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**OVERVIEW OF THE PROTECTION OF SUBCONTRACTORS
UNDER FRENCH LAW**

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**Tuesday, 5th September 2006 at 6 pm at The National Liberal Club
Whitehall Place, London SW1**

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Law N° 75-1334 dated 31 December 1975 (and its subsequent amendments) (hereinafter “the 1975 Law”) constitutes the first legislative enactment governing Subcontracts. It was designed to improve the situation of Subcontractors by providing them with a series of rights/guarantees ensuring effective payment of the amount due under the Subcontract.

Prior to the adoption of the 1975 Law, no specific rules existed with regard to Subcontracts, and those contracts were thus governed by the general rules on contract. Subcontractors were thus in a difficult position: (i) failing a contractual link with the Employer, they had no right of action against him and (ii) the Main Contractor was unable or unwilling to pay the Subcontractor whenever he himself was not paid by the Employer.

This paper provides an overview of the means of protection that Subcontractors enjoy under French law (I.). It also examines the applicability of the 1975 Law in the context of international Subcontracts, particular emphasis being placed on international arbitration case law (II.). In addition, this paper briefly discusses some procedural avenues available to Subcontractors (III.).

I. THE MEANS OF PROTECTION SET FORTH IN THE 1975 LAW

The 1975 Law was amended several times and became a real efficient protective tool for Subcontractors thanks both to its strict enforcement by the judicial system and, to the obligation imposed upon the Employer to ensure that the Main Contractor complies with the 1975 Law.

It should also be stressed that the 1975 Law is mandatory, and that therefore any contractual provision contrary to the 1975 Law is null and void.

The 1975 Law applies to both private and public Subcontracts (Subcontracts concluded in relation to a public procurement contract).

Article 1 of the 1975 Law defines the Subcontract as the:

“transaction whereby a contractor entrusts a Subcontractor, for whom he is responsible, with the performance of all or part of the works contract or part of the public procurement contract signed with the main contractor.”

The same provision further specifies that (since 1998) the 1975 law applies to transportation contracts, i.e. to Subcontracts whereby a carrier delegates part of the performance to another carrier.

The 1975 Law provides for different forms of protection according to whether it is a private (I.A.) or a public procurement contract (I.B.).

I.A. Private contracts

The 1975 Law provides for three different types of protection: payment guarantee or delegation (I.A.1.), the Employer's civil liability (I.A.2.), and the right to request payment directly from the Employer (I.A.3.).

I.A.1. Bank Guarantee/Delegation

Pursuant to Article 14 of the 1975 Law and as a matter of validity of the Subcontract, the Main Contractor must provide the Subcontractor with a bank guarantee covering all amounts due to the Subcontractor under the Subcontract. Alternatively – but this is relatively rare in practice –, the Main Contractor may delegate to the Employer the obligation to pay the Subcontractor.

The bank guarantee of Article 14 is a “personal” guarantee in the sense that it must expressly mention the individual Subcontractor. For large companies which employ hundreds or thousands of Subcontractors every year, this requirement is a considerable burden. Some corporations have, therefore, chosen to have all their Subcontracts guaranteed by a single, broadly termed, bank guarantee. The *Cour de cassation* has condemned such practice, holding that it does not satisfy the requirement that the guarantee be personal.¹ In a subsequent decision, the Court has specified that the bank guarantee must indicate (i) the name of the Subcontractor and (ii) the amount of the guaranteed transaction.²

For medium or small size companies the provision of a bank guarantee is a serious financial burden sometime very difficult to obtain.

The bank can oppose to the Subcontractor the same exceptions than the Main Contractor but at least there is no risk of insolvency of the bank.

The bank guarantee of Article 14 must, in principle, be provided to the Subcontractor at the time of the conclusion of the Subcontract. However, the courts have held that a bank guarantee can validly be issued even subsequently to the conclusion of the Subcontract, provided that the Subcontractor has not relied on the lack of validity of the Subcontract when formally requesting payment from the contractor (*mise en demeure*).³

If no guarantee is issued in accordance with Article 14, the Subcontractor may seek the annulment of the Subcontract within a period of 5 years from its conclusion.

The courts have decided that the Subcontractor may request the annulment of the Subcontract for lack of providing a bank guarantee even when he has been fully paid.⁴ This will typically be the case when, in a lump sum contract, the Subcontractor seeks payment for “additional

¹ *Cour de cassation*, 3rd civil chamber, decision of 11 October 1989, D.1990.119.

² *Cour de cassation*, 3rd civil chamber, decision of 18 December 2002, D.2002.IR.181.

³ *Cour de cassation*, third civil chamber, decision of 17 July 1996, JCP 1996.IV.2157.

⁴ *Cour de Cassation*, third civil chamber, decision of 7 February 2001, available online at www.legifrance.gouv.fr

works” or intends to apply penalties for performance delays attributable to the Main Contractor. This extensive availability of the request for annulment thus serves as an efficient but controversial tool to exercise pressure on the Main Contractor which is not in accord with the self-proclaimed purpose of the law to ensure effective payment of Subcontractors.

The Main Contractor may, instead of providing a bank guarantee to the Subcontractor, delegate the obligation to pay the Subcontractor to the Employer. This delegation is a so-called “imperfect” delegation, i.e. the Subcontractor remains free to request payment from the Main Contractor. Evidently, since it assumes both the acceptance of the Subcontractor by the Employer and the solvability of the Employer, delegation constitutes a less efficient means of protection of the Subcontractor than a bank guarantee and is therefore rather rarely resorted to in practice.

