FRANCE

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Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN FRANCE? WHAT RECURRING THEMES ARE YOU SEEING?

DUCLERCQ: With the financial crisis, the French economy has slowed down – but has not come to a stop. As a consequence, an increase of disputes relating to contract terminations and defaults in payment can be observed. In the meantime, contracts, and consequently disputes, relating to certain areas of industry have also increased, such as renewable energies or telecommunications, mainly due to the facts that these industries are on the rise and are less impacted by the crisis. Finally, we are starting to see more and more disputes arising out of contracts entered into with partners from emerging countries, such as India, Asia and Africa, particularly in the construction and distribution sectors, or arising out of joint-venture contracts.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

DUCLERCQ: First, be represented by counsel experienced in arbitration. Indeed, one of the main features of arbitration is its flexibility – well planned, it becomes a tailor-made procedure. However, obtaining a tailor-made procedure requires know-how. Second, it is often said that the arbitration is only as good as the arbitrator. Therefore, the choice of the arbitrator, a 'sage' who will have the time to study the cases – which is not always the case for a judicial judge – is key. This is especially important since arbitration is a 'one-shot' procedure, that is to say no appeal is possible. Thus, it is important to take time when choosing the arbitrator. Third, check the enforcement risk by analysing the possible places of enforcement of the award and the financial health of your opponents in the arbitration.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN FRANCE?

DUCLERCQ: There are a multitude of arbitration facilities and processes in France. France, and especially Paris, offers any facility or service necessary for the conduct of arbitration. Numerous hearing centres and conference rooms are available at various rates, and Paris is very easily accessible via its international airports and train stations. As regards arbitration processes, a large number of arbitration institutions are born in France, including the ICC, the Centre de médiation et d'arbitrage (CMAP) and the French Association for Arbitration (AFA). Of notice is also the existence of numerous regional or specialised arbitration centres and arbitration associations. For *ad hoc* arbitrations, France has one of the most accessible arbitration laws, offering a complete process laid out in a pedagogical and self-explanatory way.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

DUCLERCQ: France is an extremely 'arbitration friendly' jurisdiction and positions itself as the place to arbitrate. Its positive political inclination for arbitration was confirmed again recently with a new Decree n°2011-48 of 13 January 2011. First, annulment of awards may only be admitted in very limited cases. The Supreme Court has been seen to cast aside principles of international public policy to favour that of loyalty in arbitration, with the view to discourage behaviours consisting in invoking principles of international public policy in bad faith. Second, enforcement of awards is frequently admitted. An award may even receive the exequatur if set aside in another jurisdiction – see *Hilmarton*, Paris Court of Appeal, 19 December 1991; *Putraballi*, Supreme Court, 29 June 2007. Another element demonstrating French law's extensive support in upholding and enforcing awards is that recourse against an award or its enforcement order no longer suspends its enforcement – Article 1526 of the French Code of Civil Procedure (CCP).

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN FRANCE?

DUCLERCQ: Issues that might have to be dealt with are not necessarily restricted to France. Thus, should a dispute be brought before two competing jurisdictions, French courts decline jurisdiction in favour of arbitral tribunals by application of the principle of *kompetenz-kompetenz*. However, do not forget to invoke the existence of the arbitration clause before the court, failing which you will be deemed to have renounced to its benefit (Article 1448 CCP). When urgent conservative or interim measures are required, or if, in arbitrations involving more than two parties, one of the sides to an arbitration fails to agree on an arbitrator to appoint, the judge acting in support of the arbitration may implement them. Other examples include the fact that pending parallel criminal proceedings do not oblige the arbitral tribunal to stay the arbitral proceedings under French law (Sté Omenex, French Supreme Court, 25 October 2005).

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN FRANCE? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

DUCLERCQ: France has recently modernised its Arbitration Law, by Decree n°2011-48, which entered into force on 1 May 2011. Although already a leading place for arbitration, it hopes to become an even more attractive seat by rendering its legislation more transparent and pedagogic. New provisions designed to increase the efficiency of arbitration have been adopted. Particularly noteworthy innovations include the fact that arbitral tribunals seated in France may now enjoin a party in possession of an item of evidence to produce it in the arbitration and, if necessary, attach penalties to its injunction (Article 1467 CCP). Further, the judge acting in support of the arbitration may order the production of documents held by third-parties upon request of a party having obtained leave to do so from the arbitral tribunal (Article 1469 CCP). Finally, recourse against an award no longer suspends its enforcement (Article 1526 CCP).

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

DUCLERCQ: Although the arbitration clause might be concluded subsequently, it is highly recommended to insert an arbitration clause within the contract and pay particular attention to its drafting: it should not be treated as a mere 'midnight clause'. First, the scope of the potential arbitration should be determined: which parties are bound? Which types of disputes should be adjudicated? Second, other elements should be indicated in order for the clause to be fully efficient, including: the administering institution (if any); the place of arbitration; the law applicable to the dispute; the number of arbitrators; and the language of the procedure. If no administering institution is designated, it is also highly recommended to mention the law applicable to the arbitration procedure. Most arbitral institutions contain model arbitration clauses which can be directly inserted in contracts.

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Caroline Duclercq acts as counsel and arbitrator in domestic and international arbitral proceedings. She has experience of all steps of the dispute process, the pre-arbitral phase, arbitration proceedings, and enforcement or annulment of the award. Ms Duclercq assists clients in commercial arbitration, including distribution, telecommunications, energy, raw material, joint venture, sales / purchase agreements and industrial / intellectual property, under the aegis of several arbitral institutions as well as in *ad hoc* proceedings. A lawyer since 2001, Ms Duclercq holds a Masters degree in international business law from the University of Montpellier.