# The New French Law on Arbitration

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A new Law on arbitration was promulgated by the French legislature on 13 January 2011 (Decree 2011–48). The new Law replaces articles 1442 to 1527 of the French Civil Procedural Code (CPC) in their entirety.

The old Law dated back to 1981. It was viewed as modernist and, even though it was introduced before the 1985 UNCITRAL Modern Law on International Commercial Arbitration (the UNCITRAL Model Law), it was considered to be more avant-garde. By interpreting and applying the 1981 Law, the French courts have earned themselves a reputation at the extreme end of the pro-arbitration scale.

The reform is more about recasting the existing law and the often impenetrable judgments of the French Supreme Court that have interpreted and applied the old Law in a user-friendly fashion than improving the substance. This aim led to the decision to rewrite the arbitration section in the Civil Procedure Code anew. That said, in addition to 'codifying' 30 years' case law, there are a few new points of substance worthy of mention.

The relative ease and certainty of enforcement of international arbitration awards around the world under the 1958 New York Convention are two of the principal reasons for preferring arbitration to other forms of dispute resolution. The new Law has removed one of the few obstacles in French arbitral law in the area of enforcement; namely, the suspension of enforcement of awards when an action to set aside or a challenge to enforcement is introduced. Henceforth, under article 1526, CPC awards rendered in France are immediately enforceable. Actions to set aside or to appeal an order for enforcement of an award no longer suspends enforcement. It is only when enforcement would seriously prejudice the rights of one of the parties that the Court of Appeal seized of a motion to set aside or an appeal against enforcement may order that enforcement be temporarily suspended.

Another innovation in the new Law is the ability for parties to an arbitration in France to agree to waive any action to set aside the award. There are no residence or nationality conditions attaching to the exercise of this right, unlike the otherwise similar provisions in Swiss, Belgian and Swedish laws. If the parties specifically agree to waive actions to set aside (the waiver will not be implied), the only avenue of challenge to an award in France (that cannot be waived) is to appeal against court orders for the enforcement of the award.

The new Law has not made any substantive changes to the five limited grounds for court review of an arbitral award upon a set aside motion or appeal against enforcement; it has merely slightly rephrased the wording of the grounds found in article 1520 CPC.

The grounds are where:

- the arbitral tribunal has wrongly assumed or declined jurisdiction;
- there has been an error in the constitution of the arbitral tribunal;
- the arbitral tribunal has rendered an award without complying with its mandate;
- due process has been breached; and
- the recognition or enforcement of the award is contrary to international public policy.

The dividing line between the arbitral tribunal's and the courts' spheres of action has also been reinforced by the new Law. There are three instances when recourse to the courts is considered absolutely necessary in the arbitral process. The new Law carefully limits court interference to these three instances.

The first situation is when the tribunal is being constituted. The supporting judge, who, with the aim of ensuring consistency of decisions, is expressly nominated in international arbitrations as the president of the Paris High Court, may rule on motions to appoint arbitrators but only when the parties have not chosen an arbitral institution or other person responsible for administering the arbitration. When ruling on any such motion, no substantive assessment of the validity of scope of the arbitration agreement is permitted. The motion will be determined after verification by the court only that the arbitration agreement is not 'manifestly void' or 'manifestly non-applicable'.

The second case is when third-party disclosures are sought. The new Law permits the parties, upon invitation by the arbitral tribunal, to apply to the supporting court for assistance.

Finally, the new Law recognises the jurisdiction of the French courts to act as supporting judge of an arbitration when a party to an arbitration is exposed to a risk of denial of justice regardless of where that arbitration is taking place.

The new Law is universally recognised as having been well and clearly drafted. With its codification of the case law under the previous 30-year-old text and the few substantive changes, this Law has arguably placed France again at the very forefront of pro-arbitration policy.

### Conflicts of interest for arbitrators

The system by which arbitrators are appointed is often simplistically referred to as the ability of the parties 'to choose their own judge'. This is not accurate since in the case of sole arbitrators, the arbitrator is appointed by an appointing authority chosen by the parties unless the parties agree among themselves on a given individual; in three-person tribunals, while each party usually has the right to nominate its own party-nominated arbitrator, again the third arbitrator who will act as chairman will be nominated by the parties' chosen appointing authority unless again the parties agree among themselves on a candidate.