I.A.2. Civil Liability of the Employer

Since 1986, and in order to enhance the efficiency of the protection provided to the Subcontractor, Article 14-1 of the 1975 Law imposes upon the Employer, aware of the existence of a Subcontractor, the obligation to ensure performance by the Main Contractor of his legal duties regarding (i) the acceptance by the Employer of the Subcontractor hired by the Main Contractor and (ii) the delivery of a bank guarantee/delegation to the Subcontractor. If the Employer fails to ensure compliance by the Main Contractor with these obligations, he will be liable to the Subcontractor.

Consequently, when the Employer is aware of the presence, on the site, of a Subcontractor whose acceptance has not been requested by the Main Contractor, the Employer must enjoin the Main Contractor to do so. Second, when the accepted Subcontractor does not benefit from a payment delegation, the Employer must request the Main Contractor to provide a bank guarantee to the Subcontractor.

It must be observed that the Employer is not obliged to accept the Subcontractors proposed by the Main Contractor. However, the Employer’s freedom to refuse acceptance of Subcontractors is, in practice, considerably limited. First, provided that the Employer knows that a Subcontractor has been hired, he may not validly rely on a clause contained in the main contract prohibiting the use of Subcontractors.⁵ Second, the Employer does not have total discretion when deciding to accept or refuse a given Subcontractor. Indeed, the *Cour de cassation* has decided that the Employer’s refusal must be based on reasonable justifications.⁶

In practice, due to the presence on the site of a co-ordinator of the Employer, the latter will usually be aware of the involvement of (a) Subcontractor(s) hired by the Main Contractor. However, he is not always aware of the presence of subsequent Subcontractors, i.e. the Subcontractors hired by the Main Contractor’s subcontractor/s. For those Subcontractors, it would be advisable to specifically notify the Employer of their presence.

Once the liability of the Employer is engaged, he may be responsible in tort up to the entire claim of the Subcontractor. This new obligation imposed upon the Employer since 1986 has considerably enhanced the efficiency of the 1975 Law.

⁵ *Cour d’appel* of Paris, decision of 23 April 2003, RDI 2004.103.

⁶ *Cour de cassation*, third civil chamber, decision of 2 February 2005, JCP 2005.II.10077.

I.A.3. Direct claim (*action directe*) against the Employer

According to Article 12, first recital, of the 1975 Law:

“where the Main Contractor fails to pay the Subcontractor within one month after formal notification, the Subcontractor may request payment of all amounts due under the Subcontract directly from the Employer.”

Article 13 of the 1975 law provides that:

“the obligations of the Employer are limited to the amount he still owes to the Main Contractor at the date of receipt of the copy of the formal notification [whereby the Subcontractor requests payment from the Main Contractor].”

The meaning of the expression “amount he still owes to the Main Contractor” has given rise to some debate: the question arose of whether this amount only refers to what is due under the Subcontract or whether it refers more generally to all amounts due under the main contract. The courts have preferred the latter, more extensive, interpretation.⁷

In order to enjoy the benefit of a direct claim against the Employer, the Subcontractor himself and the modalities of his payment must be formally accepted by the Employer.⁸ The courts have interpreted this requirement in such a manner as to not excessively restrict the protection afforded to the Subcontractor. First, they have held that the Employer’s acceptance may be tacit. In its decision of 18 July 1984, the *Cour de cassation* held that “*the acceptance of the Subcontractor by the Employer... must result, not from passive behaviour, but from an unequivocal act of will*”.⁹ While this decision admits, in principle, the possibility of tacit acceptance, it nevertheless requires an “unequivocal act of will”, which substantially limits the scope of tacit acceptance.

Second, the courts recognise the possibility for the acceptance to occur subsequently to the conclusion of the Subcontract.¹⁰ As far as the determination of the last possible moment at which the Subcontractor may be accepted by the Employer is concerned, this has been the subject of evolving case law. In a 1982 decision, the *Cour de cassation* required that acceptance occur prior to performance of the Works under the Subcontract.¹¹ Three years later, the *Cour d’appel* of Bordeaux considered that the Subcontractor could validly be accepted even after completion of the Works.¹² Ultimately, in 1987, the *Cour de cassation* found that acceptance was timely when it occurred at the time when the Subcontractor exercises his right of direct claim against the Employer.¹³

One issue that has given rise to controversy is whether subsequent Subcontractors, i.e. the Subcontractors hired by the Subcontractor and all following Subcontractors, benefit from

⁷ *Cour de cassation*, mixed chamber, decision of 18 June 1982, JCP 1982.II.19858.

⁸ *Cour de cassation*, mixed chamber, decision of 13 March 1981, D.81.309.

⁹ *Cour de cassation*, third civil chamber, decision of 18 July 1984, JCP 84.IV.310.

¹⁰ *Cour d’appel* of Paris, decision of 7 July 1981, JCP 82.II.19823.

¹¹ *Cour de cassation*, third civil chamber, decision of 18 May 1982, RDI 82.515

¹² *Cour d’appel* of Bordeaux, decision of 31 October 1985, RDI 87.57.

¹³ *Cour de cassation*, third civil chamber, decision of 16 December 1987, JCP 1993.IV.1415.

Article 12's right to a direct claim. The answer to this question is to the affirmative. However, it should be specified that the subsequent Subcontractors' direct claim can only be directed against the Employer and not against the Main Contractor or other Subcontractors in the chain of Subcontractors.

In any case, the Employer can oppose to the Subcontractor the same exceptions than the Main Contractor.

Prior to bringing a direct claim against the Employer, the Subcontractor needs to formally request payment from the Main Contractor. Such request may consist of a formal writ filed with a court or, more frequently in practice, of a letter sent by registered mail. A copy of the request must be addressed to the Employer. The sending of the copy has the effect of "freezing" the money due to the Main Contractor up to the Subcontractor's claim.

I.B. Public Procurement Contracts: Direct Payment

Article 4 of the 1975 Law contains a succinct definition of public procurement contracts. It states that those contracts are "*transactions made by the State, its territorial sub-divisions, and public establishments and corporations.*" Under Article 4 of the 1975 Law, the determination of whether a contract is a public procurement contract or not does not thus require an inquiry into the actual object and purpose of the contract at stake.

