

# ARBITRATION IN FRANCE

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By Jean de la Hossieraye, Stéphanie de Giovanni and  
Juliette Huard-Bourgois, CMS



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# 1. Historical background and legislative framework

## 1.1 Overview

- 1.1.1 France – which has hosted the International Chamber of Commerce in Paris since the 1920s – is well known as a favourable venue for arbitration. It has helped provide international arbitration with the means to become a trusted dispute resolution mechanism and to establish itself as an independent legal order.
- 1.1.2 The autonomy of the arbitration agreement, policies facilitating the enforcement of international awards, very limited court interference and party autonomy are some of the classic features of French law on international arbitration, which has been supported by the French courts for decades.
- 1.1.3 France adopted a new arbitration law in 2011, modernising the rules applicable to both domestic and international arbitration. This new law codifies the principles developed in case law and aims to preserve the trust of international arbitration users in the French legal system.
- 1.1.4 The scope of this chapter is limited to provisions relevant to international arbitration, considering such provisions that either exclusively concern international arbitration or apply to both international and domestic arbitration.

## 1.2 Historical background

### *Napoleonic Codes*

- 1.2.1 The Napoleonic Codes, in particular the *Code de Procédure Civile* adopted in 1806 and the *Code de Commerce* adopted in 1807, originally provided for the restricted use of arbitration. Only limited types of disputes, including disputes relating to maritime insurance or commercial companies, could be arbitrated. In the majority of cases, it was only possible to submit disputes that had already arisen to arbitration, by way of *compromis d'arbitrage*. Arbitration agreements relating to future disputes were prohibited.
- 1.2.2 Following France's signing of the 1923 Geneva Protocol, France passed a law on 31 December 1925 establishing the validity of arbitration agreements in commercial relationships. Subsequent laws were then adopted from 1926 to 1975 concerning the application of arbitration in certain areas but these laws were passed without amending the procedural rules. The procedures for appeal and review of international awards were based on case law and a series of scattered legal texts and this frequently led to confusion and abuse of the procedures, which in turn undermined the efficiency of arbitration agreements and awards.

1.2.3 However, France was simultaneously participating in a movement to liberalise arbitration in the international sphere. France ratified numerous international treaties on arbitration during this period, including the New York Convention,<sup>1</sup> the 1961 European Convention and the Washington Convention (ICSID),<sup>2</sup> which were, in effect, still not reflected in French domestic legislation. Two major reforms then took place which shaped the present legal landscape in favour of the autonomy of international arbitration.

*The 1980–81 reform*

1.2.4 In 1980 and 1981, two revolutionary decrees were passed, introducing progressive arbitration provisions into the *Nouveau Code de Procédure Civile*, which was subsequently renamed the *Code de Procédure Civile (CPC)*. Decree No 80-354 of 14 May 1980 related to domestic arbitration and Decree No 81-500 of 12 May 1981 related to international arbitration (**1980-81 Decrees**).

1.2.5 The main objectives of the 1980-81 Decrees were to confirm, by way of statute, the autonomy of the parties and to limit judicial interference in arbitral proceedings. The 1980-81 Decrees allowed the parties to set out in their arbitration agreement the procedural rules to be followed by the arbitrators, subject to certain general principles commonly applicable to court proceedings. The 1980-81 Decrees also allowed the arbitrators to rule on the validity of the arbitration agreement and on their own jurisdiction, including the extent of their mandate. Although these arbitration provisions pre-dated the Model Law (1985),<sup>3</sup> they established one of the most modern and flexible legal frameworks for arbitration at that time.

1.2.6 Since the entry into force of the 1980–81 Decrees, French courts have developed case law which has been driven by a policy favouring the autonomy of international arbitration. For example, French courts stopped applying conflict of laws rules to international arbitration agreements and, instead, developed a number of “material rules” which aimed to ensure the efficiency of the arbitral process by asserting the validity and autonomy of international arbitration agreements.<sup>4</sup>

1.2.7 While major progress was made in French law on international arbitration, French law on domestic arbitration lagged slightly behind this liberalisation movement. EU law – especially the Unfair Contract Terms Directive<sup>5</sup> – raised new doubts over

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<sup>1</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>2</sup> *Ibid*, appendix 1.2.

<sup>3</sup> *Ibid*, appendix 2.1.

<sup>4</sup> See section 3.4 below.

<sup>5</sup> Council Directive 93/13/EEC.

the validity of certain arbitration agreements concluded by non-commercial parties. In 2001, the French legislator amended the provisions of the Code Civil relating to arbitrability of domestic arbitration agreements.<sup>6</sup> The amended provision of the Code Civil established the validity of arbitration agreements in contracts entered into for the purposes of a professional activity,<sup>7</sup> thereby removing the previous restriction that only commercial matters were arbitrable.

#### *The 2011 reform*

1.2.8 Ten years later, another overhaul appeared necessary in order to maintain the attractiveness and efficiency of the French arbitration system. In order to offer a more accessible legal framework to international arbitration users in France, the French Government sought to codify the numerous principles developed by case law in recent years. This reform led to today's legislative framework, established through Decree No 2011-48 of 13 January 2011 (**2011 Decree**), which amended the arbitration provisions of the CPC.<sup>8</sup>

1.2.9 The 2011 Decree provides for the following improvements:

- redefining the role of the courts in arbitration, explicitly establishing a judge acting in support of the arbitration process (the *juge d'appui*) and the universal jurisdiction of this judge to assist with any arbitral proceedings to ensure there is not a denial of justice;<sup>9</sup>
- simplifying the procedures for obtaining judicial review of an award;<sup>10</sup>
- abolishing the suspending effect which a challenge to an award triggers;<sup>11</sup> and
- introducing the common law principle of loss of right to object, or “estoppel”, under which a party who knowingly and without a legitimate reason fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to object to this irregularity.<sup>12</sup>

### **1.3 Legislative framework**

1.3.1 The legislative provisions and legal principles governing arbitration are for the most part in Book IV of the CPC, emanating from the 2011 Decree. However, several other principles can be found in the *Code Civil* and case law.

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<sup>6</sup> Law No 2001-420 of 15 May 2001.

<sup>7</sup> See section 3.3 below.

<sup>8</sup> E Gaillard and P de Lapasse, *Le nouveau droit français de l'arbitrage interne et international*, Recueil Dalloz, 20 January 2011, n 3, p 175.

<sup>9</sup> CPC, art 1505(4); see section 8.2 below.

<sup>10</sup> *Ibid*, art 1520.

<sup>11</sup> *Ibid*, art 1523.

<sup>12</sup> *Ibid*, art 1466.

*The CPC provisions*

- 1.3.2 The CPC provisions relating to arbitration are the main source of French law on international and domestic arbitration. They provide a full and detailed description of the legal regimes applicable to both forms of arbitration, from the validity of the arbitration agreement to the procedure to set aside an award.

*The Code Civil provisions*

- 1.3.3 A residual aspect of French arbitration law is to be found in Articles 2059, 2060 and 2061 of the *Code Civil*. These Articles apply to domestic arbitration and deal with matters of arbitrability that are explained in more detail at section 3.3 below.

*Transitional provisions*

- 1.3.4 The provisions of the 2011 Decree entered into force on 1 May 2011. However, some of its provisions will only be engaged on certain conditions:
- Articles 1442–1445, 1489, 1505(2) and 1505(3) of the CPC apply to arbitrations where the arbitration agreement was concluded after 1 May 2011;
  - Articles 1456–1458, 1486, 1502, 1513 and 1522 of the CPC apply to arbitrations where the arbitral tribunal was constituted after 1 May 2011; and
  - Article 1526 of the CPC applies to awards made after 1 May 2011.<sup>13</sup>

## 2. Scope of application and general principles

### 2.1 Distinction between domestic and international arbitration

- 2.1.1 French law makes a fundamental distinction between domestic and international arbitration. This distinction pervades the entire legal framework for arbitration in France and allows international arbitration, even if the seat of the arbitration is in France, to be governed by more flexible and permissive principles than those applying to domestic arbitration.

- 2.1.2 Consequently, the CPC provisions on arbitration follow a binary structure and are divided in two parts. Title I addresses domestic arbitration and Title II addresses international arbitration.

- 2.1.3 Title I on Domestic Arbitration (Articles 1442–1503 of the CPC) is structured as follows:
- Chapter I: The arbitration agreement (arbitration clauses and submission agreements);
  - Chapter II: The arbitral tribunal;

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<sup>13</sup> 2011 Decree, art 3.



