Recourses against arbitral awards in ICC arbitration held in Paris:
Review of novelties of the French laws of procedure after 2011

By Kenneth Weissberg and Sabra Ghayour, attorneys to the Paris Bar.

24.03.2015

When international arbitration takes place under the auspice of the ICC and where the seat is Paris, unless the parties expressly provide for a specific law to regulate proceedings, the laws of the seat, i.e. of France, are generally held to govern procedural issues, and this, whether the Arbitrator(s) or parties are French or not.

French procedural rules for arbitration are provided in the French Civil Code of Procedure. On May 1st 2011 however, a new **Decree n°2011-48 of January 2011** came into effect, changing certain procedural rules that had been enacted by the previous Decree N°81-500 of 1981.

When it comes to **means of recourses against arbitral awards**, the new law of 2011 provides for certain novelties in the areas of national and international arbitration:

➲ <u>In a national arbitration</u>

Under the old law of 1981, direct appeal of an arbitral sentence was the general rule and it was up to the parties to provide otherwise in their arbitration agreement[1]. This has been completely reversed in the new 2011 law: **awards shall not be subject to appeal unless otherwise agreed by the parties**[2].

Such an appeal can be brought as soon as the ICC award is rendered. However, the deadline to bring the action has shortened with the new law: the recourse is no longer admissible if not filed within a **month from notification of the award**[3], whereas parties had until **one month from service of an award that had been opposed with the enforcement formula**[4] **(domesticated)** under the prior law.

[1] Article 1482 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[2] Article 1489 of Decree N° 2011-48 of 13 January 2011
[3] Article 1494 of Decree N° 2011-48 of 13 January 2011
[4] Enforced by a national court decision; Article 1486 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981

Under both the old and the new law, the appeal filed within the legal deadline **suspends enforcement of the arbitral award**[5].

➲ In international arbitration

The 2011 law unambiguously sets that an **action to set aside is now the only possible recourse against arbitral sentences, where they've been rendered in France**[6]. The law of 1981 also provided for this possibility but did not explicitly exclude other recourses, such as an appeal[7].

It is important to distinguish between a **direct appeal of an arbitral award**, which allows the Court of Appeals to **amend the arbitral award, which may still be enforced**, and an **action to set aside** which annuls an award that could therefore no longer be enforced, and which may only be brought on one of the listed legal grounds of article 1520 the Civil Code of Procedure[8]:

"1°- the arbitral tribunal was wrongfully retained or denied jurisdiction,
2°- the arbitral tribunal was improperly constituted,
3°- the arbitral tribunal ruled without complying with the mission conferred upon it,
4°- the principle of due process was not complied with, or
5°- recognition or enforcement of the award is contrary to international public policy."

Though an appeal is always possible against a court decision granting or refusing enforcement of an arbitral award, a direct appeal of the arbitral award is now expressly prohibited in the context of international arbitration.

Under both the old and new law, the recourse may be brought as from the rendering of the award[9], but again, the deadline has been shortened with the new law: parties now have until **a month from notification of the award** to commence the appeal[10], whereas they previously had until **a month of service of an award declared enforceable**[11]**.In an international arbitration an award rendered in France must be properly served in compliance with French procedures, namely by a French process server.**
An important novelty of the new law is that the deadline and the filing of **actions to set aside no longer suspend enforcement of the award**[12], which was the case under the previous 1981 text[13]. This is however tempered by the sitting judge's[14] power to suspend or set conditions for enforcement, if it considers it may seriously harm a party's rights.

[5] Article 1496 of Decree N° 2011-48 of 13 January 2011, Article 1486 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[6] Article 1518 of Decree N° 2011-48 of 13 January 2011
[7] Article 1504 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[8] Article 1520 of Decree N° 2011-48 of 13 January 2011, and 1502 of of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[9] Article 1519 of Decree N° 2011-48 of 13 January 2011, and 1505 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[10] Article 1519 of Decree N° 2011-48 of 13 January 2011
[11] Article 1505 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[12] Article 1526 of Decree N° 2011-48 of 13 January 2011
[13] Article 1506 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[14] "Juge d'appui" in French

Two additional issues regarding appeal/setting aside recourses:

➲ Transitional rules

In asking which law to follow, the old or the new, in determining recourse rights against an arbitral award, Article 3 of the 2011 Decree explains that:

- The new national arbitration rule reversing the prior rule, which granted an of right possibility of direct appeal and made actions to set aside the exception, only applies if the **agreement to arbitrate** dates **after May 1st 2011**(date of entry into force of the Decree);
  As a consequence, if the agreement dates after May 1st 2011 direct appeal of the award is not possible unless parties agree otherwise, but if it dated before May 1st 2011, the appeal is possible, unless otherwise agreed by the parties.