Since the adoption of Law N° 2005-845 dated 26 July 2005, Article 14-1 of the 1975 Law is applicable to public procurement contracts. The Employer is thus liable towards subsequent Subcontractor for non-performance of his obligations under this provision.

The main guarantee provided to the Subcontractor, however, consists of his right of direct payment.

Contrary to the bank guarantee and the right of direct claim against the Employer, this right does not constitute a subsidiary mechanism when the Main Contractor fails to pay, indeed in the present case the payment by the Employer is substituted for the payment by the Main Contractor. Technically, this direct payment constitutes an "imperfect delegation", which means that the Main Contractor remains liable vis-à-vis the Subcontractor. However, the parties may specifically exempt the Main Contractor from his payment obligations.

In order for the Subcontractor to be entitled to direct payment by the Employer, several requirements have to be met. First, the Main Contractor must, when submitting his offer to the Employer, indicate (i) the nature of the tasks that he intends to have performed by the Subcontractor, (ii) the amounts involved, and (iii) the name(s) of the Subcontractor(s) he intends to employ. Second, the Employer must have accepted the Subcontractor concerned. Contrary to what we have seen with regard to the Subcontractor's direct claim (supra, I.A.3.), such acceptance must be express. Third, only Subcontractors directly hired by the Main-Contractor have a right of direct payment by the Employer; subsequent Subcontractors do not.

With regard to the amount of the direct payment, this may not exceed either (i) the amount due to the Contractor under the main contract, or (ii) the amount due under the Subcontract. Contractual penalties are not considered to be part of these amounts.

II. APPLICABILITY OF THE LAW OF 1975 TO INTERNATIONAL SUBCONTRACTS

Since Law 1975 is a rather exceptional legal protection of Subcontractors, international practitioners may be interested to know when they are at risk to suffer / could benefit from the application of the 1975 Law.

As a preliminary issue, it is necessary to determine when a Subcontract is international (II.A). When analysing the applicability of the Law of 1975 to those Subcontracts, one can distinguish three different scenarios: the parties have chosen French law as the governing law (II.B.), the parties have chosen a law different from French law as the governing law (II.C.), and the parties have not selected the applicable law (II.D.).

II.A. When is a Subcontract international?

In international conflict of laws treaties or uniform law treaties, the internationality of a contract is usually determined by way of reference to the parties (their nationalities or their places of habitual residence/domicile/incorporation) or to the transaction (does performance involve more than one country?). With regard to Subcontracts, the situation is different because Subcontracts form part of a larger economic transaction (the main contract) to which they are closely connected. French courts have thus considered that, in order for a Subcontract to be international, it is sufficient if the main contract is international. This latter internationality is, under French law, essentially defined on the basis of transaction-related criteria, i.e. a contract is international if it involves a cross-border transaction.

Two decisions are illustrative of this approach to internationality of the Subcontract. In its decision of 14 March 1989,¹⁴ the *Cour d'appel* of Paris decided that a Subcontract concluded between two French companies and which was performed exclusively in France was international as a result of the internationality of the main contract.

Similarly, in ICC case N° 7528, the Tribunal held that a Subcontract concluded between two French companies was international because the Employer was a Pakistani government agency and the works were to be performed in Pakistan.¹⁵

II.B. The parties to the Subcontract have chosen French law as the governing law

Where the parties to the Subcontract have chosen French law as the governing law, the Law of 1975 applies, as a matter of principle, to the Subcontract.

However, it should be clarified that the Law of 1975 only applies to the relationship between the Subcontractor and the Main Contractor and not to the relationship between the Employer and the Main Contractor, which may be governed by a different law. Hence, where only the Subcontract is governed by French law and the main contract by a different law, the Main Contractor is obliged to furnish a bank guarantee/payment delegation to the Subcontractor

¹⁴ Unpublished

¹⁵ Yearbook Comm. Arb'n XXII, 125, 130 (1997).

under Article 14 of the 1975 Law, while, on the other hand, the Subcontractor does not enjoy the rights granted to him vis-à-vis the Employer under Articles 11 and 14-1 (direct claim, civil liability). Only where both contracts, i.e. the main contract and the Subcontract, are governed by French law will the relationships between the three parties involved (Employer, Main Contractor, Subcontractor) fall under the 1975 Law.

If it is “natural” for the 1975 Law to apply to the Subcontract as part of the *lex contractus* when the parties have chosen French law as the governing law, a more difficult question is whether the parties are allowed, while submitting the Subcontract to French law, to exclude the application of the 1975 Law. If this were possible, the parties would be able to “pick and choose” amongst the provisions of French law those that they wish to apply to their contractual relationship and those they wish to exclude.

Article 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations provides that “the parties can select the applicable law to the whole or a part only of the contract.” Under Article 3(1), and provided that it is not fraudulent, the parties are thus free to select French law for certain aspects of their contractual relationship only. They can, for example, choose to have the scope of their contractual obligations governed by French law, while submitting the validity of their contract to another law. However, most commentators concur that Article 3(1) of the Rome Convention does not enable parties to pick amongst the provisions of the law selected since this would, as one “undermine the authority of the law”.¹⁶

However, the views of these writers are not unanimous. In at least one case – ICC arbitration case N° 7528 mentioned above – did the Arbitral Tribunal hold that the Law of 1975 was not applicable, even though the parties had submitted their contract to French law.¹⁷ In this case, the Main Contractor failed both to request the acceptance of the Subcontractor by the Employer and to provide a bank guarantee to the Subcontractor as required under Articles 3 and 14 of the 1975 Law. The Arbitral Tribunal took the view that the reference in the parties’ contract to French law was a reference to general contract law and did not necessarily include the 1975 Law. The tribunal further considered that, since the 1975 Law would have the effect of rendering the contract null and void, the parties must have intended to exclude its application.