- Chapter III: The arbitral proceedings;
- Chapter IV: The arbitral award;
- Chapter V: *Exequatur* (enforcement orders); and
- Chapter VI: Recourse (actions against awards).

2.1.4 Title II on International Arbitration (Articles 1504–1527 of the CPC) is structured as follows:

- Chapter I: International arbitration agreements;
- Chapter II: Arbitral proceedings and awards;
- Chapter III: Recognition and enforcement of arbitral awards made abroad or in international arbitration; and
- Chapter IV: Recourse (actions against awards).

2.1.5 It is important to note that, notwithstanding this division, a significant number of the domestic arbitration provisions also apply to international arbitration. These provisions are listed in Article 1506 of the CPC.

## 2.2 French definition of international arbitration

2.2.1 Article 1504 of the CPC provides a definition of international arbitration in the following terms: “An arbitration is international when international trade interests are at stake”. In other words, an arbitration is international as long as it involves an economic transaction that is not limited to the borders of a single country. This legal definition, based on “international trade interests”, is a codification of the main test that was applied by the French courts over several decades in order to determine which arbitration regime should apply to a particular dispute.<sup>14</sup>

2.2.2 An arbitration can, therefore, be “international” while having its seat in France, with or without French parties, if the dispute involves the flow of goods, services or currency over international borders. Furthermore, an award which results from international arbitration will be treated as an international award even if made in France.

2.2.3 This means that three types of award exist under French arbitration law: (i) domestic awards which were made in France and do not address international matters; (ii) international awards which were made in France and address international matters and (iii) international awards made abroad. A description of the enforcement rules applicable to these different types of awards is set out at section 10 below.

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<sup>14</sup> Cour d’appel de Paris, 13 June 1996, *Revue de l’Arbitrage (Rev Arb)* 1997, p 251–257.

## 3. The arbitration agreement

### 3.1 Definition

3.1.1 Previously there was a traditional distinction in French domestic arbitration law between arbitration agreements to arbitrate future disputes (*clause compromissoire* or *clause d'arbitrage*) and arbitration agreements to submit existing disputes to arbitration (*compromis d'arbitrage*). Some matters could only be resolved by arbitration on the basis of an arbitration agreement which had been concluded after the dispute had arisen. The 2011 Decree abandons that distinction. As a result, the arbitrability of a matter no longer depends on whether the dispute has or has not already arisen between the parties.

3.1.2 Importantly, this traditional distinction has never existed in the context of international arbitration.

### 3.2 Formal requirements

3.2.1 In French arbitration law, an arbitration agreement is valid even if it is not in writing. Courts have found that an arbitration agreement may, for instance, result from the conduct of the parties at the time of negotiating and performing the contract,<sup>15</sup> or from a party's submission to the jurisdiction of an arbitral tribunal.

3.2.2 Since the entry into force of the 2011 Decree, the CPC contains an express provision that "an arbitration agreement shall not be subject to any requirements as to its form".<sup>16</sup> This new provision constitutes a codification of case law. The courts also recognised that an arbitration agreement could be incorporated by reference to another document – even if the latter was not signed by a party – if evidence of the true consent of that party could be adduced by other means.<sup>17</sup>

3.2.3 An arbitration agreement should, nevertheless, exist in some tangible form, as a party seeking to enforce an award must produce an original or copy of both the award and the arbitration agreement. As to the proof of the arbitration agreement, it may be considered, in light of Article VII of the New York Convention,<sup>18</sup> that the existence of an arbitration agreement may be established by any means admitted by French law.

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<sup>15</sup> Cour d'appel de Paris, 17 February 2011, No 09/2828533, *Government of Pakistan v. Dallah AS*.

<sup>16</sup> CPC, art 1507.

<sup>17</sup> Cour de cassation, 11 October 1989, (Civ. 1ere) *Bomar Oil NV c/ Entreprise Tunisienne d'Activites Petrolieres (ETAP)*, 1989 Bull. Civ. I, No 314; Cour d'appel de Paris, 19 February 1988, *Firme Peter Biegi c/ Britannia*, Rev Arb, 1990, p 657–660, and Cour de cassation, 18 February 1992, (Civ. 1ere) *Firme Peter Biegi c/ Britannia*, Rev Arb, 1993, p 123.

<sup>18</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

### 3.3 Special tests and requirements of the jurisdiction

#### *Scope of arbitrability in domestic arbitration*

- 3.3.1 As a general rule set out in Article 2061 of the *Code Civil*, arbitration agreements in domestic arbitration are valid in contracts concluded “by reason of a professional activity”. In other words, regardless of the object of the contract (e.g. sale of goods, shareholders’ agreement or partnership, etc), parties are free to arbitrate as long as the contract containing the arbitration agreement is concluded in the course of the professional activity of the parties.<sup>19</sup> This means that consumer contracts are not arbitrable. It also means that the scope of arbitrability is no longer limited to commercial contracts. Disputes relating to civil contracts, as long as entered into for professional purposes, can also be submitted to arbitration.
- 3.3.2 In addition to consumer contracts, the following matters cannot be submitted to arbitration:
- matters relating to the status and capacity of persons, divorce and judicial separation;
  - disputes concerning public bodies (the state and local authorities, public entities and public institutions, except when relating to establishments authorised (by decree) to have a commercial activity); and
  - matters involving public policy.<sup>20</sup>

#### *Scope of arbitrability in international arbitration*

- 3.3.3 In accordance with well-established principles of case law, most of the restrictions on the scope of arbitrable matters in domestic arbitration do not apply in international arbitration. Unlike in domestic arbitrations, the requirement that contracts be concluded “by reason of a professional activity” does not apply to international arbitration. Therefore consumer disputes are generally arbitrable.
- 3.3.4 The following arbitration agreements can also be concluded in international arbitration:
- arbitration agreements involving the state or state-owned entities; and
  - arbitration agreements which relate to matters involving public policy, except where the subject matter of the dispute itself involves a breach of French international public policy (e.g. bribery of civil servants, drug trafficking or terrorism).

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<sup>19</sup> Code Civil (Law No 72-626 of July 1972, supplemented by Law No 75-596 of 9 July 1975 and Law No 2001-420 of 15 May 2001), art 2061.

<sup>20</sup> Code Civil, art 2060.

### 3.4 Autonomy of the arbitration agreement

#### *Autonomy from the main contract*

- 3.4.1 The principle of the autonomy of the arbitration clause from the main contract, which is equivalent to the principle of separability, has long been maintained by French courts.<sup>21</sup> This principle is now expressly recognised by statute in Article 1447 of the CPC, which provides: “An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.”
- 3.4.2 The consequence of the autonomy of the arbitration clause is that arguments as to the nullity of the main contract containing the arbitration clause shall not affect the validity of the arbitration clause or the competence of the arbitral tribunal to rule on these arguments.<sup>22</sup>

#### *Autonomy from the law governing the main contract*

- 3.4.3 The French principle of autonomy of the arbitration agreement goes beyond the classic principle of separability. French law also recognises that an arbitration clause can be subject to a different applicable law than the law governing the main contract.<sup>23</sup> Not only is the arbitration clause independent from the contract, it is also independent from the law governing that contract. Consequently, an arbitration agreement could survive despite provisions of the law governing the main contract that would arguably invalidate that contract.<sup>24</sup>
- 3.4.4 Through a consistent line of case law, the *Cour de cassation* has based the validity of the arbitration agreement on a substantive rule of validity.<sup>25</sup> This substantive rule or *règle matérielle* allows the French courts to bypass any conflict of laws rule that would identify the national law governing the validity of the arbitration agreement. As a result, arbitration agreements are governed by this *règle matérielle* of validity instead of a national law. In practice, an international arbitration agreement will be valid if the consent of the parties is established and if it does not purport to violate international public policy.<sup>26</sup>

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<sup>21</sup> Cour de cassation, 7 May 1963, *Gosset c/ Carapelli*, Rev Arb, 1963, p 60.

<sup>22</sup> Cour de cassation (Civ. 1ere), 11 July 2006, No 04-14.950, *National Broadcasting c/ Bernadaux et autres*, Rev Arb, 2006, p 870.

<sup>23</sup> Cour de cassation (Civ. 1ere), 4 July 1972, *Hecht c/ Buisman*, Rev Arb, 1974, p 89.

