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ARBITRATION

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# Arbitration procedures and practice in France: overview

Alexandre Bailly and Xavier Haranger, Morgan Lewis

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## USE OF ARBITRATION AND RECENT TRENDS

### 1. How is commercial arbitration used and what are the recent trends?

#### Use of commercial arbitration and recent trends

Arbitration is the most commonly used method to settle disputes in complex international business relationships, which often deal with significant financial issues in cross-border disputes. France is one of the most arbitration-friendly countries.

France has developed a legal system favouring arbitration, particularly in the case of international arbitration. This legal system has been set up through various reforms and case law creating a solid tradition of judicial non-interference of French courts in the arbitral process. They only act as a support.

France is a party to many international and European conventions aiming to simplify the recognition and enforcement of foreign arbitral awards, and prohibits appeal (that is, challenge on the merits) against such awards, in particular the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

Several arbitration institutions have their seat in France, including the International Chamber of Commerce (ICC), before which the largest number of arbitral proceedings were filed in 2016.

#### Advantages/disadvantages

**Advantages.** The following advantages apply:

- Arbitration offers many advantages compared to court litigation. Arbitration is an autonomous, confidential, neutral and independent process to ensure justice. It is not set up or implemented by a particular state.
- A French court is only able to assess an arbitral award's compliance with French internal or international public policy; it cannot directly enforce a foreign arbitral award. (To be enforceable, the arbitral award must benefit from an enforcement decision rendered by a *Tribunal de Grande Instance*. Only the *Tribunal de Grande Instance* of Paris is competent when the award is rendered in a foreign country.)
- The parties choose the arbitrators in the light of their skills and capabilities, and the parties can set the applicable rules.
- Generally, no appeal is available regarding an arbitral award. Therefore, arbitration may be faster than litigation.
- Arbitration is a private process based on consent.
- An arbitral award is final and binding (except when an appeal is possible).

**Disadvantages.** The following disadvantages apply:

- Arbitration can be more expensive than court litigation, as the parties involved in arbitration fund every aspect of the arbitration (that is, the arbitrator, experts, institution, and so on).
- Arbitration can sometimes last longer than litigation when the arbitration agreement for an ad hoc arbitration is not sufficiently precise or detailed (in relation to the procedure to be followed, law to be applied, and so on).

## LEGISLATIVE FRAMEWORK

### *Applicable legislation*

### 2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (either with or without the amendments adopted in 2006) (UNCITRAL Model Law)?

France has not adopted the UNCITRAL Model Law. The Code of Civil Procedure (CCP) and the Civil Code (CC) regulate domestic and international arbitration. Further, the decisions rendered by the Paris Court of Appeal and the *Cour de Cassation* (French High Court) are of paramount importance. French law and case law are arbitration friendly.

Articles 2059 to 2061 of the CC provide the scope of arbitration under French law. The CCP draws a clear distinction between domestic (*Articles 1442 et seq.*) and international arbitration (*Articles 1504 et seq.*). Some of the provisions applicable to domestic arbitration also apply to international arbitration (*Article 1506*). However, international arbitration benefits from the application of more liberal principles.

Under French law, arbitration is deemed international when international commercial interests are at stake (*Article 1504, CCP*). The nature of the economic relations giving rise to the dispute determines whether arbitration is international or domestic (*Cass., 1st Civil Chamber, 13 March 2007; Cass., 1st Civil Chamber, 20 November 2013*). A dispute that deals with a transaction that does not economically occur in only one country (regardless of the quality or nationality of the parties, the law applicable to the substance or the arbitration, or the seat of the arbitral tribunal) is international (*Paris Court of Appeal, 10 May 2007*).

### *Mandatory legislative provisions*

### 3. Are there any mandatory legislative provisions? What is their effect?

Regarding international arbitration, the provisions of the Code of Civil Procedure (CCP) are flexible and adaptable. Parties to an arbitration under French law benefit from broad freedom in the settlement of their dispute. French laws provide default rules when nothing is defined by the arbitration agreement.

However, some provisions of the CCP are mandatory:

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- Guarantee of the parties' equality and respect of the adversarial principle (*Article 1510*).
- Taking trade usages into account (*Article 1511*).
- Compliance with international public policy (*Article 1514*).

