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THE NEW FRENCH ARBITRATION LAW: ONE STEP FORWARD, TWO STEPS BACK?

Jesse Baez *

I. INTRODUCTION

France is home to the International Chamber of Commerce, and is viewed around the world as a major center for international arbitration. Due to its importance to international arbitration, any changes made to French arbitration law are of great interest to legal practitioners around the world. In January 2011 the French government issued Decree No.2011-48 of 13 January 2011 concerning changes to French arbitration law. The goal of the Decree is to reform French domestic and international arbitration.¹

The arbitration reform is embodied in Articles 1442 through 1525 of the French Code of Civil Procedure.² Title I deals with changes to domestic arbitration,³ while Title II addresses international arbitration.⁴ The additions to the law incorporate three developments into the French Civil Code: case law principles that have developed since the last major arbitration reforms of 1980-1981, provisions targeted at making arbitration more efficient, and imported features from other legal systems.⁵

One of the more important changes in French arbitration law concerns “the judge acting in support of arbitration.” This “*Juge’d’appui*” feature of the Decree is a codification of the principles developed in French case law.⁶ This role falls to the President of the relevant *Tribunal de Grande Instance* in domestic arbitration and to the President of the *Tribunal de Grande Instance* of Paris in international arbitration.⁷ There are other important codifications derived from French case law principles such as the recognition of arbitration “by reference” to a document in which it is contained, the autonomy of the arbitration clause, and the recognition of the *kompetenz-kompetenz* principle.⁸ Other provisions aim at increasing the efficiency of the arbitration process, including prohibiting appeal of an award in domestic arbitration unless the parties agree to do so, granting the arbitrator authority to enjoin the parties to produce evidence or order provisional measures if necessary, allowing international arbitration agreements to not have any requirements as to their forms, eliminating the provision that an application to set aside an

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¹ JEAN-PIERRE ANCEL, *Introduction to THE JANUARY 2011 DECREE ON THE NEW FRENCH ARBITRATION LAW* 9 (Emmanuel Gaillard et al. trans., 2011).

² Décret n° 2011-48, arts. 1442-1527 du 13 janvier 2011 portant réforme de l’arbitrage [Decree No. 2011-48, arts. 1442-1527 of January 13, 2011 on the new French arbitration law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] n° 0011, Jan. 14, 2011, p. 777-780 [hereafter “Decree No. 2011-48”].

³ *Id.* arts. 1442-1503.

⁴ *Id.* arts. 1504-27.

⁵ See ANCEL, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

award or appeal against an enforcement order suspends the enforcement of that award, and adopting the concept of estoppel.⁹

While some of the new provisions do increase the efficiency and autonomy of French domestic and international arbitration, others in fact impede arbitration's efficiency and autonomy in a significant way. Thus, the reforms are an improvement in some respects, and a digression in others.

II. DECREE NO. 2011-48 OF 13 JANUARY 2011 ON THE NEW FRENCH LAW ON ARBITRATION

A. Title I: Domestic Arbitration

1. *The Arbitration Agreement*

Title I, which encompasses Articles 1442 to 1503 describes the domestic component of the new arbitration law. Arbitration can be in the form of a clause or a submission agreement. Arbitration is defined as “an agreement by which the parties to one or more contracts undertake to submit to arbitration disputes which may arise in relation to such contracts,”¹⁰ and a submission agreement is defined as “an agreement by which the parties to a dispute submit such dispute to arbitration.”¹¹ Arbitration agreements must be in writing, and can be a written communication between the parties, or a document referred to in the main agreement.¹² An arbitration agreement is required to designate the arbitrator or arbitrators, or provide a procedure for their appointment.¹³ Parties may also choose to use the procedures described in Articles 1451 to 1454.¹⁴ In addition, parties in international and domestic arbitration may submit disputes to arbitration even if proceedings are pending before a court.¹⁵ Article 1447 codifies the separability doctrine which applies to domestic and international arbitration. The French separability doctrine states that domestic and international arbitral agreements are independent of the contracts they relate to, and will not be affected if the contract is void.¹⁶ Moreover, a court must decline jurisdiction when a dispute subject to either a domestic or international arbitration agreement is brought before it, except when the arbitration agreement is manifestly void or not applicable.¹⁷ Parties also have the right to provisional measures when an arbitral tribunal has not been constituted. In this type of situation a party has the right to apply to a court for provisional or conservatory measures, as well as for measures regarding the taking of evidence. Any application for provisional or conservatory measures is to be made to the president of the *Tribunal de Grande Instance* or the *Tribunal de Commerce*.¹⁸

⁹ *Id.* at 9-10.