This limited degree of party autonomy over the appointment of the tribunal is further reduced by the universal principle that arbitrators are, at all times, to be independent of the parties and the dispute.

This principle of independence is found in the UNCITRAL Model Law (which is the basis for the legislation on arbitration in over 80 countries) and in most institutional rules, and forms part of the codes of ethics for arbitrators of the IBA and the AAA. What this principle means in practice is, however, much debated.

Objectively, arbitrators should be independent. This means asking the hypothetical reasonable person what they think about the relevant circumstances. Subjectively, the parties should be asked what they think. Are there any circumstances that cause the parties to have doubts as to the arbitrator's independence? What the arbitrators themselves think is elemental, attaching to which is an obligation of inquiry. Finally, there are the requirements of the national legal orders in which the arbitration is to take place or produce its effects. Inevitably, there is a constant shifting between these different aspects of the question. At present, the impression is that the objective viewpoint is enjoying a certain predominance. While this approach provides for a degree of efficiency and certainty, it is not without its problems.

The ongoing annulment proceedings before the French courts of *Tecnimont v Avax* in respect of an ICC arbitral award is emblematic. The arbitration began in 2002. In summer 2007, by the time the merits phase was coming to a close, but before a partial award had been issued, Avax raised doubts over the links between the global law firm (JD), of which the chairman of the tribunal (Mr SJ) was a partner and the Tecnimont group of companies. In September 2007, Avax requested the removal of Mr SJ before the International Court of Arbitration of the ICC. The request was dismissed in October 2007. Avax reserved its rights as to Mr SJ's independence when continuing to participate in the arbitration. The partial award on the merits, condemning Avax, was rendered in December 2007.

Avax brought annulment proceedings against the partial award before the French courts. The Paris Court of Appeal upheld Avax's application and annulled the award on 12 February 2009. Tecnimont appealed that decision to the Cour de Cassation, which upheld the appeal on the sole grounds that the Court of Appeal had ruled on facts that had not been invoked by Avax and had thus modified the nature of substance of the case. The Cour de Cassation has thus remitted the case to a different Court of Appeal (this time of Reims) to retry the annulment application.

Nevertheless, the Paris Court of Appeal's decision remains an interesting source of debate. The problem faced by Mr SJ was one of objective independence. Indeed, he himself had never worked for either of the parties or their groups. His global law firm had and indeed, unbeknown to Mr SJ, continued to do so during the course of the arbitration. Although Mr SJ had argued before the ICC Court that what matters is the arbitrator's independence and not that of his law firm, the Court of Appeal considered that such structural conflicts are the stuff by which objective independence may be attacked. Notably, the Court's finding was expressly stated in terms of the existence of a conflict of interests rather than a lack of independence (the existing provision of the Civil Procedure Code does not specifically refer to an obligation of independence – article 1452).

While the links between JD and one of the parties (or its group) were found to have been varied (advice, representation and assistance) and extensive (more than €100,000 billed over the relevant time), the idea of structural independence is not without its problems. The growth of independent boutique firms of arbitrators over Europe is often cited as a result of 'too many conflicts of interests'. This means, however, that the already relatively small world of experienced arbitrators is becoming smaller if counsel in multijurisdictional firms are effectively disqualified. Although this trend may eliminate the problem of structural conflicts, it bears another, namely a risk to subjective independence. While Mr SJ knew no-one in Tecnimont or its group, the chances of one of the limited circle of experienced arbitrators knowing the counsel by whom he is proposed both professionally and socially are high. Much greater care may need to be taken, at least in some cases, when probing this type of 'conflict'.

