

**Year in review – other jurisdictions:  
China, India and France/French  
Polynesia**

**Anne-Laurence Michel**  
Barrister, Doctor in Transportation  
Law by Air and Sea (France)

**THE ENFORCEABLE LAW IN FRENCH POLYNESIA**  
*by Mrs. Anne-Laurence MICHEL*  
*Barrister to the Bar of Papeete (Tahiti) French Polynesia*

INTRODUCTION

Geographical situation

French Polynesia is composed of five archipelagos which are from North to South, the Marquesas islands, the Tuamotu-Gambier islands, the Leeward group, the Windward group -whose main island is Tahiti - and then the Austral islands.

The atoll of Tetiaroa - which is located in the Windward group and belonged to the well known actor Marlon Brando - and the island of Bora Bora, located in Leeward group, contribute to the world reputation of French Polynesia.

The area covers an economic exclusive zone of 6 millions of square kilometers which extend regarding the latitude from York Cape (Australia) in the North to Brisbane (Australia) in the South, and regarding the longitude from Vancouver in the East to the middle of Alaska in the West.

No land is located between French Polynesia and the Ecuador in the North, as between French Polynesia and the Antarctic in the South. Therefore, we can really say that French Polynesia is in the very heart of the maritime area of South Pacific.

Shipping traffic

Ships calling in French Polynesia are passengers' vessels of regular lines or occasional cruises. Commercial lines from Europe or on circular transpacific call too in French Polynesia.

Numerous fishing vessels registered in French Polynesia are often insured by contracts under English law.

A fleet for inshore coastal traffic sails to the different archipelagos, and favorable charter legislation for the high leisurely yachts has recently admitted the private yachts to charter in the waters under French Jurisdiction.

Political and administrative situation

In 1843, the Pomare Queen agreed to the protectorate of France for Tahiti. At this time, the archipelagos were independent kingdoms. The four other archipelagos have latterly requested and obtained the protectorate of France.

The more recent law relative to the statute of French Polynesia, titled "*Law of Autonomy*", dates from 27<sup>th</sup> February 2004. It confers on French Polynesia the statute of an overseas country (Pays d'Outre-Mer), which in comparison with the overseas department (Martinique, Réunion, Guadeloupe, Cayenne) and overseas territories (St Pierre et Miquelon, Southern and Antarctic countries, Wallis et Futuna) is the higher administrative development in autonomy. Now French Polynesia and New Caledonia are both overseas countries. That is the reason why in French Polynesia, we use nowadays the term "*Pays*" (Country).

In application of enforceable texts, French Polynesia has its own government which applies under the rules of freedom and democracy. The French State encourages the progress of the autonomy of the "Pays". The French State has a legal representative in the person of the High-Commissioner.

It seems to me essential to explain in a first point the share of attribution between the French State and the "Pays" (I), and then detail the judicial authorities in order to well understand the decisions issued by the Polynesian Courts (II).

## I- THE ORGANIC LAW AND THE SHARE OF ATTRIBUTION BETWEEN THE FRENCH STATE AND THE "PAYS"

Articles 7 and 14 of the law dated on 27<sup>th</sup> February 2004 provide rules relating to the share of attribution between the French State and the "Pays" (A) and allow establishing maritime texts which are enforceable in French Polynesia (B).

### A- THE PRINCIPLES OF THE SHARE OF ATTRIBUTION

The division of attribution between the French State and the "Pays" results from a share in three parts. Legal dispositions are either "*ipso facto*" enforceable in French Polynesia by the way of an automatic application (1) or special matters attributed to the French state (2) and or at last devolving for the French Polynesia (3). For the purpose of the conference, I have mentioned only the matters in relation with maritime law.

1- Article 7 of the law 2004-192 lays down a principle for **an automatic enforcement in French Polynesia** of all legal regulations in relation especially with:

- 1° the organization, the functioning and the attribution to the constitutional authorities of the Republic, the "*Conseil d'Etat*" [Supreme Court for administrative disputes], the "*Cour de Cassation*" [Supreme Court for civil disputes]... and all national supreme Court,
- 2° the national defense,
- 3° the public domain of the State (territorial waters, EEZ).

