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Arbitrating Family Disputes in France

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Even though the use of arbitration in commercial disputes is widely established in Europe, most European countries seems unwilling to use arbitration in family matters although it provides for the same benefits to parties. England seems to perfectly understand the opportunity and necessity to use arbitration in such disputes in the domestic realm, thanks to the implementation in 2012 of the Institute of Family Law Arbitrators and the support of state judges. In 2020, the Court of appeal decided in the *Hayley v Hayley* case, that the challenge of an arbitral award ruling on matters of family law would be treated in a more flexible matter by subjecting it to the rules of appeal against a court decision, rather than the stricter rules provided by the Arbitration Act 1996.

French family lawyers, law professors, notaries and arbitration experts have developed both in theory and practice, the application of arbitration in family law. This commitment has resulted mainly in the creation of the Arbitration Center for Family Disputes (*Centre d'Arbitrage des Litiges Familiaux* ("CALIF")) in 2019, followed by the implementation of the *Centre de Médiation et d'Arbitrage des Notaires de Paris* ("CMANOT-Paris") or Paris Notaries' Mediation and Arbitration Centre.

As described in this post, over the years, the French legislator has built a solid legal ground for Alternative Dispute Resolution's ("ADR") in family law which, combined with the French arbitration legislation, constitutes a solid ground for the development of Family Arbitration in France. This breeding ground has yet to be developed in order for French Family Arbitration to be on a par with its neighbors across the Channel.

The Conditions for the Deployment of Arbitration in Family Law in France

For the past few years, French family law has been subject to a "contractualization" movement with the development of ADR (especially family mediation), and the implementation of *divorce par consentement mutuel* (contractual divorce without any intervention of a judge). In fact, the desire of French legislators and practitioners to introduce willingness and proactiveness of the parties in family law constitutes a favorable ground for the deployment of arbitration in this field, especially for the financial aspects of divorce.

Arbitrability in French law

Under Article 2059 of the French Civil Procedural Code ("FCPC"), parties do not have the free disposal of all their rights: unavailable rights cannot be arbitrated, especially "*questions of status and capacity of a person*", and "*those relating to divorce and legal separation*" (Article 2060 of the FCPC). These articles only cover extra-patrimonial rights, and thus, divide family matters into two categories: on one hand, patrimonial issues that can be submitted to arbitration and, on the other hand, extra-patrimonial issues that must be excluded from the scope of domestic arbitration.

Therefore, cases involving the legal state and capacity of a person such as filiation, child custody arrangements, the very principle of divorce or the very principle of *prestation compensatoire* (compensatory allowance) cannot be arbitrated.

Conversely, cases that can be resolved with arbitration include:

- cases strictly involving patrimonial issues (inheritance -except for the status of heir-, liquidation of matrimonial regimes or joint ownership, determination of claims between spouses separated by property, fate at the time of the divorce of a *société civile immobilière* (SCI) (property management company) constituted by spouses…). Should also be added here subjects for which state judges have no more interest in (damages, return of household goods, faith of the engagement ring…);
- cases involving both patrimonial and extra-patrimonial issues (quantum and modalities of the *prestation compensatoire*, the challenging of *divorce par consentement mutuel*), and for which arbitration would be a better tool compared to state-run justice.

It is important to underline that articles 2059 and 2060 of the FCPC are not applicable to international arbitration. Hence, the opportunity to arbitrate extra-patrimonial issues in a case where "*international trade interests are at stake*" (Article 1504 of the FCPC) could be accepted in principle.

Effectiveness of the Arbitration Agreement

Like any type of arbitration cases, an arbitration agreement or an arbitration clause is necessary to arbitrate family law issues. Regarding domestic arbitration, Article 2061 of the French Civil Code provides that the arbitration clause is unenforceable in specific fields (employment, consumer, and insurance contracts). However, it does not appear that family law would be subject to this kind of exception. Thus, notaries and family lawyers could easily insert such a clause in family contracts (prenuptial agreement, divorce agreement, or co-ownership agreement…).

