Interim remedies granted by French courts in support of arbitration

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This Practice Note sets out the interim remedies available in French courts in support of arbitration. For guidance on interim remedies available from arbitral tribunals in France, see the separate Practice Note: Interim remedies granted by arbitral tribunals seated in France.

Powers of the French courts to grant interim remedies in support of arbitration

The powers of the French courts to grant interim measures in support of international and domestic arbitrations seated at home or abroad, are set out in Articles 1449 and 1468 of the French Code of Civil Procedure (CCP).

French courts have recognised that the existence of an arbitration agreement is not, in and of itself, an obstacle for parties to apply for interim remedies before French courts (*Société Le Panorama v Simt*, Cass. 3rd Civ., 20 December 1982; *Société Léon Grosse v Société Schwind*, Cass. 1st Civ., 6 December 2005). French case law states that such an application does not amount to a waiver of the arbitration agreement (*Société Akzo Nobel v SA Elf Atochem*, Court of Appeal of Versailles, 8 October 1998).

CCP, Art 1449 states that 'the existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures'.

CCP, Art 1449, as modified by the Decree No 2011-48 of 13 January 2011 reforming the law governing arbitration (2011 Decree), makes clear that it is only possible to request interim measures from French courts before the arbitral tribunal is constituted. In other words, CCP, Art 1449 excludes the possibility of applying to French courts for interim measures once the arbitral tribunal is constituted, even if there is an emergency.

However, under CCP, Art 1468, even if the arbitral tribunal has been constituted, French courts retain exclusive jurisdiction (i) to order two types of interim measures, namely conservatory attachments (*saisie conservatoire*) and judicial securities (*sûreté judiciaire*) and (ii) to enforce such measures.

Under CCP, Art 1468, the court also has the power, subject to the arbitral tribunal's authorisation, to compel a third party to produce evidence.

Finally, parties may waive their right to seek the courts' assistance with respect to conservatory and interim measures (*LPF Danel v Sotiaf*, Cass. 2nd Civ., 20 March 1989). Such a waiver shall be made expressly or tacitly. In the latter case, a waiver is tacit when parties have adopted institutional rules which preclude parties to an arbitration agreement from seeking recourse to national courts in this regard (*Atlantic Triton v Republic of Guinea and Soguipêche*, Cass. 1st Civ., 18 November 1986).

Types of interim remedies ordered by French courts in support of arbitration

The types of interim measures available to parties, the moment at which parties may apply for them and the respective power of French courts to grant and enforce such measures are discussed below. Under French law, French courts may order the following measures in support of arbitration:

Before the arbitral tribunal is constituted

Instruction measures (CCP, Arts 145 and 1449)

French courts may order instruction measures, that is to say interim measures aimed at obtaining evidence or preventing the disappearance or destruction of evidence, prior to the constitution of the

arbitral tribunal. These measures are available, irrespective of the fact that the arbitration agreement provides for a seat in France or abroad. Parties requesting such measures do not have to demonstrate any kind of urgency, but they do have to demonstrate that the following cumulative requirements will be met:

- no arbitral tribunal has been yet constituted—under French law, an arbitral tribunal is constituted as soon as the arbitrators accept their mandate (CCP, Art 1456), which is subject to institutional rules in case of an institutional arbitration. For example, in case of an institutional arbitration under the ICC arbitration rules, the arbitral tribunal is constituted once the ICC Court confirms and/or appoints the arbitrators. Under French law, there is no time limit for the constitution of the arbitral tribunal
- there is a legitimate reason to preserve or establish the evidence of facts upon which the resolution of the dispute depends—in this respect, the applicant could argue that the determinative evidence will disappear or he needs certain evidence to be produced in order to assess the likelihood of success of a future dispute. In addition, the applicant should explain that it is likely that a future dispute will arise which will give rise to an arbitration according to the arbitration agreement at stake, although he does not have to provide the grounds of said dispute or argue that it will be admissible (*Cabinet Robert Mazars, Befec Price Waterhouse v Total, SFA*, Cass. Com., 2 July 2002)
- the instruction measures requested by the applicant are legally permissible—the French judges may order any type of instruction measures provided that they are legal. For example, upon the applicant's request, they may summon a party to appear to testify on a particular sequence of events, receive factual submissions from third parties or appoint an expert on facts (*Euro Disney v Impresa Pizzarotti and C. SPA*, Cass. 2nd Civ., 11 October 1995) In the latter case, the mandate of the factual expert appointed by the court must have necessarily ceased once the arbitral tribunal is constituted, and the scope of the judge-appointed expert may not coincide with the scope of the expert appointed subsequently during the arbitration proceedings. This of course might reduce the possibility of having conflicting expert conclusions but not annihilate them

An application may be made by way of an ex parte petition (*requête*) or by way of an inter partes summary procedure (*référé*). Under CCP, Art 493, the applicant may request an interim order on an ex parte basis (*requête*), in cases where he has good reasons for not notifying the opposing party. For example, this is the case when the applicant demonstrates that pieces of evidence are likely to disappear (*Société Parfums et Beauté de France v Société Liz*, Court of Appeal of Versailles, 13 October 1988).

