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France

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A. Legislation and rules

A.1 Legislation

The main change in French arbitration legislation during the past 10 years relates to the decree of 13 January 2011 amending arbitration law. By codifying well-established French case law, the new law has significantly enhanced the accessibility of French arbitration law for foreign users.

The main provisions brought in by the previous decree of 1981 regarding international arbitration, such as freedom for the parties in the organization of the arbitration procedure and the application of common principles to arbitration taking place in France and abroad, have been kept by the 2011 decree.

In addition, while this decree keeps the clear distinction between domestic and international arbitration, it also brought some innovations.

In effect, the decree strengthens the powers of the judge acting in support of the arbitration (*juge d'appui*). The judge can thus resolve

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the issues regarding the constitution of the arbitral tribunal, the challenge of an arbitrator or even extend the time limit for arbitration.

The chapter of the decree covering the proceedings themselves codifies and clarifies existing case law. In particular, the concept of procedural estoppel has been codified. A party that voluntarily refrains from raising any irregularities before the arbitral tribunal is considered to have waived its right to do so after the award is rendered.

The arbitral tribunal's authority is also reinforced; it now has the ability to order parties, under the threat of penalty if necessary, to produce evidence that they may have in their possession. The arbitral tribunal may also order provisional or conservatory measures, except attachments of movable property or judicial liens, which are both under the exclusive jurisdiction of state courts. The arbitral tribunal may also authorize a party to request from state courts (from the president of the *Tribunal de Grande Instance*) an order against third parties to obtain evidence held by the latter.

Moreover, a major change introduced by the decree is the ability for parties to international arbitration to waive their right to request that the award be set aside. Nevertheless, the parties would still have the ability to appeal an order enforcing the award on the same grounds as those on which an award may be set aside. Hence, this provision is truly useful only in cases where an award is rendered in France, but is to be enforced abroad.

These decrees contributed to making Paris one of the world's most favored seats for international arbitration. In effect, the newly shaped legal framework, allied with a liberal state case law, enhanced the appeal of Paris as an arbitration center.

Very recently, the law of 18 November 2016 regarding the modernization of justice for the 21st century modified Article 2061 of the French civil code concerning arbitration clauses. The article now states that an arbitration clause has to be accepted to be enforceable. We believe that this definition should not affect international

commercial arbitration, as French case law has ruled for many years that the limitations to the validity of arbitration clauses set out in the previous Article 2061 were not applicable to international arbitration. Nonetheless, at this time, in the absence of any case law, the real impact that this new wording of Article 2061 cannot be ascertained.

A.2 Institutions, rules and infrastructure

Following the 2011 decree, the Center for Mediation and Arbitration of Paris (CMAP), created in 1995 by the Paris Chamber of Commerce, issued a new set of arbitration rules on 1 March 2012. These rules contains several provisions designed to improve the speed of arbitration.

These rules also show the intention of CMAP to develop arbitration in France, as the general delegate of CMAP has stated during the 20th anniversary celebrations of the institution.

On 1 January 2012, the new ICC rules entered into force. These rules included several improvements, including the possibility of assigning an emergency arbitrator, which is the most significant measure. This measure allows all parties to request conservatory or interim measures that cannot wait for the constitution of the arbitral tribunal. However, it is not possible to have recourse to the emergency arbitrator in three situations: (i) if the arbitration agreement was concluded before 1 January 2012; (ii) if the parties have expressly excluded the provisions of the rules related to the emergency arbitrator; or (iii) if the parties agreed to apply another pre-arbitration procedure.

Moreover, the new ICC rules have introduced new provisions related to cases involving multiple parties and contracts and allowing easier consolidation. It is therefore possible to deal with disputes arising from different contracts in the same arbitration.

Very recently, the ICC released new arbitration rules that will enter into force on 1 March 2017. The most compelling measure of these amendments is the introduction of an expedited procedure providing for a streamlined arbitration with a reduced scale of fees. This

procedure is automatically applicable in cases where the amount in dispute does not exceed USD 2 million, unless the parties have decided to opt out. It is also important to note that in this procedure, the ICC Court may appoint a sole arbitrator, even if the arbitration agreement provides otherwise.

In addition, in order to strengthen ICC arbitrations, the time limit for establishing Terms of Reference has been reduced from two months to one month, and there are no Terms of Reference in the expedited procedure.

B. Cases

B.1 Enforcement in France of an arbitration award set aside in a foreign country

On 29 June 2007, the *Cour de cassation*[3] issued two rulings on the same matter. In the first case, the court held that the fact that an arbitral award was set aside by the jurisdiction of the arbitration seat does not prevent its recognition and enforcement in France. In the second case, the court held that the *res judicata* attached to a judgment declaring a party admissible and legitimate to require the enforcement in France of an award set aside in the country of the arbitration seat, impeded the *exequatur* of a second award inconsistent with the first one.