According to the Tribunal, such an exclusion was valid because the 1975 Law is only mandatory for domestic contracts and may be derogated from in the international context.

It can thus be concluded that, where the parties have subjected their contract to French law, the 1975 Law will, in principle, apply. The question of whether the parties may, under such circumstances, expressly or tacitly exclude this law is, due to the paucity of relevant judicial and arbitral case law, not entirely settled. However, the proposition that the parties are not allowed to exclude the 1975 Law when their contract is governed by French law is generally preferred.¹⁸

¹⁶ See J.-G. Betto, ‘International Subcontracts: How to Exclude the French Law of 1975’, *IBLJ*, N°4, 411, 420 (1999) quoting Professor Pierre Mayer.

¹⁷ Yearbook Comm. Arb’n XXII, 129 (1997).

¹⁸ J.-G. Betto, *op. cit.* at footnote 16, p. 420: ‘an *electio juris* clause favouring French law yet expressly excluding the law of 1975 would be ineffective or even null, and particularly so if there was a strong connection to France.’

II.C. The parties have chosen a law different from French law as the governing law

When the parties have submitted their contract to a law other than French law, the 1975 Law may only be applicable if it constitutes an internationally mandatory norm or *loi de police*. Indeed, the Rome Convention provides that:

*“When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”*¹⁹

It appears from this provision that, in order for the 1975 Law to be applicable as a *loi de police*, two requirements must be met: (i) the legal relationship at stake needs to be connected to France and (ii) the French legislator must have intended the 1975 Law to apply regardless of the otherwise governing law.

As to the first requirement, it can be assumed that a sufficient connection might exist whenever the works are performed in France or the Subcontractor is a French entity. As far as the second requirement is concerned, it is unclear whether the French legislator intended the 1975 Law to be applicable even if a law different from French law is otherwise applicable. In the absence of a specific provision in the law, most courts have refused to recognise such intent. However, both the rationale and the precise meaning of the relevant decisions remain somewhat ambiguous.

In ICC case N° 4071,²⁰ the Arbitral Tribunal addressed the *loi de police* nature of Article 3 of the 1975 Law. The Tribunal stated that such a characterisation would not only be “very debatable”, but also lack a proper connection with France: on the one side, the Works were performed abroad and, on the other side, the fact that the Subcontractor is French cannot be a sufficient basis for applying the 1975 law since this law does not mention the French nationality of the Subcontractor as a prerequisite for its application. This decision does not therefore, categorically exclude the *loi de police* nature of the 1975 Law.

In ICC case N° 7528, already referred to above, the Arbitral Tribunal, examining the possible *loi de police* character of the 1975 Law, observed:

*“In order to apply Art. 14 [of the 1975 Law] as a loi de police, it should be proven first that such provision was intended to have such a character. No reported French decision has been put before the Tribunal where an international contract was avoided for non-compliance with Article 14. But if Art. 15 [which states that one cannot derogate from the provisions of the 1975 Law] were to be applied to this international contract, as claimant requests, such application would have to be warranted by a specific contact with France...”*²¹

¹⁹ Article 7(1) of the Convention.

²⁰ See P. Glavinis, ‘Le contrat international de construction’, 549 (1993).

²¹ Yearbook Comm. Arb’n XXII, 130 (1997).

The Tribunal therefore considered that legislative intent *derives* from the connection the contract has with France, rather than constitutes an independent second criterion of the *loi de police* characterisation. It further stated that the place of performance (Pakistan) is equally significant then the nationality of the parties (French), and that it is necessary to take into account the consequences of the application or non-application of Article 14 in the present case. The Tribunal ultimately found that the 1975 Law should not be applied as a *loi de police*.

In a more recent arbitration award, the Arbitral Tribunal “indirectly” addressed the question of the *loi de police* character of the 1975 Law. Indeed, the question was not submitted to the Tribunal as such: the contract was governed by French law and, therefore, the 1975 Law applied as part of the *lex contractus*. The question of the *loi de police* characterisation might only have arisen if the parties had attempted to exclude the application of this law, which was not the case. However, for reasons which are not entirely clear from the available extract, the parties had, in the proceedings, agreed that the 1975 Law did not constitute a *loi de police* and the Tribunal seems to have taken such agreement into account. It is very doubtful, however, whether a party agreement may have an impact on whether a particular rule constitutes a *loi de police* or not.

II.D. The parties have not chosen the law governing their contract

Where the parties have not chosen the law applicable to their contract, the 1975 Law will apply if French law is designated by the applicable conflict of laws rules. Under the Rome Convention, absent a choice-of-law by the parties, “the contract shall be governed by the law of the country with which it is most closely connected.”²² The Convention further specifies:

*“[I]t shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.”*²³

In order to determine the applicable law, it is thus necessary to identify the characteristic performance of the contract. Since one habitually considers that monetary obligations are not characteristic, it can be held that it is the Subcontractor who effects the performance that is characteristic of the Subcontract. Such a view has been taken, for example, by the *Cour d’appel* of Riom in its decision dated 10 November 2004. In this decision, the Court held that, “*in the absence of a choice by the parties, it is appropriate to apply the law of the habitual residence of the Subcontractor who is the debtor of the characteristic performance*”.²⁴

It can thus be concluded that, in the absence of a choice-of-law by the parties, the application of French conflict of laws rules would lead to the 1975 Law being applicable to a Subcontract when the Subcontractor habitually resides (or has his central administration) in France. However, it must be observed that, while this solution is justified as a matter of legal reasoning, the limited number of cases having addressed this issue does not allow any definite

²² Article 4(1).

²³ Article 4(2).

