Editorial

The cooperation agreement signed the 23rd October 2014 by the CAIP with the Russian Arbitration Association (RAA) is in line with the previous partnerships concluded with the Brazilian Arbitration Chamber of the FECOMERCIO in 2010 and the China International Economic and Trade Arbitration Commission (CIETAC) in 2011. It materializes the will of the CAIP, oldest active arbitration institution in France, to always spread knowledge of its activity beyond our borders, and is the evidence of its international recognition, of the quality of its awards, of its competence and expertise, which is attested by the confirmation rate of the awards rendered under its aegis, that borders on 100%. Besides, the CAIP is recognized as the first European institution on a statistical point of view with nearly 40 000 disputes settled to this day. 70% of the Chamber’s arbitrations involve at least one foreign party and 30% concern two foreign parties. As for the RAA, brought to its baptismal font in April 2013, it aspires to gather and federate arbitration practitioners, to promote cooperation and development of arbitration in Russia and within the CIS, and militates to make Russia a first choice place of arbitration. One thing is for sure: this agreement marks a milestone. This is the reason why we devote a large part of this newsletter to arbitration in Russia.

Baudouin Delforge, Chairman of the International Arbitration Chamber of Paris.

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INTRODUCTION

The International Arbitration Chamber of Paris signs a cooperation agreement with the Russian Arbitration Association

Thursday 23 October 2014, with the presence of the Ambassador of Russia in France His Excellency M. Alexandre Orlov, the Chairman of the International Arbitration Chamber of Paris M. Baudouin Delforge signed with his homologue M. Vladimir Khvalei, Chairman of the Russian Arbitration Association (RAA), a cooperation agreement seeking to reinforce relations between both arbitral institutions.

The signature of this agreement, which was done at the offices of the international law firm Freshfields Bruckhaus Deringer at the invitation of its managing partner Elie Kleiman and of Noah Rubin, associate, vice-president of the RAA, has given rise to a Round-table on the theme:

S.E. M. Alexandre Orlov, Vladimir Khvalei, Baudouin Delforge, Elie Kleiman.
The agreement has notably the purposes to promote the development of international arbitration and to offer a mutual assistance in the constitution of the arbitral tribunals and a cooperation concerning the trainings. The creation of the Russian Arbitration Association answers an innovative approach initiated by practitioners used to international arbitration practices. One of the main challenges will be to set up a new and efficient arbitration Centre in Russia, with the guarantee that by the mass participation of law firms, this project provides a tool which allows assuring that neither a company nor an economic entity could influence the arbitral proceedings, but also the recognition or enforcement of the awards. It is a matter of strong commitments, primordial and consubstantial to the idea itself of international commercial arbitration and to the development of economic relations between France and Russia.

We reproduce hereafter the speeches of Mme Irina Guérif, general secretary of the CAIP, of Professor François-Xavier Train, chairman of the scientific council of the CAIP, and of Mes Elie Kleiman and Noah Rubins.

SPEECHES

Speech of Irina Guérif (summary)
General Secretary of the International Arbitration Chamber of Paris

The CAIP, XXIst century institution

An institution that went straight into the XXIst century: this is the way Irina Guérif introduced, at once, the CAIP during her intervention. She indeed underlined that once a strong cereal identity at the time of its creation 88 years ago, the Arbitration Chamber is today a modern and polyvalent institution, open and international.

If we often talk about the continuity of the Arbitration Chamber, it is because it has a judico-economic function in the regulation of business life. It needs to be remembered that the CAIP records an annulment rate extremely low that only raises up to 0,33% and counts many cases rendered by the Paris Court of appeal, to which annulment claims are brought and by the Cour de Cassation confirming the solutions of the awards rendered under the aegis of the CAIP.

The CAIP, defined by its general secretary, as a corporative institution by its structure, governed by the representatives of professional organizations that compose the Chamber, is an open structure as to its activity, to the composition of arbitral tribunals and to the organization of the arbitral procedure. If the CAIP welcomes all kind of disputes, it particularly handles general contractual litigations: sales, services, transport, franchising and distribution, business related disputed. The CAIP, insisted Irina Guérif, is an institution firmly focused on the future, whether it is by its realizations (implementation of arbitration trainings habilitated by the CNB, of a mediation procedure or of new tools of communication, in particular its newsletter) or by its projects.

Finally, the CAIP answers the expectations of the users of arbitration. Thus, Irina Guérif pointed out that the CAIP strives to maintain moderate arbitration fees and reasonable deadlines to render the arbitral awards, whatever the economic or legal context might be. At this point, she noted the great experience of arbitrators who know how to handle and conduct procedures with confidence and rapidity. As to the choice of arbitrators, it was determined that the Chamber allows a wide liberty to the parties in the appointment of their arbitrators, although it helps them in their choice by providing a list divided into sections: legal, industrial property, construction, technical, accounting and financial, food-processing industry, split in sub-sections: cereals, fur and leather, fruits and vegetables, wine, sugar, dairy industry, cardboard factory, etc.

In respect of the composition of the arbitral tribunals, she stressed the point on the aldermanship system used by the CAIP, which appoints within each arbitral tribunal, if it is beneficial, two technicians within each arbitral tribunal, if it is necessary, of the concerned sector, formed by the CAIP, and, as the president of the arbitral tribunal, a jurist, specialized in arbitration whom moreover, possesses skills in the domain of the dispute. To conclude, Irina Guérif insisted on the fact that the CAIP aspires today to open new possibilities for companies, in particular thanks to the rapprochement between this one and the Russian Arbitration Association, full of promises for the future.
Speech of François-Xavier Train
Professor at the University Paris Ouest Nanterre La Défense à l'Université, Chairman of the scientific Council of the International Arbitration Chamber of Paris.

Works of the scientific Council and the CAIP arbitration Rules: experience and modernity.

« The CAIP asked me couple years ago to preside over the scientific Council, which I accepted with pleasure. I will start by précising that it is composed of representatives from various legal backgrounds (academics, legal counsels, directors of legal affairs, former magistrates) but also of the traditional jobs of the Chamber (professionals of the cereal commerce and international business in general), as well as experts, notably a statutory auditor. The scientific Council is therefore no less anchored within concrete reality and practice.

One of the main tasks that were given to us is, generally speaking, to accompany the harmonious evolution of the arbitration rules and practices of the Chamber depending on and accordingly with, the evolutions of arbitration law and case law particularly considerable in France. Arbitration law is becoming more and more technique, complex and not always easy to access, so that the first mission of the scientific Council is to be the interface between the jurisprudential instructions and the innovations and practices of the Chamber.

As to the arbitration rules, the Chamber took advantage of the French arbitration law reform of 2011 to revise and refresh its arbitration rules in order to bring it in line with the most modern rules and practices of both international and internal arbitration law.

This backfitting has however to be nuanced. The variety of arbitrations practiced at the CAIP is taken into account. I will take a sole example: the arbitration rules of 2011 introduced what we know in other institutions: the preliminary hearing to organize the arbitration procedure, which allows to elaborate and sign the terms of reference, and to precisely mark out the field of procedure. But the practices of the Chamber show that this first procedural hearing is at times too onerous to the eyes of the professionals and their counsels, who are not always used to it and don’t feel its necessity, so that hearing is facultative and, in any case, the organization of the procedure can be realized in a more flexible way, less formal and less costly, for example by using conference calls instead of genuine hearings to which parties and their counsels must attend in person.

Questions are asked to the scientific Council by the committees of the Chamber, it is therefore brought to give a legal opinion on very complicated matters, such as, mentioned by His Excellency, Ambassador of Russia, the independence and impartiality of the arbitrators. The Chamber has sharpened its recusal and replacement procedure of the arbitrators, by precisely especially the different aspects that must contain the independence statement of the arbitrators at the time when they accept their missions and, if need be, at a later stage during the course of the procedure. We declined these models or frameworks of statement according to the different possible hypothesis in order to give a better guidance to the arbitrators in this previous phase of disclosure delicate for the arbitrators as well as for the parties. I have heard what has been previously said about some institutions that do not explain why or why not they recuse an arbitrator in this or that hypothesis. It is true that some institutions are being reproached this lack of motivation in their decisions with regard to the recusation of arbitrators. Mister the Ambassador, we will ponder the question within the International Arbitration Chamber of Paris to try to find a satisfactory solution for the arbitrators, for the parties’ counsels but also a solution that will not have for consequences to favour a parallel state litigation that would superimpose on the arbitral procedure. We will all agree to this: the judge must control the arbitral procedure but he must do so with parsimony and advisedly.

