



# ARBITRATION & DISPUTE RESOLUTION BULLETIN

## THE NEW FRENCH LAW ON INTERNATIONAL ARBITRATION

The French decree no. 2011-48 of 13 January 2011 (“the Decree”) reforms and modernizes French domestic and international arbitration law. Indeed, faced with the tremendous development, professionalization, and processualization of arbitration litigation and the increased competition between the various European international arbitration forums, the French authorities had to react and clarify French international arbitration law.

The new French international arbitration regulatory framework now boasts 24 articles in the French Code of Civil Procedure, including article 1506 that specifically and clearly refers to 31 provisions pertaining to domestic arbitration. It is clear from the principal novelties introduced by the reform that it aimed to strengthen international arbitration in such a way that international traders would continue trusting in French law on international arbitration so that Paris may remain a major international arbitration forum. The provisions of the Decree will for the most part come into force on 1 May 2011:

### 1. The relationship between the arbitration tribunal and the judicial courts

1.1. The Decree clearly states the exceptional cases in which the judicial courts may declare themselves to have jurisdiction on the merits – i.e., if on the one hand the case has not yet been referred to the arbitration tribunal and if on the other hand the arbitration agreement is obviously null and void or obviously inapplicable.

1.2. The Decree states which judicial courts to petition for protective measures prior to the start of the arbitration proceedings: (a) the President of the High Court for (i) fact-finding measures or (ii) provisional or protective measures subject to the evidence of an urgent matter and (b) the judge in charge of the execution of decisions (*judge de l'exécution*), who alone has jurisdiction over provisional seizures and judicial securities.

1.3. Once formed, the arbitral tribunal has very broad powers to carry out its task: it may order a party to produce documents subject to periodic penalty payments or order any protective or provisional measures.

1.4. Lastly, the institution of the supporting judge (“*judge d'appui*”) is a true novelty of the Decree which provides that - where the parties have not chosen an arbitration institution- international arbitration matters can be referred to the French supporting judge if: (i) the arbitration proceedings take place in France or (ii) the parties have chosen to submit the arbitration proceedings to French procedural law or (iii) to refer disputes relating to the arbitration proceedings to the French judicial courts or (iv) one of the parties risks being the victim of a miscarriage of justice. The supporting judge is the President of the High Court in Paris unless the parties decide to refer their case to another French judge or not to refer their case to a supporting judge at all. The powers of the supporting judge are particularly broad as they cover problems with respect to forming the arbitral tribunal or maintaining or removing arbitrators, controlling the arbitrators’

## THE NEWSLETTER OF THE PLG INTERNATIONAL NETWORK

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Christophe Héry

independence, and possibly extending the deadline for the arbitration proceedings.

## 2. The arbitration proceedings

The pragmatism of the new French regulations is obvious in three new provisions:

- Recent estoppel case law has been incorporated into article 1466 pursuant to which any party that has knowingly and for no legitimate reason failed to point out an irregularity in due time to the arbitral tribunal shall be deemed to have waived all related claims.
- The arbitrators must conduct themselves fairly and openly as regards possible conflicts of interest liable to affect their independence and impartiality: any such circumstance must be disclosed prior to accepting the task.
- Lastly, failing a majority, the chairman of the arbitral tribunal alone shall decide the case.

## 3. Enforcement of arbitral awards and remedies

3.1. Enforcement can only be denied if the award is “*obviously contrary to international public policy*”. As regards form, the original copy (or a copy) of the award must be presented along with the original copy (or a copy) of the arbitration agreement. If the arbitral award is drawn up in a language other than French, it is now possible to provide a free (as opposed to a sworn) translation. The Decree concentrates the *exequatur* before the President of the civil division of the High Court in Paris for awards handed down abroad, or before the President of the High Court within whose jurisdiction the international arbitration award was handed down.

3.2. The chapter pertaining to remedies differentiates between remedies applicable to international arbitration awards handed down in France and those applicable to awards handed down abroad.

(a) It is most certainly the rules applicable to both types of awards that will work the deepest changes to post-arbitration judicial litigation. Article 1526 provides that neither the claim to have an international arbitration award rendered in France set aside, nor the appeal of the order granting the enforcement of

such an award or an award handed down abroad, shall suspend the enforcement of the award. However, same article authorizes the first President of the Court of Appeal ruling in urgent matters to stay or simply adjust the enforcement of the award “*if such enforcement is liable to encroach deeply upon the rights of one of the parties*”.