### 4. Does the law prohibit any types of disputes from being resolved via arbitration?

Disputes in the fields listed below cannot be settled through arbitration (*Article 2060, Civil Code (CC)*):

- Status and capacity of individuals.
- Divorce and judicial separation.
- Disputes involving public bodies or institutions (although some public industrial and commercial institutions are authorised by decree to use arbitration).
- Public policy related matters (more specifically when a public policy has been violated (*Paris Court of Appeal, 15 June 1956*)). Under French law, the arbitration agreement must be agreed to by the party against which it is invoked, unless that party was assigned or otherwise transferred the rights and obligations of the party who initially accepted the clause. Further, a non-professional party benefits from a choice between litigation and arbitration (*Article 2061, CC*). However, a contract signed between two non-professionals that states that potential disputes will be resolved through arbitration is mandatory for both parties (*Ministerial response on the interpretation of Article 2061 of the French Civil Code on 16 May 2017*).

Further, on 6 March 2018, the Court of Justice of the European Union (ECJ) held in a case between the Slovak Republic and Achmea (*Case C-284/16, Achmea,EU:C:2018:158*) that investment arbitration on the basis of the Netherlands-Slovakia Bilateral Investment Treaty (BIT) is incompatible with EU law, in particular Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

In 2008, Achmea, a Dutch insurance company, alleged damage when the Slovak government partially reversed liberalisation of the healthcare market. The insurer then started an arbitration procedure appealing to the BIT between the Netherlands and Slovakia. The arbitral award issued in 2012 ruled that Slovakia violated its obligations under the BIT, and awarded Achmea EUR22.1 million in damages.

Slovakia filed an action before the German court to set aside the arbitral award on the ground that the arbitration clause was in conflict with EU regulations, and the highest court in Germany referred this question to the ECJ for a preliminary ruling. The ECJ ruled that:

- The arbitral tribunal was not a court of a member state within the meaning of Article 267 of the TFEU.
- The arbitral tribunal had no power to refer matters to the ECJ.
- The arbitral tribunal's decisions were final, even though disputes referred to it could concern the application or interpretation of EU law, in particular, the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

Therefore, the highest court of the EU has considered that an arbitration clause concealed within a BIT between two member states of the EU, which removes litigation that could arise on the application or interpretation of EU law from the European jurisdiction control mechanism, is incompatible with European law. This decision seems to be limited to the Netherlands-Slovakia BIT, so it is difficult to appreciate its full impact. This decision may challenge over almost 200 existing intra-EU bilateral investment treaties. Therefore, currently, national judges will have to settle disputes arising from these treaties.

#### *Limitation*

### 5. Does the law of limitation apply to arbitration proceedings?

When the applicable substantive law chosen by the parties or the arbitral tribunal is French law, limitation provisions apply.

The limitation period is five years after the facts giving rise to the dispute were or should have been known by the party initiating the arbitration (*Article 2224, Civil Code (CC)*).

There are some specific durations and starting points of limitation periods, depending on the circumstances of the case (for example, in the event of physical injury, ecological damage, and actions concerning immovable property).

A judicial demand interrupts the limitation period (*Article 2241, CC*). A request for arbitration has the same effect (*Cass., 2nd Civil Chamber, 11 December 1985*).

## ARBITRATION ORGANISATIONS

### 6. Which arbitration organisations are commonly used to resolve large commercial disputes?

Several main arbitration institutions have their seat in Paris:

- The International Chamber of Commerce (ICC) (the world's leading institution for resolving international commercial disputes).
- The French Arbitration Association.
- The Paris Centre for Mediation and Arbitration.
- The International Arbitration Chamber of Paris.

Some other arbitration organisations are more specialised:

- The French Reinsurance and Insurance Arbitration Centre.
- The Paris Maritime Arbitration Chamber.

See box, *Main arbitration organisations*.

## JURISDICTIONAL ISSUES

### 7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Where a dispute arising under an arbitration agreement is brought before a state court, the court declares itself incompetent unless the arbitral tribunal is not yet seized and if the arbitration agreement is manifestly void or manifestly inapplicable (*Article 1448, Code of Civil Procedure (CCP)*). This applies to both domestic and international arbitrations.

Therefore, the principle of kompetenz-kompetenz applies under French law (that is, the arbitral tribunal can determine its own jurisdiction and a French court must decline jurisdiction when an arbitration clause is applicable.

## ARBITRATION AGREEMENTS

### *Validity requirements*

**8. What are the requirements for an arbitration agreement to be enforceable?**

**Substantive/formal requirements**

In domestic arbitration, the arbitration agreement must be in writing to be valid, regardless of the support (*Article 1443, Code of Civil Procedure (CCP)*).

In international arbitration, the arbitration agreement is not subject to any form requirement (*Article 1507, CCP*). The existence of a written document is simply a way to prove the agreement's existence.

No substantive requirement exists under French law. However, the subject matter of the dispute must be arbitrable (*see Question 4*).

