The International Arbitration Review

Editor

James H Carter

Law Business Research

The International Arbitration Review

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Second Edition

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Dewey & LeBoeuf LLP
New York
July 2011

Chapter 13

FRANCE

Jean-Christophe Honlet, Barton Legum and Anne-Sophie Dufêtre[*]

I INTRODUCTION

The past 12 months have seen notable developments regarding international arbitration in France. A long-awaited reform of domestic and international arbitration was finally implemented at the beginning of 2011. In March 2011, a report that was jointly requested by the Ministry of Justice and the Ministry of Finances ('the Prada Report') highlighted the importance of consolidating Paris's role as a place of international arbitration. A few weeks later, Paris was confirmed as the seat of the International Court of arbitration of the International Chamber of Commerce ('the ICC'), the world's preeminent institution for international commercial arbitration, despite rumours of a move to Vienna or Geneva. A number of court decisions have also been rendered, showing the vitality of French international arbitration case law, which remains as arbitration-friendly as ever.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The ICC World Council and Executive Board adopted the new ICC Rules of Arbitration mid-June 2011. As of 20 June 2011, they are not yet public. It is likely that the new rules will enter into force on 1 January 2012. In this context, the new French Decree on arbitration has essentially eclipsed other recent developments in France, although many international arbitration specialists, particularly in France, continue to follow with some concern EU attempts to regulate international arbitration. This deals both with the ongoing revision of the Brussels I Regulation as well as the Commission's attempts to substitute EU substantive and procedural protections (which do not include a recourse

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to international arbitration) to intra-EU bilateral investment treaties ('BITs') (which provide for international arbitration).

New French Decree on arbitration

On 1 May 2011, Decree No. 2011-48 of 13 January 2011 reforming French law of domestic and international arbitration and modifying the French Code of Civil Procedure (the 'Decree' and the 'CCP' respectively) entered into force. French arbitration law has been at the forefront of the field since the prior reform in 1980–1981. There are few if any countries in which the arbitral process runs its course as unencumbered by local court interventions as in France. Similarly, French courts have always shown great deference to decisions of arbitrators when reviewing international arbitral awards. Over time, this has made Paris one of the most attractive and most frequently chosen places for international arbitration.[1]

The Decree reinforces the ingredients that have made Paris such an attractive place for international arbitration. Its primary purpose is to make French law more accessible to international arbitration users outside of France, by codifying some of the most significant case law developments of the past 30 years. It also introduces several new provisions, inspired by international best practices, with a view to reinforcing the speed and efficiency of the arbitral process. Adopted after several years of close consultation with arbitration users and the arbitral community, and therefore tailored to their needs, the Decree has already been unanimously hailed as a success. The following are among the most salient developments of the Decree in terms of international arbitration.

Specialised judge acting in support of the arbitration

Article 1505 of the CCP institutionalises the position of a specialised 'Judge acting in support of the arbitration'. In international arbitration, and unless otherwise stipulated, such judge will be the President of the *Tribunal de Grande Instance* of Paris if the arbitration takes place in France or in certain other circumstances. The mission of the judge supporting the arbitration is to help the arbitral process to the extent necessary, for instance in the constitution of the arbitral tribunal, but not to interfere with the process. The fact that this task is entrusted to one senior judge having significant experience in international arbitration ensures that it will be exercised with sophistication, experience and deftness.

Challenges do not stay enforcement of awards

The Decree breaks new ground in removing the presumption that enforcement of an award is stayed until the French courts decide any application to set aside the award (Article 1526 of the CCP). Under prior law, actions to set aside an award made in France automatically stayed enforcement of the award on the French territory. This provided an incentive to file dilatory actions. Such dilatory tactics are no longer possible. A judge will

1 For a short introduction to French international arbitration law, see, *The International Arbitration Review*, First Edition, 2010, Page 98.

exceptionally be able to suspend enforcement, but only upon a showing of risk of severe prejudice to the rights of a party.

Waivers

The Decree makes it possible for parties to waive their right to file an action to set aside an award before French courts (Article of the 1522 CCP), which was not permitted under prior law. An express waiver is recommended for parties wishing to exclude setting-aside proceedings. Such a waiver cannot in any event prevent a party from defending against enforcement of the award, whether in France or elsewhere.