<sup>24</sup> Cour d'appel de Grenoble, 17 November 2011, no 11/0724, *M. Franck X c/ SA Taulell*.

<sup>25</sup> Cour de cassation (Civ. 1ere), 20 December 2003, *Municipalite de Khoms El Mergheb c/ Dalico*, Rev Arb, 1994, p 116; Cour de cassation (Civ. 1ere), 5 January 1999, *Zanzi J.de Coninck et autres*, Rev Arb, 1999, pp 260–261.

<sup>26</sup> See Fouchard Gaillard Goldman on International Commercial Arbitration, (Gaillard and Savage (ed.)) (1999) Kluwer International, pp 218–240.

### 3.5 Legal consequences of a binding arbitration agreement

- 3.5.1 Where there is a binding arbitration agreement, the parties are obliged to refer their dispute to an arbitral tribunal pursuant to the terms of their arbitration agreement and the courts must decline jurisdiction over that dispute.<sup>27</sup> An arbitration agreement only creates obligations on the parties to it, and has no binding force on third parties who cannot rely on it.

## 4. Composition of the arbitral tribunal

### 4.1 Constitution of the arbitral tribunal

#### *The parties' right to appoint the arbitral tribunal*

- 4.1.1 In their arbitration clause, the parties are free to designate the arbitrator, or provide for a procedure for the appointment of an arbitrator, either directly or by reference to arbitral or procedural rules.<sup>28</sup> If the parties fail to agree on the arbitrator(s), or on the procedure for their appointment, this omission does not affect the validity of the arbitration clause.
- 4.1.2 French law of international arbitration also allows the parties to agree on the number of arbitrators. Parties may appoint legal entities or individuals of any nationality to act as arbitrators. Legal provisions requiring the arbitrator to be a natural person and the arbitral tribunal to be composed of an uneven number of arbitrators only apply in domestic arbitration.<sup>29</sup>
- 4.1.3 Where there are three arbitrators, each party shall appoint an arbitrator and the two party-appointed arbitrators shall appoint the third arbitrator.<sup>30</sup>

#### *The courts' assistance in the appointment process*

- 4.1.4 Article 1452 of the CPC provides the procedure that must be followed when the parties do not agree upon the constitution of the arbitral tribunal.
- 4.1.5 Where there is to be a sole arbitrator and the parties fail to agree, the arbitrator shall be appointed by the person in charge of the administration of the arbitration (most often an arbitral institution) or, if there is no such a person, by the judge acting in support of the arbitration (the *juge d'appui*).<sup>31</sup>

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<sup>27</sup> CPC, art 1448.

<sup>28</sup> *Ibid*, art 1508.

<sup>29</sup> *Ibid*, art 1450–1451.

<sup>30</sup> *Ibid*, art 1452(2).

<sup>31</sup> *Ibid*, art 1452. See below at section 8.2.

- 4.1.6 Where the arbitral tribunal is to be composed of three members, the same rule applies. If the parties fail to appoint the arbitrators within one month or where the two arbitrators fail to appoint the chair within one month,<sup>32</sup> the person in charge of the administration of the arbitration or the judge acting in support of the arbitration shall appoint the arbitrator(s).
- 4.1.7 Any other dispute relating to the constitution of the arbitral tribunal shall be resolved, if the parties fail to agree, either by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration.<sup>33</sup>
- 4.1.8 In case of multi-party proceedings, the well known decision of the *Cour de cassation* in the *Dutco case*,<sup>34</sup> inspired the rule now set out in Article 1453 of the CPC, applicable to both domestic and international arbitration. If there are more than two parties to the dispute and they fail to agree on the procedure for constituting the arbitral tribunal, the person in charge of the administration of the arbitration, or where there is no such person, the judge acting in support of the arbitration, shall appoint the arbitrator(s). It is important to note however that Article 1453 of the CPC can be excluded by the parties in international arbitration.
- 4.1.9 The judge acting in support of the arbitration can render his decision by way of summary judgment (*référé*), which cannot be appealed. This summary procedure may also be used to resolve any other type of obstacle in relation to the composition of the arbitral tribunal, including challenges of arbitrators and problems occurring in the course of arbitral proceedings. However, in the case of institutional arbitral proceedings, it is generally considered that this summary procedure may only be used where the applicable rules of the arbitral institution are silent on the point.

## 4.2 Procedure for challenging and substituting arbitrators

### *Procedure for challenging an arbitrator*

- 4.2.1 An arbitrator may only be removed with the unanimous consent of the parties.<sup>35</sup> If the parties cannot agree on the removal of an arbitrator, Article 1456(3) provides that the issue shall be resolved by the person/institution responsible for administering the arbitration. Article 1456(3) further provides that where there is no such person, the issue shall be resolved by the judge acting in support of the arbitration (the *juge d'appui*), provided an application is made within one month

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<sup>32</sup> *Ibid*, art 1452(2).

<sup>33</sup> *Ibid*, art 1454; see section 8.2 below relating to the judge acting in support of the arbitration.

<sup>34</sup> Cour de cassation, 7 January 1992, *Societes BKMI et Siemens c/ societe Dutco*, Rev.arb. 1992 p 470.

<sup>35</sup> CPC, art 1458.

of the disclosure or discovery of the reason for challenge. In international arbitrations with their seat in France, the judge acting in support of the arbitration shall be the President of the *Tribunal de Grande Instance* of Paris.<sup>36</sup>

#### *The challenge of arbitrators*

- 4.2.2 The grounds for challenging an arbitrator have been identified by the courts and are not defined in the CPC. A challenge will be successful if the challenging party shows that the arbitrator lacks the qualities expected from any judge, including independence and impartiality.<sup>37</sup> Arbitrators are also at risk of being challenged if they do not possess the qualities or skills required by the parties in their arbitration agreement.<sup>38</sup>

#### *Replacement*

- 4.2.3 Arbitrators shall carry out their mandate until it is completed, unless they are legally incapacitated or there is a legitimate reason for them to resign. If there is a dispute as to the materiality of the reason invoked, Article 1457(2) of the CPC provides that the matter shall be resolved by the judge acting in support of the arbitration (the *juge d'appui*), provided an application is made within one month following such incapacity, refusal to act or resignation.

### **4.3 Duty of disclosure**

- 4.3.1 Arbitrators are under the obligation to disclose to the parties any information which could create a potential cause of challenge, as well as any circumstances that may affect their independence or impartiality. This duty applies before and during the arbitration.
- 4.3.2 This principle is embodied in Article 1456 of the CPC, which applies to domestic and international arbitration and has codified the case law.<sup>39</sup> A failure on the part of an arbitrator to disclose any relevant information could lead to the setting aside of the award.<sup>40</sup>

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<sup>36</sup> *Ibid*, art 1505.

<sup>37</sup> Cour de cassation (Civ. 2e), 20 February 1974, *Forges et Ateliers de Commentry Oissel v. Hydrocarbon Engineering*, Rev Arb, 1975, p 238; Cour d'appel de Paris, 8 June 1972, *Woltz v. S.O.D.I.P.A.R.*, Rev arb 1973, p 38; and Cour d'appel de Paris, 12 December 1996, *Commercial Agraria Hermanos Lucena v. Transgrain France*, Rev Arb, 1998, p 699.

<sup>38</sup> See Fouchard Gaillard Goldman on International Commercial Arbitration, (Gaillard and Savage (ed.)) (1999) Kluwer International, p 575.

<sup>39</sup> Cour d'appel de Paris, 28 November 2002, *Voith Turbo GmbH AG et Co c/ Société Nationale des Chemins de Fer Tunisiens (SNCF)*, Rev Arb, 2003, p 445; Cour d'appel de Paris, 12 February 2009, No 07/22164, *SA J&P Avax SA c/ Technimont SPA*, Rev Arb, 2009, pp 237–238, where the court held: "the arbitrator must disclose to the parties any circumstances which could influence his/her judgment and could create, in the mind of the parties, a reasonable doubt as to his/her qualities of impartiality and independence, which are the essence of his/her arbitral function" (free translation).

<sup>40</sup> Cour d'appel de Paris, 10 March 2011, No 09/28537, *EURL Tecso c/ SAS Neolectra Group*, Rev Arb, 2011, pp 569–571.