Furthermore, the automatic enforcement in French Polynesia is equally asserted in general terms for all legal regulations authorizing the ratification or the approval of international agreements.

Beyond this automatic attribution to the State by article 7, some subjects have expressly been put into the attribution of the State.

2- Article 14 lists the subjects in which **the State has a plain and complete attribution**:

- "The authorities of State have a complete attribution in the only following subjects..."*,
- 2° *the justice and the judicial organization... organization of the profession of barrister... the administrative procedure.../...*
  - 3° *the foreign policy.../...*

6° *the safety and public orders, especially the policing, prohibition to importation and exportation coming under policing and the international agreements ratified by France [weapons, drugs, stowaways, counterfeiting], planning for safeguard measures, elaboration and installment of operational plan and rescue, means to resist to great risks and disasters [organization against the marine pollution], coordination and requisition of all means for the civil security.../...*

9° *the police and the safety in the maritime traffic, watch on fishing, safety of the navigation, coordination of rescue at sea, registration as French ships, safety for vessels registered upon 160 gross tons and for all passengers vessels...*

By deduction, all subjects which are not expressly listed in the matters giving plain and complete attribution to the State fall into the attribution of the "Pays".

- 3- Article 13 of the law 2004-192 expressly provides that "*the authorities of French Polynesia have a power in all the subjects which are not devolved to the State by article 14 under the limitation of the competency attributed to the municipalities... The French Polynesia and the municipalities have a respective power until the limit of the outside limits of the territorial waters [underground]*".

The application of those legal regulations allows us to define the maritime regulations in force in French Polynesia.

## B- THE MARITIME LAW ENFORCEABLE IN FRENCH POLYNESIA

We shall separate the international conventions from the domestic law.

- 1- The international agreements with their decrees are automatically enforceable in French Polynesia

This rule emerges from the exclusive attribution to the State concerning the international agreements, so that all the international conventions which have been ratified or approved by France are automatically enforceable in French Polynesia.

For example, the international Convention for assistance of 28<sup>th</sup> April 1989 which came into force in France on 20<sup>th</sup> December 2002 is now enforceable in French Polynesia.

Article 8 of the law 2004-192 has ruled on an automatic enforceability of international conventions providing that those rule "*enter into force in French Polynesia at the date it has been fixed or otherwise within 10 days after their publication in the "Journal Official de la République française" (JORF).*"

By consequence, in maritime pollution, the Protocol 2003 which creates an additional fund to the Funds of the convention 1971-1992 comes into force in French Polynesia on 27<sup>th</sup> June 2005, ten days after its publication in the "JORF". The rule for an automatic enforceability of international agreements in French Polynesia gives a perfect knowledge of the international enforceable regulations in French Polynesia. But the evidence is not so clear for the domestic regulations.

## 2- The application of domestic regulations depends on some conditions

In French domestic law, the “*code de commerce*” governs all the commercial activities. The code is completed with special regulations. Some of those concern especially the maritime trade.

2-1 The “*code de commerce*” nearly is fully enforceable in French Polynesia and article L 110-2 is fully enforceable. Therefore, the followings are commercial acts:

- 1° shipbuilding, purchase, sale and resale of ships for inland or deep-sea navigation,
- 2° all maritime expedition,
- 3° all purchase, sale of tackles, gears and supplies,
- 4° all charter, loan or advance on the voyage,
- 5° all insurances and all other contracts concerning the sea-trade,
- 6° all agreements and contracts for crew wages,
- 7° all seamen contracts on duty at sea.

This qualification in commercial acts, and this qualification only, gives jurisdiction to the Commercial Courts.

2-2 The maritime trade is composed of different texts exposed under 7 titles:

- ① the vessel: definition – registration – shipbuilding- arrest - fund of limitation – wrecks,
- ② management of the vessel: charter – carriage,
- ③ marine insurance,
- ④ events at sea: assistance – collision – towage,
- ⑤ operators: owner – captain – agent – pilot,
- ⑥ marine infringements “*code pénal et disciplinaire de la marine marchande*”,
- ⑦ and different regulations : “affaires maritimes”, organisation of merchant fleet.