The Decree also deems a party to have waived any irregularity in the arbitral procedure if the party, knowingly and without a legitimate reason, fails to object to it before the arbitral tribunal in a timely manner (Article 1466 of the CCP).

Notifications

A practical step to increase the speed and efficiency of arbitration in France is that awards no longer need formal approval by a court (*exequatur*) before being served on the other party and thereby beginning the period in which any challenge to the award must be filed. Under Article 1519 of the CCP, the time for challenging an award made in France (one month, plus two months if a party is located outside of France) now runs from the date of service of the award on the opposing party, without any need to obtain *exequatur* first. The parties also have the possibility to agree upon the required mode of service of the award.

Confidentiality

While Article 1464 al. 4 of the CCP refers to the principle of confidentiality in domestic arbitration, there is no similar provision applicable in international arbitration. If parties wish to remove any doubt that international arbitration proceedings seated in France are confidential, they should so stipulate in the arbitration clause and, better, provide for sanctions for breach of confidentiality.

EU law developments

As reported in last year's chapter, the 2009 Green Paper of the European Commission suggested the partial deletion of the 'arbitration exception' set forth in Article 1.2 of the Brussels I Regulation.[2] In particular, the Green Paper proposed to give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity and scope of an arbitration agreement. This proposal attracted strong criticism from a number of international arbitration specialists, particularly in France, who noted that, if implemented, parties who agreed to arbitration may, in many cases, be forced

2 Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 21 April 2009, COM(2009) 175 final, item 7, Pages 8–9. *The International Arbitration Review*, First Edition, 2010, Page 100.

to resort to state courts prior to starting their arbitration, when their principal purpose when agreeing upon arbitration was precisely to avoid state court litigation.[3]

Following the Green Paper and the debate it has sparked, the European Parliament stated in its resolution of 7 September 2010 that it '[s]trongly oppose[d] the (even partial) abolition of the exclusion of arbitration from the scope [of the Brussels I Regulation]'.[4] The European Parliament '[c]onsiders that Article 1(2)(d) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation'.[5]

In December 2010, the European Commission issued its proposal for the revision of the Brussels I Regulation.[6] One of the stated goals of the Commission is to improve the interface between arbitration and litigation.[7] The Commission noted that, although arbitration is excluded from the scope of the Brussels I Regulation, an arbitration agreement may be challenged before a court. As a consequence, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings that could lead to different results.[8] Under the draft regulation, a court seised of a dispute would be obliged to stay proceedings if its jurisdiction were contested on the basis of an arbitration agreement and an arbitral tribunal were seised of the case (or court proceedings relating to the arbitration agreement were commenced in the Member State of the seat of the arbitration).[9] This proposal embraces in part the principle of competence-competence. If the European Commission's proposal were adopted, the European Union would become competent in the field of international arbitration

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3 French Committee on Arbitration, Re: EC Green Paper on proposed modifications of Regulation 44/2001, 15 June 2009.

4 European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No. 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), Article 9.

5 *Id.* at Article 10.

6 European Commission, Proposal for a Regulation of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final, 14 December 2010.

7 *Id.*, Explanatory Memorandum at Paragraph 1.2, fourth bullet point.

8 *Id.*

9 *Id.* at Paragraph 3.1.4. See also *id.*, new proposed Article 29(4) ('Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes. Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction [...]').

regarding the application of that principle.[10] The draft regulation has yet to be reviewed by the European Council and Parliament in the framework of the co-decision procedure – a process that could take several years. It will remain closely watched in France and beyond.

ii Arbitration developments in local courts

French courts have rendered a number of decisions relevant to international arbitration since May 2010.[11] Many of these decisions have reaffirmed well-established principles, such as competence-competence or the prohibition to review arbitral awards on the merits. We focus below on three series of cases. The first deals with the disclosure obligations of arbitrators; the second with how French courts review the jurisdiction of arbitral tribunals; and the third with how they gradually continue to circumscribe the notion of estoppel.