¹⁰ Decree No. 2011-48, art. 1444.

¹¹ *Id.*

¹² *Id.* art. 1443.

¹³ *Id.* art. 1444.

¹⁴ *Id.*

¹⁵ *Id.* art. 1446.

¹⁶ Decree No. 2011-48, 1447.

¹⁷ *Id.* art. 1448.

¹⁸ *Id.* art. 1449.

2. *The Arbitral Tribunal*

The selection and removal of the arbitral tribunal and is described in Articles 1450 through 1477. The majority of this Chapter, from Articles 1452 through 1460 applies to both international and domestic arbitrations. Only a natural person with full capacity to exercise his or her rights may act as an arbitrator, and when an arbitration agreement designates a legal person, only this person will have the power to conduct the arbitration.¹⁹ An arbitral tribunal must be composed of either a sole arbitrator or an odd number of arbitrators. Furthermore, if the agreement provides for an even number of arbitrators, an additional one will be appointed by the party; otherwise the additional arbitrator will be appointed by the other arbitrators or, failing this, by the judge acting in support of arbitration.²⁰ The reforms also provide a mechanism for the appointment of arbitrators if the parties fail to agree on the procedure for appointing the arbitrators. If there is a sole arbitrator and the parties disagree on the arbitrator, the person administering the arbitration or the judge acting in support of the arbitration makes the appointment. In addition, when there are three arbitrators each party will appoint an arbitrator, and these two arbitrators in turn will appoint a third arbitrator. If appointment by the two arbitrators fails, the person responsible for administering the arbitration or the judge acting in support of the arbitration will appoint the third arbitrator,²¹ if there are more than two parties subject to the dispute and all parties involved fail to agree on the procedure for appointing the arbitrators, either the person responsible for administering the arbitration or the judge acting in support of arbitration must appoint the arbitrators.²² Any other dispute involving the composition of the arbitral tribunal is again resolved by either the person administering the arbitration or the judge acting in support of arbitration.²³ The judge acting in support of the arbitration also has the power to declare that no arbitrator appointment is necessary if an international or domestic arbitration agreement is either manifestly void or inapplicable.²⁴

Articles 1456 to 1459 define the scope of the arbitrator's mandate. These provisions state that once the arbitral tribunal is composed, the arbitrators' have accepted their mandate. Prior to this, however, arbitrators are mandated to disclose any circumstance that impacts their impartiality or independence. If the arbitrator's removal is not agreed upon by the parties, his or her removal is decided by the person responsible for administering the arbitration or the supporting judge.²⁵ Arbitrators must carry out their mandate until it is complete, unless they become legally incapacitated or there is a legitimate reason for their refusal to act or resignation.²⁶ Finally, arbitrators can only be removed through the unanimous consent of the parties.²⁷

Article 1459 explains that "the judge acting in support of arbitration", is the President of the relevant *Tribunal de Grande Instance*. The provision defines the supporting judge's jurisdiction: he or she may rule on applications made on the basis of Articles 1451 to 1454, and may apply Article 1455 if necessary. The arbitration agreement determines which court has

¹⁹ *Id.* art. 1450.

²⁰ *Id.* art. 1451.

²¹ *Id.* art. 1452.

²² Decree No. 2011-48, art. 1453.

²³ *Id.* art. 1454.

²⁴ *Id.* art. 1455.

²⁵ *Id.* art. 1456.

²⁶ *Id.* art. 1457.