All those texts have initially been declared enforceable in French Polynesia. It is then necessary to check whether the modifications made by a domestic law have been published in the Journal Officiel de la Polynésie française (JOPF) or not. And we will know the up to date enforceable regulation.

Now that we know the rules for enforceability, we can come to the application of the enforceable texts.

## II- THE JUDICIAL ORGANIZATION IN FRENCH POLYNESIA

The judicial organization in French Polynesia is of a great interest for all of us who always need to know the rules which apply to the disputes raised before the Polynesian Courts.

We shall see first the judicial institutions (A), and then the rules of proceedings (B).

## A- THE JUDICIAL INSTITUTIONS

Justice and judicial organization enter into the attribution of the French State. Consequently, the institutions are thus organized like they are in the motherland of France.

Concerning the first-instance proceedings in Civil Courts, disputes are submitted to the "*Tribunal Civil de Première Instance*" (Civil Court of First Instance) and Commercial disputes are submitted to the "*Tribunal Mixte de Commerce*" (Mixed Commercial Court). (I shall not mention the Courts for tort and social disputes).

In the motherland, the Commercial Courts are composed of trades people only. In Paris, the Commercial Court concerning the maritime disputes is composed of insurers and/or managers in an international trade company... In Tahiti, a professional magistrate presides over the "*Tribunal Mixte de Commerce*" and is assisted by two trades people who are voluntary for this function.

There is only one Commercial Court in Tahiti for the whole French Polynesia and all the commercial disputes must be submitted to that Court.

The appeal against a first instance decision is lodged at the Court of Appeal of Papeete which is composed of a social, a commercial and a civil section.

The appeal against a decision issued by the Court of Appeal is lodged to the "*Cour de cassation*" (Civil Supreme Court) in Paris. The "*Cour de Cassation*" judges only on the points of law, it never considers the facts.

The "*Cour de Cassation*" establishes case-law which is applied by Courts in France as well as in French Polynesia, so that the merits of disputes are issued by the overseas Courts and the Courts of motherland on the basis of a uniform case-law issued by the "*Cour de Cassation*".

The decision rendered by the "*Cour de Cassation*" is not automatically final. When the decision is reversed, the case is sent back to another Court of Appeal or to the Court of Appeal of Papeete with another panel of judges. This "*Cour de renvoi*" (second Court of appeal) has the possibility to rule under the same terms than the "*Cour de Cassation*", but it can resist and in this case a second appeal before the "*Cour de Cassation*" remains possible for the issuing of a final decision at least.

The procedure is the same for all the disputes raised to the Courts of the French Republic.

Beyond the uniformity of case-law, we have to mention that the rules of proceedings can be different in France and in French Polynesia.

## B- THE RULES OF PROCEEDINGS

We have seen that Article 14-2° of the law 2004-192 provides that the administrative proceedings is attributed to the French State but this article does not quoted the judicial proceedings which is consequently devolved to the French Polynesia.

It is in conformity with those texts that the Assembly of French Polynesia has voted a Deliberation dated on 4<sup>th</sup> December 2001 and titled "*code de procedure civile de Polynésie française*".

Some rules will be exposed.

### 1- Territorial jurisdiction and clauses of jurisdiction

The common rule gives jurisdiction to the Court where the defendant has his domicile.

In contractual disputes, article 15 of the "*code de procedure civile de Polynésie française*" which provides the same rule than in France- mentions that "*the place of the effective delivery or of the performance of the contract can have jurisdiction*".

The rule authorizes a Polynesian -consignee in a bill of lading- to sue the maritime carrier to the Polynesian Courts as being the place of delivery- port of discharge.

But then article 16 provides that "*is null all contract in derogation with the jurisdiction rule as provided hereby and giving jurisdiction to another Courts located outside French Polynesia*".

It seems that this nullity of the clause of jurisdiction can be applied only in internal disputes. Actually, numerous international conventions consider the validity of the clauses of jurisdiction.

