New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

An ALM Publication

Litigation

WWW.NYLJ.COM

MONDAY, MAY 16, 2010

Revision To **French Arbitration** Law Arrives

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ON MAY 1, 2011, the long-awaited reform of the French arbitration law entered into force. The new law, the "décret n° 2011-48 portant réforme de l'arbitrage," which was published in January along with a report commenting on the reform, addresses both domestic and international arbitration and replaces Articles 1442 to 1527 of the French Code of Civil Procedure.[1]

Most parts of the new law are immediately effective and applicable as of May 1, 2011, except for a number of specifically enumerated provisions that apply only if the arbitration agreement was entered into, the arbitral tribunal constituted, or the award rendered, after that date.

The French arbitration community has long lobbied for this update of the law, which constitutes the first major revision of French arbitration legislation since the 1980s.

In 1981, France became one of the first countries to adopt a modern international arbitration law. The French law was followed by the UNCITRAL Model Law on International Commercial Arbitration (1985) and also by legislation in other European countries, such as the Netherlands (1986), Switzerland (1987) and the United Kingdom (1996).

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With its most recent revision of its arbitration law, France seeks to put itself once more at the forefront of modern international arbitration legislation.

Purpose Behind the Reform

The new law is in line with the long-standing tradition of innovative and "arbitration-friendly" arbitration law in France, which has been important in establishing Paris as one of the world's most popular venues for international arbitration.

Indeed, one of the aims of the new law is to maintain the leading role of Paris as a seat for international arbitration, and to ensure that the International Chamber of Commerce (ICC), including its Court of Arbitration, maintains its headquarters in France. The French Justice Minister, Michel Mercier, confirmed this in an interview with the French newspaper Les Echos.

According to Mr. Mercier, in enacting the new law, "[t]he government had paid particular attention to the situation of the International Chamber of Commerce."[2] The ICC appears to have reacted positively to the government's efforts in enacting the new law, as well as its offer of new premises and tax exemptions for ICC employees similar to those applicable to other international organizations.

The official report accompanying the new law identifies certain other important purposes of the revision: "after thirty years, the reform appeared necessary to consolidate case law [in the area], as well as to complement the existing text and conserve its efficacy."

By codifying well-established French case law, the new law aims to enhance the accessibility of French arbitration law for foreign users and observers. The report also specifically draws attention to the fact that the new law has "integrated some provisions inspired by foreign laws which have proven useful."

New Law's General Architecture

The reform maintains the overall architecture of French arbitration law, distinguishing between domestic (Articles 1442 to 1503) and international arbitration (Articles 1504 to 1527).

Article 1504 defines international arbitration as one that involves "the interests of international commerce." This is the same definition as that contained in the old law (Article 1492). Given that this definition has often been criticized for being tautological and for giving too little guidance to the courts, it is notable that the French legislature did not seek to amend it in the new law.

Some of the provisions in the new law applicable to domestic arbitration also apply, unless the parties have agreed otherwise, to

international proceedings. Article 1506 of the French Code of Civil Procedure specifically lists those provisions applicable to both domestic and international arbitration.

Because this method of listing the provisions that apply to both forms of arbitration makes the new law somewhat difficult to read, it would perhaps have been preferable from a foreign user's perspective for all provisions relating to international arbitration to be set out together in a self-contained section of the law. This had been suggested by the French Arbitration Committee (the Comité Français de l'Arbitrage) in a 2006 draft statute, but was not adopted.[3]

Notable Features

A. Definition and Validity of the Arbitration Agreement. While Article 1442 of the French Code of Civil Procedure defines an arbitration agreement for purposes of domestic arbitration, that definition does not apply to international disputes because it is too narrow. For example, it would not encompass treaty-based arbitration, such as bilateral investment treaty disputes. The new law does not attempt to define an arbitration agreement for purposes of international arbitration.

