



Arbitration Guide
IBA Arbitration Committee

FRANCE

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I. Background

- (i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

International arbitration is recognised as the normal way of solving international business disputes. France is one of the main international arbitration venues with strong support from courts. Finally, France adopted on 13 January 2011, a new arbitration statute which is amongst the most arbitration-friendly in the world.

- (ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Arbitration is widely used both in domestic and international disputes. In international arbitration, the ICC Rules are amongst the most widely used. In this respect, the fact that the ICC International Court of Arbitration is based in France contributes widely to the development of international arbitration practice in France. Almost all of the major international law firms have arbitration teams based in Paris.

- (iii) **What types of disputes are typically arbitrated?**

Any kind of business dispute can be arbitrated in France. Arbitration is used to resolve disputes in a wide range of business sectors, ranging from energy, construction, telecommunications, air and space, infrastructures, investments, amongst others.

- (iv) **How long do arbitral proceedings usually last in your country?**

There is no specific time frame for the duration of arbitrations seated in France. However, the swift and efficient support of French courts strongly contributes to streamline the arbitration process. As to setting aside proceedings, the procedure would normally take from 12 to 15 months but since the introduction of the new 2011 statute, challenges do not any longer stay enforcement proceedings.

- (v) **Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

There is no such restriction.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

French Arbitration law is contained in Book IV (Article 1442 *et seq*) of the Code of Civil Procedure (CCP). Book IV results from the 13 January 2011 Decree, which substantially modified the former provisions (Decrees of 1980 and 1981) through the codification of French case law and the implementation of new rules in support of arbitration. Articles 2059 to 2061 of the Civil Code also deal with arbitration agreements (but the restrictions contained in Article 2060 are not applicable to international arbitration).

Case law also plays an important role in the making of arbitration law in France. Both the Cour de Cassation (French Supreme Court) and the Paris Court of Appeal have, for many decades, strongly contributed to building a supportive and arbitration-friendly regime.

As explained below, French law has different regimes for domestic and international arbitration.

France has not adopted the UNCITRAL Model Law, which has however had a certain influence on the evolution of French case law as a comprehensive set of general principles generally accepted in international arbitration.

- (ii) **Is there is a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

French arbitration law provides for a distinction between domestic and international arbitration. The relevant criterion for the distinction is economic and based on the nature of the underlying transaction, as provided in Article 1504 CCP: *‘[a]n arbitration is international when international trade interests are at stake’*.

The structure of the relevant articles in the CCP is, to that effect, divided into two parts. The first set of rules (Articles 1442 to 1503) deals with domestic arbitration, while the second (Articles 1504 to 1527) deals with international arbitration. However, certain articles applicable to domestic arbitration, a list of which is set out in Article 1506 CCP, are also applicable to international arbitration.

The reason underlying such distinction is the willingness to give a more liberal regime to international arbitration as opposed to domestic arbitration. For instance, there are no requirements of form for the arbitration agreement in international disputes.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

France is a signatory to the New York Convention, which was ratified on 26 May 1959, the European Convention on International Arbitration of 21 April 1961, which was ratified on 21 August 1967, and the Washington Convention of 18 March 1965, which was ratified on 16 December 1966.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In domestic arbitration, Article 1478 CCP provides that *'the arbitral tribunal shall decide the dispute in accordance with the law, unless the parties have empowered it to rule as amiable compositeur'*.

In international arbitration, Article 1511 CCP provides that *'the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate'*. Article 1512 CCP, which is also applicable to international arbitration, provides that *'the arbitral tribunal shall rule as amiable compositeur if the parties have empowered it to do so'*.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

In domestic arbitration, Article 1443 CCP provides that *'in order to be valid, an arbitration agreement shall be in writing [...]'*.

In international arbitration, Article 1507 CCP provides that *'an arbitration agreement shall not be subject to any requirements as to its form'*.

The absence of any requirement of form in international arbitration has been established by case law¹ for many decades.

There is also no requirement in international arbitration that the procedure for the appointment of the arbitrators be specified in the arbitration agreement. Article 1508 CCP provides to that effect that *'an arbitration agreement may designate the arbitrators or provide for the procedure for their appointment, directly or by reference to arbitration rules or the procedural rules'*.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

French law provides for the complete autonomy of the arbitration agreement, and applies the principle of *competence-competence* both in its positive and negative effects.

Article 1447 §1 CCP, which applies to both domestic and international arbitration, provides to that effect that *'an arbitration agreement is independent of the contract to which it relates'*. It shall therefore not be affected if such contract is void.

Article 1448 §1 CCP, which also applies to domestic and international arbitration, provides that *'when a dispute subject to an arbitration agreement is brought before a court, such court shall decline its jurisdiction, except if an arbitral tribunal has not yet been seized with the dispute and if the arbitration agreement is manifestly void or manifestly not applicable'*.

As a consequence, if the dispute is submitted to a court before the constitution of the arbitral tribunal, the court will refer the parties to arbitration unless it finds that the arbitration agreement is manifestly void or not applicable. Courts have applied such standard in a very restrictive manner.

If the dispute is submitted to a court after the constitution of the arbitral tribunal, such court will always decline jurisdiction.