Our scientific Council does not limit itself to treat technical subjects such as independence, impartiality and the recusation procedure of the arbitrators. It also performs more prospective duties. We are notably working on the elaboration of training and perfecting programs for the arbitrators of the Chamber, which is fundamental not only on the strict legal front since, as I stated previously, the jurisprudence is rapidly evolving, it is necessary that arbitrators are kept informed of evolutions as one goes along, but also on the practical front. Indeed, these training sessions which I attend with great pleasure like many people I am seeing in this room, allow arbitrators to exchange between them, some being academics like me, some being counsels, others being former magistrates, others are not jurists -they are trade professionals- and this mixture, or rather this aldermanship that exists in both the arbitral tribunals and scientific Council as well as in the list of arbitrators of the CAIP, is the source of a great wealth: knowing other arbitral institutions, I think that this aldermanship, this mixing is a chance and a richness, and if, as it was suggested earlier, there could be a mutual enrichment between French and Russian practices, everybody would benefit this, no doubt about it. I will simply finish by an observation perhaps more personal, not as the Chairman of the scientific Council but as an arbitrator since I had the opportunity on several occasions to be part of arbitral tribunals under the aegis of the CAIP. And I must say that the Secretariat of the Chamber brings truly a precious help to arbitrators, extremely reassuring since we benefit a supervision, a presence and an availability of all the members of the Secretariat which is greatly appreciated when you are yourself arbitrator and when you know that, on the field of procedure, you can, sometimes, not think about everything ». 

www.arbitrage.org
Speech of Elie Kleiman
Partner at Freshfields Bruckhaus Deringer, International Arbitration, Paris office Managing partner

Paris, seat of Russian arbitrations

Paris offers an ideal environment for international arbitration procedures. Everything justifies the choice of Paris as the seat of international arbitrations that involve Russian economic interests.

Since almost a century, Paris is synonym for international arbitration. Parisian since 1923, the arbitration Court of the International Chamber of Commerce has strongly contributed to this acknowledgment among practitioners. French international arbitration law, characterised by innovative and autonomous solutions compared with internal law, respects a fair balance between the will of the parties and fundamental rights guaranteeing a fair trial. The Cour d’appel de Paris and the Cour de cassation case law defined this favourable regime, whose teachings are provided by a prestigious academic elite. Running from this case law, France endowed itself of a modern and readable international arbitration regulation, codified in articles 1442 to 1527 of the civil procedure Code. Modernity and readability, these preoccupations are explained by the will to give to users of international arbitration foreseeable and flexible solutions.

Foreseeability and flexibility of the solutions are the cornerstones of French international arbitration law. Everything, in its conception, tends to favour the efficiency of the arbitral procedures, not without restricting to the maximum the judicial intervention. One of the most original traits of French arbitration law holds in the simplicity of its application criteria: it applies every time French courts are seized, without passing by the uncertainties of the conflict of laws method. In other terms, French international arbitration law applies not only when Paris is chosen as the seat of arbitration, but also in case of debates provoked by the enforcement in France of a foreign arbitral award. The enforcement of arbitral awards in France, is found greatly facilitated, and is from then on much more easy than it is in other countries. I will come back later on this point.

Indubitably favourable to arbitration, French legislation confers to arbitration agreements an optimal efficiency, in the aim of good arbitral justice and facilitated enforcement of international awards. These are the three points I will develop.

I. The arbitration agreement: an optimal efficiency

Let us remind of the attachment of French courts to the autonomy of the arbitration agreement. The arbitration agreement is not affected by the potential inefficiency of the contract to which it is linked. It is also autonomous of national legislations, escaping therefore any local restriction.

The arbitration agreement is only governed by French material rules applicable to international arbitration, which erect its validity to the rank of principle. It is therefore mainly on the question of the parties’ intention to submit their dispute to arbitration that the control must be placed. French law is very liberal regarding the validity conditions of arbitration agreements: arbitrariness is widely admitted and no formalism is required. Thus, Paris is at the forefront compared to the New York Convention of 1958 and most modern legislations, which still require a written agreement. The absence of formalism induces important practical consequences. So we can make non-signatories parties intervene in an arbitration procedure on the basis that they were directly involved in the conclusion or performance of the contract, reducing in that way the risk of fragmentation of multi-parties litigations.

The efficiency of the arbitration agreement also relies on a wide conception of the «competence-competence» principle. Its negative effect imposes a French court of law seized by a dispute, at the occasion of which a party opposes an arbitration agreement, to declare itself incompetent by principle, in favour of arbitration. French courts of law must not interfere with the arbitral process. It is the arbitral tribunal, when its competence is challenged, that will rule by priority on its own competence. The rule will be set aside only if, the arbitral tribunal not being constituted yet, the invalidity or the inapplicability of the arbitration agreement is obvious. But in most cases, it is the role of arbitrators to rule on their competence, provided a retrospective control of state courts seized by an appeal for rescission or an appeal against the order granting the exequatur to the award.

II. The arbitral procedure

The arbitral procedure is placed under the double sign of celerity and loyalty, which impose themselves to the parties as to the arbitrators (article 1464, sub-section 3). French law wants to reach a balance between liberty and regulation. I will state three examples:

1. The choice of arbitrators: between liberty and duties

French law allows parties to choose freely their arbitrators, directly of by reference to a set of arbitration rules. No condition comes to restrict this choice, except that arbitrators are necessarily independent and impartial.

The legitimacy of the Paris place is increased by a rigorous conception of independence and impartiality of the arbitrators. French case law applies a criterion based on appearance: it should not appear to the eyes of a third person, that circumstances are likely to affect the independence or impartiality of the arbitrator. The approached arbitrator, who knows such circumstances but does not see an impeding is those, must reveal it to the parties. This duty of disclosure is continuous and spreads to the emergence of such circumstances during the course of the arbitration. Sanctions include the recusal of the arbitration and, if need be, the nullity of the award. Case law shows severity. It does not take into account the good faith of the arbitrators, when it punishes for example the existence of a work relationship between one of the shareholders of a party to the arbitration and an associate of the arbitrator working in another office, which is often the case in multinational law firms. This rigour, sometimes extreme, is perhaps the price that need to be paid for the place of Paris to earn its impeccable reputation in the matter of international arbitration. XXI century arbitration requires: accountability, meritocracy, diversity, openness and transparency. Such is the modern conception that the Paris place defends.

2. Procedural freedom

French law allows the parties to freely choose which rules will govern their procedure, these parties can leave it up to institutional or ad hoc arbitral rules, to a foreign procedural law or even to custom made procedural rules. It is therefore possible to hold in Paris LCIA arbitration or an ad hoc arbitration with authority of nomination to the Permanent Court of Justice in the Hague.
Ad hoc arbitration particularly finds its relevance in Paris: Paris Place of Arbitration has recently published the Paris rules, ad hoc arbitration rules which favour the speed and efficiency for the settlement of disputes even complex. This liberty is however exercised in line with the fundamental guarantees of the equitable trial, in particular the principles of equality of arms and contradiction.

3. « Juge d'appui »

The President of the Tribunal de grande instance of Paris is competent to assist the parties, and if need be the arbitrators, for the settlement of some difficulties likely to arise during the arbitral procedure. Holding seat in this capacity, he is names the « juge d'appui ».

His competence is subsidiary; parties can prefer an authority of their choice even within ad hoc arbitrations.

The competence of the « juge d'appui » relates essentially to issues relating to the constitution of the arbitral tribunal. He can also assist in obtaining documents from third parties, abroad as a result of the judicial cooperation conventions.

Article 1505 of the CPC provides that the parties can seize this judge when:

1. The arbitration takes place in France or;
2. Parties agreed to submit the arbitration to French procedural law or;
3. Parties have expressly given competence to French state courts to settle disputes relating to the arbitral procedure or;
4. One of the parties is exposed to a risk of denial of justice.

III. The arbitral award

It is again a regime of favour to arbitration that characterises the recognition and the enforcement of the international arbitral award. The mandatory principle in the matter is that French courts refrain from revising the trial: they do not rejudge the content of the case.