With respect to the validity of the arbitration agreement, Article 1507 provides that "the arbitration agreement shall not be subject to any requirement as to its form." While case law prior to the reform had already taken a non-formalistic approach to this issue, the new statute helpfully contains an express provision to that effect.

By virtue of this approach, French law is significantly more liberal and arbitration-friendly than most other arbitration regimes, including Article II of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which requires proof of an "agreement in writing."[4]

Finally, Article 1447 of the French Code of Civil Procedure (which applies to both domestic and international arbitration) codifies well-established case law concerning the "separability" of the arbitration agreement from the underlying contract in which it is found. Article 1447 states that "[t]he arbitration agreement is independent from the contract it relates to."

This fundamental principle is well-recognized today in most developed arbitration laws, including in the United States. Under this "separability" doctrine, the arbitration clause may remain valid and effective even if the underlying contract is found to be void.

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B. Arbitral Process and Party Autonomy. As under prior French law, the new law makes clear that the arbitral process is governed by the overriding principle of party autonomy. That is, the parties are free to choose the procedure for the arbitration, including by referring to pre-established arbitration rules (such as, for instance, arbitration rules published by the major arbitration institutions) (Article 1509), as well as the rules of law applicable to the merits of the dispute (Article 1511).

The new law contains few new provisions regarding the arbitral process and those that it does introduce are based mainly on existing case law or arbitral practice. For instance, Article 1510 now expressly provides that "irrespective of the procedure chosen, the arbitral tribunal shall ensure that the parties are treated equally and granted the right to be heard," a principle of fundamental procedural fairness that applied under the old law as well.

Another example can be found in Article 1466 (applicable to both domestic and international arbitration proceedings), which is inspired by previous French case law as well as the common law concepts of waiver and estoppel. Under Article 1466, a party who, in knowledge of the facts and without any legitimate excuse, fails to object to any aspect of the arbitral process in due course, is prevented from doing so at a later stage in the proceedings.

Finally, the new law includes a provision stating that arbitration proceedings are, in principle, confidential (Article 1464(4)), but that provision only applies to domestic and not international arbitrations. It has been suggested that this distinction was made to take into account the clear tendency towards increased transparency in international investment arbitrations. In light of this, parties who wish to ensure the confidentiality of the proceedings in international arbitrations should include an express provision to that effect in their arbitration agreement.

C. National Court Intervention in the Arbitral Process. The new law also addresses the issue of national court intervention into the arbitral process. French law has traditionally sought to limit interventions by the local courts into arbitral proceedings. Nevertheless, French law recognizes that, in exceptional and clearly defined circumstances, an intervention by the local courts may be required to support the arbitral process. The circumstances in which this intervention is appropriate have been clarified in the new law.

Article 1505 provides that the president of the "Tribunal de Grande Instance" in Paris may intervene in support of the arbitration if one of the following jurisdictional requirements is met:

(i) the arbitration "takes place" in France;

(ii) the parties have chosen French procedural law to govern the arbitration;

(iii) the parties have included a specific choice of court agreement in favor of French courts regarding disputes relating to the arbitral process; or

(iv) one of the parties faces a "denial of justice."[5]

Whereas the first two requirements were already contained in the former arbitration law (Article 1493), the other two requirements are new to the revised arbitration law and were inspired by scholarly writing and French case law.

Provided that one of the jurisdictional requirements listed in Article 1505 is met, a French judge may intervene in the arbitral proceedings to address any one of a number

of issues set forth in Articles 1452 to 1458 and 1463(2) of the French Code of Civil Procedure. These issues involve difficulties encountered during the constitution of the arbitral tribunal as well as issues relating to the challenge, resignation and replacement of arbitrators.

D. The Arbitral Award and Challenges to the Award. The new law introduces some interesting new provisions related to the arbitral award. For example, Article 1513 of the French Code of Civil Procedure addresses situations in which the tribunal is unable to reach a unanimous decision.