#### **4.4 Arbitrators' fees**

- 4.4.1 The arbitrators' fees are set by reference to various factors, including:
- the diligence of the arbitrators;
  - the amount of time spent to adjudicate the dispute and write the award;
  - the speed of the proceedings; and
  - the complexity of the claim.
- 4.4.2 Often, when the arbitration is institutional, fees may be determined on the basis of the amount of the claim.
- 4.4.3 It is up to the arbitrators to decide which of the parties shall have the final obligation to pay the arbitration fees. The decision that a particular party is to pay the arbitration fees in whole or in part is usually mentioned in the final part of the award.

#### **4.5 Liability and immunity of arbitrators**

- 4.5.1 As a general rule of French law, the liability of an arbitrator to the parties is contractual by nature, as the arbitrator is related to the parties by virtue of a contract.
- 4.5.2 French law allows civil claims to be brought against arbitrators on the grounds of contractual responsibility as set out in Article 1142 of the *Code Civil*. Such claims could arise if, for instance, the arbitrator does not implement the arbitral procedural rules, resigns without a good reason or breaches the duty to disclose any fact which might lead to his or her removal.
- 4.5.3 An arbitrator's liability is limited by a certain immunity, based on the particular nature of the arbitral mandate. French law provides that an arbitrator is not liable for errors committed in the adjudication of the claim or the contents of the award.<sup>41</sup> For this reason, where a party is not satisfied with an award, it should first seek to challenge the award itself and not claim against the arbitrator.
- 4.5.4 An arbitrator's immunity is not absolute in French law and does not cover all acts and omissions included in the scope of the arbitrator's mandate. In particular, the arbitrator remains liable for fraud, gross negligence and wilful misconduct.

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<sup>41</sup> Tribunal de Grande Instance de Paris, 13 June 1990, *Bompard c/ Consorts C et autres*, Gaz. Pal. 1990 II somm., Rev Arb, 1996, pp 475–476.



- 4.5.5 Nevertheless, arbitrators and arbitral institutions are entitled to limit or to exclude their contractual liability when the default at issue is minor and does not result from any fraud, wilful misconduct or a breach of an essential obligation under the contract.

## 5. Jurisdiction of the arbitral tribunal

### 5.1 Competence to rule on jurisdiction

- 5.1.1 In principle, a party who wishes to contest the jurisdiction of an arbitral tribunal cannot seek a ruling from the French courts. In French law on international arbitration, jurisdiction is a matter for the arbitral tribunal to decide in the first instance. However, parties can turn to the courts before the arbitral tribunal has been constituted and where the arbitration agreement is “manifestly void” or “manifestly not applicable”, although this rarely occurs.<sup>42</sup>

- 5.1.2 Article 1448 of the CPC, which is applicable both to international and domestic arbitration, provides:

“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”

Article 1448 of the CPC, which was introduced by the 2011 Decree, is mandatory and any agreement of the parties to exclude its application would be invalid.

- 5.1.3 As with the principle of autonomy of the arbitration agreement (separability), French courts have adopted a doctrine of *competence-competence* that goes beyond what is generally adopted in other legal systems. French courts have recognised a double effect of the doctrine of *competence-competence*, finding that not only can arbitrators rule on their jurisdiction (*effet positif*), but also that the courts cannot rule on this issue (*effet négatif*).
- 5.1.4 The dual effect of the doctrine of *competence-competence* is re-affirmed by Article 1465 of the CPC, which provides: “The arbitral tribunal has **exclusive** jurisdiction to rule on objections to its jurisdiction” (emphasis added).

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<sup>42</sup> Cour de cassation (Civ. 1ere), 6 October 2010, No 09-68.731, *Blonde génétique et autre c/ SCEA Plante Moulet et autre*, Rev Arb, 2010, pp 971–972; Cour de cassation (Civ. 1ere), 16 October 2001, *Société Quatro Children's Books Limited c/ Société Editions du Seuil et autre*, Rev Arb, 2002, p 920.

## 5.2 Power to order interim measures

- 5.2.1 The arbitral tribunal may order any conservatory or provisional measures that it deems appropriate,<sup>43</sup> impose conditions for such measures and, if necessary, attach penalties to such an order.<sup>44</sup>
- 5.2.2 Furthermore, pursuant to Article 1468 of the CPC, the arbitral tribunal has the power to amend or add to any provisional or conservative measures it has granted.<sup>45</sup> This statutory provision was introduced by the 2011 Decree and means that, in arbitration, the arbitral tribunal is not required – as would normally be the case under ordinary rules of French civil procedure – to establish the existence of new circumstances in order to obtain an amendment to an interim measure or an additional interim measure. However, only courts may order attachments or judicial security as arbitrators lack the requisite powers.

# 6. Conduct of proceedings

## 6.1 Legal framework applicable to international arbitral proceedings

### *A statutory opt-out system for international arbitral proceedings*

- 6.1.1 The French arbitration legal framework follows a binary structure. It differentiates the regime applicable to domestic arbitration from the regime applicable to international arbitration, even where international arbitration has its seat in France. As a result, the CPC contains: (i) some procedural rules which apply only to domestic arbitration;<sup>46</sup> (ii) some which apply only to international arbitration;<sup>47</sup> and (iii) some which apply both to domestic and international arbitral proceedings.<sup>48</sup>
- 6.1.2 As regards the third type, the 2011 Decree has enhanced the transparency of the applicable regimes,<sup>49</sup> by specifically identifying the domestic procedural rules applicable to international proceedings. These rules apply automatically to international arbitral proceedings if the parties have not expressly decided to exclude them or have not provided for a different solution. The 2011 Decree therefore implements an “opt-out” system of procedural rules.

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<sup>43</sup> Cour d'appel de Paris, 7 October 2004, No 2004-263442, *Société Otor Participations et autres c/ Carlyle Holdings 1 et autre*, Rev Arb, 2005, pp 737–741.

<sup>44</sup> CPC, art 1468(1).

<sup>45</sup> *Ibid*, art 1468(2).

<sup>46</sup> Title I of the 2011 Decree, art 1442–1503 of the CPC.

<sup>47</sup> Title II of the 2011 Decree, art 1504–1527 of the CPC.

<sup>48</sup> See CPC, art 1506.

<sup>49</sup> Eric A Schwartz, *The New French Arbitration Decree: The Arbitral Procedure*, The Paris Journal of International Arbitration/ Les Cahiers de l'Arbitrage 2011-2, p 349.

*Party autonomy as to the procedure*

- 6.1.3 In addition to this “opt-out” framework of procedural rules, under the French law on international arbitration parties enjoy wide autonomy when determining the procedural rules which will govern their arbitration. They are free to state these rules in their arbitration agreement either directly or by reference to a procedural law or existing arbitration rules. The principle of party autonomy in respect of procedural matters is expressly set out in Article 1509(1) of the CPC.

**6.2 Arbitral tribunal’s discretion and its duty of fairness and diligence**

- 6.2.1 If the parties did not choose procedural rules for their arbitration, the arbitral tribunal has the discretion to establish or determine them.<sup>50</sup> The arbitral tribunal will often formulate the procedural rules at the outset of the dispute as it is typically done under the ICC Arbitration Rules<sup>51</sup> in the Terms of Reference.<sup>52</sup> The discretion of the tribunal as regards procedural matters also includes the power to issue any provisional measure it deems necessary, with the exception of judicial securities (*sûretés judiciaires*) and conservatory attachments (*saisies conservatoires*).<sup>53</sup>

- 6.2.2 While offering wide discretion to the arbitrators, French law imposes on them a duty to act promptly and fairly in the conduct of the proceedings.<sup>54</sup> In line with this duty of fairness and diligence, arbitrators are under the obligation to respect the scope of their mandate, subject to their award being annulled or found unenforceable. The fact that an arbitral tribunal ruled without complying with its mandate is one of the grounds for annulment or refusal of recognition listed in Article 1520 of the CPC.

**6.3 General procedural principles**

- 6.3.1 The general principles governing the arbitral procedure are the equal treatment of the parties, due process and the principle of estoppel.<sup>55</sup>

*Equal treatment of the parties*

- 6.3.2 Originally based on case law, the application of the principles of equal treatment of the parties and due process in international arbitration proceedings is now expressly stated in the 2011 Decree. Article 1510 of the CPC provides that,

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<sup>50</sup> CPC, art 1509(2).

<sup>51</sup> CMS Guide to Arbitration, vol II, appendix 3.7.