The foundations on which the parties can claim the annulment of the award rendered in France, or refuse the recognition and enforcement of a foreign arbitral award, are the same and are very restrictive. The parties can even give up contractually exercising an annulment claim when the seat of arbitration is in France. There are only five restrictive cases in which an arbitral award can be annulled, or its enforcement refused:

1. The arbitral tribunal has wrongly declared itself competent or incompetent or;
2. The arbitral tribunal has been irregularly constituted or;
3. The arbitral tribunal has ruled without complying to the mission it has been entrusted with or;
4. The principle of contradiction has not been respected or;
5. The recognition or the enforcement of the arbitral award is against international public order.

The annulment of the foreign arbitral award by the courts of law of the seat is not a cause of refusal of the recognition and enforcement, French law departs on this point from the New York Convention. French courts consider arbitral awards as "international justice decisions". The grievance of the violation of French international public order is strictly appreciated: an established case law reminds that the violation must be « obvious, effective and concrete ». The annulment claim as well as the appeal against the exequatur order does not have a suspensive effect, which favours the enforcement and prevents from dilatory appeals.

Conclusion

Paris enjoys a true arbitral culture. French law develops a safe judicial environment, favourable and neutral, in which arbitration can take place according to the parties’ preferences. The offer of professional services is dynamic, various and multicultural.

Paris leads more than ever as an excellence international place of arbitration and a natural seat for Russian arbitrations.

NOTES

3. CPC, Article 1447.
6. CPC, Article 1507.
8. CPC, Article 1448.
9. CPC, Article 1520.
10. CPC, Articles 1456 et 1520.
11. CPC, Article 1456.
12. CPC, Article 1509.
13. Download the pdf.
14. Article 1469 CPC.
15. CPC, Article 1522 (but the appeal against the exequatur in France cannot be excluded).
16. Article 1520 CPC.
17. Article 1525, alinéa 3 CPC.
20. CPC, Article 1526.
I. Introduction

During the past ten years, arbitration has established itself as an inescapable mode of disputes settlement. The increasing complexity of the contracts concluded by commercial entities stemming from the Commonwealth of Independent States (CIS) and the necessity to obtain enforceable decisions in foreign countries are all factors participating the prosperity of arbitration.

First economic power of the region and benefiting from strong cultural, judicial and economic bounds with former soviet republics, Russia has also become a major place to welcome arbitral procedures involving parties coming from all the CIS, at the forefront of which Ukraine, Armenia and Central Asia.

Provided, since the 7th June 1993, with a dedicated legislation based on the CNUDCI model law of 1985 and being original party to the New York Convention of 1958, Russia takes on all the assets of a great modern place of arbitration.

Yet, one cannot fail to observe that the success of Russian arbitration is mitigated for foreign operators. Many Russian entities prefer to rely on foreign courts of law or arbitral tribunals seating outside of Russia to settle their commercial disputes. Thus, the three quarters of disputes involving a party originating from the CIS are settled in foreign countries, even when Russian law is applicable to the half of them1.

For Vladimir Khvalei, Chairman of the Russian Arbitration Association (RAA) board of directors and head of the CIS Dispute Resolution Practice Group in Moscow at the firm Baker & McKenzie, this observation is irrevocable: « Russian » disputes escape to foreign countries because companies cannot obtain the same quality of arbitration in Russia that they do in countries around the world «2».

This distrust toward the Russian seat of arbitration is notably explained by the unsuitable nature of the great arbitration institutions to the regional judicial environment (II.), and by the absence of local alternatives likely to satisfy the needs of the parties concerning their disputes with high stakes (III.). Yet, the users of arbitration could not be satisfied with this gap, and this is why the RAA was born in 2013, leading quickly as a major actor of arbitration within the CIS (IV.).

II. International arbitral institutions unsuitable to the CIS local market

Amongst the four institutions the most popular to settle the disputes involving a Russian or a CIS originating party, three are familiar to us: the LCIA, the ICC and the SCC3. Yet, when arbitral procedures are entrusted to these institutions, it is rare that Russia is chosen as the seat of arbitration. Often, a choice imposes itself within the mind of the parties: either they put forward the institution, or they opt for the Russian seat.

Indeed, inured to the administration of international arbitrations, these institutions are not very familiar with the judicial environment of the CIS. It is difficult for them for instance, when they are seized as a nomination authority, to appoint an arbitrator. They lack the detailed knowledge of the field and local specialists.

Statutory restrictions framing the activities of arbitral institutions in Russia raise another issue. Therefore, a Russian arbitration reform is currently studied and cast a threatening shadow on the activity of these institutions.

The 17th January 2014, the Minister of Justice of the Russian Federation has introduced a reform of the arbitral procedure and system in Russia in the form of four bills (the Reform). The Reform is currently losing in front of the parliament, the Duma, and the bills have not been adopted yet. It is interesting to note that two weeks ago, the adoption of the Reform was suspended. Although there is little doubt that it finally will be adopted, it should not be excluded that it may be subject to slight modifications.

This Reform requires arbitral institutions operating in Russia to be incorporated under the form of non-profit entities, to publish the identity of the founders and shareholders, and it conditions their activity to the procurement of a state agreement delivered by the Minister of Justice. Anxious to preserve their independence, essence of their success, it is quite unlikely that arbitral institutions such as the ICC, the LCIA or the SCC accept to comply with such condition.

The Reform then imposes to institutions obligations related to the keeping of files during a long period of time, as well as the annual publication of their statistics.

Mikhail Galperin, Chairman of the Department of Economic Development at the Ministry of Justice, has indicated that the recognition of arbitral awards rendered under the aegis of these institutions will be conditioned to the respect of the conditions set out by the Reform, and notably the procurement of the authorization to exercise.

The Reform therefore undermines the activity of the great arbitral institutions in Russia, which will lead the users of arbitration looking for the quality and security of an institutional arbitration to turn towards local solutions.

Yet, in the area, it must me concluded that the alternatives are not widespread.

III. The lack of local alternatives adapted to the strategic disputes of international operators

When we wish to rely on an arbitral institution and that we consider local alternatives, two choices are then possible.

There are several hundreds of « pocket courts » in Russia. They are arbitral institutions established by great companies to administrate the disputes existing between them and their clients. The system of the « pocket courts » is therefore deeply partial and the Superior Court of Arbitration of the Federation of Russia refuses regularly to recognize the awards rendered under their auspices. The distrust toward them is important, even amongst the operators originating from the CIS. The « pocket courts » do not constitute a credible alternative to the great arbitral institutions.

The second option consists to rely on the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (ICAC). The ICAC enjoys an undeniable popularity. It is
the second most used institution, right behind the LCIA, when a party is originating from the CIS. However the ICAC is not an arbitral institution in the traditional meaning of the term.

Indeed, it cannot be said that the ICAC is entirely independent from the Russian State, since it is structurally bound to the Chamber of Commerce and Industry of the Russian Federation (CCIRF) and is instituted by the federal law.

Procedural rules followed by the ICAC are by the way subject to the approval of the CCIRF, and are similar to the ones included in the Russian courts, which can be disturbing for foreign operators not used to local specificities. One of the most singular aspects of the procedural rules of the ICAC is that many of them are mandatory, meaning that they cannot be modified by the parties.

Thus, under the auspices of the ICAC, the President of the arbitral tribunal must appoint a reporter, the dokladchik, who plays a role similar to the one of a clerk in the United-States. The dokladchik is responsible for the redaction of the minute during the hearings and he drafts the arbitral award. All dokladchik are jurists, and they are picked amongst a list of names approved by the Presidium of the ICAC.

Procedural flexibility and freedom of choice, dear to the users of arbitration, are not forthcoming here, and the ICAC cannot therefore lead as a satisfactory alternative for foreign operators.

IV. The Russian Arbitration Association, new inevitable actor

However, today, a new wind blows through arbitration in Russia. Observing a lack of choices and the weaknesses of the Russian seat, professionals coming from the CIS and foreign practitioners have joined forces to promote a new credible institution.

Their project is to offer access to the parties to an arbitration administered accurately and with knowledge of local conditions, localized within the CIS. This is how, blessed with a specific expertise, with a real knowledge of the judicial environment of the CIS and forged to fulfill the needs of the customary users of great arbitral institutions, the Russian Arbitration Association (RAA) was born the 2nd April 2013.