Independence of arbitrators

Last year in the *Tecnimont* case the Paris Court of Appeal set aside an ICC award in a situation where the chairman of an arbitral tribunal did not disclose all of the links between the law firm where he was 'of counsel' and one of the parties to the arbitration – although he may not himself have been aware of these links.[12] On 4 November 2010, the Court of Cassation, France's highest court in civil and commercial matters, quashed this decision on a purely technical ground (i.e., the Court of Appeal had modified the subject matter of the dispute in violation of Article 4 of the CCP).[13] The Court of Appeal had ruled that the aggrieved party did not know of the alleged conflict of interests before

10 Emmanuel Gaillard and Pierre de Lapasse, *Le nouveau droit français de l'arbitrage interne et international*, Dalloz, 20 January 2011, No. 175, at Paragraph 47.

11 We already reported last year on the 17 May 2010 decision of the *Tribunal des Conflits*. In that case, the *Tribunal des Conflits* decided that, in principle, and subject to certain exceptions, French judicial, as opposed to administrative, courts had jurisdiction to deal with an action to set aside an award rendered in France in the matter of international arbitration when a French public entity is a party and the contract is administrative in nature. *The International Arbitration Review*, First Edition, 2010, Pages 103–104. The case ended through a decision of 26 January 2011 of the Court of Cassation, which rejected a challenge against a decision of the Paris Court of Appeal of 13 November 2008. The Court of Appeal had itself rejected the action to set aside the award, which had ordered the French public entity, INSERM, to pay damages. It is possible that the legislator may be called to suppress the jurisdictional duality resulting from the *INSERM* decision. It is not desirable and it is also difficult for international operators to understand that depending on whether a French public party has entered into a contract with a non-French party, different French courts may be called to review the resulting award.

12 CA Paris, 12 February 2009, Case No. 07/22164. *The International Arbitration Review*, First Edition, 2010, Page 101.

13 Civ. 1, 4 November 2010, Case No. 09-12716. Article 4 of the CCP provides in essence that the subject of the dispute is determined by the respective claims of the parties and may be modified by interlocutory claims if they have a sufficient link with the initial claims.

the partial award was rendered, while this party in fact appeared to have relied on 'almost the totality' of the same facts in recusal proceedings against the arbitrator before the ICC Court, that took place before the partial award was made. The matter was remanded to the Reims Court of Appeal.

Several other decisions were rendered on the question of arbitrators' independence and impartiality and related disclosure obligations.

On 20 October 2010, the Court of Cassation quashed two decisions of courts of appeal, which had refused to set aside arbitral awards in two different cases where a co-arbitrator had repeatedly been appointed by companies of the same group (51 appointments in the first case and 34 in the second) without disclosing this fact to the other party in the arbitration.[14] The court held that the systematic appointment of an arbitrator by companies of the same group created a 'business stream' between the arbitrator and such group of companies that ought to have been fully disclosed.

In a decision rendered on 9 September 2010, the Paris Court of Appeal referred to the same notion of 'business stream' to set aside an award in a case where one of the arbitrators did not fully disclose the extent of such business stream (whether through arbitral appointments or otherwise) between him and the law firm who was counsel to the party that had appointed him.[15] It had emerged during the arbitration that, in addition to receiving his arbitrator appointment, the arbitrator had been consulted on several occasions on various points of law by the law firm in question in unrelated cases. This was deemed to be disclosable.

On 11 March 2011, the Paris Court of Appeal similarly set aside an award rendered by an arbitral tribunal where one of the arbitrators was formerly of counsel at the law firm in which the counsel for the party who had appointed the arbitrator was an associate.[16] This too was deemed to be disclosable and had not been disclosed.

Except for *Tecnimont*, such decisions were rendered in the matter of domestic arbitrations. There is reason to believe, however, that the same principles would apply *mutatis mutandis* in international arbitration cases.

Review of arbitrators' jurisdiction

Two recent decisions are noteworthy.

