when the parties have agreed that French procedural law shall apply to the arbitration, or when the parties have expressly designated French courts as the supporting court for disputes related to the arbitral procedure, but also whenever a party to arbitration is exposed to a risk of denial of justice. The new law empowers the French court to act whether or not the arbitration has a "link with France", and gives French judges unconditional universal jurisdiction to secure the effectiveness of international arbitration agreements.

Finally, the law introduces a new right allowing the parties, with leave of the arbitral tribunal, to request assistance from state courts in production of documents or evidence held by third parties. The application

must be made to the president of the Paris *Tribunal de grande instance*, by way of summary proceedings (article 1469 CCP).

5. Signature of the award by the president of the arbitral tribunal

Absent a majority decision, the president of the arbitral tribunal can sign the arbitration award (article 1513 CCP). If there is no majority, the president of the arbitral tribunal shall rule alone. Should the other arbitrators refuse to sign, the president of the tribunal shall so state in the award, which only he or she shall sign. Such an award shall have the same effect as if it had been signed by all the arbitrators or made by majority decision.

6. Codification of the estoppel principle

In line with existing case law, the new law prevents a party that fails to raise in a timely manner an irregularity in the arbitral process, knowingly and without a legitimate excuse, from availing itself of such irregularity (article 1466 CCP). This principle is already expressly provided for in many arbitration rules, including article 33 of the ICC Rules.

7. Waiver of annulment proceedings

The new arbitration law allows the parties, at any time, by specific agreement, to waive their right to bring an action to set aside the award (article 1522 CCP). Such waivers are not uncommon and can serve to expedite the enforcement process. Article 28(6) of the ICC Arbitration Rules already contains such a waiver although it remains to be seen if French courts will consider reference to ICC Arbitration Rules as a "specific" waiver within the meaning of article 1522 CCP.

Such waiver does not affect the parties' right to appeal an enforcement order (*l'ordonnance d'exequatur*), which can never be waived. For this reason, the benefits of waiving annulment proceedings are limited when enforcement of the award is sought in France, since both proceedings for setting aside an award and for appealing an enforcement order are based on identical grounds, as listed in article 1520 CCP.

When enforcement of an award is sought in a New York Convention signatory state other than France, waiver of annulment could serve to prevent a party from invoking article VI of the Convention pursuant to which a decision on enforcement can be adjourned pending completion of setting aside proceedings.

Pursuant to article 3 of the Decree, waiver of annulment proceedings is possible only where the arbitral tribunal was constituted after 1 May 2011.

8. No more automatic suspension of enforcement proceedings when an award is challenged or an enforcement order appealed

Reversing previous rules, article 1526 CCP states that neither an action to set aside an award nor an appeal against an enforcement order shall stay enforcement of an award. In other words, an arbitral award endorsed with an enforcement order is automatically enforceable in France irrespective of annulment proceedings or any appeal against the enforcement order.

The only exception to this new principle is to allow the judge to stay execution or to set conditions for enforcement of an award where enforcement would be highly detrimental to the rights of one of the parties.

This provision applies only to arbitral awards rendered after 1 May 2011.

9. Changes to the limitation period for bringing an application to set aside an award or to appeal an enforcement order

Proceedings to set aside an award must be commenced within one month following notification of the award (article 1519 CCP), while proceedings to appeal an enforcement order must be commenced within one month following notification of the award endorsed with the enforcement order (article 1522 CCP). This period is extended by two months for persons living abroad pursuant to article 643 CCP.

Under the new regime, the parties are free to choose any suitable means of notification. Thus the limitation period commencement date to set aside an award or to appeal an enforcement order, in contrast with the previous position, does not necessarily require notification by bailiff ("*signification*"). Other means of notification are now permissible.

It should be noted from the above that with regard to setting aside proceedings only, the limitation period runs from the day of notification of the award and not of *the award endorsed with the enforcement order*, as was previously the case (article 1519 CCP).

In practice, these changes may considerably shorten the deadline for challenging an award.

10. Relaxation of the formal conditions for seeking an enforcement order application

The original award is no longer required in an application for an enforcement order or exequatur. The applicant may produce a duly authenticated copy of the award (article 1516 CCP), and the enforcement order can be affixed on such copy (article 1517 CCP).

Further, under the new law, translation of the award into French is not *always* required to be made by a "translator registered on the list of experts", although translation by an accredited European translator *may* be required in order to enhance the recognition of the enforcement order across Europe (article 1515 CCP).

11. Rewording of the grounds for challenging an award or challenging its enforcement

The five grounds for setting aside an arbitral award or appealing an enforcement order have been reworded. However, according to the explanatory report to cabinet, it is not intended to bring about any substantive modifications. Article 1520 CCP describes these grounds as follows:

- The arbitral tribunal wrongly upheld or declined jurisdiction; or
- The arbitral tribunal was not properly constituted; or
- The arbitral tribunal ruled without complying with the mandate conferred upon it; or
- Due process was violated; or
- Recognition or enforcement of the award is contrary to international public policy

Conclusion and practical steps to be taken going forward

In summary, the revised law is not designed to make a radical change to the manner in which international arbitration proceedings are conducted in France. Rather it is concerned with clarifying and simplifying the existing legal regime. In addition, the law opens the door to improvements in support for international arbitration from the French courts and for increased efficiencies in the enforcement process in France.

In order to optimise the benefits available under the new law, parties entering arbitration clauses or agreements for arbitration in France should consider addressing the following points:

- Agree whether and the extent to which the arbitration shall be confidential

- Ensure that the arbitration agreement meets the formal requirements of the likely place of enforcement
- Be cognizant of the changes to the procedures and time limits for challenging any award
- Consider taking advantage of waiving annulment proceedings
- Bear in mind the unconditional universal jurisdiction of French judges to assist with the constitution of an arbitral tribunal whenever parties are exposed to the risk of denial of justice

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