Straightaway, the emphasis must be laid on a crucial point: the RAA was established by private parties. It has therefore no bound, neither close, nor distant, with the Russian administration. In this, the RAA is truly an independent institution.

Then, it will be underlined that the RAA does not have its own arbitration rules at its disposal. The rules of the RAA cross-refer to the ad hoc arbitration rules of the CNUDCI which, revised in 2010, is a modern text, familiar to the users of arbitration, and especially adapted to the settlement of international disputes. By virtue of Article 1.2.1 of the arbitration rules of the RAA (the Rules), parties can choose the RAA to act as a nomination authority (Articles 2 and 3 of the Rules) and/or as an administrative authority (Articles 4 to 7 of the Rules). This faculty opened to the parties to choose which role will play the RAA is precious.

Thus, the Arbitrators Nominating Committee, specialized committee having at its disposal a deep knowledge of the judicial environment of the CIS, will be able to assist the parties in the composition of the arbitral tribunal if they wish so or when they cannot get along on the composition of the tribunal. The Arbitrators Nominating Committee will also be competent to rule on the replacement of an arbitrator, when his nomination is then challenged.

Acting as an administrative authority, the RAA will be able to check, review and certify the arbitral awards rendered before they are signed in order to make sure of their conformity with the standards laid out by the Russian law.

In view of the pending Reform and of the current severity of Russian courts towards imperfect awards, the assistance of the RAA as an administrative authority represents an invaluable asset. Since it makes sure that the awards are not marred by annulment causes and watches over the good preservation of the file, the efficiency of the awards rendered under the aegis of the RAA is maximal.

The assistance of the RAA is economically reasonable: the institution offers to its users an excellent cost/efficiency ratio. Besides, the General Secretary of the RAA can reduce the arbitrators’ fees if they render a belated award (Article 10.9 of the Rules). To my knowledge, the RAA is the sole institution in the world to impose such economic penalty to inefficient arbitrators.

Finally, apart from its disputes administration remit, the RAA has set the goal to organize the training of the arbitrators and counsels, to organize conferences, to develop the auto-regulation of the arbitral practice within the CIS through the publication of a Code of Best Practice, and finally to participate to the evolution of arbitration law by proposing bills.

We would be glad to see many of you to take part in those efforts in the future, efforts that members of the RAA amongst which Freshfields, wish that they will contribute to better the conditions of disputes settlement in Russia and within the CIS.

NOTES

Meeting with Valéria Golikova
Business jurist, Legal department and insurances, Assystem.

What global look do you take on arbitration in Russia and what are the current problems of the Russian international commercial arbitration?

Arbitration is an ancient institution in Russia: justice, through private actors, has preceded state justice. After the appearance of state courts, the research of an alternative and efficient mode of disputes settlement was done by Russian jurists during several centuries, resulting in the constitution of the arbitral tribunal (« Tretieskiy sud »). A formal possibility of the use of private justice has existed in soviet Russia. However, during this period, because of the political organization at that time, arbitration has not known an expansion or a legislative development.

Today, and since several years, in the context of the market economy, arbitration has on the other hand known to find its place and knows a real popularity in the disputes settlement system. Favoured by international private exchanges, international arbitration has developed and was given a modern legal framework.

While arbitration could lighten the justice’s charge, a perusal of some judgements, tends to indicate that the coexistence has sometimes created a competition spirit between private and public justice. Indeed, foreign economic operators sometimes find themselves in a delicate situation notably facing a court of law called to rule on the contrariety of the arbitral award to the public order of substance or of procedure or even on the non-arbitrability of the disputes, in particular those related to shareholders agreements or public contracts.

With the international commercial arbitration law of 1993 adopted on the CNUDCI model, does Russia have at its disposal a law in line with international operators’ expectations?

The law is explicit on several aspects of organization and procedure as well as on lockout situations between the judicial procedure and the arbitral procedure, on the power of the arbitrator to order interim measures, offering to economic operators some flexibility in disputes settlement. It is nonetheless a legislative system wanted by the power for arbitrations taking place in Russia; thus, it exists in the texts hierarchy in particular in those of the Code of procedure of commercial courts, treaties and international conventions. Its development to adapt to the needs of current economic operators, for instance, can be long to implement at the legislative level.

The expectations of the operators regarding the availability of the arbitrators for the settlement of their dispute can, nevertheless, be satisfied by personal initiatives of the arbitrators who have the power, according to article 17, to define the procedural rules of the arbitration.

Concerning the recognition and enforcement of the arbitral awards, does Russia fully recognize the autonomy of the arbitration agreement? What is the extent of the awards’ control by Russian courts of law?

The autonomy of the arbitration agreement is limited as far as the international commercial arbitral law of 1993 sets out the criteria for the arbitration agreement to be applied when the state courts is seized and one of the parties requests, in limine litis, that it declares itself incompetent in favour of arbitration. Therefore, the judge checks the arbitrability of the dispute, the absence of legal flaws, but also decides if the arbitration agreement can be performed, if it is valid and in force. This check does not have a suspensive effect on the arbitral procedure.

The examination of the arbitration agreement by the Russian judge can appear restrictive towards the principle of autonomy of the arbitration agreement. But it can also serve as a handrail regarding the principle of « competence-competence ». Compared to the laconic definition of article 1458 of the French Code of civil procedure (aiming the « obviously null agreement ») which gives rise to an abundant case law, the examining criteria provide more visibility regarding the strategy of the dispute. The New York convention was signed by Russia who recognizes and Russian courts apply the international principles of recognition of foreign arbitral awards set out by this convention.

The control criteria of the award specified in the law of 1993 apply without distinction to arbitral awards rendered in Russia or elsewhere. The Russian judge, regarding his control, checks out in particular the arbitrability of the dispute and if the arbitration agreement is valid under the law applicable to it, failing that, under the law of the country where was rendered the award. Accordingly, a double control of the arbitration agreements by the courts is not excluded, in the case where the judge has already ruled on its incompetence in the previous or parallel procedure to the arbitration, which is logically under the reserve of the res judicata principle.

Among other filters of exequatur, the pleas raised by the party: procedural irregularities (related to the principle of contradiction, to the appointment of the arbitrators, to the overtaking of their mission), the annulled or non mandatory award, the plea automatically raised by the judge of the contrariety to the public order… all of this raises lots of questions for foreign operators. The number of decisions of Russian judges censoring the foreign arbitral award sometimes creates a feeling of judicial insecurity for foreign partners. However, the High jurisdiction of the commercial courts (« Visshiy arbitragniy sud» of the Russian federation), is mindful of the matter. In its collection of cases published in the Newsletter n°156 of the 23rd February 2013, it gives many examples of arbitral awards and foreign judgements in line with the Russian public order clarifying this litigious question.

What does the partnership between the CAIP and its homologue the Russian Arbitration Association inspire you?

These fruitful exchanges on the arbitral practices, on the case law related to the recognition and enforcement of the arbitral awards and doctrinal developments on current problems, will contribute undoubtedly to a greater confidence in the French-Russian relationships, in a current and difficult political situation.
Russia, or rise and fall of the arbitration

By Philippe Cavalieros

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Vastest country in the world with almost unlimited energetic resources, which, following the 26th October 2014 will welcome eleven instead if nine time zones thanks to a law signed by the hand of its President, Russia is most certainly the country of outrageousness, and of a certain idea of greatness, according to Dostoïevski.

Outrageousness, greatness and also vertigo in the matter of arbitration, as testified by the phenomenal ciphered data of the Yukos case, and particularly an arbitral award condemning Russia, after more than 10 years of procedure, to pay more than $50 billions of (conditional) damages, without even mentioning the arbitration and representation fees of which amount makes, far beyond the circle of arbitragists, all law firms green with envy.

Procedural vertigo and exhilaration of the corruption finally, since Russia would count no less than two to three thousands « arbitration Centres » out of which – according to a representative of the Russian Ministry of justice – 80 to 90% are involved in illegal activities, these famous « pocket arbitration courts », centres of a complete fabrication and financed by companies, that their awards are supposed to condemn. We do not dare to mention the welcoming by the judge of so many appeals against arbitral awards or exequatur requests therefore giving away the distrust of a system – especially when its interests are involved – towards arbitration.