**Separate arbitration agreement**

In domestic arbitration, the arbitration agreement can be either (*Article 1442, CCP*):

- An arbitration clause in the contract (*clause compromissoire*).
- A separate agreement entered into by the parties once a dispute has arisen (*compromis d'arbitrage*).

In international arbitration, there is no specific requirement.

An arbitration agreement can also be incorporated into a contract by reference to another document. However, the consent of the parties to the arbitration agreement must be certain and effective.

**Unilateral or optional clauses**

**9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?**

Optional dispute resolution clauses provide that a party can bring the dispute before a first instance court (that is, theTribunal de Grande Instance (TGI)) chosen among those proposed in the clause. The option can be open to one party (unilateral) or to several parties (bilateral or multilateral). The *Cour de Cassation* has expressly recognised the validity of optional bilateral dispute resolution clauses (*1st Civil Chamber, 12 June 2013*) as well as unilateral optional clauses (*1st Civil Chamber, 15 May 1974*).

After some hesitation (*1st Civil Chamber, 26 September 2012*), the *Cour de Cassation* reaffirmed the validity of such a clause as long as the jurisdictions provided in the option are predictable (*1st Civil Chamber, 7 October 2015*).

**10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?**

A person that is not party to an arbitration agreement can be joined to the arbitration proceedings:

- Under certain conditions, third party companies belonging to the same group as the party to the arbitration agreement can join the arbitration (*Sentences CCI. No 1434 de 1975, JDI. 1976*).
- An arbitration clause inserted into an international contract has a validity and efficiency of its own which requires the extension of its application to the parties directly involved in the performance of the contract and in disputes which may result. This applies if it is established that the third party's situation and activities imply that they knew the existence and scope of the arbitration clause, even though they were not signatories to the contract (*Paris Court of Appeal, 17 December 1997*).
- Third parties considered to have been represented in the arbitration agreement can be joined to the arbitration (*Paris Court of Appeal, 4 January 1980*).
- The arbitration clauses can be extended to a third party on the basis of the theory of appearance (that is, the circumstances of the negotiation and the entry into the contract had made the signatory believe that this third party was part of the arbitration agreement (*Paris Court of Appeal, 7 October 1999*).

**11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?**

A non-party to an arbitration agreement can compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement, in particular in the case of transmission of an arbitration clause. Transmission involves third parties taking over the rights and obligations of the signatory (*Cass., 1st Civil Chamber, 8 February 2000*) or third party assignees (*Cass., 1st Civil Chamber, 5 January 1999*) benefiting from the arbitration agreement.

### *Separability*

**12. Does the applicable law recognise the separability of arbitration agreements?**

French law recognises the principle of separability of an arbitration agreement. The nullity of the contract containing the arbitration agreement does not have any effect on the validity of the arbitration agreement and vice versa (*Article 1447, Code of Civil Procedure (CCP)*).

### *Breach of an arbitration agreement*

**13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?**

**Court proceedings in breach of an arbitration agreement**

Where a dispute arising under an arbitration agreement is brought before a French court, the court declares itself incompetent unless the arbitral tribunal is not yet seized and if the arbitration agreement is manifestly void or manifestly inapplicable (*Article 1448, CCP*).

A French court cannot declare itself incompetent on its own motion. The party to the arbitration agreement that considers itself affected must raise the court's incompetence and invoke the existence of the arbitration agreement. The existence of such an agreement must be raised before any defence on the merits. Otherwise, the party is considered as waiving its right to arbitration.

However, a party to an arbitration agreement can seek from the court an inquiry, interim or precautionary measures, as long as the arbitral tribunal is not constituted (*Article 1449, CCP*).

**Arbitration in breach of a valid jurisdiction clause**

If no arbitration agreement is entered into by the parties, it is unlikely that an arbitral tribunal may be constituted. The existence of the arbitration agreement provides powers to the arbitral tribunal. According to the principle of Kompetenz-Kompetenz (*see Question 7*), the arbitral tribunal will consider itself as incompetent where there is no agreement.

The situation is more complicated when the parties' intention as to the method to resolve a dispute arising out of a contract is not clear (for example, where both a jurisdiction clause and an arbitration clause exist in the contract, or where an arbitration agreement was entered into after an initial contract containing a jurisdiction clause).

The principle of Kompetenz-Kompetenz grants to the arbitral tribunal the power to assess its own jurisdiction. Therefore, the arbitral tribunal, with regard to the arbitration agreement, determines if it is the competent body to rule on the case. It can either decline or accept to do so.