<sup>52</sup> ICC Arbitration Rules 2012, art 23 (see CMS Guide to Arbitration, vol II, appendix 3.7).

<sup>53</sup> CPC, art 1468.

<sup>54</sup> *Ibid*, art 1464(3).

<sup>55</sup> The principle of estoppel has only recently been introduced in French law and is an innovation brought about by the 2011 Decree.

irrespective of the adopted procedure, the arbitral tribunal must ensure that the parties are treated equally and that the principle of due process is complied with.

- 6.3.3 The principle of equal treatment of the parties forms part of international public policy and was established by the *Cour de cassation* in the famous *Dutco decision*.<sup>56</sup> In this multi-party case, two respondents with divergent interests had been asked to appoint an arbitrator jointly. The *Cour de cassation* decided to set aside the award finding that, as equality of the parties in the designation of the arbitrators had not been respected, the award infringed on international public policy. This decision led to a change of the ICC Arbitration Rules<sup>57</sup> and to the introduction in the CPC of Article 1453.

#### *Due Process*

- 6.3.4 The French principle of due process (*principe de la contradiction*) is slightly different from other standards of due process. It goes beyond the mere opportunity that a party may have to present its case.<sup>58</sup> Adding to the arbitrators' duty to ensure that each party will be heard on any point of law or facts, the arbitral tribunal also has the obligation to ensure that the parties have had the opportunity to consider and comment on each legal and factual issue considered in the award (i.e. that new arguments and evidence are not introduced in the award that were not considered in the proceedings or submissions).<sup>59</sup>

#### *Estoppel*

- 6.3.5 The 2011 Decree has introduced the principle of estoppel, inspired by common law, in French law on domestic and international arbitration. Under this principle a party may lose its right to object to an irregularity before the court, if it knowingly and without a legitimate reason, failed to object in a timely manner before the arbitral tribunal.<sup>60</sup> Also known as the "loss of right to object", this French version

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<sup>56</sup> See paragraph 4.1.4 above.

<sup>57</sup> CMS Guide to Arbitration, vol II, appendix 3.7.

<sup>58</sup> See Fouchard Gaillard Goldman on International Commercial Arbitration, (Gaillard and Savage (ed.)) (1999) Kluwer International, p 947; see also Cour d'appel de Paris, 6 May 2003, Rev Arb, 2004, p 720: "The 'equality of weapons', which represents an important element of the fair trial principle protected by public policy, implies the possibility to offer to each party a reasonable possibility to present his case and evidence in conditions which do not put the party in a disadvantageous situation" (free translation).

<sup>59</sup> Cour de cassation (Civ. 1ere), 29 June 2011, No 1023321, *Overseas Mining Investments Ltd c/ Commercial Carribean Niquel SA*, The *Cour de Cassation* upheld the annulment of an UNCITRAL award, finding that the arbitrators' failure "to invite the parties to express their views" on loss of chance violated due process; see also Cour d'appel de Paris, 6 April 1995, *Thyssen Stahlunion c/ Meeaden*, Rev Arb, 1995, p 448.

<sup>60</sup> CPC, art 1466.

of estoppel has already been applied by the courts prior to the enactment of the 2011 Decree.<sup>61</sup>

## 6.4 Commencement of arbitration

6.4.1 Arbitral proceedings are usually commenced by the submission of an arbitration request or notice by the claimant to the respondent or to the arbitral institution, as provided in the Model Law (1985).<sup>62</sup> In contrast, there is no legal provision or requirement as to the date of the commencement of the arbitral proceedings under French law. Neither is there a specific limitation period for filing the request for arbitration.

6.4.2 The 2011 Decree instead places a significant emphasis on the date of the arbitral tribunal's constitution. Article 1459 of the CPC provides: "The constitution of an arbitral tribunal shall be complete upon the arbitrators' acceptance of their mandate. As of that date the tribunal is seized of the dispute". The date upon which the arbitral tribunal is deemed to be constituted and seized is important under French law as it determines when the courts can exercise the power to order interim and protective measures<sup>63</sup> or to rule on the validity of an arbitration agreement.<sup>64</sup>

## 6.5 Seat, place of hearings and language of arbitration

6.5.1 The CPC does not contain any provisions on the determination of the seat and language of arbitral proceedings. Like other procedural matters, the seat and language of the arbitral proceedings shall be determined by the parties, for example, by reference to a set of arbitral rules or, in the absence of an agreement between the parties, by the arbitral tribunal itself.<sup>65</sup>

6.5.2 French courts have held on many occasions that the seat of the arbitration was purely a juridical concept.<sup>66</sup> Nothing prevents the arbitrators from holding any part

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<sup>61</sup> Cour de cassation (Civ.1ere), 6 July 2005, *Golshani c/ Gouv.Rep. Islamique d'Iran*, Bull.civ. I, No 302; Cour de cassation (Civ.1ere), 3 February 2010, *Merial c/ Klocke Verpackungs-Service GmbH*, Rev Arb, 2010, p 93. On this case see K Karadellis "French court defines estoppel – but confusion remains", in Global Arbitration Review 24 February 2010; E Kleiman, "Stop! Définition nécessaire de l'estoppel, entre faveur à l'arbitrage et droit d'accès au juge", JCP G, No 11, 15 March 2010, p 564.

<sup>62</sup> Model Law (1985), art 21 (see CMS Guide to Arbitration, vol II, appendix 2.1).

<sup>63</sup> Cour de cassation, 6 December 2005, Rev Arb, 2005, p 1104.

<sup>64</sup> CPC, art 1448.

<sup>65</sup> Cour d'appel de Paris, 16 November 2006, No 04-24238, *Empresa de Telecomunicaciones de Cuba c/ Telefonica Antillana et SNC Banco Nacional de Comercio Exterior*, Rev Arb, 2008, p 109. In this case, an award was set aside as the arbitrators had imposed the same seat, Paris, for two connected disputes relating to different contracts that provided for two different arbitral seats. The courts found that the arbitrators could not ignore the agreement of the parties to have two different seats.

<sup>66</sup> Cour d'appel de Paris, 3 December 1998, *Société ITP Interpipe c/ Hunting Oilfield Services (HOS)*, Rev Arb, 1999, pp 601–622. See also Cour d'appel de Paris, 28 October 1997, Rev Arb, 1998, p 399.

of the proceedings in a place other than the seat of the arbitration if this is more appropriate.

## **6.6 Oral hearings and written proceedings**

- 6.6.1 The format and timetable for written submissions or hearings is to be determined by the arbitral tribunal in such a manner as to enable each party to present its case and to address that of its opponent.
- 6.6.2 The parties will often submit written memoranda (*mémoires*) containing their arguments on the facts and the legal basis for their demands, supported by extensive documentation.
- 6.6.3 As with classic international arbitration practice, the parties will also attend hearings, during which the arbitrators will ask for any clarification that may be required. If necessary, the arbitral tribunal will ask for additional written submissions.

## **6.7 Default by one of the parties**

- 6.7.1 The 2011 Decree does not contain any specific provisions relating to default proceedings. However, where default arbitrations take place, the following principles apply:
- (i) the institution in charge of administering the arbitration, or the courts, will appoint the arbitral tribunal;<sup>67</sup>
  - (ii) the default of one party cannot stop the arbitral proceedings, which shall continue despite the absence of the defaulting party; and
  - (iii) the French courts will be ready to enforce a default award if the defaulting party received the notification informing it of the commencement of the arbitral proceedings and it knowingly decided not to appear at the arbitral proceedings.<sup>68</sup>

## **6.8 Evidence generally**

- 6.8.1 Under Article 1467 of the CPC, applicable to both domestic and international arbitration, arbitrators shall take all necessary steps concerning evidentiary or procedural matters jointly, unless the parties authorise the arbitral tribunal to delegate these tasks to one of its members. The arbitrators' general power to take and admit evidence derives also from the discretion afforded to them by Article 1509 of the CPC.

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<sup>67</sup> See ICC Arbitration Rules, art 12 (see CMS Guide to Arbitration, vol II, appendix 3.7) and LCIA Arbitration Rules, art 2.3 (see CMS Guide to Arbitration, vol II, appendix 3.12).

<sup>68</sup> For example, Cour d'appel de Paris, 7 February 1991, *Dovert et Tabourdeau c/ Confex*, Rev Arb, 1992, pp 625–684.