In this case, the French company Rena purchased pepper from the Indonesian company Putrabali. The shipment was lost during the carriage. As a result of the French company's refusal to pay for the goods, the seller started an arbitration in London. In a first award, the arbitral tribunal ruled that the Rena had a right to refuse to pay. This award was then quashed by the High Court of London, sending the case back to arbitration. However, the second arbitral award ordered Rena to pay Putrabali. In the meantime, Rena had successfully requested the *exequatur* of the first arbitral award in France, whereas Putrabali had obtained the *exequatur* of the second award also in

[3] *Cour de cassation*, 29 June 2007, 05-18053 and 06-13293.

France. The Paris Court of Appeal confirmed the *exequatur* of the first award and cancelled the second *exequatur* as it was inconsistent with the first decision. These decisions were then challenged before the *Cour de cassation.*

In the first ruling, the court considered that because the arbitral award was not linked to any domestic legal order, being an international decision, its validity has to be examined with regard to the rules applicable in the country of its recognition or enforcement. As to the second case, the court only applied the basic principle of *res judicata*. In practice, these decisions mean that the party which obtains first satisfaction is almost assured to be able to enforce the award, even if the second award appears to be a better decision, as the first decision's *res judicata* prevails over the second.

B.2 Transmission of the arbitration clause and extension of its scope

In a landmark decision of 27 March 2007, the *Cour de cassation* asserted two important principles of French arbitration law. On the one hand, the court affirmed that when a chain of contracts transfers ownership, the arbitration clause is automatically transferred as an accessory. On the other hand, it stated that the arbitration clause applies to the parties that have been involved in the performance of the contract or the dispute arising from it.

The French company, Alcatel, worked with its subsidiary, AME, to produce an electronic chip. AME then entered into a contract, containing an arbitration clause, with the US company, AMKOR. AMKOR subsequently signed a subcontracting agreement with a Korean company, ANAM. Because of alleged bad workmanship Alcatel sued AMKOR and ANAM in the French courts. The defendants argued that the French state judge did not have jurisdiction to hear the case due to the arbitration clause contained in the contracts.

The dispute was eventually adjudicated by the *Cour de cassation,* which established two principles having the same effect: to broaden the scope of the arbitration clause.

The first principle answers the following question: can an arbitration clause be applied to the sub-purchaser of goods, even if it did not negotiate it and perhaps did not even know of its existence? Under previous case law, the *Cour de cassation* previously stated, in the *Peavy* case,[4] that an arbitration clause could not be applied to a party which "reasonably ignored the existence of it." This limitation is removed in the present case, which therefore does not require the acceptance, even implicit, of the clause.

As to the second principle, the court ruled that the involvement of a third party in the performance of a contract presumes the implicit acceptance of this party of the arbitration clause contained in it. The extension of the arbitration clause's applicability is based on the ratification principle. By fulfilling the performance contract, which the third party did not sign, this party has agreed to the obligations contained in the contract and thus, to the arbitration clause.

In practice, this solution implies that an arbitration clause contained in a contract transferring ownership of goods or in a contract performed by a third party, will apply to everyone.

B.3 Arbitrator impartiality and duty to disclose

On the topic of arbitrator impartiality, the *Tecnimont* case is undoubtedly a milestone in French arbitration case law as no less than five decisions were issued.[5] The *Cour de cassation*[6] held that when a party refrains from challenging an arbitrator within the period of time

[4] *Cour de cassation,* 6 February 2001, 98-20776.
[5] Paris Court of Appeal, 12 February 2009; *Cour de cassation,* 4 November 2010 09-12.716; Reims Court of Appeal, 2 November 2011; *Cour de cassation,* 25 June 2014, 11-26.529 and last, Paris Court of Appeal, 12 April 2016.
[6] *Cour de cassation,* 25 June 2014, 11-26.529.

provided for in the applicable arbitration rules, said party is considered to have waived its right in this respect.

The case involved a sub-contract for the construction of a factory. This sub-contract was concluded on 23 November 1998 between Tecnimont and Avax. Following a dispute, Tecnimont started an ICC arbitration. Before the ICC Court, Avax brought two motions for disqualification of the president of the arbitral tribunal because the latter was working in a law firm, of which Tecnimont was a client. The ICC Court rejected the motion because it was introduced after the 30-day delay provided by ICC rules.