Inexorably, this distrust has also contaminated international arbitration involving Russia since it is highly recommended if not mandatory to choose a centre and a seat of arbitration outside the territory in order to avoid as much as possible any friction with local procedures.

Yet, as always in Russia, a presidential or governmental ukase can shift the lines. Thus, if for instance Russia was ranked in 2012 at the 120th place on 184 economies for the easiness to make business, it was 92nd on 189 economies at the beginning of the year, and progresses quickly after its President has set the goal to reach the 20th place in 2018.

As a matter of arbitration, the awareness seems to emerge as well, since a bill proposes to « clean » the Russian arbitration of its endemic scoria, by notably unifying the regimes of internal and international arbitration.

This bill, which was subject to a public consultation between the months of January and April 2014, constitutes certainly a step forward but remains imperfect according to the observers. For instance, the authorization and registration – undoubtedly remnant of a not entirely bygone soviet age – to the Ministry of justice of arbitral institutions not only domestic but also international that would have to deal with arbitration of which the seat would be in Russia, seems contrary to the fundamental principles of arbitration. In the current state of the bill, a default of registration would have for penalty the refusal of the enforcement of the awards by Russian courts, and even the liquidation of these institutions.

If the bill seems to be in a dead end today, it is nevertheless not excluded that a new vision of arbitration shortly emerges, in a widen framework sketched aforesaid, from a will of the Russian authorities to make its gigantic and always promising market more attractive to foreign investors, even though the severe deterioration of international climate, by the double effect of the Syrian and above all Ukrainian crisis, risks to delay its adoption.

However, according to a Russian proverb of which the parenthood was sometimes attributed to Otto von Bismarck, « Russians take a long time to hitch up, but they ride fast ». For the matter, once the Reform adopted, it can only be wished that arbitration quickly finds in Russia the necessary confidence of its operators and censors.

The recognition and enforcement of foreign judgements in Russia

By Catherine Joffroy

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The efficiency of economic relationships in the international context is subordinated to the cooperation between the different States in the judicial matter, and more accurately to the possibility to recognize on the territory of a given country the judgement rendered outside its borders. Despite some recent jurisprudential evolutions related to the recognition of foreign decisions, the actual state of the case law is not always favourable to companies wishing to execute a foreign judgement in Russia. This situation is explained notably by the interpretation of the rules in vigour subordination the efficiency of foreign decisions to the existence of an international convention between Russia and the State concerned.

In reality it has been noted a great disparity between ordinary courts and the economic courts (or « commercial ») which have adopted a softer approach on the matter. Indeed, in absence of international convention it seems difficult, if not impossible, to obtain the exequatur of a foreign decision with the ordinary courts in Russia (I), by contrast it goes another way before the commercial courts recognizing foreign judgements on the basis of international law principles (II).

I. The impossibility to recognize a foreign judgement in Russia in the absence of international convention
We will expose the rules of Russian law related to the recognition and enforcement of foreign decisions (A), to then see the approach of the ordinary courts on this question (B).

A. The legal basis in the matter of recognition and enforcement of foreign decisions

In the current state of Russian law, the recognition and enforcement of foreign judgements require an express international convention between Russia and the foreign State concerned. According to article 6, al. 3 of the federal constitutional law related to the judicial system of the Federation of Russia: « the effects of the decisions of justice of foreign tribunals, internationals courts and international arbitral tribunals are ruled by the international conventions of the Federation of Russia ».

Article 409, point 1 of the Code of civil procedure of the Russian Federation, hereafter « CCP RF » sets out the same rule: « the decisions of foreign courts of law are recognized and executed on the territory of the Russian Federation on condition that it has been set out by an international convention ». Article 241, point 1 of the Code of commercial procedure (economic) of the Federation of Russia hereafter « CPA RF » follows the same logic.

Thus, in the absence of international convention and besides few legal exceptions1, the decisions rendered by a foreign court of law will not be able to receive exequatur in Russia.

The fact to subordinate the application of foreign decisions to the prerequisite of the existence of an international convention binding Russia is prejudicial to operators. Such approach does not favour the economic cooperation with Russia and creates unsteadiness as far as Russian judgements can be recognized and enforced in other countries even in the absence of international convention, notably in the USA, in France or in the Netherlands. For instance, in France most of the foreign judgements and Russian in particular (except those related to criminal, administrative or tax law) can be recognized in the absence of treaty on the condition to respect the exequatur procedure.

B. The recognition and enforcement of foreign decisions by ordinary courts

Ordinary courts have a restrictive vision of legal provisions in the matter and refuse in most of the cases to order the exequatur of a foreign decision in the absence of an international convention2.

However, by a judgement of the 7th June 2002, the Russian Supreme Court decided to depart from previous case law. In this case, the Moscow Court refused the exequatur of a judgement rendered by the Supreme Court of the United Kingdom on the grounds of the absence of treaty with Russia. The Supreme court overturned the trial judges' decision considering that « in the absence of international convention, the foreign decision can be recognized and executed in Russia in application of the principle of reciprocity as long as the court of law of the foreign State involved recognize the decisions rendered by Russian courts». To render their decision, the judges of the Supreme Court have also taken into account the agreement signed between Russia, United-Kingdom and Northern Ireland the 9th November 1992 as well as the partnership and cooperation Agreement (« PCA») of the 24th June 1994 between Russia and the EU.

The decision in question was a major improvement on the question of the recognition of foreign judgements. Nonetheless, ordinary courts unfortunately did not follow the position of the Supreme Court in the decision of 2002 and kept to refuse the exequatur in the absence of international convention. Then, the Moscow Court, in its decision of the 21st April 2006, refused to recognize a foreign judgement considering that the absence of international convention prevented any recognition.

An appeal of this decision was made by the plaintiff, A. Adamova who tried to contest the constitutionality of article 409, point 1 of the CCP RF on the grounds that the condition relative to the necessity of an international treaty was contrary to article 46, al. 1 of the Constitution in the aspect that it does not respect the fundamental right to the judiciary protection. The constitutional Court judged the claim inadmissible deciding that « in the absence of international treaty the foreign decision does not produce any judicial effect on the Russian Federation's territory ».

Consequently, one has to admit that ordinary courts keep considering that only the existence of an international convention with Russia can serve as a base to the recognition and enforcement of foreign decisions.

II. The possibility to recognize foreign decisions on the basis of international law principles

Contrary to ordinary courts, commercials courts have adopted a softer position and more appropriate in the matter of the recognition of foreign judgements (A). This position is to be nuanced when public order is at stake (B).

A. The encouraging case law of commercial courts

Conscious of the difficulty, even impossibility, to recognize in Russia a foreign decision outside an international convention, commercial courts tried to palliate this deficiency by invoking the recognized principles in international law, namely the principle of reciprocity and international courtesy3. This approach was adopted notably by the decision rendered by the commercial Court of Moscow the 2nd March 2006 recognizing the decision of the High Court of Justice of England and Wales in the « Yukos » case. Judges have mentioned the PCA signed the 24th June 1994 between Russia and a certain amount of countries in the EU, according to which « each signatory country commits to assure a free and non discriminatory access to its own tribunals to physical and moral persons of any other signatory country ».

The tribunal has also invoked article 15, point 3 of the Constitution of the Russian Federation, according to which « the international principles commonly recognized and the rules of international law are parts of the judicial system of Russia ». In the judges' opinion, reciprocity and courtesy are superior principle of international law.

Judges made reference to the case of the European Court of human rights of the 19th March 1997, « Hornsby v/ Greece », N° 107/1995/613/701, where it was judged that the enforcement of a judgement, independently of the origins of the court which rendered it, should be considered as being an integral part of the « trial » under article 6 of the ECHR.

In the decision of the 29th July 2009, the commercial Court of Moscow also recognized the foreign judgement on the basis of international reciprocity and courtesy. The Court decided that even in the absence of express convention on the recognition and enforcement of foreign decisions between Russia and Holland, the Dutch decision was to be recognized and enforced in Russia, on the basis that « the Federation of Russia joined several international conventions guaranteeing the right of the access to the judge and the equitable trial».