- 6.8.2 In particular, the arbitral tribunal has the power to join a party to produce evidence in its possession in a manner determined by the arbitral tribunal itself.<sup>69</sup> If that party does not comply with the tribunal's order, penalties may be granted as a consequence.<sup>70</sup>
- 6.8.3 A broad range of evidence is admissible before an arbitral tribunal. Evidence may be obtained through the disclosure of documents, witness statements, expert reports or discovery, in the same way as in normal court proceedings. However, the arbitral tribunal is not required to follow all the rules applicable to court proceedings.
- 6.8.4 In particular, the arbitral tribunal has the power to call upon any person to provide testimony.<sup>71</sup> Under Article 1467(2) of the CPC, witnesses appearing before an arbitral tribunal shall not be sworn in.

## 6.9 Court assistance in taking evidence

- 6.9.1 Pursuant to Article 1469 of the CPC, court assistance in taking evidence can be sought in two situations, where third party evidence is required or where the production of a private deed to which the applicant is not a party is needed.
- 6.9.2 If one of the parties intends to rely on an official or private deed to which it was not a party, or on evidence held by a third party, it may, upon the authorisation of the arbitral tribunal, have that third party summoned before the President of the *Tribunal de Grande Instance* in order to obtain a copy or to have the deed or the item of evidence produced.<sup>72</sup> Such claims shall be made, heard and decided through expedited proceedings (*référé*).<sup>73</sup> If the judge acting in support of the arbitration (the *juge d'appui*) considers the party's request to be well-established, they shall order the other party to produce the relevant piece of evidence, with a periodic penalty payment if necessary. Such an order is not immediately enforceable and may be appealed within 15 days following service.

## 6.10 Confidentiality of arbitral proceedings

- 6.10.1 When enacting its new arbitration law, the French legislator introduced a statutory provision in the CPC dealing with confidentiality of arbitral proceedings which is

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<sup>69</sup> CPC, art 1467(2).

<sup>70</sup> Cour d'appel de Paris, 7 October 2004, JCP 2006. II 1007.

<sup>71</sup> Cour d'appel de Paris, 10 September 2009, No 08/11757, *Schneider Schaltgeratebau und Elektroinstallationen GmbH c/ CPI Industries Ltd*, Rev Arb, 2009, pp 920–921.

<sup>72</sup> CPC, art 1469.

<sup>73</sup> *Ibid*, art 1469(3). Cour d'appel de Paris, 27 January 1993, *Taylor Woodrow Projects France (TNPF) c/ Atelier Perrault Frères*, Rev Arb, 1994, p 560.

expressly limited to domestic arbitration.<sup>74</sup> In contrast, the CPC remains silent as to the confidentiality of international arbitral proceedings. While this silence does not deny a presumption of confidentiality which is needed in certain cases, it does not impose an obligation of confidentiality. Therefore, the CPC indirectly allows for international arbitral proceedings that cannot be confidential, such as certain types of investment arbitrations, to be seated in France.

- 6.10.2 Further, in the absence of an express statutory provision imposing confidentiality upon international arbitral proceedings, it is highly recommended that parties who wish to protect the confidentiality of their proceedings incorporate such an obligation into their arbitration agreement or enter into a special confidentiality agreement at the outset of the proceedings.

## 7. Making of the award and termination of proceedings

### 7.1 Applicable law

- 7.1.1 The parties are free to choose the rules of law that shall be applicable to the dispute. In the absence of such a choice by the parties, the arbitrators shall apply the rules of law that they consider appropriate.<sup>75</sup> In either case, the arbitral tribunal is compelled to take trade customs into consideration.<sup>76</sup>
- 7.1.2 The use of the wording “rules of law” rather than “law” in the CPC is intended to give the parties and the arbitrators greater flexibility in the choice of law, allowing the application of private rules (such as the UNIDROIT principles) instead of the law of one specific country.
- 7.1.3 Arbitrators can act as *amiable compositeur*, only if expressly empowered by the parties to do so.<sup>77</sup> When acting as *amiable compositeur*, arbitrators are seeking a fair resolution of the dispute without being bound by any specific system or general principles of law alone.

### 7.2 Timing

- 7.2.1 There are no specific provisions in French law on international arbitration governing the duration of the mandate of the arbitral tribunal.<sup>78</sup> However, where parties have

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<sup>74</sup> CPC, art 1464.

<sup>75</sup> *Ibid*, art 1511.

<sup>76</sup> *Ibid*, art 1511(2).

<sup>77</sup> *Ibid*, art 1512.

<sup>78</sup> The six month limit for the duration of the arbitral tribunal’s mandate that is set out in Article 1463 of the CPC only applies to domestic arbitration.



determined a time limit for the award to be made, the courts will hold the arbitrator personally liable towards the parties if he/she does not respect it.<sup>79</sup>

- 7.2.2 In any event, the statutory or contractual duration of the arbitral tribunal's mandate may be extended by agreement between the parties or, in the absence of such agreement, by the judge acting in support of the arbitration (the *juge d'appui*).<sup>80</sup>

### 7.3 Form, content and notification of the award

- 7.3.1 Usually, the award is in writing although there is no express requirement as to the form of an international award. A written award presents the advantage of being capable of execution and recognition. Furthermore, if a party wishes to exercise recourse to the courts in order to set aside the award, proving the existence of the award would be difficult if the award had been made orally.
- 7.3.2 Pursuant to Article 1482 of the CPC, the award must succinctly set out the respective claims and arguments of the parties. Most importantly, the award shall state the reasons upon which it is made.<sup>81</sup>
- 7.3.3 The award must contain:
- the full names of the parties as well as their domicile or corporate headquarters;
  - if applicable, the names of counsel or other persons who represented or assisted the parties;
  - the names of arbitrators who made the award;
  - the date on which the award was made; and
  - the place where the award was made.<sup>82</sup>
- 7.3.4 Parties are usually notified of the award by the arbitrator or the arbitral institution. There is no formal requirement as to the notification of an international award. The requirement that the award needs to be notified by service, unless otherwise agreed by the parties, is only applicable to domestic arbitration.<sup>83</sup>
- 7.3.5 Finally, the award shall be made by a majority decision unless the parties agree otherwise and shall be signed by all the arbitrators.<sup>84</sup> In circumstances where a majority is not reached, the chair of the arbitral tribunal is empowered to rule

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<sup>79</sup> Cour de cassation (Civ. 1ere), 6 December 2005, Rev Arb, 2006, p 127.

<sup>80</sup> CPC, art 1463(2).

<sup>81</sup> *Ibid*, art 1482.

<sup>82</sup> *Ibid*, art 1481.

<sup>83</sup> *Ibid*, art 1484(3).

<sup>84</sup> *Ibid*, art 1513.

alone.<sup>85</sup> If the dissenting arbitrator(s) refuse to sign the award, the chair shall state this in the award.

#### **7.4 Settlement**

7.4.1 Parties may resolve their dispute during the arbitral proceedings. In such a case, the parties may privately formalise an agreement containing their mutual commitments, providing for an amicable settlement of their dispute (and thereby ending the arbitral proceedings). Alternatively, the parties may ask the arbitral tribunal to make an award setting out the terms upon which the dispute is resolved amicably, which is called an agreement award. The benefit of an agreement award is that it provides the parties' decision with the *res judicata* effect which is attached, in principle, to every award. Furthermore, it allows the parties to enforce the award should a party fail to perform it.

#### **7.5 Power to award interest and costs**

7.5.1 Absent an agreement of the parties as to costs, French law confers a wide autonomy on the arbitrators to determine issues of costs. There is no specific rule regarding the award of costs or interest in international arbitration. The award of interest is usually a matter governed by the law applicable to the substance of the dispute.

7.5.2 The costs of the arbitration also include the fees and expenses of any arbitral institution involved in the proceedings. Although the arbitrators have the right to determine their fees, these amounts will often be determined in accordance with the applicable arbitral rules.<sup>86</sup>

#### **7.6 Effect of the award**

7.6.1 The 2011 Decree expressly states that the award is final and has a binding effect upon the parties as from its notification. As soon as the award is made, it is *res judicata* with regard to the claims adjudicated in that award.<sup>87</sup> This means that national courts do not have the right to hear a case that has been settled through arbitration when that claim involves the same parties and the same issue. Furthermore, once the award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award.<sup>88</sup>

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<sup>85</sup> *Ibid*, art 1513(3).