On 6 October 2010, the Court of Cassation rendered a important decision in the *Abela* case.[17] The Abela brothers had created a Liechtenstein corporation and sold their shares in that corporation to two 'foundations' dealing with the family's businesses. The by-laws of the Lichtenstein corporation provided for arbitration. A dispute arose between certain members of the family. An arbitral tribunal seated in Paris and applying French substantive law was constituted. The brothers who had created the Lichtenstein

14 Civ. 1, 20 October 2010, Cases No. 09-68997; Civ. 1, 20 October 2010, Case No. 09-68131.

15 CA Paris, 9 September 2010, Case No. 09-16182.

16 The counsel had acted in her personal capacity and not as an associate of her firm, as is permitted under French law.

17 Civ. 1, 6 October 2010, Case No. 08-20563.

corporation but who were no longer shareholders on the date the arbitration was commenced were nevertheless made respondents to the arbitration. They disputed the jurisdiction of the arbitral tribunal. The tribunal declined jurisdiction with regard to the Abela brothers because, in the tribunal's view, they were not parties to the arbitration agreement. On 22 May 2008, the Paris Court of Appeal set aside the award and decided that the brothers, in spite of the fact that they had sold their shares, had behaved as the true shareholders of the corporation and, for that reason, should be held as true parties to the arbitration agreement. That decision was challenged before the Court of Cassation, which upheld the decision of the Court of Appeal and thus confirmed that the arbitrators had wrongly declined jurisdiction in this case.

The decision is interesting in two respects. First, it confirms the long-standing position of the Court of Cassation set out in the *Pyramids* case, according to which a French court is entitled to seek 'all elements of fact and law' in order to review the arbitral tribunal's jurisdiction at the annulment stage.[18] Second, it makes clear that the nature of the review is the same whether the arbitral tribunal upheld or declined its jurisdiction. Such review is a consequence of the competence-competence principle. If arbitrators are given priority to decide on their jurisdiction, as is clearly the case under French law, a true review of such jurisdiction must exist at the annulment or enforcement stage. The outcome of the *Abela* case has already been codified in the new Decree on arbitration. Pursuant to Article 1520 of the CCP, a French court may annul an award rendered in France in an international arbitration if the arbitral tribunal 'wrongly upheld or declined jurisdiction.' Pursuant to Article 1525 of the CCP, the same test applies to actions for enforcement in France of awards made outside of France.

On 17 February 2011, the Court of Appeal of Paris also rendered a decision in the *Dallah* case.[19] The claimant, Dallah Real Estate Tourism and Holding Company (Dallah) had entered into a Memorandum of Understanding with the President of the Islamic Republic of Pakistan, whereby Dallah committed to acquire real estate and build some housing in Mecca, Saudi Arabia, to accommodate Pakistani Hadj pilgrims in Mecca. A separate contract containing an ICC arbitration clause with a place of arbitration in Paris was signed between Dallah and a trust created by the government of Pakistan concerning the same project. Due to reasons involving Pakistani law, the trust expired only a few weeks after the conclusion of the contract. Dallah commenced arbitration against the Ministry of Religious Affairs of the government of Pakistan directly. The arbitral tribunal, after some hesitation, decided that the Ministry of Religious Affairs of the government of Pakistan was party to the arbitration clause. It was ordered to pay damages as a result of the contract. A challenge was brought by the Ministry of Religious Affairs of the government of Pakistan before French courts to annul the awards retaining jurisdiction. The Paris Court of Appeal conducted a factual and legal review of the arbitrators' finding regarding jurisdiction and concluded, like the arbitrators, that the Ministry of Religious

18 Civ. 1, 6 January 1987, Case No. 84-17274.

19 CA Paris, 17 February 2011, Case. No. 09/28533.

Affairs of the government of Pakistan was the 'true Pakistani party for the purposes of the economical operation.'[20]

The decision generated some surprise, mostly outside of France, because, on 3 November 2010, the United Kingdom Supreme Court had reached an opposite conclusion, applying French law as well.[21] It refused to enforce the award in the United Kingdom. Although the two decisions are inconsistent in their outcome, it is noteworthy that they applied the same test under French law, namely whether the respondent was the 'true party' to the economic operation and the contract containing the arbitration clause. However, they drew different conclusions from the same facts.