Case law of the commercial Court of Moscow was confirmed by the decisions rendered by the Court of cassation of the Federation of Russia. In the decisions of the 7th December 2009 and 26th July 2012, the Court of cassation had commanded the exequatur of English and Dutch judgements by following the very same reasoning: even in the absence of international convention on the recognition and enforcement of foreign judgements, the latter can be enforced in Russia by virtue of the international reciprocity and courtesy principles.
The decision of the Presidium of the Court of cassation of the 26th November 2011 in the case 25-845/2012 should also be quoted. Judges considered that « the enforcement of foreign judgements is part of the judiciary protection, therefore, the non-enforcement or the late enforcement of a judiciary act, constituted a violation of the right of equitable trial in a reasonable time».

More recently, the 8th October 2013 the Presidium of the Court of cassation had granted the exequatur for a decision rendered by the High Court of Justice of Northern Ireland in the domain of the fight against the corruption. Judges made reference to several international agreements of which Russia and Northern Ireland are parties: (i) the UN convention against corruption, (ii) the PCA of 1994 and (iii) the convention relating to the economic cooperation of 1992.

In this case, judges considered that international conventions could constitute a sufficient base for the recognition and enforcement of foreign decisions even in the absence of reciprocity.

B. The exception of public order in the enforcement of foreign judgements in Russia

Indeed, the violation of the public order constitutes one of the foundations to refuse the exequatur to a foreign justice decision. In practice bad faith defendants not wishing to execute an unfavourable judgement often invoke this foundation. Moreover, Russian legislation does not provide for a precise definition of public order. Consequently, this notion is appreciated case by case and is often confused with the notion of State’s interest or foreign overriding mandatory rules. Some judges even had a tendency to interfere with the content of the case under the guise of public order violation.

It is in this optic that the Presidium of the Court of cassation has come to precise the application of the public order exception in its newsletter of the 26th February 2013. Even though the recommendations contained in the newsletters published by the Court of cassation do not have a mandatory character, in practice the tribunals broadly follow them. The newsletter in question does not give a definition of public order. By contrast, it lists the circumstances of a public order violation, and those that cannot be considered as such. Concretely, according to the Court of cassation: (i) the exequatur of foreign judgements cannot be refused on the only basis of the absence in Russian law of equivalent legal norms to the applicable law; (ii) the review of the foreign decision as to its conformity to public order must not have for consequence the review of the content of the case, and (iii) the independence and impartiality of the judge are not public order guarantees.

The Court of cassation also judged in the aforementioned case of the 8th October 2013 that the non-participation of Russian parties to a trial started before a foreign tribunal was in line with Russian public order as long as the legislation of the foreign State provided guarantees for the persons of whom the rights and interests were affected by the judicial procedure.

Thus, the position as to the matter of the recognition and enforcement of foreign judgments in Russia varies from a court to another. Although Russia does not know the rule of precedents, two approaches tend to confirm. Besides an isolated decision in 2002, ordinary courts continue to apply the rules restrictively, refusing the exequatur in a systematically in the absence of international agreement.

On the other hand, commercials courts in Russia adopted a more flexible approach and interpret legislative dispositions broadly. According to these courts, the very notion of the international convention must be broadly considered: in the absence of express convention it is possible to recognize a foreign decision on the basis of different international agreements that do not specifically aim to the recognition of judgements but provide for a general framework for the great principles of international law, such as the principles of reciprocity and international courtesy.

Yet, the judicial practice of the commercial tribunals favourable to operators risks to be called into question with the suppression of the Court of cassation following the reform of the judiciary system. Indeed, since the 6th August 2014 this court, which was until today the highest competent court of economic matters, has merged with the Supreme Court of the Russian Federation. From now on, a special section within the new Supreme Court, formed accordingly to the legal procedure, will review commercial disputes. The merger of the courts was aiming before all to standardize the judicial practice. However, it is not sure that the new Supreme Court will resume the experience of the former Court of cassation, especially in the matter of the recognition of foreign decisions. Although commercial tribunals remain at a regional level, the question is to know if they can keep certain autonomy, as it was the case before the reform. The law provides that resolutions and opinions published by the former Court of cassation remain applicable until the adoption of new resolutions by the Supreme Court newly formed.

Two solutions can be considered in order to solve the problem of the enforcement of foreign judgements in Russia and to give more security to operators. The first solution would be to elaborate a global international convention gathering the majority of the states which Russia has established more or less stable economic relations. However, this kind of convention is very difficult to settle on a practical view. Then, the most adapted solution would be to modify, even suppress the condition of article 6, al. 3 of the federal constitutional law, of article 409, point 1 of the CCP RF and of article 241, point 1 of the CPA RF.

In the absence of legislative reform, it is possible to opt for arbitration as an alternative dispute resolution mode. Indeed, by contrast with the judgements of state tribunals, arbitral awards do not meet the same difficulties because the mechanism of their recognition and enforcement is ruled by the New-York Convention of 1958, ratified by the majority of States. Yet, arbitration is not adapted to all disputes and remains quite often a costly justice. Therefore, even though the jurisprudential trends offered certain predictability until today, the recognition of foreign judgements in Russia remains random for the time. It is possible that, with the merger of the high courts of law, an approach standardized comes into the light, but it is hard for the moment to evaluate the real impact on jurisprudential evolution.

NOTES

1. Notably in the matter of bankruptcy, the federal statute of the 26th October 2002 in its article 1, point 6, provides for the recognition of foreign judgements related to bankruptcy on the basis of reciprocity.
2. Cf. the answer given by the Supreme Court of the Russian Federation in the case N° 4-G98-16 of the 2nd November 1998 and the case N° 5-r01-82 of the 7th August 2001.
5. Case N° 50-56571/12.
6. Cf. article 36 of the Russian law relating to international commercial arbitration and article V, point 2 of the UN Convention on the recognition and enforcement of foreign arbitral awards.
7. In the case, three foreign companies had granted loans to Russian companies. All rights attached to the debts have then been transmitted to the Irish company. Irish courts annulled the transfer contracts according to which the rights of the Irish company were transmitted to an offshore company (dummy company) which, in turn, had also transferred these contracts to Russian companies. The latter tried to challenge the decision of the Irish judge claiming the violation of processual public order in the fact that the Irish tribunal had rendered its decision without their participation, thus, their right of trial was not respected. Trial judges
followed this reasoning but the Presidium of the Court of cassation reviewed the case to grant the exequatur.

8. The reform in question was made by several successive laws including the federal constitutional law N° 2-FKZ of the 5th February 2014 related to the Supreme Court and to the State Counsel’s Office of the Russian Federation (in force since the 6th February 2014) and the federal constitutional law N° 4-FKZ of the 5th February 2014, in force since the 6th August 2014, modifying the federal constitutional law on the judiciary system of the Russian Federation.

9. Indeed, some domains are expressly excluded of arbitration, including family and criminal law.

POINTS OF VIEW

Secrecy and transparency
By Didier Ferrier
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There is today a declared and arguable opposition between secret and transparency.

First, it is situated on the ethical plan: secrecy is assimilated to dissimulation, to disloyalty, and transparency is attached to the truth and loyalty. Transparency should fight secret while secrecy would try to escape transparency.

It is then situated of the technical plan: secrecy is a way of reservation and conservation of knowledge, to the benefit of power; transparency would be a method to reveal and broadcast knowledge, to the benefit of all. The opposition is nonetheless excessive.

First, is it fair to make secrecy the opposite of transparency while it would be better to oppose secrecy to knowledge and transparency to opacity. We realize then that secrecy can be legitimate in its principle itself and should be respected as a right (For private life as well as for business, both being often bound: B. Boulou, Le secret des affaires, DPCI, 1990, 6), and should even be proclaimed as a duty ( Secrecy hanging over doctors as well as on the necessary confidants, secrecy imposed on the works committee members), while transparency can be tricky by shifting the opacity in the way a lamp creates shadow zones, even harmful by denying the value or the cost of a cognition or of information.

Next, is it coherent to strongly oppose what can be combined: secrecy sometimes only survives thanks to transparency while transparency can often be assured with or by secrecy. These questions are raised with acuity for business secrecy understood in a broad manner as the confidential information, meaning undiscoverable by authority of the law and undisclosed to the initiative of the company, concerning the situation and activity of the company, the entrepreneur or any other economic actor.

We will consider the ethical opposition or opposition of values, of secrecy and transparency (I), before raising the technical conciliation or conciliation of the means of secrecy and transparency (II).