If the arbitral tribunal considers itself competent to rule on the case, a party can challenge this decision at the setting aside stage and claim annulment of the arbitral award on the basis that the arbitral tribunal was not competent. To do so, the party claiming annulment must have challenged the arbitral tribunal's competence during the arbitration proceedings. Otherwise, it is considered as having waived its right to challenge (*Article 1466, CCP*).

When a French court is designated by a jurisdiction clause, the court can, before the arbitral tribunal is constituted, be seized by a party to assess the validity of the arbitration clause (*Article 1448, CCP*).

**14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?**

Local courts cannot grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement. Anti-suit injunctions are not recognised under French law.

## ARBITRATORS

### *Number and qualifications/characteristics*

**15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in your jurisdiction to serve as an arbitrator there?**

In domestic arbitration, arbitrators must be individuals (*Article 1450, Code of Civil Procedure (CCP)*). A legal entity can only administer the arbitration. The arbitral tribunal can be composed of one or more arbitrators. However, the number of arbitrators must always be odd. When the initial composition of the arbitral tribunal refers to an even number of arbitrators, the arbitral tribunal must be completed (*Article 1451, CCP*). There is no equivalent provision regarding international arbitration.

There are no requirements regarding the arbitrator's nationality or their need for a licence to practice in France as an arbitrator.

#### Independence/impartiality

**16. Are there any requirements relating to arbitrators' independence and/or impartiality?**

An arbitrator, before accepting his or her mandate, must disclose any circumstance likely to affect his or her independence or impartiality (*Article 1456, Code of Civil Procedure (CCP)*). Independence and impartiality requirements are clearly recognised under French law. The Paris Court of Appeal on 28 November 2002 stated that "independence and impartiality are of the very essence of the mission assigned to the arbitrator".

When an arbitrator fails to disclose any circumstances likely to affect his or her independence or impartiality, the arbitral award rendered by the arbitral tribunal he or she is part of can be set aside (*Cass., 2nd Civil Chamber, 6 December 2001*).

A party's reasonable doubt regarding the independence and impartiality of an arbitrator must be discovered during or after the arbitration proceedings. If a doubt arises during the arbitration proceedings, the parties can challenge the arbitrator in compliance with the procedure and time limits set out in the applicable arbitration or procedural rules.

### *Appointment/removal*

**17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?**

#### Appointment of arbitrators

French law contains default provisions relating to the appointment of arbitrators (Article 1452 et seq.; Code of Civil procedure (CCP).

Where there is a sole arbitrator and the parties do not agree on that sole arbitrator, he or she is designated by the person in charge of administrating the arbitration or, failing that, the judge acting in support (*juge d'appui*) (*Article 1452 1°, CCP*).

The procedure is the same in the case of a multi-party arbitration. When the parties do not agree on the composition of the arbitral tribunal, the person in charge of administrating the arbitration or, failing that, the *juge d'appui* designates the arbitrators (*Article 1453, CCP*).

Where there are three arbitrators, each party must designate an arbitrator (*Article 1452 2°, CCP*). Both arbitrators designated by the parties designate the third arbitrator. The person in charge of administrating the arbitration or, failing that, the *juge d'appui* must designate the missing arbitrator when:

- A party does not designate an arbitrator within a one month period from the day it has been asked to do so.
- The two arbitrators designated by the parties cannot agree on the identity of the third arbitrator within a one month period following their nomination.

#### Removal of arbitrators

French law contains default provisions relating to the removal of arbitrators (*Article 1456 et seq., CCP*). In principle, a unanimous decision is required for an arbitrator to be removed (*Article 1458, CCP*). However, when the parties cannot agree on the removal of an arbitrator, the decision is made by the person in charge of administrating the arbitration or, failing that, the *juge d'appui*, in a one month period following the discovery of the contested fact (*Articles 1456 § 3, 1457 § 2 and 1458, CCP*).

## PROCEDURE

### *Commencement of arbitral proceedings*

**18. Does the law provide default rules governing the commencement of arbitral proceedings?**

There are no default rules governing the commencement of arbitral proceedings.

### *Applicable rules and powers*

**19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?**

#### Applicable procedural rules

Parties to arbitration proceedings are free to determine the procedural rules applicable to the arbitral tribunal.

The determination of the procedural rules can be direct or indirect (that is, by referring to sets of arbitration rules or national rules of civil procedure) (*Articles 1464 § 1 and 1509 §, Code of Civil Procedure (CPP)*).

### Default rules

When the arbitration agreement does not provide for any procedural rules, directly or by reference, the arbitral tribunal determines the mandatory procedural rules it must comply with, even directly or indirectly (*Articles 1464 § 1 and 1509 § 2, CCP*).

