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Newsletter

Carbonnier Lamaze Rasle & associés
SOCIETE CIVILE PROFESSIONNELLE D'AVOCATS

EDITORIAL

PARIS : WORLD ARBITRATION CAPITAL

Can there possibly be a link between the French decision to update its arbitration law and the idea that was floated of relocating (outside France) the ICC (International Chamber of Commerce) and its Court of Arbitration?

Of course, it's a coincidence! The cramped conditions of the ICC premises on the Cours Albert 1er (here in Paris) and a visit to a large show flat overlooking Lake Geneva created a certain tension. However these fears appear to have been groundless. The ICC and its Court will be moving to the soon to be released premises of the Western European Union (WEU) on the Avenue du President Wilson in the 16th arrondissement of Paris.

In fact, the idea of overhauling the present system, which was based on the Decrees of May 14, 1980 and May 12, 1981 with a view to modernization and streamlining, is not new. It comes from the draft code of the French Arbitration Committee which aims to initiate the reform set out in the Decree No 2011-48 of January 13, 2011(see page 2 – "The expected reform of arbitration").

This move was imperative, despite the very high quality of the texts written in the early eighties under the leadership and direction of Gérard Cornu and under the patronage of Henri Motulski. Competition is fierce between those major cities where international arbitration is settled. This competition occurs at all levels, each city defending its particular assets – access to airports and ease of flight connections, quality of hotel accommodation, size and quality of the local legal community, efficiency of local arbitration law and the existence of a more favourable legal environment.

The presence here in Paris of the International Chamber of Commerce and of the Court of Arbitration, the leading global institution for settlement of international commercial disputes, their close links with the United Nations and their influence in the international economic community are remarkable assets for Paris and for France. However, such advantages are not everlasting and we have to be able to maintain our position.

So it was time, thirty years after the innovative texts of 1980 and 1981, to enhance Paris's appeal. Other great international centres of arbitration have upgraded their legal environment in order to develop dispute resolution in this sector.

To maintain our position, it has been necessary to insist on greater transparency and relevance in our arbitration law as well as more exposure to outside influences, both domestic and international. Case law of recent years which has been recognised internationally has favoured arbitration and we have had to embrace these solutions.

The task of consolidating a large portion of existing case law was one of the main objectives of the Minister of Justice and this is clearly stated in his report to the Prime Minister.

The choice was also made to reduce as far as possible "formalism".

Solutions have been taken from foreign systems of law to strengthen the independence of our arbitration and improve its effectiveness.

The Swiss term of "juge d'appui" (support judge) has been adopted. This role in fact already existed but was never recognized in French law.

Maybe from a strictly legal point of view the recognition of such a judge is debatable as he or she is not specialized – an "extraordinary judge" as was said in the past. Regardless, the effect is excellent.

Likewise, we can mention the clarification of the rules on motions.

These changes should help to maintain Paris's position at the forefront of the competition between leading centres of arbitration. This was the original intention of these long-awaited reforms and let's admit it!! We can only be enthusiastic.

However, the task is never finished. Case law will obviously – and we can only be gratified – contribute to the existing set of rules. Further updates are probable in a few years. These new reforms will doubtless be necessary long before the lease has expired for the new premises of the ICC and its Court of Arbitration on the Avenue du President Wilson.

Jean-Jacques DAIGRE
Professor at the School of Law
at the Sorbonne Lawyer at the Paris Bar

Edouard de LAMAZE
Partner
Lawyer at the Paris Bar

SUMMARY

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THE AWAITED ARBITRATION REFORM

Decree No 2011-48 of January 13, 2011 which amends French arbitration law came into force on May 1, 2011. The new law governing both French and international arbitration is now included in Sections 1142 to 1527 of the French Code of Civil Procedure.

The reform will apply to proceedings that will be conducted under arbitration agreements entered into after May 1. For agreements entered into before May 1, only part of the new law will apply if proceedings take place after that date.

Thirty years after rules were established by the decrees of 1980 and 1981, the new reform aims to streamline procedure and make it more effective. The fact that there is a favourable legal environment in France as regards arbitration should be apparent.

One of the main points of the reform is the enactment of certain case law principles linked to decisions handed down over the last thirty years. The decree does not hesitate to take a stand on certain principles of procedure. Designed to better forestall delaying tactics and obstructions to the progress of the arbitration process, the new system strengthens legal security. This is through reinforcing the role of the arbitration tribunal and giving a major role to the "juge d'appui" (support judge).