Whereas the principle remains that an arbitral award may be made by a majority decision, Article 1513(3) specifically allows the chairperson of the tribunal to sign the award on his or her own if no majority may be reached. The rationale underlying this provision is to prevent deadlock in cases where the chairperson may not be willing to agree with either of the co-arbitrators' positions.

Other important changes address the legal remedies available to a party to challenge an arbitral award. For example, Article 1522 contains a significant change in the parties' ability to waive their right to seek annulment or vacatur of an award in France. Under Article 1522, "the parties may, by specific agreement, waive at any time their right to challenge the award." This new provision applies to arbitration agreements entered into after May 1, 2011.

The parties' waiver under Article 1522 does not affect their right to oppose the enforcement of the award in France. Given that the grounds for seeking annulment of an award are exactly the same as those for opposing the enforcement of an award, the practical implications of Article 1522 in France should not be overstated. Nevertheless, by waiving the right to seek annulment of the award, a party is prevented from relying on Article V(1)(e) of the New York Convention in enforcement proceedings outside France. In light of this, it remains to be seen whether parties are willing to waive their right to seek annulment under Article 1522.

According to the report accompanying the new law, Article 1522 was inspired by "existing foreign law." Indeed, a few jurisdictions with similarly modern, pro-arbitration statutes permit the parties to waive or exclude judicial review of the award by way of annulment proceedings.

For instance, Swiss and Belgian law permits such waivers provided the parties are foreign, and have no connection to Switzerland or Belgium. Under the new French law, by contrast, such waivers of the right to seek vacatur of an award are valid not only as to foreign parties but as to French parties as well.

Another notable innovation is contained in Article 1526, which provides that a challenge to an arbitral award does not automatically result in the suspension of ongoing enforcement proceedings. Rather, according to Article 1526(2), the suspension of enforcement proceedings must be specifically requested by the challenging party and will be granted only if such enforcement would be highly detrimental to the rights of the party requesting the suspension.

The report accompanying the new law notes that the aim of this new provision is to discourage the filing of annulment proceedings in bad faith simply for the purpose of delaying the enforcement of valid arbitral awards. Article 1526 applies to awards rendered after May 1, 2011.

Conclusion

The new French arbitration law has been well-received by the international arbitration community. Initial reactions describe the revisions as innovative and trend-setting.

As stated in the report accompanying the new law, the success of French arbitration law, both old and new, is built on the effort to strike the important balance between "flexibility and legal security." While it remains to be seen how the new law will operate in practice, it is likely that other jurisdictions that seek to be leading venues for international arbitration will consider making similar changes to their laws on international arbitration to ensure that they remain competitive in attracting users of arbitration from around the world.

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1. The new law can be found at http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110114&numTexte=9&pageDebut=00777&pageFin=00781, as well as the accompanying commentary http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110114&numTexte=8&pageDebut=00773&pageFin=00777.

2. Les Echos, dated 14 Jan. 2011 "Paris veut conserver son leadership."

3. Draft Statute on French Arbitration Law, proposed by the Comité Français de l'Arbitrage, published in Revue de l'arbitrage 499 (1996).

4. It should be noted that, even if French law imposes no form requirement in order to recognize an agreement to arbitrate, it is always advisable to enter into such agreements in writing. Indeed, when seeking recognition or enforcement of an international arbitral award, proof of the arbitration agreement in written form is required, in principle, both under French law (Article 1515(1)) and the New York Convention (Article IV).

5. The inability of a party to have its claims heard by a judge or arbitrator has been found to constitute a "denial of justice." For instance, in Israel v. Societe NIOC, the claimant was unable to proceed with the arbitration because the respondent refused to nominate its arbitrator. Although the seat of the arbitration was not in France and the arbitration was not governed by French procedural law, the French Supreme Court confirmed that the President of the "Tribunal de Grande Instance" in Paris had jurisdiction to designate the arbitrator in lieu of the respondent, on grounds that no other national court was in a position to do so and thus the claimant faced a denial of justice. See Judgment of French Supreme Court, dated 15 Feb. 2005, Revue de l'arbitrage 693 (2005).