The question in this case was whether the judge ruling on the arbitration award was aligned with the duty to respect the rule provided by the contract on the delay of disqualification.

Normally, the binding force of the contract must be applied under the provisions of public order. However, impartiality and independence matters are not concerned with public order, and thus, the Court was under the obligation to consider that the 30-day delay had to be applied.

C. Trends and observations

When the decree of 2011 was issued by the then Minister of Justice Michel Mercier, he expressed his particular wish to keep and strengthen the premium position of Paris as a place of arbitration.[7]

This wish to develop arbitration in France is entirely shared by French courts, which appear to be favorable to arbitration, as can be seen in various case law trends.

First, the field of arbitrability has tremendously expanded. Under French law, the matters that cannot be treated by arbitration are very

[7] He stated that: "Paris is the first place of arbitration in the world and I wish that it stays that way: when our law is particularly acknowledged, it is part of the state's responsibility to ensure that it will continue to shine." Report to the Prime Minister regarding the decree of 13 January 2011.

limited and mainly cover three areas: criminal issues which can solely be judged by the French jurisdiction; tax cases, where the same rule applies; and last, bankruptcy matters. As to competition and intellectual property law, only a few specific provisions are subject to non-arbitrability, making most of the field subject to arbitration. Moreover, in international arbitration, Article 2060 of the French civil code forbids the applicability of arbitration to matters related to public order, but case law has progressively reduced the scope of this article. Indeed, nowadays, domestic courts acknowledge that a dispute cannot be considered non-arbitrable only because an issue of public order applies to the case.[8]

Second, the applicability of arbitration clauses has been widely interpreted. As previously mentioned,[9] domestic courts consider that an arbitration clause can be extended to companies that did not formally sign the agreement containing the clause if they have participated in the performance of the contract and had knowledge of the arbitration clause's existence. This extensive application of arbitration clauses has been confirmed several times by domestic courts and in particular, in a decision from 2012 of the *Cour de cassation*[10] in which the highest court held that if a company is substituted by a third one in a distribution contract, the arbitration clause applies to the third party that has performed the contract, as it was directly involved in the distribution activity, even if it was not party to the contract containing the arbitration clause.

Third, Article 1448 of the French code of civil procedure states that an arbitration clause is void if it is manifestly invalid or inapplicable. Yet, domestic courts have interpreted this concept very strictly. In effect, an arbitration clause is considered manifestly void or inapplicable if this criterion appears without any doubt at first

[8] *Cour de cassation*, 8 July 2010, 09-67.013 and more recently Paris Court of Appeal, 1 July 2014, *Scamark v Conserverie des cinq oceans*.
[9] See case law in B2.
[10] *Cour de cassation*, 7 Novembre 2012, no. 11-21.891.

reading.[11] If doubt exists regarding the validity or the applicability of the clause, it is for the arbitral tribunal to decide whether a valid arbitration clause exists. It is only at the stage of a possible subsequent action to set aside the award that state courts can determine whether the arbitration clause was valid.

Court decisions which found that an arbitration clause was not lawful pursuant to Article 1448 of the French code of civil procedure are very scarce. For example, the *Cour de cassation* has clearly stated that an arbitration clause is manifestly inapplicable when a legal action is brought by the Minister of Economy in order to protect the international public order in a distribution agreement.[12]

However, most parts of the case law tend to have a restrictive interpretation of this criterion. Indeed, case law has strengthened the trend to stretch out the scope of the arbitration clause. In a case rendered in 2014, the court held that if an arbitration clause is inserted into a contract forming a "contractual scheme" with another contract, this clause can be applied to disputes arising out of the second contract, even if it is not expressly mentioned, and therefore cannot be considered manifestly inapplicable.[13]

Moreover, very recently a domestic court has ruled that even if a litigant cannot pay the required provision for the arbitration procedure, this hurdle for a party does not make the clause manifestly inapplicable.[14] It rests then on the arbitrator to make sure that this impediment does not lead to a denial of justice.

Thus, it is to be expected that international arbitration will still continue to be fostered in France by public authorities as well as by state courts. The public report issued by the Ministry of Justice in December 2013, entitled *The judge of the XXI century*,[15]

[11] *Cour de cassation,* 11 February 2009, 08-10.341.
[12] *Cour de cassation,* 6 July 2016, 15-21.811.
[13] *Cour de cassation,* 9 July 2014, 13-17.495.
[14] *Cour de cassation,* 13 July 2016, 15-19.389.
[15] *The judge of XXI century,* DELMAS-GOYON, December 2013.

enthusiastically supports arbitration and takes arbitration as a model of efficiency that domestic courts should learn from.