²⁷ *Id.* art. 1458.

jurisdiction, and if it does not do so then jurisdiction lies with the court where the seat of the arbitral tribunal is set or if the agreement is silent on this, where the party resisting the application resides.²⁸ Parties to international and domestic arbitration, as well as the arbitral tribunal itself, have a right to apply to the judge supporting arbitration to have a decision made as an expedited proceeding. Moreover, any decision made by the judge supporting arbitration cannot be appealed. However, an Article 1455 decision by a supporting judge may be appealed.²⁹ The last Article of this Chapter, 1461, states that any provision that contradicts the rules in Chapter II will be considered invalid.³⁰

3. *Arbitral Proceedings*

A dispute can be submitted to arbitration by either of the parties or jointly.³¹ Moreover, if the arbitration agreement lacks a time limit, the tribunal's mandate is limited to six months. However, in either domestic or international arbitration this time limit may be extended either by agreement by the parties or by the judge acting in support of arbitration.³² The arbitral tribunal defines the procedure for the arbitration, however fundamental principles of French court proceedings will apply to domestic arbitration proceedings.³³ Moreover, in both domestic and international arbitration parties and arbitrators will act diligently and in good faith in the conduct of proceedings. In addition, arbitral proceedings are confidential unless otherwise agreed to by the parties.³⁴

Articles 1465 to Articles 1472 apply to domestic and international arbitration, and contain the most important provisions of this Chapter. First, Article 1465 recognizes the *kompetenz-kompetenz* principle, which means that domestic and international arbitral tribunals have exclusive jurisdiction to rule on objections to their jurisdiction.³⁵ Second, if a party, without good cause, fails to object to any irregularity in the arbitral tribunal in a timely fashion, they waive their right to object to the irregularity.³⁶ Third, arbitral tribunals have the power to take necessary provisional or conservatory measures, and attach penalties to these orders. Furthermore, a tribunal may amend any provisional or conservatory measure it has ordered. However, courts reserve the power to order conservatory attachments and judicial security.³⁷ Fourth, if evidence is under the control of a third party, parties subject to the arbitration agreement may, with leave from the arbitral tribunal, have the third party summoned before the *President of the Tribunal de Grand Instance* to obtain the evidence. The President has the power to order production of the evidence and attach penalties if necessary. This order may be appealed within fifteen days of service of the order.³⁸ Fifth, the arbitral tribunal has the power to rule on a

²⁸ Decree No. 2011-48, art. 1459.

²⁹ *Id.* art. 1460.

³⁰ *Id.* art. 1461.

³¹ *Id.* art. 1462.

³² *Id.* art. 1463.

³³ *Id.* art. 1464.

³⁴ *Id.*

³⁵ Decree No. 2011-48, art. 1465.

³⁶ *Id.* art. 1466.

³⁷ *Id.* art. 1467-1468.

³⁸ *Id.* art. 1469.

claim of forgery or request for verification of handwriting.³⁹ Finally, the tribunal also has the power to stay the proceedings.

4. *The Arbitral Award*

For domestic arbitration, the arbitral tribunal must decide the dispute in accordance with the law unless empowered to rule as *amiable compositeur*.⁴⁰ In addition, in both the international and domestic arenas, the arbitral tribunal's deliberations must be confidential.⁴¹ For both international and domestic arbitration, the award must state the names of the parties and their domicile or headquarters, the names of the counsel who represented the parties, the names of the arbitrators, the date on which the award was made and the place where it was made.⁴² Both domestic and international arbitral awards must set forth the claims and arguments of the parties, and the award must state the reasoning behind it.⁴³ Article 1484 has important estoppel significance for international and domestic arbitration. The provision states that an arbitral award will be *res judicata* with regard to the claims adjudicated, and that the award may be declared provisionally enforceable.⁴⁴ A domestic or international arbitral tribunal is no longer vested with power to rule on the claims adjudicated in that award once an award is made. Furthermore, upon application of a party an arbitral tribunal can correct clerical errors or omissions, interpret the award, or make an additional award where it failed to rule on a claim. If the international or domestic tribunal can no longer be reconvened, and if the parties can't agree on a new tribunal, the above powers are vested in the court that would have had jurisdiction if there was no arbitration.⁴⁵ Moreover, any appeal made under Article 1485 and any decision amending the award must be made within three months of application to the arbitral tribunal, although this may be extended by agreement between the parties.⁴⁶

5. *Enforcement*

An award can only be enforced with an enforcement order issued by the *Tribunal de Grande Instance* of the place where the award was made.⁴⁷ Furthermore, enforcement proceedings will not be adversarial. In addition, an enforcement order will not be granted where an arbitral award is contrary to public policy. Any order denying enforcement must state why the award was denied.⁴⁸

³⁹ *Id.*

⁴⁰ *Id.* art. 1478.

⁴¹ Decree No. 2011-48, art. 1479.

⁴² *Id.* art. 1481.

⁴³ *Id.* art. 1482.