(b) As regards international arbitration awards rendered in France, the Decree recalls that awards cannot be appealed, they can only be the subject-matter of a claim for having them set aside whereby the five cases for setting an award aside remain unchanged :: (i) the arbitration tribunal lacks jurisdiction or (ii) the arbitration tribunal is irregularly formed or (iii) the arbitration tribunal does not comply with its task or (iv) the arbitration tribunal does not respect due process or (v) the recognition of the award is contrary to international public policy. Two new rules could drastically change the way arbitration agreements are drawn up: (i) the parties may expressly waive all claims to have the award set aside and (ii) the deadline for the claim to have the award set aside is one month as of notification of the award which can be made by service or otherwise decided by the parties (for example by providing that notification shall proceed by recorded delivery letter, return receipt requested, or by e-mail).

(c) There have been no significant changes to the remedies available against arbitral awards handed down abroad. Orders answering petitions for the recognition or enforcement of such awards in France are appealable, whereby the competent Court of Appeal may only deny recognition or enforcement in the cases provided for in article 1520.

Christophe Héry, partner  
Lmt Avocats, Paris  
chery@lmtavocats.com

## MEDIATION AND PRE-MEDIATION IN ISRAEL

Mediation is becoming more and more popular in Israel, mainly due to the encouragement of the courts and nowadays, in accordance with the new addendum to the Civil Procedure Regulations, 1984, mediation has become part of the stages in the civil proceeding.

### Pre-Mediation procedure – The MAHO”T Meeting

Pursuant to Article 99(A-K) to the Civil Procedure Regulations, a MAHO”T (information, familiarity and coordination) Meeting is a procedure designed for the parties to examine the possibility of solving the conflict through mediation. A MAHO”T meeting is a compulsory procedure and the court will not hear the parties before the parties participate in such meeting. The MAHO”T meeting does not involve a fee, and is used as a pre-mediation (just like the pre-trial).

A MAHO”T meeting will take place only with civil monetary claims more than NIS 50,000.

A MAHO”T meeting is held by a mediator appointed by the court. The mediator will explain the principles of the MAHO”T meeting, the mediation process and the benefits of settlement of the claim by mediation. In addition, the mediator will examine with the parties the possibility to settle the claim by mediation.

As mentioned above, a MAHO”T meeting is intended to allow discussion of the option to end the conflict by mediation. Thus, for example, the parties must appear at the meeting in person (or accompanied by a lawyer) and the mediator can hear both parties’ arguments and speak to each party in private.

No more than 10 days following the MAHO”T meeting the parties jointly announce to the mediator and court whether they agree to transfer the prosecution process of mediation or seek to pursue it in court.

The details of the MAHO”T meeting, just like in mediation, are confidential and will not be used as evidence, whether the parties will agree to continue to mediation or decide to go back to court.



## General Procedure

In case the parties will chose to seek to pursue the prosecution process in court, the court may, at any stage of the procedure, transfer the proceedings to mediation if the parties have given their consent. However, in such case, the parties nominate the mediator with the court's approval, as opposed to the appointment of the mediator of the MAHO" T procedure who is nominated only by the court without the consent of the parties to the mediator's identity.

The mediation (whether after a MAHO" T meeting or at any stage of the procedure) is carried out according to the agreement detailed in the addendum to the Mediation Rules, unless the parties agree in writing otherwise.

## Advantages and Disadvantages of Mediation

In general, a main advantage of mediation is that it helps parties reach solutions or arrangements which are satisfactory to both parties. In order to reach a solution both parties have to give their consent. It should also be mentioned that due to the flexible nature of mediation, solutions reached through mediation procedures can be creative and unique.

In most cases, mediation is quicker and a less expensive procedure than litigation or arbitration.

On the other hand, mediation can be problematic in such a way that it can enable parties to carry out "Evidence Fishing". Although all things said or given in a mediation procedure are confidential and cannot be used as evidence in court, a party can always find a sophisticated and indirect way to use this information during a civil trial, like cross examination of witness etc.



Michal Dagan Jacob, Lawyer  
D. Mirkin & Co., Tel Aviv  
michal@mirbar.co.il

## RELEVANT ASPECTS OF THE FUTURE PORTUGUESE ARBITRATION LAW

The current Portuguese Arbitration Law which was approved in 1986 does not respond to the increased sophistication of voluntary arbitration procedures at an international level and does not deal with the demand of both corporations and individuals that worldwide employ extra judicial conciliation and arbitration procedures.