• The unifying and partial relaxation of rules governing arbitration agreements

The new decree unifies the legal regime of the arbitration clause (concluded prior to litigation) and of the arbitration agreement (concluded after litigation has been initiated) under the one name of "arbitration covenant".

Regarding French arbitration, the validity of an arbitration clause requires a mandatory written document. Otherwise the clause is null and void. The same applies to arbitration agreements. The arbitration covenant may result from an exchange of written documents or simply from a document to which reference is made in the master agreement (new section 1443 of the Code of Civil Procedure, hereafter"CPC").

In the case of international arbitration, the arbitration agreement is not subject to any formal requirement (Section 1507 of the CPC).

In addition, the decree states the principle of total independence of the arbitration covenant from the master contract to which it relates. Thus, the voiding of the master contract in no way nullifies the arbitration covenant.

• Statement of the principle of "competence jurisdiction"

The decree of January 13, 2011 sets out with greater force (in addition to the rule of total independence of the arbitration covenant from the master contract) the principle of "competence jurisdiction" which is now referred to in Section 1465 of the CPC.

A principle universally acknowledged in international arbitration practice, enacted into law by various national legislative bodies, and appearing in different instruments such as the ICSID Convention (Section 41) and the UNCITRAL Model Law (Section 16), the principle of "competence jurisdiction" bolsters the authority of the arbitration court by granting exclusively to this court the right to rule on its jurisdiction.

• Acknowledgement of the role of "juge d'appui"(support judge)

The concept of "support judge" is formally established by this reform. He or she, unless otherwise agreed by the parties, is the President of the Tribunal de Grande Instance of the seat of Arbitration (the President of the Tribunal de Grande Instance de Paris in international arbitration, Section 1505 CPC). The judge may be approached even at the start of proceedings if there is a problem with the setting up or the composition of the tribunal or at a later date if there is a request for an extension of procedural deadlines. However, the parties can in the arbitration covenant designate the President of the Commercial Court as long as the dispute relates to the formation or composition of the arbitration tribunal.

• Authority of the Court of Arbitration increased

The powers of the Court of Arbitration are increased. It can now order a party to produce pieces of evidence, subject to penalties for late production (Section 1468 CPC).

• The Establishment of the principle of "estoppel".

Close to the obligation of good faith in French law, the principle of "estoppel", which applies uniquely to arbitration, is set down in the new Section 1466 of the CPC. It is "a procedural exception intended to punish, for considerations of good faith, contradictions in the behaviour of a party, the latter being bound by his or her past conduct and therefore prevented from making new claims". The aim of this basic rule is to prevent or sanction delaying tactics by certain plaintiffs and thereby contribute to the speed and effectiveness of arbitration proceedings.

• The relaxation of rules concerning notification of awards

The decree allows the parties to choose for themselves how to notify arbitration awards. (Sections 1484 and 1519 CPC). The previous system imposed on the parties notification of awards by way of judiciary service.

• Clarification of remedies

One significant aspect of the reform concerns remedies against arbitration awards. The decree of January 13, 2011 reveals an abrupt change in direction as regards arbitration in France. Cancellation becomes the rule and the appeal process the exception (unless the parties agree). More importantly, the decree removes the suspensive effect of appeals in order to speed up the enforcement of the award (Section 1526 CPC).

In international arbitration, the system of remedies is becoming more transparent whether it concerns awards made in France or abroad. From now on parties have the option to waive expressly, by special arrangement or at any time, the motion for cancellation. (Section 1522 CPC).

This overview, though brief, demonstrates the importance of the reform and the determination of France to remain at the forefront of the world's major arbitration centres.

Antoine FOURMENT
Lawyer at the Paris Bar and the Brussels Bar

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THE INCREASED ROLE OF FRENCH JUDGE IN ARBITRATION PROCEEDINGS

The recent reform of arbitration covered by Decree No 2011-48 of January 13, 2011 confers on the French (state) judge a number of prerogatives and institutionalizes the concept of "support judge".

They are responsible for solving issues raised by the actual arbitration proceedings but also expected to contribute to the process of collecting evidence and can decide provisional measures. From now on they can intervene on numerous occasions before and throughout the arbitration proceedings.

In proceedings where the parties have voluntarily chosen not to submit their dispute to the state jurisdiction (but rather to arbitrators) it is legitimate to wonder whether such a reform was opportune!!

And who is this so-called "support judge"?

