Kluwer Arbitration Blog

Looking Across Borders: French Arbitration Law Reform in Light of English and German Advances

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On 20 March 2025, a working group consisting of arbitration practitioners, judges, arbitrators, and academics submitted a report to the French Minister of Justice. The report included proposals to reform French arbitration law to enhance its efficiency and international appeal. These proposals will be presented and discussed during Paris Arbitration Week on 8 April 2025 in the Main Amphitheatre of the Sorbonne University.

The reform of French arbitration law presents an opportunity to reinforce Paris as a leading choice of seat for international arbitration. It is advisable that the measures adopted in the recently enacted 2025 English Arbitration Act (see previous posts here) and draft revised German arbitration law (see here and here) be considered as part of the reform process in order to remain competitive. Particular attention should be given to the amendments adopted relating to the law applicable to the arbitration agreement, the deference given to the arbitral tribunal's findings, and the enforceability of provisional measures.

Impact of the 2025 English Arbitration Act

The 2025 English Arbitration Act, which received royal assent on 24 February 2025 (see also here) and amends the 1996 Arbitration Act, spreads across eighteen sections and makes six noteworthy changes:

1. Setting a clear default rule for the law applicable to arbitration agreement;
2. Codifying arbitrators' duties of disclosure;
3. Clarifying arbitrators' powers to make awards on a summary basis when there is "*no real prospect of success*";
4. Increasing deference to the arbitral tribunal on challenges of substantive jurisdiction;
5. Increasing support of emergency arbitration; and
6. Strengthening arbitrator immunity pertaining to resignation.

These changes have been described as evolutionary rather than revolutionary, as many of the amendments involve codifying existing caselaw (*for example,* the duty of disclosure as established in *Halliburton v Chubb*) or a nudge of encouragement, such as encouraging arbitrators to be bold in face of due process paranoia through reassurance that summary dismissal is authorised under

English law (despite it already being provided for under most major arbitral rules).

Law Applicable to the Arbitration Agreement

The most notable change from the 2025 English Arbitration Act, which is equally of interest to the French arbitration law reform, is undoubtedly the setting of a default rule for the law applicable to the arbitration agreement. The 2025 English Arbitration Act overrides the multi-step test established by *Enka v Chubb* regarding the law applicable to the arbitration agreement and applies the law of the seat by default, unless agreed by the parties to the contrary. This is a welcome amendment in its simplification of a complicated issue that, while known to arbitration practitioners, was often unknown to transactional lawyers inserting arbitration clauses into contracts and notably absent from leading institutions' model arbitration clauses – including the ICC model clause.

The choice of the default rule is perhaps surprising considering the *Kout Food* saga in that the 2025 English Arbitration Act essentially adopts the French law position as the default position – a position that had been previously characterised as "*illogical*" by the UK Supreme Court.

In *Kout Food*, the UK Supreme Court and French Cour de Cassation came to different conclusions regarding the enforcement of an arbitral award against a non-party precisely due to the issue of whether French or English law applied to the arbitration agreement. The UK Supreme Court applied the test set out in *Enka* to apply the law of the contract (English law), whereas the French Cour de Cassation applied the law of the seat (French law), under which the effectiveness of the arbitration clause is determined by reference to the common will of the Parties subject to mandatory French law and international public order.

The English Arbitration Act's amendment therefore appears to be a capitulation to pragmatism with the benefit of closing the risk of contradictory judgments across the Channel. Accordingly, the French arbitration reform should equally adopt this default position to codify the Cour de Cassation's position in the *Kout Food* saga and provide clarity to international parties going forward.

Deference to Findings of the Arbitral Tribunal and Waiver

Another point from the 2025 English Arbitration Act worth emulating is the deference to the findings of the arbitral tribunal. The revised English Arbitration Act attempts to move further away from *de novo* review, specifically in reference to challenges under Section 67 to substantive jurisdiction. France may wish to similarly codify the level of review to be applied to challenges to arbitral awards, particularly as they relate to challenges on the basis of international public policy, such as corruption, where the arbitral tribunal could have made a finding on those issues.

As it currently stands, following the Cour de Cassation decision in *Sorelec v Libya*, a party can raise corruption allegations for the first time during enforcement proceedings and have the French courts undertake a full *de novo* review of those allegations irrespective of whether the party raised the defence before the arbitral tribunal. This approach has been characterised as maximalist and potentially encroaches into the territory of revisiting the merits of the dispute.

The French law reform should take this opportunity to align with the English law position – which arguably strikes a better balance between addressing corruption and respecting the prohibition on reviewing the merits of an award along with procedural fairness. While combating international corruption is crucial, the *Sorelec* decision could be moderated to exclude corruption allegations that could have been raised before the arbitral tribunal and to allow deference to the findings of the arbitral tribunal. This approach aligns with the English law stance as demonstrated in *Province of Balochistan v Tethyan Copper Company*, which applied section 73(1) of the English Arbitration Act regarding the loss of right to object to corruption allegations, and *Westacre v Jugoimport*, which deferred to the arbitral tribunal's dismissal of corruption allegations.

Notably, the UK Government declined to address corruption in the 2025 English Arbitration Act after a healthy exchange in the House of Lords, which included Lord Hoffmann's practical perspective as arbitrator in the infamous case of *Nigeria v PI&D*. The rejected amendment would have imposed an obligation to "*safeguard the arbitration proceedings against fraud and corruption*". Notably, Lord Hoffmann warned that such a provision could "*create uncertainty and unnecessary difficulties in the way in which arbitrations are conducted*" and lead to challenges based on allegations that the tribunal did not do enough to investigate whether there was corruption. France also should similarly exercise caution before imposing any positive obligation on tribunals regarding corruption.

Enforceability of Provisional Orders

Finally, the French arbitration law reform should draw inspiration from both the English Arbitration Act and the draft revised German arbitration law, to increase the enforceability of provisional measures issued by the arbitral tribunal. The draft German arbitration law would allow for provisional measures issued by international arbitral tribunals to be enforced in the German courts, subject only to limited exceptions mirroring the criteria under the New York Convention.

While section 42 of the 1996 English Arbitration Act already provided a mechanism to enforce provisional orders of the Tribunal in the English courts, the 2025 English Arbitration Act has extended this enforcement mechanism to the decisions of emergency arbitrators.

As it stands, in France, in order for arbitral interim measures to be enforceable in the French Courts, they must qualify as an award under French law (see Paris Court of Appeal, 7 October 2004, No. 2004/13909). While the French Courts have previously found arbitral provisional measures to qualify, as they finally decide the dispute as to the requested provisional measures, this legal reasoning is not universally accepted as provisional measures are by their very nature provisional.

Therefore, it would be preferrable to follow the English and German approach and explicitly provide for the enforcement of provisional measures. By expressly providing for court enforcement, the French arbitration law will likely increase voluntary compliance by parties subject to arbitral provisional measures, thereby reducing the need for court enforcement in the first place.

Conclusion

While the working group's recommendations have yet to be released, the upcoming reform of French arbitration law presents an opportunity for France to enhance its role in international arbitration. To remain competitive, it is essential to consider the recent amendments to the English Arbitration Act and the draft revised German arbitration law, particularly regarding the law applicable to the arbitration agreement, the deference given to the arbitral tribunal's findings, and the enforceability of provisional measures. This is indeed a valuable opportunity for France to not only update its regulations to keep up with competing jurisdictions, but also a chance to innovate. The Paris arbitration community eagerly awaits the conference on 8 April 2025 to hear more about these updates and innovations.

The opinions expressed in this article are solely those of the author and do not necessarily reflect the views or positions of Herbert Smith Freehills LLP.

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