²⁴ The decision is available online at: www.legifrance.gouv.fr.

conclusion as to the actual practice. Indeed, the above-mentioned ICC case N° 4071 seems to attribute considerable weight to the place of performance of the Subcontract and upholds the suggestion that the 1975 Law could, in principle, apply whenever the Subcontract is performed in France.

Finally depending upon the jurisdictional forums (local courts or arbitral tribunal) the conflict of law rules chosen as well as the relative weight of each connexion may be different.

III. SPECIFIC PROCEDURAL VENUES AVAILABLE TO SUBCONTRACTORS

Apart from substantial protection, Subcontractor may resort to certain procedural scheme to enhance their rights such as Dispute Boards (III.A.), careful drafting of ad hoc arbitration provision (III.B.) or the French *référé-provision* procedure (III.C.).

III.A. Dispute Boards

To emphasize their legal protection in international context, subcontractors may well be advised, when possible, to negotiate appropriate dispute resolution mechanism such as Dispute Boards when the contract implies long term and/or costly works. As a matter of example the parties may refer to the new ICC Dispute Boards Rules.

Dispute Boards are normally set up at the outset of a contract and remain in place and are remunerated throughout its duration. Comprising one or three members thoroughly acquainted with the contract and its performance, the Dispute Boards informally assists the parties, if they so desire, in resolving disagreements arising in the course of the contract and it makes recommendations or decisions regarding disputes referred to it by any of the parties. Dispute Boards have become a standard dispute resolution mechanism for contractual disputes arising in the course of mid- or long-term contracts from which Subcontractors could widely benefit.

Under the ICC Dispute Boards Rules three alternative types of Dispute Board are available to parties:

- **Dispute Review Board ('DRB')**

The Dispute Review Board which issues 'Recommendations' with respect to any dispute referred to it and constitutes a relatively consensual approach to dispute resolution. If no party expresses dissatisfaction with a Recommendation within a stated time period, the parties contractually agree to comply with the Recommendation. If a party does express dissatisfaction with the Recommendation within such time period, that party may submit the entire dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the Recommendation but are not bound to do so.

• **Dispute Adjudication Board ('DAB')**

The DAB issues 'Decisions' with respect to any dispute referred to it and constitutes a less consensual approach to dispute resolution. By contractual agreement, the parties must comply with a Decision without delay as soon as they receive it. If a party expresses dissatisfaction with a Decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the Decision unless and until the arbitral tribunal or court rules otherwise. If no party expresses dissatisfaction with a Decision within the stated time period, the parties contractually agree to remain bound by it.

This was the system provided for in the Tunnel Channel case although it was an ad hoc and not an ICC Dispute Board, which did not exist at that time.

• **Combined Dispute Board ('CDB')**

The CDB normally issues Recommendations with respect to any dispute referred to it but may issue a Decision if a party so requests and no other party objects. In the event of an objection, the CDB will decide whether to issue a Recommendation or a Decision on the basis of the criteria set forth in the Rules. The CDB thus offers an intermediate approach between the DRB and the DAB.

The essential difference between a Decision and a Recommendation is that the parties are required to comply with the former without delay as soon as they receive it, whereas a Recommendation must be complied with only if no party expresses dissatisfaction within a stated time limit. In either case, if a party is dissatisfied with a Dispute Board's determination of a given dispute, it may refer the dispute to arbitration, if the parties have so agreed, or the courts, in order to obtain an enforceable award or judgement. The Dispute Board's determination is admissible in any such further proceedings.

III.B. Ad hoc arbitration provisions

Subcontractors may hand draft ad hoc arbitration provisions such as the ones provided for in the Eurodisney main and subcontract .

In this significant project, the parties had agreed in their main contract that Claimant and Respondent had the option within a limited period of time, after filing of the request for arbitration or of the answer, to attract subcontractors in the dispute to ensure simultaneous settlement of all claims before the same forum – similar provisions were included in each subcontract (See Annexe 3 with a sample of the dispute resolution mechanism provided in some Eurodisney contracts).

The analysis of this provision could deserve extensive discussion, suffice to say for the time being that it proved to be an efficient mechanism although since it lead to multiparty arbitrations, careful drafting of the method of appointment of arbitrators was essential.

III.C. The *référé provision*

The specificity of the French *référé provision* procedure under French law may constitute a useful tool for ensuring prompt payment to a Subcontractor.

The *référé* procedure is a procedure whereby a claimant may obtain provisional relief within a very short time period. According to Article 809 of the *Nouveau Code de Procédure Civile*, the judge may, where the existence of the obligation of the defendant is not seriously challengeable, order the defendant to pay to the claimant the amount allegedly due to him (the “provision”).

A Subcontractor may make use of the *référé-provision* procedure to claim payment from the Main Contractor, or the Employer.

From a practical standpoint, if the conditions are satisfied, i.e. Claimants can demonstrate that the amount is due and Respondent has no serious evidence to challenge it, French judge can order payment of the entire amount within a couple of days notwithstanding any arbitration provision.

As a matter of example Transmanche Link (TML) obtained a court order from the Tribunal de Grande Instance within less than 15 days ordering Eurotunnel (ET) to pay over a hundred millions of French Francs, since Eurotunnel had no serious defense to oppose the claim and notwithstanding the fact that the parties had agreed that all disputes were to be settled first by a dispute review board, and if a party disagree with the outcome, by ICC arbitration.

ANNEXE 1
Core provisions of the Law n°75-1334
dated December 31, 1975 on subcontracting

Article 1

Under this law, subcontracting is the transaction whereby a contractor entrusts a subcontractor, for whom he is responsible, with the performance of all or part of the works contract or part of the public procurement contract signed with the main contractor.