Estoppel

Estoppel was introduced as a concept of French law of international arbitration in 2005,[22] but the concept remained vaguely defined until the *Merial* case in 2010. In that case, the Court of Cassation defined estoppel as a party's procedural conduct which amounts, in law, to a change in position creating an erroneous belief as to that party's intentions.[23] In other words, the Court of Cassation introduced the notion of 'detrimental reliance', which is well known by common lawyers as a constituent ingredient of estoppel. Interestingly, the new Article 1466 of the CCP, which deems a party to have waived any irregularity in the arbitral procedure if the party, knowingly and without a legitimate reason, fails to object to it before the arbitral tribunal in a timely manner, is described as estoppel by the report to the Prime Minister regarding the new Decree on arbitration, although the term is not used in the Decree itself. This is arguably a broader definition than that retained by the Court of Cassation in *Merial* because it equates in essence estoppel to a procedural waiver. Whether practical consequences, and if so which ones, attach to the two different approaches is still unclear, however. Estoppel remains an embryonic notion under French arbitration law.

A case recently clarified one further element from the procedural regime of estoppel though. On 2 December 2010, the Paris Court of Appeal decided that failure by an arbitral tribunal to apply the 'rule of estoppel', assuming that it is proven, cannot constitute a breach of international public policy and thus a ground for annulment of an award under French law, except in case of procedural fraud, which was not alleged in the case at hand.[24] In that case, a contractor had taken a position on the merits of the case in an ICC arbitration on the basis of a certain reading on a termination clause in a construction contract. That party subsequently alleged in the arbitration that the contract contained an error in cross-references, which could be explained under the

20 *Id.*

21 *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46.

22 Civ. 1, 6 July 2005, Case No. 01-15912.

23 Civ. 1, 3 February 2010, Case No. 08-21288. See *The International Arbitration Review*, First Edition, 2010, Page 102.

24 Paris CA, 2 December 2010, Case No. 09-15742. The authors were counsel for one of the parties in this case.

circumstances and also explained its initial and erroneous position in the arbitration regarding the reading to be made of the termination clause. This party therefore changed its position regarding the interpretation of the clause while the arbitration was pending, as is permitted under the ICC Rules of Arbitration. The arbitral tribunal agreed with the revised position and confirmed that there was a drafting error in the contract. On the basis of what it viewed as the correct reading of the contract, it held that the employer had wrongly terminated the contract. The Court of Appeal refused to set aside the award. As a result of that decision, estoppel can only constitute a ground to challenge the admissibility of an action to set aside an arbitral award ('*fin de non recevoir*'), for instance if a party took inconsistent positions before the arbitral tribunal and the court reviewing the award regarding the existence of an arbitration clause, but it cannot be used to set aside the award on grounds of violation of international public policy, except in case of procedural fraud, which was not alleged here. Although the Paris Court of Appeal did not use those words, the decision is an illustration of the principle, again well known by common lawyers, that estoppel, in spite of its many facets, is generally 'a shield, not a sword.'

iii Investor–state disputes

It appears that France was made a party to a dispute under a BIT for the first time in 2010, although no details are publicly available about the case.

On 18 November 2010, the Paris Court of Appeal also rendered its second decision regarding investor–state disputes.[25] In that case, the government of the Region of Kaliningrad, a region of the Russian Federation ('the Region') sought to set aside an ICC award rendered in favour of the Republic of Lithuania on the basis of the BIT between the Russian Federation and the Republic of Lithuania ('the BIT').

Pursuant to a banking loan agreement that had not been reimbursed by the Region, a London Court of International Arbitration ('the LCIA') award had been rendered against the Region and enforced in the Republic of Lithuania under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As a result, some real property of the Region was seized in Lithuania by the LCIA award's beneficiary. The Region alleged that such enforcement constituted an expropriation of its property rights under the BIT. The ICC arbitral tribunal declined jurisdiction on grounds that the BIT did not constitute an appellate mechanism of the decisions of enforcement rendered by Lithuanian courts under the New York Convention. The Region asserted before the Paris Court of Appeal that the arbitrators had misconstrued their mission and misinterpreted the respective scopes of the BIT and the New York Convention. The Paris Court of Appeal rejected the action and first held, using the *Abela* formula referred to *supra*, that the court was entitled to review arbitrators' awards accepting or declining jurisdiction through a review of both facts and law and that no different standard applies to the review of the arbitrators' jurisdiction when a bilateral investment treaty forms the jurisdictional basis for the arbitration. The court then proceeded with a review of

25 The first was a decision of the Paris Court of Appeal of 25 September 2008; see *The International Arbitration Review*, First Edition, 2010, Page 104.

the provisions of the BIT, the Vienna Convention on the Law of Treaties and the New York Convention to conclude that the arbitrators were correct in their finding of lack of jurisdiction.