<sup>86</sup> See ICC Arbitration Rules, art 37 and appendix III, art 2 (see CMS Guide to Arbitration, vol II, appendix 3.7) and LCIA Arbitration Rules, art 28 (see CMS Guide to Arbitration, vol II, appendix 3.12).

<sup>87</sup> CPC, art 1484(1).

<sup>88</sup> *Ibid*, art 1485(1).

## 7.7 Correction, clarification and issue of a supplemental award

7.7.1 On the application of a party, the arbitral tribunal may interpret the award, correct clerical errors and omissions or make an additional award where it has failed to rule on a claim.<sup>89</sup> The arbitral tribunal shall rule on a party's rectification claim having heard both parties, or after having given them the opportunity to be heard. The application must be filed within three months of the notification of the award.<sup>90</sup> The decision amending the award or the provision of an additional award shall be made within three months of the application to the arbitral tribunal.<sup>91</sup>

7.7.2 Thus, arbitrators may interpret their award at the request of either party and may render an interpretative award to this effect. Interpretation may be needed where there is disagreement between the parties or uncertainty as to the meaning of the award. Simple confusion in relation to the reasons for the award does not give rise to a right for a party to request that the arbitral tribunal interprets the award.

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

*The courts' obligation to decline jurisdiction because of an arbitration agreement*

8.1.1 Where a party attempts to bring proceedings in a French court despite the existence of an arbitration agreement, the French courts will not stay their proceedings (in contrast with other court systems, e.g. the English courts), but rather, will decline jurisdiction. In cases involving international arbitration where the arbitral tribunal has not yet been seized of the matter, the court will decline jurisdiction if the arbitration agreement is not manifestly null and void, or inapplicable to the dispute.<sup>92</sup>

8.1.2 It is important to note however that the court may not decline jurisdiction of its own accord;<sup>93</sup> this decision must be made upon the demand of a party. The court's decision on jurisdiction may be appealed within 15 days under a special procedure designed to avoid costs and delay (*contredit*).

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<sup>89</sup> *Ibid.*, art 1485(2).

<sup>90</sup> *Ibid.*, art 1486(1).

<sup>91</sup> *Ibid.*, art 1486(2).

<sup>92</sup> *Ibid.*, art 1448(1).

<sup>93</sup> *Ibid.*, art 1448(2).

8.1.3 In France, there is no option of obtaining a preliminary court ruling on jurisdiction. Article 1465 of the CPC, which is applicable both to domestic and international arbitration, provides that “the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction”. It is a general principle of French international arbitration law that the validity of the arbitration agreement is decided by the arbitrators applying the *competence-competence* principle, unless the clause is manifestly null and void.<sup>94</sup>

*Claims relating to the constitution of the arbitral tribunal*

8.1.4 In disputes before the courts relating to the constitution of the arbitral tribunal, if the arbitration agreement is manifestly void or manifestly not applicable, the judge acting in support of the arbitration (the *juge d’appui*) shall declare that no appointment needs to be made.<sup>95</sup>

**8.2 The supporting role of the courts**

8.2.1 The 2011 Decree created a judge whose task is to support the arbitral proceedings: the judge acting in support of arbitration or *juge d’appui*. This judge helps to ensure the effectiveness of the arbitration process.

8.2.2 Article 1505 of the CPC provides that the judge acting in support of an international arbitration shall be the President of the *Tribunal de Grande Instance* of Paris where:

- the arbitration is taking place in France;
- the seat of the arbitration is in another country but the parties have agreed that French procedural law should apply to the proceedings;
- the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or
- one of the parties is exposed to a risk of denial of justice.<sup>96</sup>

*The supporting role of the French courts in case of risk of a denial of justice*

8.2.3 One of the most progressive innovations of the 2011 Decree is to confer on the courts the power to support any international arbitral proceedings – including arbitral proceedings which have their seat in a foreign country – if a party is at risk of a denial of justice.

8.2.4 The judge acting in support of the arbitration can be seized if it is shown that a party is at risk of a denial of justice.<sup>97</sup> In these circumstances, the judge can be

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<sup>94</sup> *Ibid*, art 1448.

<sup>95</sup> *Ibid*, art 1455.

<sup>96</sup> *Ibid*, art 1505. See section 8.5 below for further detail.

<sup>97</sup> *Ibid*, art 1505(4).

asked to: act as an appointing authority; extend the time limits for arbitration; or decide on the incapacity, removal or resignation of an arbitrator. There is no requirement to establish any connection with France to obtain this jurisdiction.<sup>98</sup>

- 8.2.5 This supporting role of the court is meant to reinforce the authority of the arbitral tribunal and enable the parties to conduct the arbitral proceedings in accordance with the principles of due process and equal treatment of the parties.

### 8.3 Interim protective measures

- 8.3.1 Pursuant to Article 1468 of the CPC, provisional and protective measures are in principle ordered by the arbitral tribunal itself. Conservatory attachment and judicial securities on the other hand must be ordered by the courts at the request of the arbitral tribunal or the parties.

## 9. Challenging and appealing an award through the courts

### 9.1 Jurisdiction of the courts

#### *Awards made in France only*

- 9.1.1 The French courts will not entertain any challenge or appeal against awards made abroad. Such awards can only be subject to an action attempting to resist enforcement, as discussed in Section 10 below. Only domestic awards<sup>99</sup> and international awards made in France<sup>100</sup> can be challenged before the French courts.

#### *No possibility to appeal*

- 9.1.2 Although they can be challenged, international awards made in France cannot be appealed before the courts. The only court action available to an unsatisfied party is an action to set aside the award (*recours en annulation*).<sup>101</sup>

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<sup>98</sup> Before the 2011 Decree, the courts had required at least a minimal connection with France. See Cour de cassation (Civ. 1<sup>re.</sup>), 1 February 2005, *Etat d'Israël c/ Société NIOC*, Rev Arb, 2005, pp 218–219. The requirement of a link with France was construed very widely. The *Cour de cassation* held that, where the claimant could not apply to another foreign court to obtain the judicial appointment of an arbitrator on behalf of the respondent, the *Tribunal de Grande Instance* of Paris has jurisdiction to make this judicial appointment.

<sup>99</sup> As the scope of this chapter is limited to international arbitration, it does not describe the challenge procedures applicable to domestic awards.

<sup>100</sup> Please refer to paragraph 2.1.1 above regarding the definition of “international arbitration”.

<sup>101</sup> CPC, art 1518.

## 9.2 Action to set aside an international award made in France

9.2.1 An action to set aside an award must be brought before the *Cour d'appel* in the place where the award was made.<sup>102</sup> The court seized of an action to set aside an award cannot re-hear the case or overturn the arbitral tribunal's findings of fact or law. The court can only declare the award null and void on the limited grounds contained in Article 1520 of the CPC, which are listed below. If the judge decides to set aside the award, this decision does not affect the existence of the arbitration agreement. As a result, the parties can resubmit their dispute to the arbitral tribunal.

### *Limited grounds of challenge*

9.2.2 Article 1520 of the CPC sets out the limited grounds upon which international awards made in France may be challenged by an application to set aside the award. These grounds are restrictive and enable the courts to ensure observance of certain minimum standards for the international enforceability of an award.<sup>103</sup>

9.2.3 An international award made in France may be challenged on the following five limited grounds:

- where the arbitral tribunal wrongly upheld or denied jurisdiction;
- where the arbitral tribunal was not properly constituted;
- where the arbitral tribunal ruled without complying with the mandate conferred upon it;
- where due process was violated; or
- where recognition or the enforcement of the award is contrary to international public policy.<sup>104</sup>

9.2.4 Under the 2011 Decree, the lack of a reasoned opinion is not a valid ground of challenge in an action to set aside an award.<sup>105</sup> This is consistent with the minimum standards of review set out by the New York Convention.<sup>106</sup>

9.2.5 An action to set aside an award must be initiated within one month of notification of the award and shall be effected by service, unless otherwise agreed by the

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<sup>102</sup> *Ibid*, art 1519.

<sup>103</sup> Before the 2011 Decree entered into force, the courts had already established that international awards could not be challenged for failure to respect certain criteria which solely applied to domestic awards, such as the legal time limit for rendering an award, or the need for the arbitrators to hold meetings.

<sup>104</sup> CPC, art 1520.

<sup>105</sup> *Ibid*.