In this regard, CCP, Arts 42–48 determine which national court (ie *Tribunal de Grande Instance* or *Tribunal de Commerce*) has territorial jurisdiction:

- unless otherwise advised, the court of the domicile of the defendant will have jurisdiction (CCP, Art 42)
- in real-estate matters, only the court of the place where the building is located has jurisdiction (CCP, Art 44)
- in contractual, tort and mixed matters, the claimant may bring his case at his choosing either before the court of the place where the defendant lives or another court as specified under CCP, Art 46

In addition, the *Cour de cassation* has held that the judge having territorial jurisdiction would be the President of the court, which would hear the potential dispute or of the court where the interim measure would be executed (*Altran CIS and Datacep v Devoteam, S'Team management*, Cass. 2nd Civ., 15 October 2015).

Finally, the instruction measures will be enforced at the initiative of the judge who issued them or that of one of the parties according to the rules applicable to each matter upon examination of an extract or a certified copy of the judgment (CCP, Arts 154–155).

Measures aimed at preserving the status quo pending the determination of the dispute and taking action that would prevent or refrain from taking action that is likely to cause current or imminent harm (CCP, Arts 808, 809, para 1, 872, 873, para 1, 1449, para 2)

Before an arbitral tribunal is constituted, parties to an arbitration agreement, may apply for interim measures aimed at preserving the status quo pending the determination of the dispute and at taking action that would prevent, or refrain from taking action that is likely to cause, imminent harm. This type of measures includes but is not limited to conservatory attachments and judicial securities for a claim. For example, the French courts may order a party to suspend work in case construction work is likely to cause irreparable harm to another party (*Lienhard v Epoux X*, Cass. 3rd Civ., 20 October 1976).

Such an application may only be made by way of an inter partes summary procedure (*référé*) to the President of the *Tribunal de Grande Instance* or of the *Tribunal de commerce*, which has jurisdiction to hear the matter pursuant to CCP, Arts 42–48.

Parties requesting measures under CCP, Arts 808 and 872 have to comply with the three following criteria:

- the measures do not give rise to any serious dispute or are warranted because of the existence of a dispute—French case law considers that there is a serious dispute when there is a dispute as to whether the rights claimed by a party exist (*S.A. LECASUD et al v S.A.S. CHEPAR et al*, Nîmes Court of Appeal, 2nd Com. Chamber, 26 March 2009, No 08/05054). French case law also considers that the existence of a dispute is established by the mere existence of the parties' request to be granted interim measures by way of a summary judgment (*Adnan M. v SCP PIMOUGUET LEURET*, Bordeaux Court of Appeal, 5th Civ. Chamber, 7 December 2011, No 11/03977). For the sake of clarity, the French courts will assess whether this requirement is satisfied without rendering a decision on the merits, which will be issued subsequently by the arbitral tribunal in compliance with the arbitration agreement
- urgency—must be established on a case-by-case basis. Often the court will make a comparison between the interests of the debtor and those of the creditor. For example, urgency was made out when, in light of an imminent tax audit, a judge appointed a receiver due to a dispute between the partners of a firm (*Mme X. et al v M. D.*, Cass. 1st Civ., 17 October 2012)
- the arbitral tribunal is not yet constituted (see above)

Even if the claims are seriously disputed and provided that the other two criteria are met, parties, by way of a summary procedure, may request any kind of interim measures either to avoid causing an imminent harm or to annihilate a manifestly illegal nuisance (*trouble manifestement illicite*) (CCP, Arts 809, para 1 and 873, para 1). The *Cour de cassation* has held that the courts had absolute discretion in assessing on a case by case basis the likelihood of an imminent harm (*Messrs Chemidelin, Gillin and Ms. Y. v Ms. X*, Cass. 2nd Civ., 27 June 1979). However, they refer to objective criteria when they conclude that there is a manifestly illegal nuisance. For example, any infringement to property rights (*Mrs. Y v Spouses X*, Cass. 3rd Civ., 22 March 1983) or a party's refusal to perform its contractual obligations (*Société ONIC v Société Lexington insurance company*, Cass. 1st Civ., 15 June 2004) would constitute such nuisance.