⁴⁴ *Id.* art. 1484.

⁴⁵ *Id.* art. 1485.

⁴⁶ *Id.* art. 1486.

⁴⁷ Decree No. 2011-48, art. 1487.

⁴⁸ *Id.* art. 1488.

6. *Recourse*

According to the new law, an arbitral award is not subject to appeal unless the parties come to an agreement to allow appeals.⁴⁹ Furthermore, actions to set aside an award are prohibited except where parties have agreed that the award can be appealed.⁵⁰ The basis of setting aside an arbitral award includes situations where the arbitral tribunal declined jurisdiction or wrongly upheld it, the tribunal was not properly constituted, the tribunal exceeded the authority of its mandate, due process was violated, the award was contrary to public policy, and where the award does not state the reasons on which it is based or fails to state the date, names, and signature of the arbitrators making the award.⁵¹ Any actions to set aside an award are to be brought before the Court of Appeals of the place where the award was made. This must be done within one month of the notification of the award.⁵² A decision that denies an appeal or application to set aside an award is considered an enforcement order of the award.⁵³ No recourse can be had against a judicial order that enforces an award.⁵⁴ Furthermore, an order that denies enforcement can be appealed within one month.⁵⁵ Additionally, third parties have the ability to challenge an arbitral award by petitioning the court that would have had jurisdiction had there been no arbitration.⁵⁶ In both international and domestic arbitration, parties may apply for revision of an arbitral award in circumstances provided in articles 595, 594, 596, 597 and 601 to 603.⁵⁷

B. International Arbitration

The provisions covering international arbitration are shorter than those pertaining to domestic arbitration, due to the fact that many of the provisions in Title I cover both domestic and international arbitration. The supporting judge mentioned in Title I also has a role in international arbitration when: the arbitration occurs in France, the parties have chosen French law to govern the arbitration, the parties have granted jurisdiction to French courts over disputes relating to the arbitral procedure or one of the parties is at risk of a denial of justice.⁵⁸ The provisions in Title I that apply to both domestic and international arbitration shall apply unless the parties agree otherwise.⁵⁹ Title II further provides that the arbitral agreement may define the procedure that will be used by the arbitral tribunal,⁶⁰ as well as the choice of law the dispute will be governed by.⁶¹ However, the arbitrators must ensure that parties are treated equally and due process is upheld.⁶² Title II also states that an arbitral award will be recognized and enforced in France as

⁴⁹ *Id.* art. 1489.

⁵⁰ *Id.* art. 1491.

⁵¹ *Id.* art. 1492.

⁵² *Id.* art. 1494.

⁵³ Decree No. 2011-48, art. 1498.

⁵⁴ *Id.* art. 1499.

⁵⁵ *Id.* art. 1500.

⁵⁶ *Id.* art. 1501.

⁵⁷ *Id.* art. 1502.

⁵⁸ *Id.* art. 1505.

⁵⁹ Decree No. 2011-48, art. 1506.

⁶⁰ *Id.* art. 1509.

⁶¹ *Id.* art. 1510.

⁶² *Id.* art. 1511.

long as the award's existence can be proven, and it is not "manifestly contrary to public policy."⁶³ The award can only be enforced with an enforcement order that is issued by the *Tribunal de Grand Instance* of the place where the award was rendered or by the *Tribunal de Grande Instance* of Paris.⁶⁴ Furthermore, the only means of recourse for an international arbitration award made in France is an action to set aside.⁶⁵ There are several reasons why an award would be set aside, including when an arbitral tribunal wrongly upheld or declined jurisdiction, when the arbitral tribunal was improperly constituted, where the arbitrators exceeded their mandate, where there was a violation of due process, and when recognition and enforcement of the award would be contrary to international public policy.⁶⁶ While the parties may waive their right to bring an action to set aside, both parties retain the right to appeal an enforcement order on one of the grounds set forth in article 1520.⁶⁷ In addition, similar to Title I, an order denying recognition or enforcement of an award made in France or abroad can be appealed.⁶⁸

III. ANALYSIS

In several important aspects the new law enhances the efficiency and autonomy of arbitration. First, perhaps one of the most important and positive features is the inclusion of the separability doctrine in domestic and international arbitration. Separability helps to ensure the survival and autonomy of arbitration agreement even if the main contract is found to be invalid. Second, the memorialization of *kompetenz-kompetenz* enhances arbitration's autonomy by clearly defining that it is the arbitrator themselves, and not the judiciary that will determine whether the arbitral tribunal has jurisdiction. However, this must be qualified by the fact that in all likelihood arbitrators will rarely strike down their own jurisdiction due to their financial incentive in sitting on the arbitral tribunal.