However, regardless of the applicable procedural rules, whether or not chosen by the parties, the arbitral tribunal guarantees the parties' equality and the adversarial principle (*Article 1510, CCP*). French case law consistently confirms this provision (*Cass., 2nd Civil Chamber, 9 December 1981*).

### *Evidence and disclosure*

#### 20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

Parties can determine in the arbitration agreement the procedural rules applicable to the arbitration proceedings and the powers conferred on the arbitrators.

However, when no express agreement exists, default rules govern the arbitrator's powers. The arbitrator can (*Article 1467, Code of Civil Procedure (CCP)*):

- Order the necessary inquiry measures.
- Compel to appear and be questioned any person, party or non-party to the arbitration agreement, as a witness.
- Compel a party to disclose any document and any piece of evidence.

To enforce these powers, the arbitral tribunal can order penalty payments or injunctions (*Paris Court of Appeal, 7 October 2004*).

When a document or piece of evidence is owned by a third party to the arbitration, it is possible to ask a state court to issue an order to obtain the document or piece of evidence (*Article 1469, CCP*).

## EVIDENCE

#### 21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

### Scope of disclosure

There is a distinction between common law and civil law systems. Common law systems benefit from a very broad discovery process (particularly the US). In civil law systems, such as France, the scope is much narrower. Indeed, a party must prove its own case and, to do so, disclose the elements of proof on which it relies. However, a party can always ask the judge to order the other party to disclose documents provided that the request covers a limited number of specified documents. There is no pre-trial discovery procedure in French civil litigation.

### Validity of parties' agreement as to rules of disclosure

The rules of disclosure and their scope can be determined through the parties' agreement or, failing that, by the arbitrators. They are generally broader than what is possible in French litigation.

Arbitrations seated in France often refer to the IBA Rules on the Taking of Evidence in International Arbitration 1999, which is a balanced combination of the common law and civil law systems.

The arbitral tribunal can request a party to disclose a document in both domestic and international arbitrations (*Articles 1467 and 1506, CCP*).

## CONFIDENTIALITY

#### 22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

In domestic arbitration, unless the parties agree otherwise, the arbitral proceedings are subject to confidentiality (*Article 1464 § 4, CCP*).

There is no confidentiality provision in international arbitration under French law. When parties agree to apply French law to arbitral proceedings and want to ensure confidentiality, they can enter into a confidentiality agreement. Parties can also submit the arbitration proceedings to institutional rules providing for an express confidentiality obligation.

In any case, the arbitral tribunal's deliberations must remain secret (*Article 1479, CCP*). As a consequence, a confidentiality obligation exists under French law at least regarding deliberations of the arbitral tribunal.

## COURTS AND ARBITRATION

#### 23. Will a local court intervene to assist arbitration proceedings seated in its jurisdiction?

A local judge can intervene to assist arbitration proceedings seated in his or her jurisdiction, in particular:

- As long as the arbitral tribunal is not constituted, a party can seize a local court to obtain inquiry or interim measures (*Article 1449, CCP*).
- When necessary, the *juge d'appui* will assist the parties in the composition of the arbitral tribunal (*Articles 1451 to 1453, CCP*).
- The *juge d'appui* is competent to find that there is no need to nominate arbitrators when the arbitration agreement is obviously null (*Article 1455, CCP*).
- When there are questions regarding an arbitrator's participation in the arbitration proceedings, the *juge d'appui* can intervene (*Articles 1456 to 1458, CCP*).
- To obtain a document or piece of evidence owned by a third party to the arbitration (*Article 1469, CCP*).
- The enforcement, appeal and setting aside of an arbitral award.

In domestic arbitration, the *juge d'appui* is, in principle, the President of the *Tribunal de Grande Instance* of the seat of the arbitral tribunal, unless otherwise agreed by the parties (*Article 1459, CCP*).

In international arbitration, the *juge d'apui* is, unless otherwise agreed by the parties, the President of the *Tribunal de Grande Instance* of Paris when either (*Article 1505, CCP*):

- The arbitration takes place in France.
- The parties have agreed that the arbitration proceedings will be governed by French procedural law.
- The parties have agreed to grant exclusive competence to French local courts to deal with dispute regarding the arbitral procedure.

- One of the parties faces a risk of denial of justice.

In any case, the *juge d'appui* can be seized by either a party to the arbitration, the arbitral tribunal or a member of the arbitral tribunal (*Article 1460, CCP*).

### 24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

#### Risk of court intervention

The principle of Kompetenz-Kompetenz (*Article 1448, CCP*) acts as a legal safeguard which prevents French courts from intervening in arbitration proceedings once the arbitral tribunal is constituted.