Another focal point of the challenge to Mr SJ before the Paris Court of Appeal was his performance of the obligation to declare matters that may give rise to doubts over his independence. It seems that Mr SJ's answers to questions made by Avax prior to the challenge before the ICC Court regarding the links between Mr SJ's law firm JD and the Tecnimont group were incomplete. We learn from the Appeal Court's decision that while an arbitrator is not required to declare matters of which he is ignorant, his initial declaration of independence carries with it an obligation of investigation that must be undertaken thoroughly and thereafter, at the very least, when probed by a party during the course of the arbitration, the arbitrator must investigate and answer such questions diligently. Further, it is not for the arbitrator to pick and choose as to what he should disclose; the answers must be complete. A failure to do so may give rise to a reason to challenge the resulting award (if not in and of itself a problem of independence).

Another question, not considered in the Tecnimont case, is the extent to which the parties can themselves waive an arbitrator's lack of independence. From the point of view of party autonomy, they obviously should be able to do so. From the point of view of the legitimacy of arbitration within any given national order, the answer is by no means so obvious. The principle of estoppel by which a party is prohibited from contradicting its earlier conduct on which the other party has relied militates against allowing challenges of this nature to succeed. There may well come the day, however, when the European Court of Human Rights is seized of a claim of this nature and a wise man would be wary to second-guess how that Court may rule.

### Arbitration, third parties and consent

The absence of third parties from an international arbitration proceeding is one of the major differences between arbitration and court litigation. While a court has its jurisdiction limited territorially (with many exceptions), an arbitral tribunal has its jurisdiction limited in personam. Situations arise nevertheless when one or other of the parties to an arbitration may wish to involve a non-signatory to the arbitration agreement. This may be because the claimant considers that a parent company of its contracting party is more solvent and should be held liable for the faults of its subsidiary; or because of the involvement of a disclosed or undisclosed agent in the commercial relationship between the parties; or because the harm has been caused not only by a contracting party but also by the tortious acts of a third party; or because a third party holds vital evidence; and so on.

What may be seen as inroads to this principle are, in fact, no more than extensions of what is meant by 'consent'. Where that consent is express, there is obviously little difficulty in allowing a non-signatory to the arbitration agreement to join a pending arbitration proceeding as a party. When that consent is to be inferred, however, is where the problems start. First, there is the factual

investigation – as a matter of fact, did the three persons consent. Two other inquiries surround the factual scenario: in which legal framework is the factual matrix to be analysed – a question of applicable law to be determined by the applicable rules of private international law; and by whom – a question of jurisdiction?

The recent dispute over a contract for the construction of accommodation for pilgrims in Mecca in *Dallah v Pakistan* that has passed through the hands of an ICC arbitral tribunal sitting in France, of the United Kingdom Supreme Court and of the Court of Appeal of Paris has shed a somewhat variable light on when gatecrashers may don an invitee's clothing.

Dallah was a member of a Saudi group of companies. It signed a memorandum of understanding with the government of Pakistan pursuant to which Dallah agreed to acquire land in Mecca to build pilgrim accommodation on it and then to lease the land to the Pakistani government. Dallah acquired the land. The Pakistani government established a Trust for the purposes of implementing the project. Dallah and the Trust entered into a formal and full agreement to which the Pakistani government was not a signatory, whether as a party, a guarantor or otherwise. The agreement contained an ICC arbitration clause in Paris. After a change of government in Pakistan, the project broke down.

The Trust issued proceedings in the Pakistani courts against Dallah for repudiation of the agreement. Dallah commenced an ICC arbitration against the Pakistani government. The Pakistani government challenged the jurisdiction of the arbitral tribunal claiming that it was not a party to the arbitration agreement. The arbitral tribunal issued three awards: in June 2001, it issued a partial award finding that it had arbitration to determine Dallah's claim; in January 2004, it issued a second partial award holding that the Pakistani government had repudiated the agreement and directing that damages were to be assessed; and in June 2006, it issued its final award ordering the Pakistani government to pay Dallah almost US$19 million in damages plus almost US$1.7 million in costs.