The estoppel and *res judicata* effect granted by the new law adds to the legitimacy of the arbitration process by giving arbitral awards a nearly equivalent status with judicial rulings. Also, estoppel and *res judicata* grant finality to the arbitration process, and also prevents parties from turning to the judicial process to re-litigate the same issues. In addition, the lack of appeal in domestic and international arbitration also adds to the finality, efficiency and credibility of arbitration as an institution.

Furthermore, the new laws also pave a path to a fair and just decision by the arbitrators by giving the arbitrators the power to order conservatory or provisional measures, a powerful tool that allows the arbitrators full access to the information they need to make a fair decision.⁶⁹ The Decree's provision requiring the arbitrator's to disclose any information that may impact their partiality guarantees that the arbitral tribunal will be conducted in a fair manner, and also helps to protect the parties' due process rights.

However, the new laws also damage arbitration's autonomy and efficiency in several crucial respects. The "supporting judge" is one of the main culprits in this regard. Arbitration is a technique to resolve legal disputes *outside* the court system, yet the addition of a supporting judge

⁶³ *Id.* art. 1513.

⁶⁴ *Id.* art. 1516.

⁶⁵ Decree No. 2011-48, art. 1519.

⁶⁶ *Id.* art. 1520.

⁶⁷ *Id.* art. 1522.

⁶⁸ *Id.* arts. 1523, 1525.

⁶⁹ *Id.* art. 1468.

in domestic and international arbitration makes the court a permanent player within the arbitration process itself. Moreover, because the supporting judge is endowed with the power to declare that no arbitral appointment be made if he or she feels that the agreement is void and not applicable,⁷⁰ the judge can effectively negate the *kompetenz-kompetenz* principle. The power of the supporting judge makes arbitration seem less like an alternative dispute resolution mechanism and more like a branch of the judiciary.

Another way the new laws damage arbitration's autonomy is the potential the laws create for conflicting jurisdiction between the courts and the arbitral tribunal. While a court must decline jurisdiction if a dispute subject to an arbitration is brought before it,⁷¹ the parties can submit the dispute to arbitration even if their dispute is already before a court.⁷² What happens if the latter instance occurs? What if the arbitral tribunal and the court come to different conclusions? Is the arbitrator's determination simply ignored? This provides for uncertainty in the arbitration process.

Further hampering the efficiency and economy of arbitration are several articles which allow for a *de facto* appeal of the arbitrator's decision, thereby damaging the efficiency of arbitration. The provision mandating that arbitral awards must state the reasons why it was awarded, combined with the requirement that the arbitral tribunal may interpret the award upon application and make additional awards,⁷³ allows for appeal within the arbitral process. This prolonging of arbitration reduces the savings in time and resources that would occur if the arbitral award was final.

Finally, several provisions allow for judicial interference after the tribunal has rendered the award. While it is understandable that an award may be vacated for an arbitrator exceeding their mandate or for violation of due process, awards may also be vacated for violating public policy in both domestic and international arbitration.⁷⁴ "Public policy" reasons are not defined within the Decree, and can provide a pretext for an activist court to vacate an award based on an amorphous reason. Future amendments should explicitly define on what international and domestic public policy grounds a court may vacate an award.

IV. CONCLUSION

The French reform of arbitration has its positives and negatives. The memorialization of several important arbitration principles stand alongside a detrimental internal appeal process within the arbitral tribunal, and numerous ways for the courts to get involved. To improve the recently enacted laws, the supporting judge's role should be minimized if not eliminated entirely, simultaneous proceedings in arbitration and the courts should be prohibited, the arbitrator's ability to render new awards should be limited so as to prevent *de facto* appeal, and public policy grounds for *vacatur* of an award should be clearly defined. If these changes were made to the new laws, arbitration in France would take more than one step forward.

⁷⁰ *Id.* art. 1479.

⁷¹ Decree No. 2011-48, art. 1448.

⁷² *Id.* art. 1446.

⁷³ *Id.* art. 1485.

⁷⁴ *Id.* art. 1491, 1520.