However, French courts can always act in support of the arbitration proceedings when requested to do so by the parties (*Articles 1463-2 and 1505, CCP*) (*see Question 23*).

#### Delaying proceedings

The possibility to delay arbitration by making frequent court applications is limited. The arbitral tribunal is the only body competent to rule on the case and a court will usually decline jurisdiction in favour of the arbitral tribunal. However, a court can stay the arbitral proceedings if necessary (*Article 1472, CCP*).

## INSOLVENCY

### 25. What is the effect on the arbitration of pending insolvency of one of more of the parties to the arbitration?

In domestic arbitration, the pending insolvency of one or more of the parties to the arbitration leads to a stay of the arbitration process (*Article 369, Code of Civil Procedure (CCP),* applicable by reference to Article 1471 of the same code). The arbitration process can resume when the creditor has registered its debt as part of the insolvency proceedings. Arbitrators can only asses the amount of the debt but cannot sentence the insolvent party to execute the arbitral sentence.

No such provision exists under French law for international arbitration. However, the suspension of individual legal actions once insolvency proceedings have been initiated or the observance of equality among the creditors is part of French international public policy. As such, the arbitrators must comply with these French rules and stay the arbitral process.

## REMEDIES

### 26. What interim remedies are available from the tribunal?

#### Interim remedies

The arbitral tribunal can, on the conditions it determines and, if necessary, under penalty payment, order the parties to take any provisional or interim measures it considers appropriate (*Article 1468, CCP*). However, the state court alone has jurisdiction to order provisional seizures and judicial safeguards.

In practice, the parties tend to go before the state courts.

#### Ex parte

Ex parte measures are rendered on behalf of one party only. However, a tribunal with its seat in France that issues ex parte measures risks having its arbitral award set aside. This is because the arbitral tribunal must guarantee the parties' equality and the adversarial principle (*Article 1510, CCP*).

#### Security

Security for costs is designed to ensure the payment of the costs of the arbitration when the party who lost the arbitration is ordered by the arbitral award to pay the legal costs and expenses of the prevailing party. No specific French provision addresses security for costs. Therefore, an arbitral tribunal can order a party to provide security for costs.

### 27. What final remedies are available from the tribunal?

Once the case is ruled on, the arbitral tribunal renders a final and binding award, unless the parties settle their dispute before the award is made. It must be in writing and contain several elements of information. It should, and usually does, state the reasons on which it is based (*Article 1482, Code of Civil Procedure (CCP)*).

The CCP does not contain any statutory provision regarding the remedies an arbitral tribunal can award. The arbitrators benefit from a wide discretion as to the content of the award they render and the remedies they grant.

Under French law, only one kind of remedy could be problematic: punitive damages. Punitive damages are not provided under any French rules and cannot be granted by French courts. However, case law has already stated that such damages are not contrary to French international public policy and, accordingly, can be enforced in France as long it is not disproportionate to the damage suffered (*Cass., 1st Civil Chamber, 1 December 2010*).

## APPEALS

### 28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

#### Rights of appeal/challenge

In domestic arbitration, the arbitral award cannot be appealed unless the parties have agreed otherwise (*Article 1489, Code of Civil Procedure (CCP)*). However, an arbitral award can always be set aside unless the parties agreed to allow the appeal of the arbitral award (*Article 1491, CCP*).

Appeal and setting aside procedures are initiated before the Court of Appeal of the seat of arbitration within one month as of the notification of the arbitral award (*Article 1494, CCP*) (extended by two months when the party is located abroad). The filing of the appeal or the setting aside procedure suspends the enforcement of the decision (*Article 1596, CCP*).

In international arbitration, when an arbitral award has been rendered in France, it can be set aside but not appealed (*Article 1518, CCP*). However, the exequatur decision can be appealed (*Article 1525, CCP*).

The setting aside proceedings must be initiated before the court of appeal of the seat of the arbitration within one month as of the notification of the arbitral award (*Article 1519, CCP*). Contrary to domestic arbitration, the filing of a setting aside procedure or the appeal of the enforcement decision do not suspend the execution of the arbitral award (*Article 1526, CCP*).

#### Grounds and procedure

In domestic arbitration, an arbitral award can be set aside if the (*Article 1492, CCP*):

- Arbitral tribunal declared itself wrongly competent or incompetent.
- Arbitral tribunal was irregularly constituted.

- Arbitral tribunal has ruled on the matter contrary to the given assignment.
- Adversarial principle has not been respected.
- Arbitral award is contrary to public policy.
- Arbitral award is not grounded or does not state the date on which it has been rendered or the name of the arbitrator(s), or does not include the required signature(s) or was not rendered by a majority vote.