The provisions of this Law shall apply to transport operations, the “donneur d’ordre” shall be assimilated to the employer, and the party with whom the subcontracting carrier who performs the transport concludes a contract, shall be assimilated to the main contractor.

Article 3

The main contractor planning to execute a contract using one or more subcontractors must, when the contract is concluded and throughout its duration, have all subcontractors accepted and the conditions of payment for each subcontract approved by the employer; the main contractor shall be bound to provide the employer with the subcontract(s) upon request.

Should the subcontractor not be accepted or the conditions of payment not be approved by the employer under the conditions laid down in the previous subparagraph, the main contractor shall nevertheless be obligated to the subcontractor but shall not be able to invoke the subcontract with regard to the subcontractor.

Article 5

Without prejudice to the acceptance laid down in Article 3, the main contractor must, at the time of submission, indicate to the client the nature and value of each service he plans to subcontract as well as the subcontractors he intends to employ.

During the execution of the contract, the main contractor may employ new subcontractors, upon preliminary disclosure to the client.

Article 6

The direct subcontractor of the successful bidder who has been accepted and whose conditions of payment have been approved by the client shall be paid directly by the latter for the part of the contract executed by the former.

However, the provisions of the previous paragraph shall not apply when the value of the subcontract is below a threshold which, for all the contracts laid down in this title, shall be set at 600 euros. This threshold may be increased by Conseil d'Etat Decree according to variations in the economic situation. Below this threshold, the provisions of Title III of this Law shall apply.

With regard to industrial contracts concluded by the Ministry of Defense, a different threshold may be set by Conseil d'Etat Decree.

This payment shall be mandatory even if the main contractor is in liquidation, receivership or temporary suspension of proceedings.

The subcontractor responsible for the execution of a contract who delegates a part of such contract to another subcontractor shall provide him with a bank guarantee or a delegation of payment according to the provisions of Article 14.

Article 12

Where the main contractor fails to pay the subcontractor within one month after formal notification to pay, the subcontractor may request payment of all amounts due under the subcontract directly from the employer.

Any waiver of the right of direct action shall be considered invalid.

This direct action shall apply even if the main contractor is in liquidation, receivership or temporary suspension of proceedings.

The provisions of the second subparagraph of Article 1799-1 of the Civil Code shall apply to subcontractors who fulfil the conditions laid down in this article.

Article 14

In order for the subcontract to be valid, the payment of all monies due to the subcontractor by the contractor pursuant to the subcontract shall be guaranteed by a personal and joint guarantee obtained by the main contractor from a qualified establishment, approved under conditions laid down by Decree. However, the guarantee shall not be provided if the contractor has delegated payment of the subcontractor to the employer pursuant to Article 1275 of the Civil Code, up to the amount of the services executed by the subcontractor. On a temporary basis, the guarantee may be obtained from an establishment which appears on the list laid down by the Decree implementing Law No 71-584 of 16 July 1971 on guarantee reductions.

Article 14-1

For contracts concerning building works and public works:

- should the employer be aware that a subcontractor present on site has not been the subject of the requirements laid down in Article 3 or article 6, or article 5, he should request the main contractor or the subcontractor to fulfil his obligations. This provision applies to public and private works.
- should payment of a subcontractor who has been accepted, and whose conditions of payment have been approved by the employer under the conditions laid down by Conseil d'Etat Decree not be delegated to the employer, the latter must require the main contractor to prove that he has obtained the bank guarantee.

The provisions above regarding the employer shall not apply to physical persons building a home for themselves, their spouse, their own ascendants or descendants or those of their spouse.

ANNEXE 2

Summary of some of the core cases quoted

[Peinture Normandie / Fougerolle Construction] Cour de cassation, 3rd civil chamber, decision of 11 October 1989, D.1990.119 (See footnote 1)

A painting company had concluded a Subcontract with another painting company. The Subcontractor brought an action against the Main Contractor for the annulment of the Subcontract. The *Cour de cassation*, unlike the Court of Appeal, annulled the contract on the grounds that the bank guarantee was not personal as required by the terms of articles 14 and 15 of 1975 law since it was a bank guarantee common to several different Subcontractors.

[CITC / Société Entreprise Laine] Cour de cassation, 3rd civil chamber, decision of 18 December 2002, D.2002.IR.181 (See footnote 2)

The Subcontractor company (a Metallic construction company) requested the annulment of the Subcontract for violation of articles 14 and 15 of the 1975 Law. The *Cour de cassation*, unlike the court of appeal, granted the annulment on the ground that the provided bank guarantee contained neither the name of the Subcontractor nor the exact amount of the sum guaranteed.

[Matra transport / Cegelec] Cour de cassation, third civil chamber, decision of 17 July 1996, JCP 1996.IV.2157. (See footnote 3)

A transportation company had concluded a Subcontract with another company for the construction of a new subway line. The Subcontractor requested the annulment of the Subcontract for violating article 14 of the 1975 law. The *Cour de cassation* affirmed the decision of the Court of appeal which refused the annulment on the grounds that the Subcontract was not null and void even though the bank guarantee was not provided at the time of conclusion of the contract, and that such guarantee could be validly provided even after the conclusion of the Subcontract.

[Chagnaud / Paritherm] Cour de cassation, 3 rd civil chamber, decision of 7 February 2001, RDI 2001, p. 163 (See footnote 4)

The Subcontractor requested the annulment of the Subcontract for absence of a bank guarantee at the time of conclusion of the contract. The Main Contractor contested the annulment arguing that he could validly provide a bank guarantee after the conclusion of the Subcontract as long as the Subcontractor did not suffer from such delay. But the *Cour de cassation* held that since the bank guarantee had not been provided concomitantly with the conclusion of the contract, the Subcontractor had the right to ask for the annulment of the contract and consequently the court declared the Subcontract null and void.