Independence and Impartiality

The proper functioning of an arbitration procedure requires the independence and impartiality of the arbitral tribunal. Regarding domestic arbitration, Article 1456 of the FCPC provides for the obligation for arbitrators to disclose any element that could affect their independence or impartiality.

Article 8 of the CALIF Arbitration Rules also requires the same obligation.

Equality of the Parties, Celerity of the Procedure and Availability of Arbitrators

Parties in family litigations are particularly in need of equality. From the nomination of the arbitrators to the time allocation during the hearing, the arbitration procedure put in place by the CALIF Arbitration Rules allows the parties to be heard and most importantly, to feel that they have been heard.

The rapidity and confidentiality of the procedure, as well as the availability of arbitrators, also enable the parties in family disputes to have control over the procedure.

Thus, French law constitutes a breeding ground for the use of arbitration in family disputes. However, this ADR is still not well known and well used: French family law practitioners are reluctant to include an arbitration clause in their family contract. So what remains to be done?

Prospects for the Deployment of Family Law Arbitration in France

The creation of the CALIF allows family law professionals to have a space to discuss and reflect on ways to promote arbitration in family matters by highlighting its advantages and suggesting legislative changes.

The CALIF is the most blatant example of the strength and unity of the French family law community: lawyers, notaries, law professors, and arbitration experts are all working together to spread awareness by providing training, organizing conferences, writing articles, and exchanging with other European colleagues in family law.

All its members are motivated by the desire to add arbitration clauses to their family contracts, and to address this method of dispute resolution to certain clients for whom arbitration could be a better solution.

Another driver is that French state-run justice is notoriously slow. It can take two to four years to obtain a final decision on the divorce, and another two to four years for the liquidation of the matrimonial regime. Having to wait four to eight years to find a judicial response to a family dispute is an additional source of suffering for the parties. Through arbitration, they could obtain the settlement of their dispute within a time frame that they can control with their lawyers, thanks to the arbitration agreement.

Complex financial family disputes can be stressful for the parties, their lawyers, and state judges, especially because of their technical aspects and high financial stakes which necessarily implies a lengthening of the procedure. In this situation, arbitration appears to be the best remedy because of its inherent benefits (confidentiality, celerity…).

In commercial arbitration, it is not uncommon for a hearing to take place over an entire day or week. Such an organization makes sense in family law: the arbitral tribunal will have the opportunity to take the time needed to hear the parties through their counsel and cross-examine

witnesses and experts. Thus, the parties will feel that they have been heard.

The arbitrator knows the case before the hearing, unlike the judge, and the award is motivated, which allows the litigant to better accept it.

Thus, arbitration in family law allows the parties to reappropriate their dispute and reduce a certain number of resentments. The proper and practical introduction of arbitration in family law is becoming a necessity.

Conclusion: Changes Required Under French Law

As of today, French law is a fertile ground waiting to be cultivated. However, the intervention of the legislator would be a good fertilizer.

On one hand, Articles 2059 and 2060 of the FCPC are obsolete, and require a legislative reform, which may take some time and is not a priority for the French Parliament. Another solution would be for the French legislator to expressly allow arbitration for the *prestation compensatoire.*

On the other hand, reforming Article 1516 of the FCPC appears to be an easier and more realistic solution: allowing the judge of the divorce to homologate an arbitral award that has dealt with patrimonial issues and integrate it into the divorce judgment, which will simplify the recognition and enforcement of the award and avoiding the exequatur procedure.

It is now the responsibility of French family law professionals and family arbitration enthusiasts to insist and explain to their peers the usefulness of inserting an arbitration clause in their family contracts, and to disseminate to arbitration professionals the virtues of arbitration in family law matters.

These changes should not be seen as a barrier to starting to use arbitration in family law right now.

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