In international arbitration, an arbitral award can be set aside if the (*Article 1520, CCP*):

- Arbitral tribunal declared itself wrongly competent or incompetent.
- Arbitral tribunal was irregularly constituted.
- Arbitral tribunal has ruled on the matter contrary to the given assignment.
- Adversarial principle has been respected.
- Recognition or enforcement of the arbitral award was contrary to international public order.

### Waiving rights of appeal

By special agreement, the parties can at any time expressly waive the application for annulment (*Article 1522, CCP*).

### 29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award?

Actions to set aside or challenge an arbitral award must be initiated within one month of the day the arbitral award was notified (*Article 1494, Code of Civil Procedure (CCP)*) (extended by two months if the party is located abroad). If the action is initiated after expiry of the one-month period, the action is declared inadmissible.

### 30. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

If no limitation period exists under French law for a party to claim an enforcement decision, the party seeking enforcement has ten years (from the date of the French court's enforcement decision) to execute the arbitral award (*Article L. 111-4, French Code of Civil Enforcement Procedures*).

## COSTS

### 31. What legal fee structures can be used? Are fees fixed by law?

The parties are free to determine the legal fee structures.

For lawyers, parties can either decide to apply hourly rates or flat fees. Success fees can be agreed under French law only if they are paid in addition to the hourly or flat fees, and if they are not manifestly excessive.

Arbitrators' fees are usually agreed on with the parties or determined by the arbitral institution.

Third-party funding of arbitration is allowed. The Paris Bar has developed some rules to ensure the compliance of third-party funding with French ethics:

- The parties' lawyers cannot enter into contact directly with the third party, to ensure compliance with the attorney-client privilege.
- Incentives to disclose to arbitrators the existence of third-party funding, to avoid any conflicts of interest.

### 32. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

### Cost allocation

French law does not regulate cost allocation. The arbitral tribunal is often granted discretion to determine the allocation of costs among the parties. However, the principle of "costs follow the event" usually applies.

### Cost calculation

French law does not regulate cost calculation.

### Factors considered

The arbitrators consider several factors in allocating the costs of the arbitration among the parties:

- Reasonable cost submissions.
- The existence of an agreement between the parties.
- The behaviour and/or bad faith of the parties.

## ENFORCEMENT OF AN AWARD

***Domestic awards***

### 33. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

To be enforceable or recognised in French courts, an arbitral award must be followed by an enforcement decision.

A party who wants to obtain recognition or enforcement of an arbitral award in France must establish the existence of the arbitral award, which must not be manifestly contrary to French international public policy (*Article 1514, Code of Civil Procedure (CCP)*). Therefore, the party seeking its recognition or enforcement must provide the French courts with the originals or copies of the arbitral award and arbitration agreement. If these documents are in a foreign language, they must be translated into French (*Article 1515, CCP*).

The French court competent to render an enforcement decision is the Tribunal de Grande Instance (TGI) (*Article 1516, CCP*). When the arbitral award has been rendered outside France, the competent TGI is the Paris TGI. Otherwise, the competent TGI is the one where the seat of the arbitration is located. The procedure to obtain enforcement of an arbitral award is not subject to the adversarial principle. When the competent TGI refuses to render an enforcement decision, it must justify the reasons for its refusal (*Article 1517, CCP*).

The same kind of provisions applies to domestic awards in a domestic arbitration (*Articles 1487 and 1488, CCP*). In domestic arbitration, a decision refusing enforcement must be initiated within one month of its notification (*Articles 1499 and 1500, CCP*).

In international arbitration, when the arbitral award is rendered in France, a decision refusing enforcement can be challenged within one month of the notification of the decision (*Article 1523, CCP*). A decision granting enforcement cannot be challenged (*Article 1524, CCP*).

### *Foreign awards*

**34. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?**

France is a party to three international treaties relating to recognition and enforcement of foreign awards:

- The New York Convention, aiming to simplify recognition and enforcement of international arbitral awards by providing common legislative standards.
- The European Convention on International Commercial Arbitration.
- The Washington Convention on the Settlement of Investment disputes.

**35. To what extent is a foreign arbitration award enforceable?**

A foreign arbitral award is enforceable in France under the same provisions applicable to international arbitral awards rendered in France (*see Question 33*). The party seeking recognition and enforcement in France of a foreign arbitral award must do all of the following:

- Establish the existence of the arbitral award.
- Demonstrate that the arbitral award is not manifestly contrary to French international public policy.
- Provide the French courts with the originals or copies of the arbitral award and arbitration agreement, and translate them when necessary.
- Initiate the procedure before the *Tribunal de grande instance* (TGI)of Paris.