[ETP / HLM] Cour de cassation, third civil chamber, decision of 2 February 2005, JCP 2005.II.10077 (See footnote 6)

The Employer had concluded a contract with another company for the realization of a real estate program. The contractor who intended to conclude a Subcontract with another company presented the prospective Subcontractor to the Employer in order to obtain its acceptance, which the company refused to give. The prospective Subcontractor claimed damages for the Employer's abusive refusal to give its acceptance. The *Cour de cassation*, unlike the Court of appeal court, accepted the request for damages on the grounds that the Court of appeal could not refuse the damages claim without examining whether or not the motifs of such refusal were not discriminatory.

[Miro et Cecometal / Batiroc-Centre] Cour de cassation, mixed chamber, decision of 18 June 1982, JCP 1982.II.19858. (See footnote 7)

A company had concluded a Subcontract with another company for the construction of a building. The Employer paid the Main Contractor for the Subcontractor's services. But the Main Contractor never paid the Subcontractor and after he had filed for bankruptcy, the Subcontractor exercised a direct action against the Employer. The *Cour de cassation* held that according to Article 13 of the 1975 law, in a direct action against the Employer, the Subcontractor is only entitled to ask for the sum provided for in the Subcontract, which is in any event limited to what the Employer still owes the Main Contractor.

[SLT / ACEM] Cour de cassation, third civil chamber, decision of 18 July 1984, JCP 84.IV.310. (See footnote 9)

A company had concluded a Subcontract with another company. Since it remained unpaid by the Main Contractor, the Subcontractor exercised its direct action against the Employer. *The Cour de cassation*, unlike the Court of appeal, refused the direct action on the ground that the acceptance of the Subcontractor by the Employer must be manifest, unambiguous and unequivocal.

[S.A.G.I. / Grouvel-Arquembourg] Cour d'appel of Paris, decision of 7 July 1981, JCP 82.II.19823. (See footnote 10)

A company had concluded a Subcontract with another company for the construction of a group of buildings. Once the Main Contractor went into liquidation, the Subcontractor used its direct action against the Employer. The *Cour de cassation* decided that the Subcontractor could validly exercise his direct action against the Employer on the grounds that, even though Article 3 of the 1975 Law provides that the Subcontractor cannot exercise any direct action unless the Employer has previously accepted the Subcontractor and the modalities of his payment, the text does not say that the acceptance must be prior or concomitant with the conclusion of the Subcontract.

ANNEXE 3

Example of ad hoc arbitration provision allowing inclusion of Subcontractors

Dispute resolution

1 All disputes arising of or in connection with the present Contract, including its signature, validity, interpretation, execution, modifications, termination and the obligations following its termination, shall be settled finally under the Rules of Arbitration (“the Rules”) of the International Chamber of Commerce (“ICC”), modified according to the followings, being however provided that all disputes giving rise to a multiple parties’ arbitration according to the followings shall be settled finally by three (3) arbitrators pursuant to the following provisions.

1.2 Common provisions. In every arbitral proceedings:

- (i) Any claimant shall submit to the ICC its Request for Arbitration without nominating any arbitrator.
- (ii) Any respondent shall submit to the ICC its Answer and its Counterclaim (if any), within sixty (60) days from its receipt of the Request for Arbitration from the claimant, without nominating any arbitrator. Any Counterclaim not submitted within this delay shall be excluded from the arbitral proceedings.
- (iii) No arbitrator shall be a national neither of France nor of the United States of America, unless such arbitrator is nominated by a party or specifically confirmed by the parties. The President of the Arbitral Tribunal shall not have the same nationality as any of the parties to the proceedings. All the arbitrators shall have a perfect knowledge of English and an important experience in international disputes relating to construction. The President of the Arbitral Tribunal shall be a jurist.
- (iv) The language of the arbitration shall be English and all the documents shall be submitted in English or with a complete English translation. The place of the arbitration shall be Paris, France.
- (v) The parties shall have a right to a reasonable discovery and the Arbitral Tribunal shall be granted the power, upon request by a party, to order, as necessary, the discovery by another party, including the discovery of documents, answers to examining and statements, the parties specifically declaring agreeing to such power.

- (vi) The ICC and the arbitrators nominated according to the Contract shall be remunerated pursuant to the provisions of the Rules.
- (vii) Any award arising of or in connection with any arbitral proceeding in application of this Contract shall be final, shall bound the parties and can be submitted and enforced before any competent court. The parties waive their right of review or judicial appeal, as far as such waiver is authorized by law.

1.3 Bi-party arbitration: In the case of an arbitral proceeding for which no junction intervened within the delays prescribed by the provisions on multiple parties' arbitration set forth below, the parties, within twenty (20) days following the expiration of the said delays, shall either agree upon a sole arbitrator, or each appoint its arbitrator, after which the arbitration shall proceed, and the dispute settled finally according to the Rules.

1.4 Multiple parties' arbitration: Any multiple parties' arbitration arising of the junction of other parties shall be settled finally in a sole arbitral proceeding according to the following provisions:

- (i) The junctions shall only be authorized according to the following provisions, including, without it being limitative, the delays strictly established hereinafter, and no junction other than the ones expressly provided hereinafter shall be authorized:
 - (a) In the case of an arbitration initiated by the Contractor against the Client or by the Client against the Contractor, the Client shall be entitled to include any third party as a party to such arbitration, under the condition that such third party concluded a contract with the Client relating to the Development allowing such junction, or concluded a contract with the Client relating to the Development and agrees to such junction, by submitting to the ICC the Client's Request for Arbitration against such third party or third parties, expressly requesting such junction to the arbitration between the Contractor and the Client (with a copy of such request to the Contractor) either at the time of the submittal by the Client of its Request for Arbitration against the Contractor, or within sixty (60) days from receipt by the Client of the Contractor's Request for Arbitration, or within thirty (30) days from receipt by the Client of the Contractor's Answer and Counterclaim (if any), depending on the case; and the Contractor expressly agrees, under the Contract, to such junctions upon request of the Client and to the nomination of the arbitrators according to the present provisions.
 - (b) In case of an arbitration initiated against the Client by a third party (including a Designated Subcontractor, eventually) pursuant to a contract relating to the Development, if such contract allows the Client to include other parties to such arbitration or if the third party agrees upon such junction, or in the case of an arbitration initiated by the Client against a third party pursuant to such contract, the Client shall be entitled to include the Contractor as a party to such arbitration by submitting to the ICC the Client's Request for Arbitration against the Contractor expressly requesting such junction to the arbitration between the third party and the Client (with a copy of such Request to such third party or third parties) either at the time

of the submittal by the Client of its Request for Arbitration against the third party, or within sixty (60) days from receipt by the Client of the third party's Request for Arbitration, or within thirty (30) days from receipt by the Client of the third party's Answer and Counterclaim (if any), depending on the case; and the Contractor expressly agrees, under the Contract, to such junctions upon request of the Client and to the nomination of the arbitrators according to the present provisions.

(c) In all the abovementioned cases, the Contractor shall be entitled to include, concerning the questions implying the Client, all (if any) Designated Subcontractors which concluded a contract with the Contractor allowing such junction, as a party to the arbitration with the Client, by submitting to the ICC the Contractor's Request for Arbitration against the Designated Subcontractor, expressly requesting such junction to the arbitration with the Client (with a copy of such Request to the Client and to all third parties or concerned parties) either at the time of the submittal by the Contractor of its Request for Arbitration against the Client, or within sixty (60) days from receipt by the Contractor of the Client's Request for Arbitration against the Contractor, or within thirty (30) days from receipt by the Contractor of the Client's Answer and Counterclaim (if any) to the Contractor, depending on the case; and the Client expressly agrees, under the Contract, to such junctions upon request of the Contractor and to the nomination of the arbitrators according to the present provisions.

(ii) All the parties participating to a multiple parties' arbitration proceeding as provided by the present provisions shall have forty five (45) days, starting the day after the date when all the junctions, authorized according to the present provisions, should have been made, to seek an unanimous agreement upon the appointment of each of the three arbitrators and the nomination amongst them of the President of the Arbitral Tribunal; should it be necessary, for any reason whatsoever, to appoint an arbitrator in order to fill a vacancy in the Arbitral Tribunal after its constitution, the parties shall have thirty (30) days following such vacancy to reach an agreement. In case no agreement is reached within this delay, any party implied in the arbitral proceeding shall be entitled to request from the President of the *Tribunal de Grande Instance* of Paris, pursuant to Articles 1493 or 1444 of the French Civil Procedure Code, the nomination of the necessary arbitrator(s) to constitute a Tribunal composed of three arbitrators. The parties agree that the President should proceed to such nominations from a list of at least nine (9) individuals, qualified to be arbitrators according to the Contract, provided, upon request of any party, by the Secretary General and the President of the Arbitration Court of the ICC acting in common, unless the President of the TGI assesses that there are not enough arbitrators on such list qualified for acting as an arbitrator according to the Contract, in which case he should proceed to the necessary appointment(s) to constitute a tribunal by taking into consideration any additional list provided as indicated above. In case of any other problem and/or dispute in relation to the abovementioned agreement on the choice of the President of the Arbitral Tribunal amongst the three (3) arbitrators, all party implied in the arbitral proceeding shall, in the same way, defer such question to the President of the *Tribunal de Grande Instance* of Paris.

- (iii) Following the appointment of the Arbitral Tribunal according to the present provisions, the multiple parties' arbitration shall proceed, and the dispute settled finally, pursuant to the Rules except for their provisions (such as Article 2 (from 1 to 7), paragraph 2 of Article 2 (8) and the first sentence of Article 2 (12) of said Rules) that shall not be in accordance with the express provisions of the present Contract.
- (iv) Any arbitrator shall be and remain independent from the parties implied in the arbitration, and shall immediately disclose to the parties, in writing, all the facts and circumstances which may challenge its independence from the parties' point of view. The challenge of an arbitrator, according to the Rules, must be sent by a party either within thirty (30) days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within thirty (30) days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
- (v) None of the present provisions authorizes a party to file a claim against another party with which it did not directly conclude a contract for which a reference is made in the present Contract.
- (vi) All the advances deemed necessary by the ICC to cover the costs of the arbitral proceedings shall be allocated by the ICC between the parties to a multiple parties' arbitration proceeding, following a method the ICC shall consider suitable and equitable according to the circumstances.
- (vii) The Arbitrators shall enjoy all the necessary powers to establish any necessary or likely additional procedural rule according to the multiple party nature of the procedure.

1.5 The Contractor binds itself to include in all contracts it shall conclude with a Designated Subcontractor (if any), arbitration clauses including provisions on multiple parties' arbitration in identical terms as the ones in the present Contract (acceptable by the Client in substance and on the form), and that the Contractor shall also make sure that such Designated Subcontractor expressly agrees to, in case it exercises its right to file an action directly against the Client, exercise such right by way of arbitration (and not by way of judicial proceedings) according to such arbitration clauses, including the provisions on multiple parties' arbitration. However and without prejudice to the abovementioned, in case of judicial proceedings related to the Development, either by any third party (including a Subcontractor) against the Client, or – in the case where, in relation with the disputes at stake, the Client is not bound by an arbitration clause with substantially identical terms as the ones of the present provisions – by the Client against any third party, the Contractor, in both cases, binds itself to assist the Client in such proceedings in the manner and to the extent eventually requested by the Client, and the latter shall be entitled to include the Contractor to such judicial proceedings; the Contractor expressly agrees to such junction, notwithstanding any abovementioned provision.