Therefore the Portuguese Government, seeking the development of the voluntary arbitration at the national level, have aimed at the transformation of Portugal into an attractive location for international operators to place their disputes. After taking into consideration (i) the accumulated experience acquired with the practical application of the current law, (ii) UNCITRAL (*United Nations Commission on International Trade Law*) Model Law on International Commercial Conciliation, (iii) the vast number of different papers and studies on commercial arbitration and investment arbitration carried out both in Portugal and abroad (particularly during the last three decades in countries where this type of procedures are broadly employed and also the current laws of said countries), it has decided to launch public discussion to prepare a new and up-to-date voluntary Arbitration Law. The Portuguese Arbitration Association has just announced the text of a law proposal (hereinafter referred to as the "project law") from which we shall draw your attention to the most significant features. Please note that this project law establishes an entirely new framework and therefore it is not feasible to describe herein all the novel characteristics of said framework!

Amongst other points the project law, following the German arbitration law of 1998 firstly changes the dispute's arbitrability criterion by making it primarily dependent on its pecuniary nature (with a subsidiary criterion regarding the relevant subject matter of the claim in order to allow the submission to arbitration of disputes not involving pecuniary interests but regarding which settlement is allowed). Secondly it provides a higher flexibility in the compliance with written form requirements and thirdly it undoubtedly states the principle of the arbitral process' autonomy and it



noticeably reaffirms the so called negative effect of the "Kompetenz-Kompetenz" principle of the Arbitral Tribunal. Further the project law introduces provisions determining the constitution of the Arbitral Tribunal, including the method by which to constitute an Arbitral Tribunal in the event of multiple applicants or respondents, and adopts a solution that has been implemented in recent foreign laws and in some regulations often used in international arbitrations (e.g. CCI regulation) stipulating the conditions for the appointment and removal of the arbitrators.

This project-law also introduces new provisions regarding interim measures in subordinated arbitral processes through the adoption of a distinction between "preliminary orders" – which are by nature short termed and not liable to be coercively enforced and which may be issued without hearing the respondent – and true 'interim measures', which are only ordered after hearing the respondent. Despite the fact that this distinction was directly inspired in UNCITRAL's provisions, the project-law has adjusted it to the terminology commonly used in the Portuguese Civil Procedure Law.

Moreover the project law regulates several other aspects of the arbitral process, from which we consider noteworthy: (1) the granting of power to the Arbitral Tribunal to decide when the parties fail to set the payment terms of the arbitrators' fees and of the costs within the arbitration agreement; (2) the absence of statement of defence by the respondent does not lead to an admission of the facts claimed by the applicant; (3) the acknowledgment of the possible intervention of third parties in the course of the arbitral process, whether prior to or during arbitration proceedings; (4) an initial period of twelve months, that can be extended several times without requiring the approval of both parties, replacing thus the period of six months of the current law as the time limit for the Arbitral Tribunal's final

award; (5) the extension of the arbitrators' power to decide as "amicable compositeurs" in national arbitrations; (6) a repeat of the final award appealability subsidiary rule, hence (unless expressly provided by the parties in the arbitration) cannot be appealed; (7) the possibility that the parties request the correction of any final award as well additional awards as to claims or relevant issues therein not decided by the Arbitral Tribunal.

The procedures for appealing are also foreseen. The appeal - only admissible if based on one of the grounds typified in the project law - will no longer constitute an action under ordinary proceedings and remains subject to two degrees of appeal, but the intervention of courts of first instance is waived and only the appeal court ("Tribunal da Relação") and the supreme courts (either judicial or administrative) are admitted, in order to assure a higher level of experience by the judges and prompt decisions. All other interventions by the state courts foreseen across the project law, with some minor exceptions, are now submitted to said high courts.

These are just some of the principles that the project law adopts, but these are relevant enough for this project, when finally approved, to be considered revolutionary for voluntary arbitration in Portugal. New arbitration structures will surely be created in Portugal and this alternative to the slow, expensive and unspecialised common courts may be a first step towards the confidence of entrepreneurs in our internal judiciary mechanisms, thus constituting a very positive input for the increase of Portugal's international competitiveness.