I – The ethical opposition or opposition of the values
If transparency is broadly advocated today (A), secrecy remains a great value (B).

A – Transparency against secret
An evolution occurs in the direction of the increasing claim of transparency: it is about eliminating secrecy by liberating the information that it intended to subtract from the knowledge of people that might be interested which means “having an interest” or more widely “being concerned”.

1. The access to information or the removal of secrecy
The law aims to suppress the obstacles to the access to the information in many domains interesting people placed in a weakness situation compared to the holder of the information.
For instance:
- The shareholder must have access to the accounts of the company,
- The citizen must have access to administrative documents that are concerning him…

It is the right to know or at least of information.

2. The communication of the information or the disclosure of the secret
The legal requirement often goes beyond the imperative of transparency by imposer not only the liberation of the access to the information but also the communication of some information.

It is therefore important to let know but also to make know

A plethoric provision thus creates obligations to inform those involved on elements that one could have wished to keep secret (for example the commercial conditions granted to some buyers) or to assure the publicity of these elements towards third parties (it is notably the vast domain of legal publicity).

Jurisprudence went to recognize the existence of an advisement obligation of which the object was to dissuade the beneficiary of the counsel to contract with the debtor of the advisement obligation (garage owner who must advise the client not to repaire its vehicule, Civ.19janvier 1983, JCP 1984, II, 20175, note P. Jourdain).

In extreme cases, is even imposed the informing: from the “declaration of suspicion” that financial organisms must operate on sums or operations that seem to come from drug traffic to the “whistleblowers”.

It is the right to be informed.

B – Secrecy outside transparency
Secrets prosper in the shadow, and particularly where transparency is not imposed.
1. **Reservation of secret**

In the absence of transparency or communication, everything can be object of secret and protected as such, notably by the convention between the parties.

If no text yet institutionalizes the secret of business (articles L.621-1 CPI and L.1227-1 C. trav. punish the disclosure of trade secrets understood in a restrictive manner), there is however a principle of secrecy widely recognized.

As it was strictly underlined: “a total transparency would not be lawful. Indeed, it is opposed to the right of secrecy, which means the right to retain information. This rights relies on two basis: on the one hand the information is source of power…on the other hand it has a cost and a price…the holder has the right and duty to not disclose, even to lie, lying constitutes an efficient economic weapon…transparency must not exceed what is necessary to the good working of the market, for the rest business secrecy takes back its empire” (D. Schmidt, Transparence et marchés financiers et boursiers, p.169). In European law, business secrecy is recognized as a general principle with legislative value (CJCE 18 mai 1982, Rec. 1575).

It is the right to remain silent.

2. **Secrecy shifting**

Transparency often leads to a secrecy shifting outside of the sphere of the normal disclosure of the information. The move is recorded in vast domains, for instance:

- In the matter of public contracts it has been noted that “to the transparency of the procedures is opposed to the opacity of the montages, to the transparency of choice on the products is opposed the opacity of the choice of the contractor” (Ch. Brechon-Moulènes, Droit des marchés publics, p.52.)

- In the matter of contracts between professionals, the legislator itself has admitted that transparency on general commercial sale conditions stops where starts the opacity of the specific conditions of services favouring the commercialisation of products.

- In the matter of credit, the requirement of transparency imposed by the legislator to commercial companies, for guarantee operations, has led to a considerable development of letter of intent.

It is the right to hide.

II – The technical conciliation of the conciliation of the means

The opposition between transparency and secrecy being clarified regarding the ethic, their technical conciliation remains possible in the way that transparency needs secrecy (A) and secrecy can serve transparency (B).

A – **Transparency with secrecy**

Sometimes transparency and secrecy are bound because one cannot obtain the first one without assuring the second. Secrecy is therefore brought at the service of transparency.

1. **Transparency between confidants**

It appears in many situations that the communication of some information cannot be operated in secret. Transparency needs secrecy because it required a sharing of the secret.

In labour law, transparency is thus wanted on the economic situation of the company between the personnel representatives and the company’s leaders in the context, notably, of the works committee, but the communication of sensible information concerning the politic or the difficulties of the company requires that a discretion obligation lies between the hands of the members of the works committee.

Generally, when interested people exchange with necessary confidants, they use, in order to share a secret, contractual mechanisms, recognized as legal, that organize the conditions of conservation of secret and allow assuring the transparency.

It is the obtaining of transparency by secrecy.

2. **Transparency on the market**

The market, in the sense of economic exchanges place, needs transparency. It is the premise of competition law that can also be found in financial market law: “A good functioning of the stock market is essential to attract investments…the market must be transparent in its functioning which is against any idea of secret” (M. Carreau et J.Y. Martin, DPCI 1990-2, 42.).

But often, this transparency cannot be obtained in another way than secrecy.

This explains for example:

- The condemnation of information exchanges on price raises, even on practiced prices;

- The condemnation of insider dealings, which punishes the obligation of people, that come to the knowledge of privileged information, to keep it for themselves; “in such way that financial market law is explained by the two complementary principles of the interdiction of secrecy in the name of the market’s transparency and of the obligation of secret in the name of the respect of the financial market’s integrity” (M.Carreau et J.Y. Martin, préc.). Thus, the principle here is that everybody gets access to the same information; it is by the way irrelevant if the information is wrong. One can see how the quest of transparency distinguishes itself from the quest of the truth and how transparency can appear unfamiliar to any ethical function. It is barely a mean to assure equality or competition.

This is the protection of transparency by secrecy.

B – **Secrecy in transparency**

Transparency can be put at the service of secrecy, protect it, by assuring its recognition or ignorance.

1. **The recognition of secrecy**

Secrecy can perfectly be recognized, and thus protected, in transparency. The transparency on the existence of the secret allows precisely assuring the respect of its content.

The secret must obviously reveal itself as such to benefit the protection. And those who will receive its disclosure will, of course, have to keep it (C. pén. art. 226-13: «the revelation of a secret information by a person who is the depositary of it…is punished…»).

Thus, competition authorities organise with extreme rigor and caution the determining of business secret and its confidential treatment, reserving the right to withdraw, even without request of the parties, a document of the file when the business secret of a company is at stake. Here appears secrecy of the secret. Still, in principle, it is the involved party who should ask this withdrawal, but she needs to know that this document was seized, without knowing so the withdrawal of the document will only be able to occur after its disclosure. The question of the real transparency on secrecy and of the stakes of this transparency of the secret is asked here.

It is the protection of secret by transparency.
2. The ignorance of secrecy

Secret can be ignored in all transparency. Transparency is going to pretend the absence of secrecy.

One could evoke the stolen letter of Edgar Poe, when the highlight allows better dissimulation.

The use of “dummy companies” or holdings of which the account transparency allows to opacity relationships, activities or downstream organisations, is a good illustration of this misleading transparency.

It therefore appears different states of transparency to which correspond distinct states of confidentiality (M. Cozian, «Images fiscales, transparence, semi-transparence, translucidité et opacité des sociétés, JCP 1976, I, 2817.»).

And we perceive, in these transparency-secrecy degrees, an infinite regression game of which secrecy or transparency will emerge victorious depending on the stage at which it is stopped.

This is the obtaining of the secrecy by transparency.

Conclusion

On a technical plan, transparency and secrecy have each one their own role in the good conduct of business and in the control of business related behaviours, these roles can even combine; however in the ethical sphere, transparency and secret have as much legitimacy as the other, to be recognized as values in the economic matter but their domain is here separate, there is no possible complementarity.

The evolution towards transparency is not the sign of a moral progression, it renders the necessities of new information in a more and more complex and more demanding world in this respect.

Tomorrow, before the profusion of information, the quest may not be the one of transparency but the one of the filter and we might face once again the virtues of secret and silence.

Forum shopping strategies

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In a broad sense, forum shopping can be understood as the choice made by a party to bring a dispute in a jurisdictional order rather than in another one. This allows to avoid more and more restricting national legislations (ex: the period of notice provided by French or Belgian law in order to terminate a contract) or on the contrary to obtain the application of more favourable rules (ex: the possibility to form a class action before the American judge). It should indeed be noted that in most cases, choice of judge and choice of law are closely linked. The main interest to choose a judge rather than another one is often to see him apply a law considered more favourable.

It is therefore only about using to its own benefit options opened to parties by national laws. Yet, the expression forum shopping has a pejorative connotation echoing to something illegitimate. Between procedural hability and fraudulent choice, it belongs to the judge to rule over it.

