CLEARY GOTTLIEB

Alert Memo

MAY 6, 2011

www.clearygottlieb.com

New French Arbitration Law enters into effect on May 1, 2011

On May 1, 2011, Decree 2011-48 of January 13, 2011 entered into force and reformed French arbitration law to an important extent. The overarching goal of the reform is to modernize French arbitration law and codify important parts of French case law. This memo presents the main features of the newly applicable rules with respect to international arbitration.

1. Agreements to arbitrate: the French liberal approach is reaffirmed

The Decree reaffirms case law determining that the arbitration clause is independent of the contract in which it is found (*id.*, §1447), so that an agreement to arbitrate is not affected by the inefficacy – broadly understood as inexistence, invalidity or termination – of the contract itself.

The well-known principle of kompetenz-kompetenz is also reaffirmed both in its positive sense (*id.*, §1465: "*The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction*") as well as in its negative sense (*id.*, §1148: "*When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.*")

Moreover, the Decree enacts a new rule pursuant to which an agreement to arbitrate need not meet any particular formal requirement in order to be valid. Accordingly, an agreement to arbitrate may be found based upon the unequivocal intent of the parties, even in the absence of any writing.

2. Arbitral tribunals: the constitution of the tribunal is facilitated and the role of "supporting judge" is formalized

The Decree recognizes and officially enshrines the concept of a "supporting judge," meaning a judge acting in support of the arbitration (known as the *"juge d'appui"*). The President of the Paris Court of First Instance has centralized jurisdiction to facilitate arbitration proceedings at all stages and to hear disputes relating to (i) the constitution of the tribunal, (ii) the resignation, inability to serve, or abstention of arbitrators and (iii) the extension of the deadline by which arbitrators shall hand down their award. The role of the

juge d'appui will be of importance for arbitrations that are not conducted under the auspices of an arbitral institution, which is usually empowered to deal with such issues.

Another major innovation is that the Decree introduces France as a forum with universal jurisdiction in cases involving a denial of arbitral justice. As a consequence, a party with a valid agreement to arbitrate that has not been successful in having its claims heard by arbitrators could bring an action before the President of the Paris Court of First Instance in order to have an arbitral tribunal constituted, even if such claims have no link with France.

It should be noted that French domestic courts retain exclusive jurisdiction to issue orders of attachment and orders to produce documents held by third parties.

3. Arbitration proceedings: the powers of arbitrators are clarified and strengthened

The arbitral tribunal's powers have been reaffirmed to expressly include, *inter alia*, the power to order document production, including to impose penalties for non-compliance, as well as provisional or interim measures (with the exception of attachments).

Moreover, a fairness principle inspired by the Common law principle of *estoppel* is introduced into the Decree: *"A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity."* (Id., §1466)

The limits to the broad freedom granted to the parties to organize the arbitration procedure as they see fit are that the arbitral tribunal shall *"ensure that the parties are treated equally"* and shall *"uphold the principle of due process."* (Id., §1510)

Lastly, an overarching standard of swiftness and good faith is codified for arbitrators (as well as for the parties), which requires that they must act *"diligently"* and "*in good faith"* in the conduct of the proceedings. (Id., §1464)

4. Arbitral awards: the effectiveness and binding force of awards are reinforced

The Decree provides that a decision shall be reached by a majority of votes if the arbitration agreement and the applicable arbitration rules are silent on this issue. In order to remedy deadlock situations in which no majority can be reached, a new rule states that the president of the arbitral tribunal may, in this case, decide alone.

Concerning the means of notification of awards, the Decree departs from the traditional civil procedure rule (according to which notification is made by bailiff). The parties may agree to alternative and less cumbersome channels, such as certified mail or even e-mail.

The time limit to bring a claim for interpretation of the award, rectification of typographical mistakes or for omission to rule on a certain issue is rendered to three months from the day of the notification. Unless the parties agree otherwise, arbitrators are required to hand down their decision on this type of claim within three months.

5. Recognition and enforcement of awards: striving for expediency

The Decree codifies and modernizes French law related to recognition and enforcement issues. First, it confirms that exequatur is an *ex parte* proceeding. Second, exequatur may be granted merely upon presentation of a copy of the award. It will no longer be necessary to present the original of the award.

6. Challenges to awards: the option to waive and no automatic stay of enforcement

Two major innovations are introduced into French law concerning awards handed down in France.

First, parties may expressly and by special agreement waive their right to bring set-aside proceedings. Such waiver may be agreed upon at any time and there are no conditions pertaining to the parties' nationalities or residence. As a safeguard, it nevertheless remains possible for parties to appeal any decision granting exequatur of an award. Such an appeal may only be based on the limited grounds provided for at Article 1520.

Second, in order to expedite enforcement of awards in France and to avoid frivolous challenges, the initiation of an action to set aside an award will no longer automatically stay enforcement of the award. A party may nevertheless apply to the *juge d'appui* and seek a specific order staying enforcement in cases where enforcement would be highly detrimental to the rights of that party.

Claims seeking to set aside such awards shall be brought within one month of notification of the award (three months, if the party resides outside of France), whereas under the old rule, the time-period would only start to run from notification of the award with exequatur. This is an important development that will reinforce the finality of arbitral awards.

***

This long-awaited reform makes French arbitration law more efficient and clearer to users and foreign parties. It likely will reinforce France's position as an arbitration-friendly jurisdiction where arbitral proceedings may proceed without domestic court interference, but where the aid and support of domestic courts remains available when needed.

If you have any questions in relation to this memo, please contact Jean-Yves Garaud (33 1 40 74 68 76), Roland Ziadé (33 1 40 74 69 84), Olivier Loizon (33 1 40 74 68 50) or any of your regular contacts at Cleary Gottlieb.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CLEARY GOTTLIEB

Office Locations

New York
One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

Washington
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

Paris
12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

Brussels
Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

London
City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

Moscow
Cleary Gottlieb Steen & Hamilton LLC*
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax
* an affiliate of Cleary Gottlieb Steen & Hamilton LLP

Frankfurt
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

Cologne
Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

Rome
Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

Milan
Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

Hong Kong
Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

Beijing
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax

Buenos Aires
CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
54 11 5556 8900
54 11 5556 8999 Fax

CLEARY GOTTLIEB

Office Locations

New York
One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

Washington
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

Paris
12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

Brussels
Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

London
City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

Moscow
Cleary Gottlieb Steen & Hamilton LLC*
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax
* an affiliate of Cleary Gottlieb Steen & Hamilton LLP

Frankfurt
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

Cologne
Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

Rome
Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

Milan
Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

Hong Kong
Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

Beijing
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax

Buenos Aires
CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
54 11 5556 8900
54 11 5556 8999 Fax