- The new rule stating that an appeal or action to set aside may not suspend enforcement of awards in international arbitration applies only if the **arbitral award is rendered after May 1st 2011.**
  So, if the arbitral award is dated after May 1st 2011 the deadline or the filing of an action to set aside, or an appeal (of a decision granting or refusing enforcement and not of the award itself) will not suspend enforcement, but if the award is rendered after May 1st, it will.

- Other than a few other exceptions in the transitional rules, other dispositions of the 2011 law apply as of May 1st 2011. As a consequence, the new shortened deadline to commence recourses, i.e. ending a month from notification of award, applies as of May 1st in both national and international arbitration. So, **regardless of when the agreement to arbitrate was signed, the award rendered or the arbitral tribunal constituted**, parties now only have until one month from notification of, no longer an *exequatured* award (which takes longer to obtain), but of a simple arbitral award, to commence their recourse, .

➲ Notification and Service of arbitral award

When is an arbitral award successfully notified: is service (by bailiff) required or is simple notification enough? The question is important in assessing the starting point of the month-long deadline to commence a recourse.

The difference is also of high importance since service to a party living abroad will necessarily increase the delay to commence a recourse by 2 months[15], therefore granting opposing party 3 months to commence setting aside action in the case of arbitration.

[15] Article 643 and 680 Code of Civil Procedure

Simple notification, on the other hand, does not impose this additional "distance delay". In fact, its content and form has yet to be defined by courts. The procedure is therefore less constraining.

The prior 1981 law allowed only one notification method in both national and international arbitration: service by way of bailiff[16]. Simple notification was not an option.
The 2011 rules are slightly more lenient, allowing parties to opt for simple notification in some cases:

a/ International arbitration

In international arbitration, notification must be done by way of service through bailiff, unless otherwise agreed by the parties[17].

The question therefore becomes: when could we consider that parties have agreed to simple notification? In institutional arbitration, does adopting arbitration rules that provide for notification by the institution constitute agreement to simple notification of the award?

A recent Court of Appeals case[18] qualified notification by way of service as a procedural guarantee and set that parties must **unequivocally manifest their will to renounce this guaranty**.

As a consequence, though ICC Rules of Arbitration provide that the Secretariat shall notify arbitration awards to the parties, an agreement to adhere to such rules does not constitute *unequivocal and manifest renunciation* to service by bailiff and is not enough to count as notification[19]. At the most, such notification by the Secretariat only releases ICC's duty of notification and does not replace the parties' obligations[20].

In other words, in an international ICC arbitration an award rendered in France must be properly served in compliance with French procedures, unless parties expressly renounce to this, or else there will be no fixed deadline for bringing setting aside proceedings in front of the French court of appeals[21].

b/ National arbitration

Though the new Decree states that notification of national arbitration awards must be generally done through service process unless parties agree otherwise[22], its specific dispositions on recourses do not impose such a distinction[23], unlike the dispositions on international arbitration (as seen in par. a)).

[16] Articles 1486 and 1503 of Code of Civil Procedure, as enacted by Decree N°81-500 of 1981
[17] Article 1519 of Decree N° 2011-48 of 13 January 2011
[18] CA Paris, pôle 1, ch. 1, 4 juill. 2013, n°12/08215
[19] Antoine KIRRY et Geoffroy GOUBIN, *Un progrès en trompe l'oeil : le nouveau texte sur la notification des sentences rendues en France en matière d'arbitrage international* : Procédures 2014, étude 5, par.4
[20] CA Paris, pôle 1, Ch.1, 6 mars 2014
[21] Articles 651 and onward of the Civil Code of Procedure
[22] Article 1484 of Code of Civil Procedure
[23] Article 1494 of Code of Civil Procedure

It therefore seems that simple notification may be freely adopted by parties in national arbitration conducted in France.

This is confirmed by a recent Court of Appeals decision where the only reasons stated by the judge for not retaining the date of notification by way of registered letter with acknowledgement of receipt was the fact that the photocopy of the receipt was illegible and did not allow to affirm what exactly was sent and by whom[24]. It was solely on grounds off evidentiary difficulties that the court retained the later date of service by bailiff as the starting date of the month-long period to commence action.

In national arbitration therefore, it seems that the rule is less strict and parties need not expressly renounce to notification by way of service in order to use simple notification methods.

[24] CA Lyon, Ch.8, 14 Octobre 2014, N°13/03727