Recent actuality offers a general survey of different strategies, more en more sophisticated, implemented by the parties in order for their interests to prevail.

1. Anti-suit injunction

Let’s remind that in common law countries, this injunction aims to prevent a party to engage or pursue proceedings engaged in another State, most often despite of a jurisdiction or arbitration clause. It is coupled with a particularly heavy punishment, the contempt of Court, which can lead to a fee or a prison sentence. It can also be accompanied with procedural sanctions such as the interdiction for the party violating the injunction to defend on the content.

Within the European Union, such injunctions are prohibited by the Court of Justice, which considers that they constitute a violation of the principle of mutual confidence for ruling. However, it is possible that the new Brussels 1 regulation, applicable starting the 10th January 2015, puts an end to this prohibition by principle when the injunction aims to protect an arbitration agreement. Indeed the recital number 12 returns in this case to national law, précising that «nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law ».

French law does not know the equivalent of anti-suit injunctions. After having expressed certain hostility towards them, suggesting that they would violate “foreign sovereign prerogatives” 4, the Court of cassation has granted the exequatur to an anti-suit injunction aiming to protect the jurisdiction clause, by holding that it would not violate French international public order.

A decision rendered by the Paris Court of appeal in the Vivendi case opens the door to such injunctions in France. Next to the introduction, by the shareholders of Vivendi, against the latter, of a class action in the United-States, the company Vivendi seized the French judge for a tort action against the initiators of the class action. Vivendi was asking in particular the injunction of withdrawal of the
American procedure. This procedure, which was pending, did not give rise to a final decision.

The Court of appeal admittedly refused, in the case, to receive the request of injunction, but without sustaining that such a decision would collide with a foreign sovereignty. It only ruled that no fault was established, considering the serious existing bounds between the dispute and the American jurisdiction.

Perhaps it would have been different if the action was engaged on the basis of the violation of a jurisdiction or arbitration clause, or for the seizure of a court without any link with the dispute.

It should nonetheless be précised that if such injunctions could be, in the future, pronounced in France, it is very likely that the punishment would be limited to penalty payment.

2. The significant imbalance

In a recent case, a Swedish company had entrusted a French company of the exclusive distribution of childcare products on several territories including France. The contract provided that Swedish law was the applicable law and that any dispute would be settled by arbitration in Stockholm. Next to the termination of the contract by the Swedish supplier, the French company tried to obtain damages before the French judge.

Still, his conviction to set aside the arbitration clause was needed, which supposes the clause to be “obviously null of obviously inapplicable” according to article 1448 of the Code of civil procedure. To do so, the claimant upheld that the litigious arbitration clause coupled with a choice of law clause created a significant imbalance between the rights and obligations of the parties, in the sense of article L. 442-6-I of the Code of commerce. According to him, the play of different clauses deprived him of the benefit of the French law, more protective and qualified as overriding mandatory rule, making the clause obviously null.

The Court of appeal refused to follow this analyse, placing itself, not on the field of significant imbalance as was asking the claimant but exclusively on the one of the obvious nullity. It upholds, on the one hand, that in accordance with the Rome Convention of 1980 on the applicable law to contractual obligations, the parties have exercised the faculty to freely choose the law governing the contract, and, on the other hand, that the exercise of this choice does not prevent the applicability of French overriding mandatory rules.

The criterion of the obvious inapplicability or nullity is very difficult to fulfil but it does not constitute an impassable obstacle. The question will certainly come up again, without any certitude on the answer that will be brought by the judges. Especially as the notion of significant imbalance is an expending work in progress.

Furthermore, it should be noted that the conditions of article 1448 of the civil procedure Code are not applicable to a jurisdiction clause. Such clause could be easily paralyzed by resort to the notion of significant imbalance.

3. The detour by the foreign judge

While it is traditionally taught that French judges must refuse the exequatur of a foreign judgement rendered in violation of a jurisdiction or arbitral clause, recent decisions oblige to wonder on the reach of such affirmation.

In the case Planor Afrique, which has given rise to a Court of cassation’s decision the 28th March 2013, one of the parties invoked the existence of an arbitration clause to contest the exequatur of a decision rendered by Burkinabe courts. The Court of cassation approved the Court of appeal that did not take into account the arbitration clause since it had established the existence of a sufficient link between Burkinabe judges and the dispute in the sense of the Simitch case.

Should it be understood that the foreign judge can withhold its competence in violation of an arbitration clause as long as he has a characterized link with the dispute?

At least, we have known the Court of cassation and the Paris Court of appeal swifter to support the efficiency of the arbitration clause.

On the contrary, in a decision of the 8th October 2013, the Paris Court of appeal has had a more protective approach of the arbitration clause, blaming the foreign judgement which proceeded to a “substantial review” on the clause to declare it inefficient. It therefore erects the principle of competence-competence, which gives priority to the arbitrator to rule on its own competence, in a international public order rule that must necessarily be followed by the foreign judge for his decision to be recognized in France.

Despite the uncertainties, the Planor Afrique case is of the nature to give ideas to many litigants.

4. The resort to declaratory actions

Traditionally regarded with distrust by French law, the declaratory action is a claim sometimes used by litigants to reinforce their choice of jurisdiction.

Thus, next to the air accident of Charm-el-Cheikh in 2004, victims’ families have seized, in accordance with article 28 of the Varsovia Convention of the 12th October 1929, the American judge in order to repair their prejudice. The American judge considered the French forum more appropriated and rendered a forum non conveniens decision under the reserve that the French judge declare himself competent. The victims’ families therefore seized the French judge with the only aim to see him declare himself incompetent. Defendants raised the inadmissibility of this claim supporting that the claimants did not have any interest to see the court, which they have themselves seized, declare itself incompetent. In vain, since the Paris Court of appeal confirmed the incompetence of French courts and gave free rein to the American judge.

The Court of cassation was brought to rule in a similar case where articles 33 §1 and 46 of the Montreal Convention of the 28th may 1999, which offer competences options to the victims, were pleaded. The Court takes care to precise that in application of this Convention “claimant has at its disposal, and only him, the choice to decide before which court the dispute will effectively be settled, any internal procedural rules which may lead to contradict this choice should not be applied”, it concluded that the seized Court of appeal should declare itself incompetent.

More recently, the Grenoble Court of appeal also had to deal with a declaratory action in a different context.

In this case, a French supplier and a Belgian distributor were involved in commercial relations for he distribution of products in Belgium. The supplier took the initiative of the relations. On his side, the distributor expressed the most explicit reserves and indicated his intention to take advantage of Belgian law.

Taking him by surprise, the supplier seized the French judge in order to see him judge, according to French law, that the term of notice that he gave to his contractual partner was reasonable and that he was therefore not indebted of any damages. The distributor contested the admissibility of the action on the basis that the claimant did not have any legitimate interest, born and actual, and that it was an abusive and disloyal forum shopping, but the argument was dismissed by the Grenoble Court of appeal.

This decision, if it is confirmed, can encourage parties to rapidly seize the judge that they believe to be the more favourable to their interests before the opposite party does so.

In a context where competition between the different jurisdictional orders speeds up, such strategies of forum shopping have
necessarily vocation to increase. The rush for the judge is never far away.

These different cases show that the law and French judges can adapt to try to answer to the new expectations of the operators.

NOTES

1. See the distinction proposed by P. de Vareilles-Sommières between the « shopping bonus » and the « shopping malus » dans sa communication « Le Forum shopping devant les juridictions françaises », T.C.F.D.I.P. 1999, p.49
2. CJUE, 27th April 2004, Turner, C-116/02 ; CJUE, 10th February 2009, West Tankers, C-185/07
3. In that respect, A. Nuyts, « La refonte du Règlement Bruxelles 1 », Rev. crit. DIP, 2013, p.1
12. Vivendi, ibid.

NEWS OF THE CAIP

Conference of FranceAgrimer in London

At the occasion of this conference which took place the 12th September 2014, Madame Irina Guérif, general Secretary of the Chamber, gave a lecture of the theme: « Dispute resolution by the International Arbitration Chamber of Paris ».

This conference was the occasion, for British participants, to attend this presentation of the CAIP, its functioning and of the different proposed procedures and to peruse its Rules of arbitration.