In the case of domestic arbitration, unless the agreement between the parties contains a clause specifying the President of the Commercial Court, the support judge is the President of the Tribunal de Grande Instance of Paris (Section 1459 paragraph 1 of the new Civil Procedure Code, hereinafter CPC)

Regarding international arbitration, Section 1505 of the new CPC provides that the support judge shall be the President of the Tribunal de Grande Instance of Paris, unless otherwise agreed between the parties, as long as there exists a connection or link with France. This link is considered valid if (1) the arbitration takes place in France, (2) the parties have agreed to submit their arbitration to French procedural law or (3) the parties have expressly given jurisdiction to French state courts to hear disputes relating to the arbitration process.

In any event, it should be noted that the President of the Tribunal de Grande Instance of Paris has jurisdiction as soon as (4) a party is exposed to a risk of miscarriage of justice.

The judge hears the parties and renders his or her decision as in the case of summary proceedings ("référés"). The decision cannot be subject to any appeal (Section 1463 of the new CPC)

1) The role of the state judge to decide questions of arbitration procedure

The support judge is competent to hear a dispute relating to the composition and constitution of the Court of Arbitration (e.g. impossibility, independence, impartiality, objection to an arbitrator, arbitration clause invalid or insufficient to set up a court).

The judge can also rule on disputes relating to the extension of deadlines in arbitration proceedings.

2) The role of the state judge to collect evidence and decide provisional measures

The French judge may intervene before and during the entire arbitration proceedings.

a) Intervention of the judge prior to the arbitration proceedings

The judge can intervene before any arbitration proceedings, i.e. before the signing of the arbitrators' mission, to authorize provisional or protective measures (Section 1449 of the CPC) or to give orders "in futuram" as provided by Section 145 of the CPC. In the latter case, the orders/measures should tend to the preservation or the establishment of the facts on which the outcome of the case might depend.

b) Intervention of the judge during the arbitration proceedings

Under Sections 1468 to 1506 of the new CPC the judge has jurisdiction to rule on possible temporary seizures or other judicial remedies both in cases of domestic French arbitration or international arbitration. This is an exclusive competence. It is important to realize that claims for money or objects due have to be well grounded and that there must a real possibility of non-payment.

As well, in the event that a party to the arbitration proceedings wants to use a document to which he or she had no access or a piece of evidence in the possession of a third party, he or she can now, subject to the approval of the court, approach the judge to that end.

3) The judge's intervention: a necessary complement to the mission of the Arbitration court

Clearly, the reform of French arbitration practices illustrates the French Parliament's intention to give to the judge a more significant role in arbitration proceedings. This determination confirms the ambition to ensure greater effectiveness and speed.

If the parties elect to have their dispute heard by arbitrators rather than by a French judicial court, it is obvious that they do not want the dispute to be decided by a judge. Nevertheless, it is sure that the attraction of arbitration is based largely on the speed of the proceedings and the state judge, holder of the "imperium" – that is to say the power vested in him to give orders and have public enforcement agencies at his disposal – facilitates the rapidity of the whole process.

Thus, arbitration proceedings have been reinforced in all aspects. They benefit from the efficiency and powers of the French system of justice while maintaining their specificities such as independence and confidentiality

In summary, the French judge is there to facilitate the whole process of arbitration. His greater role resulting from the recent reforms in no way modifies the capability and authority of the arbitrators but rather contributes to their effectiveness.

Dorothée de BERNIS
Lawyer at the Paris Bar
sollicitor in England and Wales

Zoom on the office

RECENT DEVELOPMENTS

Daniel MARMOND
Lawyer
at the Paris Bar

CARBONNIER LAMAZE RASLE & ASSOCIES, through its holding CARLARA INTERNATIONAL, has joined forces with ALCIMUS, a law firm, specialist in labour law.

ALCIMUS, founded in 2004 by Daniel MARMOND, focuses exclusively on providing an advisory service as well as on litigation matters in the field of labour law. It has currently 4 partners and 8 associates and offices in Paris and Lyon.

This acquisition aims to strengthen our capacities in labour law with a strong team of experienced lawyers, well-known in their field. We can thus develop synergies with other member firms of the CARLARA INTERNATIONAL network in France and abroad to better respond to the needs and expectations of our clients.

This new venture follows on the recent developments that have boosted the CARLARA INTERNATIONAL network in Lyon (southeast of France) and in Lille (north of France) since the beginning of 2011.

NEW ARRIVAL IN THE PARIS OFFICE

Marie-Laure BARRE joined the firm as a partner in January 2011.