The remainder of French interest in investor–state disputes over the past 12 months has concentrated on the question of BITs in the context of the European Union. Since the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union has exclusive competence in relation to foreign direct investment.[26] This has raised uncertainty and debate as to the future of BITs concluded by EU Member States. In this context, the European Commission published a draft regulation and an accompanying communication designed to address that uncertainty.[27] As regards the approximately 1,100 BITs currently in force between EU Member States and third countries, these agreements remain binding on the Member States as a matter of public international law. The draft regulation will authorise their continued existence. However, these BITs may have to be modified in order to bring them in compliance with EU law. The draft regulation thus establishes a framework and conditions so that Member States can enter into negotiations with a third country with a view to modifying an existing BIT. Under the draft regulation, Member States are also empowered under certain conditions to negotiate and conclude new BITs with third countries, but this possibility should be viewed as an exceptional transitional measure until the EU fully exercises its exclusive competence in foreign direct investment. The accompanying communication notes that future EU agreements on investment protection should include investor–state dispute settlement. However, the EU is currently unable to invoke ICSID arbitration since the 1965 ICSID Convention is open to ratification only by states that are members of the World Bank or party to the Statute of the International Court of Justice. The Commission intends to explore the possibility of the EU acceding to the ICSID Convention, which would require amending the ICSID Convention, a result that can only be achieved by a unanimous decision of the signatories and is thus unlikely. The draft regulation still needs to be approved by the European Council and Parliament – a process that may take some time given the tide of criticism the proposal has attracted from Member States and members of the European Parliament.

The draft regulation does not encompass the 191 existing BITs between EU Member States (the intra-EU BITs). The Commission has indicated on several occasions that it considers that the possibility granted in some intra-EU BITs to resort to

26 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

27 Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010) 344 final, dated 7 July, 2010, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions towards a comprehensive European international investment policy, COM(2010)343 final, dated 7 July, 2010, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

investor–state arbitration is incompatible with EU mandatory law and the EU's judicial system as it creates a discrepancy of treatment between EU Member States. For instance, a Czech investor investing in Italy will benefit from the protection of a BIT, while a French investor investing in Italy will not. In the words of the Commission, '[e]ventually, all intra-EU BITs will have to be terminated.'[28] However, most Member States do not share this view.[29] Replacing the substantive, but most importantly the procedural protections of a BIT, including first and foremost access to international arbitration, by domestic remedies providing for access to courts of EU Member States applying EU law, may be understood as a step backwards regarding investor protection. If the Commission were to prevail on that question, EU investors wishing to invest in another EU country may have an interest in setting up investment vehicles outside of the EU in order to attract the protection of a BIT, a rather paradoxical result.

III OUTLOOK AND CONCLUSIONS

The entry into force of the Decree will no doubt reinforce France and particularly Paris as a place of arbitration, as will the confirmation that the ICC headquarters will remain in Paris. France thus emerges from the past 12 months as more attractive than it already was as a place for international arbitration. Recent cases have shown, however, that French courts do not hesitate in sanctioning arbitrators for what they deem to be fundamental breaches of the arbitrators' duties, such as the absence of disclosure of information that may cast a reasonable doubt on the arbitrators' impartiality and independence or wrongly accepting or declining jurisdiction. This too is a sign of vitality.

28 *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, PCA Case No. 2008-13, UNCITRAL, available at http://ita.law.uvic.ca/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf, Paragraph 182 (quoting Observations of the European Commission, dated 7 July 2010, Paragraph 30).

29 See Council of the European Union, 2010 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payment, 14 December 2010, Document No. 17870/10, available at http://register.consilium.europa.eu/pdf/en/10/st17/st17870.en10.pdf, Annex, Page 9, Paragraph 23.

Appendix 1

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