Dallah sought to enforce the final award in the English courts. The Pakistani government objected under the English enactment of the New York Convention 1958 (section 103 of the Arbitration Act 1996) on the ground that there was no arbitration agreement. When the case came to the Supreme Court in 2010, the Court asked five questions:

- Was the enforcing court entitled to conduct its own examination of jurisdiction – in this case whether the Pakistani Government was a party to the arbitration agreement? The Supreme Court answered 'yes', it being a fundamental aspect of the New York Convention that the arbitral tribunal's finding on jurisdiction is not final. The enforcing court is entitled and indeed required to conduct a full investigation.
- Which law governed the arbitration agreement? The Supreme Court answered under the New York Convention that this was French law as the place of arbitration since there had been no specific choice of law by the parties – the arbitration agreement being autonomous from the main agreement and the choice of law to the main agreement not necessarily applying to the arbitration agreement.
- What was the test under French law to determine whether Pakistan was a party to the arbitration agreement? Having heard expert evidence on French law, the Supreme Court answered that there must be an investigation of the objective evidence to discern whether the subjective intentions of all three persons (Dallah, the Trust and the Pakistani government) was, for the non-signatory party, to be bound by the arbitration agreement;
- On the basis of those answers, could the Supreme Court uphold the arbitral tribunal's finding that it had jurisdiction over the Pakistani Government? The Supreme Court answered 'no' because the tribunal had applied what was called the 'alter ego theory' rather than the subjective intentions theory and that on the basis of the evidence there were no sufficient grounds to find that the Pakistani government consented to arbitration.
- Did the enforcing court have a residual discretion to uphold the award despite a finding that the arbitral tribunal did not have jurisdiction? The Supreme Court answered 'no, not here'.

No doubt emboldened by this ruling, the Pakistani government moved before the Court of Appeal of Paris to have the award annulled (the tribunal having its seat in France). Its swagger, however, turned into a stumble.

Although the Paris Court of Appeal did not explicitly adopt the same five-step analysis, its judgment can be reviewed by asking the same questions. In answer to the first (applying mutatis mutandis given that instead of being a question of enforcement the case was

one for annulment in the place of arbitration), the Court of Appeal came to the same conclusion as the Supreme Court: namely that, under the French rule (modelled on the New York Convention), a de novo examination of the issue of jurisdiction is to be undertaken by the reviewing court. It was in answer to the second question on applicable law that the Paris Court of Appeal diverged from the UK Supreme Court. Instead of finding that French substantive law should apply, the Paris Court of Appeal applied the rules developed by the Cour de Cassation in *Dalico* (1993) to the effect that the conflicts rules applicable in international arbitration are less strict than those applicable before the courts, such that no specific national law has to be applied to the question of jurisdiction and thus consent. When answering the third question, the French court undertook an objective review of the facts to see whether from an economic standpoint the third entity was and had behaved as a party to the contract without expressly seeking a manifestation of subjective common intent. When it applied that test – and in answer to the fourth question – the Paris Court of Appeal found that, on the facts (including the involvement of the Pakistani government in the pre-contractual negotiations), the creation of the Trust was purely formal and that, with Dallah's consent, it was the Pakistani government that was the true Pakistani party to the agreement. The fifth question was thus no longer applicable, the Court of Appeal having found reason to uphold the award on jurisdiction rendered by the arbitral tribunal.

The difference between these two judgments on precisely the same question goes further, therefore, than a simple disagreement on the facts. It lies in an understanding of the conflict of laws rules applicable (at least in France) to the question under the New York Convention of which law is to be applied to the issue of jurisdiction. It was here that the proponents of the transnational or a national concept of international arbitral law were more persuasive before the French courts than they had been before the UK Supreme Court.

Another issue that this difference of findings between the UK Supreme Court and the Paris Court of Appeal raises is the solidity of one of the bedrocks of international arbitration; namely that of consent. Two high-level instances experienced in issues of international arbitration law in two advanced and civilised jurisdictions each steeped in a different legal tradition came to the opposite conclusion on exactly the same issue of consent applying exactly the same rules. This singular fact is a salutary reminder that arbitration is not only dependent upon the consent of the parties but also on the acceptance of that very institution by each legal regime within which it operates. The terms of that acceptance continue to differ from one jurisdiction to another despite the continuing and laudable moves towards harmonisation personified in the instruments such as the New York Convention, the UNCITRAL Model Law and the like.