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The Form of the International Arbitration Agreement under the 2011 French Arbitration Law

Michael Wietzorek (Taylor Wessing) · Thursday, April 7th, 2011 · YIAG

The 1981 French Arbitration Law did not contain a provision covering the form or the proof of an international arbitration agreement. The former Article 1499 of the Code of Civil Procedure (“CCP”) indirectly addressed the issue of form by stipulating, in the context of the recognition and enforcement of awards, that the existence of an award shall be established by submitting the original document together with the arbitration agreement. It was unclear whether it was legitimate to infer that this article requires a written arbitration agreement or at least an arbitration agreement evidenced in writing. Most commentators have concluded that French international arbitration law contains no requirements of form (*cf.* in detail and with further references Gaillard/Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer 1999, §§ 606-610).

Under the new law, Article 1507 CCP clearly expresses that an international arbitration agreement shall not be subject to any requirements as to its form. In the light of considerations made e.g. by the Austrian legislator in 2006, it remains to be seen how non-French courts will deal with arbitration agreements that are valid under Article 1507 CCP, but do not meet the form requirements of the New York Convention: Section 583 of the Austrian Code of Civil Procedure contains a modern form requirement for arbitration agreements (English translation available [here](#)). Yet, the Austrian legislator decided against a further liberalization of the form, due inter alia to the consideration that an arbitral award rendered on the basis of an arbitration agreement concluded in a form more liberal than the form required under the New York Convention might not be recognized and enforced in other jurisdictions (*cf.* “Erläuterungen” = Explanations, 1158 der Beilagen XXII. GP – Regierungsvorlage – Materialien p. 9, available [here](#)).

Book IV, Title II, Chapter III of the CCP is dedicated to recognition and enforcement of arbitral awards made abroad or in international arbitration. Article 1514 CCP provides that an arbitral award shall be recognized or enforced in France if the party relying on it can prove its existence (and if such recognition or enforcement is not manifestly contrary to international public policy). Article 1515(1) CCP, like the old Article 1499(1) CCP, provides that the existence of an arbitral award shall be proven by producing the original award, together with the arbitration agreement, or duly authenticated copies of such documents.

Given that French law is applicable to the validity of the arbitration agreement, Article 1515(1) CCP read together with Article 1507 CCP raise the question how a party will produce, for example, an oral arbitration agreement. Certainly, the requirement “producing (...) the arbitration agreement” by itself could be interpreted widely to mean that the party relying on the arbitration

agreement could also produce a witness who may be able to testify to the existence of the arbitration agreement. The French term “produire un témoin” (to produce a witness) might be a point in favor of such an interpretation (the author of the present paper is not a native speaker of French). However, Article 1515(1) CCP is satisfied by producing “duly authenticated copies of such documents”. This can lead to the conclusion that both an arbitral award and an arbitration agreement, in the sense of Article 1515(1) CCP, have to be in the form of a document which can be copied and authenticated. While an arbitral award will be in such a form, such interpretation would not cover all valid arbitration agreements in the sense of Article 1507 CCP.

Thus, what happens in a case where recognition or enforcement of an international arbitral award based on an oral arbitration agreement is sought in France? A similar question already existed under the previous law (Gaillard/Savage, § 1576), with the difference that the requirement as to the form of the arbitration agreement is now clearly expressed in Article 1507 CCP. This question is likely not to become one of the crucial issues in connection with the new French arbitration law: In international practice, arbitration agreements are usually not concluded only orally (Gaillard/Savage, § 1576; cf. also the German “Draft of a Law on a New Regulation of the Law of Arbitration Procedure”, BT-Drucksache 13/5274, 12 July 1996, p. 36 – available [here](#)). However, a similar question might arise in any situation where the party requesting recognition or enforcement of the arbitral award is unable to produce a document containing an arbitration agreement, yet it follows from the circumstances of the case that the parties agreed to arbitrate (cf. with examples Otto, Article IV, III.B.3., in: Kronke/Nacimiento et. al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards*, Kluwer 2010, 143, 168).

There are several ways how the conflict between Article 1507 CCP and Article 1515(1) CCP could be solved:

- (1) There is no relation between Article 1507 CCP and Article 1515(1) CCP, with the result that while an oral arbitration agreement can be validly concluded under Article 1507 CCP, such agreement will result in an arbitral award that due to Article 1515(1) CCP cannot be recognized or enforced in France. This interpretation would only “solve” the conflict as long as the recognition and enforcement stage – and thus, the conflict itself – is not reached.
- (2) Article 1507 CCP is to be interpreted in the light of Article 1515(1) CCP, meaning that an international arbitration agreement shall not be subject to any requirements as to its form, as long as the arbitration agreement can be evidenced in the form of a document. Such interpretation is against the wording and against the purpose of Article 1507 CCP, which is to “enshrine the principle” according to which the arbitration agreement is not subject to any requirements as to its form (“L’article 1507 consacre le principe...”, cf. Accompanying Commentary to Article 1507 CCP; available [here](#)). A result would also be that a great number of parties who comply with arbitral awards voluntarily and thus never reach the recognition and enforcement stage would also unnecessarily be bound by a stricter form requirement than that of Article 1507 CCP.
- (3) Article 1515(1) CCP is to be interpreted in the light of Article 1507 CCP. This would mean that the requirement to produce the arbitration agreement in Article 1515(1) CCP – in cases where such agreement cannot be evidenced in the form of a document – is also satisfied by the production of any other evidence showing that there is a valid arbitration agreement (compare Gaillard/Savage, § 608, who concluded that the old Article 1499 CCP merely required “that the plaintiff should put the court hearing the action for enforcement in a position to establish, *prima facie*, the existence of an arbitration agreement”). Such interpretation would balance Article 1515(1) CCP and Article

1507 CCP, giving the most possible effect to both provisions. Based on this interpretation and in light of the explicitly stated requirement as to the form of the international arbitration agreement, it is now even more “conceivable that a court hearing an application for enforcement of an award made on the basis of an oral arbitration agreement could disregard the procedural requirement for an original or certified copy of the award and make do with other forms of evidence appropriate to the situation” (Gaillard/Savage, § 1576) than it was under the previous law.

Considering that the requirement to produce the arbitration agreement or a certified copy thereof had been criticized already under the old French law (cf. Gaillard/Savage, § 1576 with further reference), the French legislator could also have reconsidered the previous Article 1499(1) CCP, and accordingly have drafted the new Article 1515(1) CCP differently: The experience in other jurisdictions shows that it is not absolutely necessary to require the submission of the arbitration agreement or a copy thereof when requesting recognition or enforcement of the arbitral award: In Germany, the courts reach such conclusion by means of interpreting Section 1064(1) and (3) of the German Code of Civil Procedure (English translation available [here](#); for the interpretation, cf. only Oberlandesgericht Düsseldorf, 15 December 2009, Germany No. 135, in: XXXV Y.B. Com. Arb. 386-388, para. 4 (2010)). Section 614(2) of the Austrian Code of Civil Procedure expressly states that the “presentation of the original arbitration agreement or a certified copy thereof (...) shall only constitute a requirement if requested by the court”.

The English translation of the 2011 French Arbitration Law by Gaillard/Leleu-Knobil/Pellarini was used (available [here](#)).

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