<sup>106</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

parties.<sup>107</sup> One of the main goals of the 2011 Decree is the prompt and straightforward enforcement of international awards that have been made in France or abroad. Consequently, time limits to commence court actions challenging awards are short and such actions do not suspend the enforcement of awards.

*Interim enforcement of international awards pending actions to set aside*

- 9.2.6 This is a peculiarity of the 2011 Decree. Neither an application to set aside an award nor an appeal against an enforcement order (see section 10 below) shall suspend the enforcement of an award, unless the enforcement of the award severely prejudices the rights of one of the parties.<sup>108</sup>
- 9.2.7 Furthermore, a decision denying an application to set aside the award shall be deemed to be an enforcement order of the whole of the award or of the parts of the award that have not been overturned.<sup>109</sup>

### 9.3 Waiver of the right to challenge the award

- 9.3.1 The 2011 Decree introduced the option for the parties to waive, at any time, their right to seek annulment of the award.<sup>110</sup> This right to renounce, by contract, the courts' review can be executed by any party, whether foreign or not.
- 9.3.2 If the parties have waived their right to challenge the award, the CPC provides the alternative right for the parties to appeal the order granting recognition or enforcement of the award in France.<sup>111</sup> This alternative right cannot be waived.<sup>112</sup>

## 10. Recognition and enforcement of awards

### 10.1 Obtaining enforcement of international awards

- 10.1.1 An international award, whether made in France or abroad, is recognised in France if its existence can be established by the production of the award and the arbitration agreement, and if its enforcement is not manifestly contrary to

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<sup>107</sup> CPC, art 1519(2)–(3).

<sup>108</sup> *Ibid*, art 1526.

<sup>109</sup> *Ibid*, art 1527(2).

<sup>110</sup> *Ibid*, art 1522.

<sup>111</sup> *Ibid*, art 1523(1).

<sup>112</sup> Such an appeal is otherwise not available for awards made in France. It can only be brought where the parties had waived their right to apply for an annulment of the award, as described in Article 1522 of the CPC. In this case, a party can exceptionally appeal the enforcement order granting enforcement on the same grounds as those applicable to an action to set aside an award pursuant Article 1520 of the CPC.

international public policy.<sup>113</sup> Provisions regarding the enforcement of foreign international awards are the same as those applicable to international awards made in France.

10.1.2 Since the 2011 Decree, it is no longer necessary to provide an original copy of an award to obtain an enforcement order. The existence of the award shall be proven either by producing originals of both the award and the arbitration agreement or by producing duly authenticated copies of such documents.<sup>114</sup> If these documents are not in French, a translation must be provided to the court.<sup>115</sup> If the arbitration agreement is not in writing, this will not prevent the recognition or enforcement of the award, as a written arbitration agreement is not required under French law.<sup>116</sup>

10.1.3 The award may only be enforced by virtue of an enforcement order (*exequatur*) issued by the *Tribunal de Grande Instance* of the place where the award was made.<sup>117</sup> In the case of foreign international awards, this place will be the *Tribunal de Grande Instance* of Paris.<sup>118</sup> *Exequatur* proceedings are not adversarial and the request for enforcement must be filed with the Court Registrar.<sup>119</sup>

10.1.4 Orders denying the enforcement of an award can normally be appealed. Such appeal must be brought within one month of service of the enforcement order.<sup>120</sup>

## 10.2 Resisting enforcement of an international award made in France

10.2.1 The only recourse available to parties wishing to resist enforcement in France of an international award made in France is an action to set aside the award.<sup>121</sup> Therefore, if the enforcement order being appealed concerns an international award made in France, the *Cour d'appel* can, at the request of a party, directly rule on an action to set aside the award in question, unless the parties had waived the right to bring such action or the time limit to bring it has expired.

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<sup>113</sup> CPC, art 1514. See Cour de cassation (Civ. 1ere) 17 October 2000, *Asecna n/ N'Doye*, Bul. Civ. I; No 243, D. 2000, Rev Arb, 2000, pp 648–656.

<sup>114</sup> CPC, art 1515(1).

<sup>115</sup> *Ibid*, art 1515(2).

<sup>116</sup> Cour d'appel de Paris, 23 October 1997, *Inter-Arab Investment Guarantee Corporation c/ Banque Arabe et Internationale d'Investissement SA*, Rev Arb, 1998, pp 143–150.

<sup>117</sup> CPC, art 1516(1).

<sup>118</sup> *Ibid*, art 1516.

<sup>119</sup> *Ibid*, art 1516(2)–(3).

<sup>120</sup> *Ibid*, art 1523.

<sup>121</sup> *Ibid*, art 1524. See above at section 9.2.



### 10.3 Resisting enforcement of an international award made abroad

10.3.1 As foreign international awards cannot be subject to an action to set aside, the only recourse available to parties who wish to resist enforcement of such awards is to appeal the order granting enforcement. Such an appeal must be brought before the *Cour d'appel* of Paris within one month of service of the enforcement order.<sup>122</sup> In such cases, the *Cour d'appel* can only deny recognition on the same grounds as those listed in Article 1520 of the CPC, which are applicable to an action to set aside an international award made in France.<sup>123</sup>

#### *Enforcement of awards set aside in their country of origin*

10.3.2 Contrary to the express provisions of the New York Convention,<sup>124</sup> the fact that an award made abroad has been set aside in its country of origin is not a good ground under French law to resist enforcement of that award in France. Applying Article VII of the New York Convention<sup>125</sup> – which allows contracting states to apply their law where it is more favourable to the award than the New York Convention – French courts have on many occasions refused to consider that the annulment of an award by foreign courts was a valid ground to refuse enforcement in France.<sup>126</sup>

## 11. Special provisions and considerations

### 11.1 Consumers

11.1.1 With respect to domestic consumer contracts, the Unfair Contract Terms Directive<sup>127</sup> provides that arbitration agreements in consumer contracts are presumed to be unfair. French law goes further and provides that they are invalid *per se*.<sup>128</sup>

11.1.2 In contrast with this prohibition, where the consumer contract can be characterised as an international consumer contract, i.e. where international trade interests are at stake, the *Cour de cassation* has found that an arbitration agreement incorporated into these contracts can be valid.<sup>129</sup>

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<sup>122</sup> CPC, art 1525(2).

<sup>123</sup> *Ibid*, art 1525(3).

<sup>124</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>125</sup> *Ibid*.

<sup>126</sup> Cour de cassation (Civ. 1ere), 29 June 2007, *Société PT Putrabali Adyamulia c/ Société Rena Holding et autre*, Rev Arb, 2007, pp 645–646, Bull. 2007, I, No 250; Cour de cassation (Civ. 1ere), 23 March 1994, *Société Hilmarton c/ Société OTV*, Bull. 1994, I, No 104, Rev Arb, 1994, pp 327–328.

<sup>127</sup> Council Directive 93/13/EC.

<sup>128</sup> Code de la consommation, art L.132-1.

<sup>129</sup> Cour de cassation (Civ. 1ere), 21 May 1997, No 95-11.427, *Renault c/ Société V 2000 (Jaguar France)*, Rev Arb, 1997, p 537.

## 11.2 Employment law

11.2.1 Employment disputes give rise to a complex regime of arbitrability, depending on which party initiates the arbitration.

11.2.2 In French law, arbitration agreements provided for in international employment contracts cannot be the basis of a claim by the employer. Only the employee can initiate the arbitration. If the employee decides to start a claim before the employment courts, instead of exercising his right for arbitration, he/she is free to do so and a claim by the employer that the arbitration agreement should be enforced would fail.<sup>130</sup>

## 12. Contacts

### CMS Bureau Francis Lefebvre

1 – 3, villa Emile Bergerat  
92522 Neuilly-sur-Seine Cedex  
France

#### **Jean de la Hosseraye**

Partner

**T** +33 1 4738 5500

**E** jean.delahosseraye@cms-bfl.com

#### **Stéphanie de Giovanni**

Associate

**T** +33 1 4738 4341

**E** stephanie.degiovanni@cms-bfl.com

### CMS Cameron McKenna LLP

Mitre House, 160 Aldersgate Street  
London EC1A 4DD  
United Kingdom

#### **Jeremy Wilson**

Partner

**T** +44 20 7367 2614

**E** jeremy.wilson@cms-cmck.com

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<sup>130</sup> Cour de cassation (Soc.), 16 February 1999, No 90-40.643, Rev Arb, 1999, p 289–290.