Bernardo Correia Barradas, lawyer  
CRA, Lisbon  
[cra@cralaw.com](mailto:cra@cralaw.com)

<sup>1</sup> The law proposal, including an English version both of the proposal and of the statement of reasons, is available at the Portuguese Arbitration Association's website - <http://arbitragem.pt/projectos/index.php>.

## NEW DIRECTION FOR ELECTRONIC DISCLOSURE

### Background

In any dispute, the obligation to disclose relevant documents is a key stage of litigation. The obligation extends to electronic documents and as the prevalence of electronic documents has increased exponentially, so has the need to review the e-disclosure process become more urgent.

In October 2005 a practice direction was introduced with specific requirements regarding the disclosure of electronic documents. Whilst many embraced the requirements, Lord Justice Jackson's report on the costs of civil litigation highlighted concerns that many were not following guidance offered. A number of cases have reached the court recently in which the management of e-disclosure has resulted in wasted costs, cost sanctions and the collapse of cases.

### New rules governing electronic disclosure

The Electronic Documents Practice Direction (the Practice Direction) came into force on 1 October 2010, and applies to all parties in Multi-Track cases (claims over £25,000). The stated purpose of the Practice Direction is to encourage and assist parties to reach agreement in relation to e-disclosure in a proportionate and cost-effective manner. The Practice Direction emphasises the need for early and ongoing communication and imposes more stringent obligations in that regard.

There is now a need to preserve electronic documents as soon as litigation is contemplated. Before the first case management conference, parties must discuss use of technology in the management and disclosure of electronic documents and inform the court of the outcome of these discussions.

The Practice Direction introduces a new e-disclosure questionnaire. The questionnaire gives the parties a structured and prescribed way of exchanging information by which they can agree the scope, extent and most suitable format for e-disclosure. Although it is not compulsory, it is the view of many practitioners that it will become part of standard practice and provide an aide to good project management. There are likely to be tactical advantages in using it before being ordered to do so under pressure from the court.

### Commentary

The aim of the Practice Direction is to encourage opposing parties to agree reasonable steps to take to access key information in a way that is proportionate. In the recent case of *Digicel -v- Cable & Wireless*, the parties were criticised for their failure to co-operate during the e-disclosure process, with the result that much of the disclosure exercise had to be repeated.

Electronic documents will include e-mails, text messages, data bases, documents on memory sticks as well as documents retained on servers and back up systems. Lawyers will now have to collaborate with IT experts in order to better understand client's IT infrastructures and data management practices. Technical experts will prove invaluable in providing opinions and costs estimates in the determination of what steps are proportionate.

The language of the Practice Direction is mandatory whereas the previous practice direction was phrased in more permissive terms. Ignoring the changes that the Practice Direction brings is therefore a very high risk strategy.



Paul Jonson, Partner  
Pannone LLP, Manchester  
[paul.jonson@pannone.co.uk](mailto:paul.jonson@pannone.co.uk)



# PLG Offices

SUMMER 2011

## To Contact PLG

### ANDORRA

Alfonsa Donaire Mena  
E-mail: [adonaire@andorra.ad](mailto:adonaire@andorra.ad)

### ARGENTINA

Cabanellas, Etchebarne, Kelly & Dell'Oro Maini,  
Buenos Aires  
Guillermo Cabanellas  
E-mail: [g.cabanellas@cekd.com](mailto:g.cabanellas@cekd.com)

### AUSTRIA

Petsch Frosch Klein Arturo, Vienna  
Peter Klein  
E-mail: [peter.klein@pfka.eu](mailto:peter.klein@pfka.eu)

### BELGIUM

Tondreau & Associés, Brussels  
Daniel Tondreau  
E-mail: [daniel.tondreau@tondreau.be](mailto:daniel.tondreau@tondreau.be)

### BRAZIL

Paulo Roberto Murray-Advogados, São Paulo  
Paulo Roberto Murray  
E-mail: [prmurray@prmurray.com.br](mailto:prmurray@prmurray.com.br)

### CANADA

Joli-Coeur Lacasse S.E.N.C.R.L., Montreal and Québec  
François-Xavier Simard Jr  
E-mail: [fx.simard@jolicoeurlacasse.com](mailto:fx.simard@jolicoeurlacasse.com)

### CHILE

Uribe Hübner Canales, Santiago  
Luis Felipe Hübner  
E-mail: [fhubner@uhc.cl](mailto:fhubner@uhc.cl)