It has been judged by the "*Cour de Cassation*" that the validity of the clause of jurisdiction mentioned in a bill of lading had to be considered under the law of the contract or alternatively of the place of issue of the bill of lading (Cass. Civ. 1er du 3 décembre 1991).

In the international carriage of goods by sea, the Hague / Visby Rules do not prohibit the clause of jurisdiction in derogation to common rules. Courts of Appeal have ruled that the dispositions of Article 48 of the "*nouveau code de procedure civile*" which is enforceable in France with similar provisions than the ones quoted in article 16, do not apply in international matters (CA. Aix-en-Provence du 14 mars 1985, CA. St Denis du 29 novembre 1985).

When a party wants to invoke the validity of a clause of jurisdiction, she has also the possibility to refer to the judicial conventions. The Brussels Convention of 27<sup>th</sup> September 1968 governing on the judgement regulations in the EEC admits in its article 17 that in international trade, the validity of the clauses of jurisdiction depends on the usage of which the parties are or ought to have been aware.

In maritime dispute, the “*Cour de Cassation*” requires the knowledge and the approval to the clause of jurisdiction to admit its opposability to the parties.

It is necessary to mention that the approval by the shipper does not imply the approval by the consignee who must have given his acceptance at least at the time of delivery.

Under this rule, the “*Tribunal Mixte de Commerce*” of PAPEETE has rejected the objection opposed to its jurisdiction stating that “*a clause of jurisdiction is valid and can be applied under the condition that it has been required and approved by the parties to the contract, in the lack of approval the common rule applies* (Tribunal Mixte de Commerce de PAPEETE du 25 août 2003). This decision has been rendered in conformity with case-law.

## 2- Additional time for distance

The “*code de procedure civile de Polynésie française*” raises a classic rule when it provides that the usual time of action to issue a writ can be increased depending on the distance of the domicile of the defendant. The usual time is increased of one month when the defendant is domiciled in the motherland of France and two months for all foreign countries. This time of distance is increased of two months for defendants domiciled in the different archipelagos of French Polynesia.

The time of actions is public order rules which imply the nullity of the writ which has not been delivered in conformity with this rule, subject not to have been covered by a procedural act. The nullity can usefully be invoked when the irregular writ has been served just before the time barred limit considering that the irregular writ has not interrupted the time of action.

## 3- Time limitation

Article 217 of the “*code de procedure civile de Polynésie française*” provides that an action is no longer valid when no party makes proceedings at Court during three years. In France the proceedings is expired in a time of two years and we can notice that the time has locally been increased due to the distance of French Polynesia, even if we can consider that the distance is definitively no more a reality when we are all of us communicating by internet!

Nevertheless, the “*Tribunal Mixte de Commerce*” of PAPEETE has recently rendered several decisions on the expiration of the actions in a case where the judicial survey has had an extremely long duration to analyze the causes of a fire occurred aboard a merchant ship in commercial operations in the port of PAPEETE. The parties had obtained the appointment of the judicial surveyor by a provisional order of the judge rendered in 1996. In parallel, they had interrupted the time of the action by the service of a writ issued to the “*Tribunal Mixte de Commerce*” of PAPEETE to obtain a decision on the merits against the carrier. Unfortunately the judge has noted that no proceedings had been issued at Court during a period of three years and he has pronounced the expiration of the proceedings by several decisions rendered in 2006.

In France, a decree dated on 28<sup>th</sup> December 2005 has modified numerous rules of the "*nouveau code de procedure civile*", including points on the judicial survey but these new rules will not apply in French Polynesia as the civil proceedings are in the attribution of the "*Pays*" which has not decided to publish those rules in French Polynesia.

In conclusion, it seems interesting to me to underline the enforceability in French Polynesia of all the international agreements ratified and/or approved by the French State, especially concerning the maritime conventions and the principle of uniformity of case-law issued by all the Courts of the French Republic. It would comfort numerous actors in the international commercial maritime trade who operate in that lovely place of TAHITI.