Measures relating to obtaining interim payment (référé-provision) (CCP, Arts 809, para 2, 873, para 2 and 1449, para 2)

When the existence of the contractual obligation is not seriously disputed, the creditor may obtain, on an interim basis, partial or entire payment of his debt. To obtain such a payment, three requirements must be satisfied (*Sitas v Horeva*, Cass. 1st Civ., 6 March 1990):

- the measures do not give rise to any serious dispute or are warranted because of the existence of a dispute (see above)
- urgency—eg, urgency is established when the creditor will face imminent harm and the recovery of the debt will be threatened, should it not be possible to immediately obtain payment of the debt, whether payment is partial or full (*X v Société Firma Waibel*, Cass. Com., 29 June 1999; *X v Société Rega*, Cass. 2d Civ., 13 June 2002)

- the arbitral tribunal is not yet constituted (see above)

This is an inter partes procedure. These measures are interim and do not bind the arbitral tribunal once the arbitration is commenced.

Once the arbitral tribunal is constituted

Measures relating to obtaining evidence held by a third party (CCP, Art 1469)

This is a procedural innovation introduced by the 2011 Decree. Parties to an ongoing arbitration may request the arbitral tribunal's authorisation to seek the assistance of the President of the *Tribunal de grande instance* in compelling a third party to produce properly identified pieces of evidence which were not in the possession of the parties to the arbitral proceedings.

CCP, Arts 42–48 determine which *Tribunal de grande instance* has territorial jurisdiction in this matter (see above).

In order to ensure that the proceedings before the *Tribunal de grande instance* are quick, the application is to be made, heard and decided as for summary judgments, which means that:

- this is not an ex parte application
- the decision rendered will be binding, and
- it is provisionally enforceable, unless otherwise advised (CCP, Art 492-1)

Before and after the arbitral tribunal is constituted

Conservatory attachments and judicial security for a claim (CCP, Art 1449)

Irrespective of whether the arbitral tribunal is constituted, a certain type of measure aimed at preserving the status quo and taking action that would prevent or refrain from taking action that is likely to cause current or imminent harm can only be granted by the courts, namely conservatory attachments and judicial securities for a claim.

Conservatory attachments can be performed against all movable assets even if they are held by a third party (eg freezing of bank accounts), and judicial securities for a claim can be performed against immovable assets (eg hypothec (legal charge), pledging of shares, pledging of business capital, etc).

Such measures fall under the exclusive jurisdiction of the enforcement judge (*juge de l'exécution*). The enforcement judge is either the President of the *Tribunal de Grande Instance* (Article 213-5 of the Code of the Judicial Organisation) or as the case may be the President of the *Tribunal de commerce*, where the debtor is domiciled, as stated by Articles 67 and 69 of the law of 9 July 1991.

Pursuant to Article L 511-1 of the Code of Civil Procedures for Enforcement (CCPE), a party may request interim measures against the opposing party's assets located in France when it demonstrates *prima facie* that (i) a debt exists and (ii) there are circumstances likely to threaten its recovery. The request for interim measures is made on an ex parte basis.

When a party demonstrates that one of these requirements is not met anymore, such measures will be lifted (CCPE, Art L 512-1). For example, conservatory attachments may be lifted, when the debtor submits to the court that it had obtained a bank guarantee such as a first demand guarantee (*Sociétés civiles immobilières Lisevic et al. v Société Hôtel du Soleil Isola 2000*, Cass. 2nd Civ., 31 January 2013).

It is not necessary to seek a judicial authorisation, when the creditor already holds an enforceable title against the debtor such as an arbitral award (*Same Deut-Farh Group v. Motokov France*, Cass, 2nd Civ., 12 October 2006). But, when the award has not been rendered, the party seeking interim measures must file an application before the enforcement judge.

The costs of this procedure are to be borne by the debtor. However, if the measures are lifted and if they have harmed the debtor, the latter will be entitled to claim damages (CCPE, Art L 512-1).

Anti-suit injunctions

Anti-suit injunctions are strictly speaking not available under French law. Nonetheless, French courts have recognised their validity under limited and specific circumstances and only when a non-EU Member State is involved. Indeed, in the *In Zone Brands* case, the *Cour de cassation* has granted recognition and enforcement to an American judgment, containing an anti-suit injunction restraining the French party, *In Beverage International*, to bring its claims before a court in France, given the fact that the contract contained a dispute resolution clause providing for the jurisdiction of an American court (*In Zone Brands International v In Beverage International*, Cass. 1st Civ., 14 October 2009).

French courts have not been faced with the recognition or enforcement of anti-suit injunctions issued by arbitral tribunals. However, in the 2015 *Gazprom* case, the Court of Justice of the European Union (ECJ) specified that where an anti-suit injunction is issued by an arbitral tribunal seated in the EU, the Brussels I Regulation does not apply. Enforcement of an arbitral award prohibiting a party from bringing certain claims before an EU Member State court is thus a matter for that member state's national law and applicable international law.

References:
Gazprom, C-536/13