### CHINA

Boss & Young PRC Lawyers, Beijing and Shanghai  
David Wu  
E-mail: [davidwu@boss-young.com](mailto:davidwu@boss-young.com)

### COSTA RICA

Interlex/Bufete Echeverría, San José  
Carlos Echeverría  
E-mail: [cecheverria@bufetecheverria.com](mailto:cecheverria@bufetecheverria.com)

### CYPRUS

Markos P.Spanos & Co., Nicosia  
Paris Spanos  
E-mail: [paris@mpspanos.com](mailto:paris@mpspanos.com)

### FRANCE

Lmt Avocats, Paris  
Antoine Lemétais  
E-mail: [alemetais@lmtavocats.com](mailto:alemetais@lmtavocats.com)  
Lamy Lexel, Lyon  
André Gast  
E-mail: [agast@lamy-lexel.com](mailto:agast@lamy-lexel.com)

### GERMANY

SKW Schwarz Rechtsanwälte, Berlin, Düsseldorf,  
Frankfurt, Hamburg and Munich  
Michael Brauch  
E-mail: [m.brauch@skwschwarz.de](mailto:m.brauch@skwschwarz.de)

### ISRAEL

D. Mirkin & Co., Tel-Aviv  
Efraim Barak  
E-mail: [efraim@mirbar.co.il](mailto:efraim@mirbar.co.il)

### ITALY

Studio Legale Marsaglia, Milan  
Antonia Marsaglia  
E-mail: [amarsaglia@marsaglialex.it](mailto:amarsaglia@marsaglialex.it)

Studio Legale Biamonti, Rome  
Luigi Biamonti  
E-mail: [luigi.biamonti@studiobiamonti.it](mailto:luigi.biamonti@studiobiamonti.it)

### NETHERLANDS

Schaap & Partners, Rotterdam  
Marianne van der Laak  
E-mail: [vanderlaak@schaap.eu](mailto:vanderlaak@schaap.eu)

### POLAND

KKS Legal, Warsaw  
Tomasz Sanak  
E-mail: [t.sanak@kkslegal.pl](mailto:t.sanak@kkslegal.pl)

### PORTUGAL

Coelho Ribeiro E Associados, Lisbon  
Jaime Medeiros  
E-mail: [jaimedeiros@cralaw.com](mailto:jaimedeiros@cralaw.com)

### SPAIN

Pintó Ruiz & Del Valle  
Barcelona, Ma del Mar Martín,  
E-mail: [mmartin@pintoruizdelvalle.com](mailto:mmartin@pintoruizdelvalle.com)  
Madrid, Javier del Valle,  
E-mail: [ma@pintoruizdelvalle.com](mailto:ma@pintoruizdelvalle.com)

Palma de Mallorca, Raimundo Clar,  
E-mail: [palma@pintoruizdelvalle.com](mailto:palma@pintoruizdelvalle.com)

### SWITZERLAND

Canonica Valticos & Associés, Geneva  
Dante Canonica,  
E-mail: [dcanonica@cvpartners.ch](mailto:dcanonica@cvpartners.ch)

### UNITED KINGDOM

Pannone LLP, Manchester  
Soren Tattam  
E-mail: [soren.tattam@pannone.co.uk](mailto:soren.tattam@pannone.co.uk)  
Pritchard Englefield, London  
Stuart McInnes  
E-mail: [smcinn@pe-legal.com](mailto:smcinn@pe-legal.com)

### URUGUAY

Estudio Algorta & Asociados, Montevideo  
Oscar E. Algorta  
E-mail: [algorta@estudioalgorta.com.uy](mailto:algorta@estudioalgorta.com.uy)

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© 2011 Arbitration & Dispute Resolution Bulletin - Summer 2011

Julienne Laveaux, PLG Secretariat  
PANNONE LAW GROUP EEIG  
Avenue de Sumatra 41  
1180 Brussels  
Belgium  
Tel: 00 32 2 374 88 46  
Fax: 00 32 2 374 90 61

email: [plg@plg.be](mailto:plg@plg.be)  
[www.plg.eu.com](http://www.plg.eu.com)

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This Newsletter is intended to introduce and explain on a regular basis new areas of Arbitration and Dispute Resolution which are of general interest to all of our clients. It is jointly written and produced by PLG's International Arbitration and Dispute Resolution Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Arbitration and Dispute Resolution News. Further information is available on all topics but nothing in PLG Arbitration and Dispute Resolution News is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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