Member of the Paris Bar since 1991, she holds a PhD in criminal policy and human rights. After working, successively, for the law firm of Henri LECLERC and then Jean-Louis PELLETIER, both prominent criminal lawyers in Paris, she continued to specialize in criminal procedure, general criminal law, criminal business law and family law within the law firm AGID-BLOCK-MOIROUX. She has acquired a vast experience in criminal law matters and criminal procedure that enables her to advise and assist companies as well as individuals in all aspects of this field of law.

Her activity is also internationally oriented (internship in Cordoba in the law firm of Antonio de la RIBA, criminal lawyer (Madrid-Cordoba-London). She was called upon to participate, along with the International Federation of Human Rights, as an expert, in the setting up of certain aspects of Cambodia's criminal law.

FRANCO-ALGERIAN ROUND TABLE

CARBONNIER LAMAZE RASLE & ASSOCIES, represented by Edouard de LAMAZE, its co-Managing Partner and Chairman of the CARLARA INTERNATIONAL network and accompanying him its corresponding partner, Nadir HACENE, lawyer, member of the Paris Bar and practicing mainly in Algeria, welcomed the network members of the Franco-Algerian ICE network (Consulting Engineers Surveyors) to Paris on April 21, 2011. The meeting took place in the offices of CARBONNIER LAMAZE RASLE & ASSOCIES in Paris. This round table included:

- SEM Mohammed BENMERADI, Minister of Industry and Investment,
- the Algerian General Consul in Paris, Mr. Rachid OUALI,
- the Director of the Ministry of Foreign Affairs, European Division in Algiers, Mr. Smail ALLAOUA

as well as other figures from the political world in Algeria. The ensuing discussion concerned economic and financial issues relating to the revival of French investments in Algeria. This is in accordance with the wishes of Mr. Jean-Pierre RAFFARIN, appointed by the President of the Republic Nicolas SARKOZY to attain this objective. Edouard de LAMAZE has worked with Mr. RAFFARIN as " Délégué interministérielle aux Professions Libérales".

Representatives from the business world and the liberal professions (lawyers, accountants, consultants and engineers) contributed to the success of the discussions.

The event was filmed by CANAL ALGERIE; this represents a real milestone in the cooperation between the two countries.

SEMINARS AND TRAINING

Fanny DESCLOZEAUX, a partner in the Banking-Finance-Stock Market department led a 2 day training session for the French banks CIC EST and CREDIT MUTUEL Strasbourg. The subject was bank liability relating to credit cards.

Jérôme GRAND d'ESNON, a partner in the Public Law and Environment department was speaker on March 3, 2011, at a conference concerning local government reform organized by the Forum for the Management of Cities.

He also participated, from March14 to 18, 2011, as leader expert of the French delegation, in the UNCITRAL working group concerning a model law for public procurement.

He was a speaker on March 24 and 25, 2011, on new contractual arrangements for public investment at the XXXVIIIth ICLC Conference in Marrakesh (International Center for Local Credit).

Corinne THERACHE, the head partner of our New Technology and Industrial Property department, was one of the speakers in a seminar organized by the GESTE. The subject was the future of connected televisions and touch pads on the theme: "The control of the screen, legal aspects."

She also participated in the workshop on cybercrime of ADIJ (Association for Development of Legal Information) held on May 11, 2011.

Corinne THERACHE will soon publish an article in IAEL Book 2012 (Association of Entertainment Lawyers) about social networks and the digital right to forget ("The Right to forget and Its practical consequences in social media") and an article about "The Publishing content on connected televisions " in the May issue of the 2011 Légipresse newsletter.

SCP CARBONNIER LAMAZE RASLE & Associés
Law firm - 8, rue Bayard - 75008 PARIS
Tél. : 33 (1) 53 93 61 41 - Fax : 33 (1) 53 76 03 80
55, rue du Président Edouard Herriot - 69002 LYON
Tél. : 33 (4) 78 38 70 00 - Fax : 33 (4) 72 41 98 62
Avenue Louise 137/1-B - 1050 BRUXELLES - Tél. et Fax : 32 (2) 538 02 05
8, rue Anatole France - 59000 LILLE - Tél. : 33 (3) 28 36 51 40
E-mail : avocats@carlara.com - Web : www.carlara.com
Courthouse: P. 298

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MANAGING EDITOR: EDOUARD DE LAMAZE.
CONTRIBUTORS TO THIS ISSUE: JEAN-JACQUES DAIGRE, ANTOINE FOURMENT, DOROTHEE de BERNIS and JULIE NIDDAM.
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