The order granting or denying enforcement of a foreign arbitral award can be challenged within one month of the notification of the award (*Article 1525, Code of Civil Procedure (CCP)*). When the order is served on a party located abroad, an additional two-month period applies (*Article 643, CCP*). The Paris Court of Appeal can deny recognition or enforcement of the foreign arbitral award only on the five grounds mentioned in Article 1520 of the CCP (*see Question 28*).

### *Length of enforcement proceedings*

**36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?**

Obtaining an enforcement order of an arbitral award usually takes a few weeks. It is an ex parte proceeding and France is arbitration friendly (*see Questions Question 33 and 35*). It usually takes a few days. It can, on an urgent basis, be obtained the same day.

When setting aside proceedings or appeal are initiated, it can take around 18 months to obtain a final order. In international arbitration, initiation of setting aside proceedings or appeal of the enforcement order does not suspend the execution of an arbitral award (*Article 1526, Code of Civil Procedure (CCP)*). An award rendered in domestic arbitration can order provisional enforcement (*Article 1496, CCP*). The award is therefore immediately enforceable.

There is no expedited procedure.

## REFORM

**37. Are any changes to the law currently under consideration or being proposed?**

Law No 2016-1547 of 18 November 2016 slightly modifies Article 2061 of the Civil Code (CC), which now specifies that the party against which the arbitration clause is raised must have accepted it, unless that party was assigned or otherwise transferred the rights and obligations of the party who initially accepted the clause.

On 20 April 2018, the French government submitted to the Ministers' council a bill on the reform of the justice system for 2018 to 2022. This reform aims to further develop alternative dispute resolution and institutes a legal framework specific to digital arbitration. The bill states that digital arbitration providers are subject to the obligations relating to data protection and, unless agreed by the parties, confidentiality requirements. The bill also underlines the fact that the arbitrator must act with due diligence and competence, independently and impartially, within the framework of an effective and fair procedure. Further, the bill states that a digital arbitration award, unless expressly agreed by the parties, should not be the result of exclusive algorithm processing. To assess these requirements, digital arbitration providers may be granted a state certification. Subject to discussions in Parliament, this reform should be effective during the course of 2018.

### MAIN ARBITRATION ORGANISATIONS

**International Court of Arbitration of the International Chamber of Commerce**

**Main activities.** World's leading arbitral institution helping to resolve difficulties in international commercial and business disputes to support trade and investment by providing individuals, businesses and governments alike with a variety of customisable services for every stage of their dispute.

**W** *https://iccwbo.org*

**French Arbitration Association**

**Main activities.** Independent arbitration and mediation institution offering the possibility of resolving commercial and professional, national and international disputes safely and with complete neutrality.

**W** *www.afa-arbitrage.com*

**Paris Centre for Mediation and Arbitration**

**Main activities.** Leader in France and one of the leading European centres for the management and resolution of commercial disputes. Also a recognised training organization.

**W** *www.cmap.fr*

### ONLINE RESOURCES

**Legifrance**

**W** *www.legifrance.gouv.fr*

**Description.** Official website of the French government publishing current French legislation and numerous decisions. Non-official and often outdated translations of the Civil Code (CC) and Code of Civil Procedure (CCP).

## Practical Law Contributor profiles

**Alexandre Bailly, Partner**

Morgan Lewis

T +33 1 53 30 43 00
F +33 1 53 30 43 01
E alexandre.bailly@morganlewis.com
W www.morganlewis.com


**Professional qualifications.** Paris Bar.

**Areas of practice.** Litigation and international arbitration, including commercial litigation, bankruptcy, restructuring and financial services counselling.

**Publications.** Numerous publications in French and international legal reviews. The latest publication is: *"A new example of the exceptional nature of the manifest aspect of the invalidity or inapplicability of an arbitration clause".*

**Languages.** French, English, Spanish.

**Xavier Haranger, Partner**

Morgan Lewis

T +33 1 53 30 43 00
F +33 1 53 30 43 01
E xavier.haranger@morganlewis.com
W www.morganlewis.com


**Professional qualifications.** Paris Bar.

**Areas of practice.** Bankruptcy and restructuring; commercial litigation; financial services counselling; litigation and international arbitration.

**Publications.** Numerous publications in French and international legal reviews. The latest publication is: *"A new example of the exceptional nature of the manifest aspect of the invalidity or inapplicability of an arbitration clause".*

**Languages.** French, English, German.