Case law considers, finally, that the existence and effectiveness of the arbitration agreement is assessed in accordance with the common intent of the parties and is not subject to the laws of any State². French courts, to that effect, have established a principle of validity of the arbitration agreement³.

¹ *Costa de Marfil Naviera v. Compagnie Marchande de Tunisie*, Paris Court of appeal, *Rev. Arb.* 1961.25.

² *Hecht*, Cass. 1e civ., 4 July 1972.

³ *Zanzi*, Cass. 1e civ., 5 January 1999.

- (iii) **Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

There are no restrictions to the enforceability of multi-tier clauses.

According to case law, the consequence of commencing an arbitration in disregard of a mandatory mediation clause is the non admissibility of the claim⁴.

- (iv) **What are the requirements for a valid multi-party arbitration agreement?**

Parties are free to frame their multi-party arbitration agreement as they wish. However, the French Supreme Court established in *Dutco*⁵ a principle of public policy according to which the parties should be entitled to equal participation in the constitution of the arbitral tribunal.

Accordingly, Article 1453 CCP, which is applicable to both domestic and international arbitration, provides that *'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 responsible for administering the arbitration or, where there is no such person, the judge acting in support of the arbitration, shall appoint the arbitrator(s)'*.

- (v) **Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

French case law admits the validity of arbitration agreements whereby one of the parties, or both parties, have the right to elect either arbitration or submitting the dispute to the courts⁶.

- (vi) **May arbitration agreements bind non-signatories? If so, under what circumstances?**

There is no requirement of formal consent to an arbitration agreement. As a consequence, French law admits that an arbitration agreement may bind non-

⁴ *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, Paris Court of appeal, 04 March 2004, *Rev. Arb.* 2005.143; Cass. Mixte, 14 February 2003, *Les cahiers de l'arbitrage / Paris J. of Int'l Arb.*, vol. II, p. 197.

⁵ *Société BKMI et Siemens v. Société Dutco construction*, Cass. 1e civ., 7 January 1992.

⁶ Cass. 2e civ., 26 November 1997, *Rev. Arb.* 1997.544.

signatories if the circumstances of the case show that such party accepted to be bound by its terms.

A different scenario is when the arbitration agreement is transmitted, for example in case of assignment of the claim or of the contract. French case law admits, in such case, that the arbitration agreement may be transmitted to the assignee.

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Article 2059 of the Civil Code provides that *‘[a]ll persons may make arbitration agreements relating to rights of which they have the free disposal’*.

Article 2060 of the same Code restricts recourse to arbitration *‘in matters of status and capacity of persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned’*.

Case law has however, restricted to a considerable extent the application of Article 2060, in particular in international arbitration. It is now widely admitted that matters in which public policy is concerned are arbitrable. In addition, the negative effect of *competence-competence* would give the arbitral tribunal jurisdiction to decide on a dispute relating to arbitrability, under the control of the court having jurisdiction to entertain a challenge against the award. To that effect, Article 1465 CCP provides that *‘the arbitral tribunal has the exclusive jurisdiction to rule over dispute on its jurisdictional powers’*. Such provision encompasses all matters relating to the jurisdiction and powers of the arbitral tribunal, as well as matters of arbitrability.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

As for the procedure to be applied if court proceedings are initiated despite an arbitration agreement, see our response to question III (ii) above.

Objections to jurisdiction before the court must be made on a preliminary basis, failing which, the party is deemed to have accepted the jurisdiction of the court.

Likewise, a party which proceeds with the arbitration without raising an objection to jurisdiction is deemed to have accepted the jurisdiction of the arbitral tribunal.

The French Supreme Court has accordingly held that participation by a party to the arbitration proceedings without any reservation constitutes a waiver of any objection as to the arbitrators' jurisdiction. As a consequence, such party is *'inadmissible, on the basis of the rule of estoppel, to argue [...] that that tribunal had rendered its decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is null and void'*⁷.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The arbitral tribunal has exclusive jurisdiction to rule on an objection to its jurisdiction, according to the principle of *competence-competence* (Article 1465 CCP). The word 'exclusive' indicates that courts do not have any prior or concurrent jurisdiction to decide the issue (except if the clause is *'manifestly void or manifestly not applicable'* pursuant to Article 1448 CCP. See question V (ii) above).

Courts may exercise control over the arbitrators' jurisdiction only in two circumstances: (i) if the court is seized of the dispute before the constitution of the arbitral tribunal, in which case the court will only assess, *prima facie*, whether the arbitral agreement is manifestly void or inapplicable; and (ii) in the context of setting aside proceedings. In the latter case, according to case law, the control by the court of the tribunal's jurisdiction is exercised by reviewing *de novo* all elements of fact and law⁸.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Parties are free to agree on the modalities of selection of the arbitrators. In particular, they are free to agree that the arbitrators will be appointed by an arbitral institution.

In domestic arbitration, Article 1451 CCP provides that the arbitral tribunal shall be composed of a sole arbitrator or an uneven number of arbitrators, and that, if

⁷ *Golshani v. Gouv. Rép. islamique d'Iran*, Cass. 1e civ., 6 July 2005.

⁸ Cass. 1e civ., 11 July 2006, *Rev. Arb.* 2006.977.

the arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed.

Article 1452 CCP, which is applicable to both domestic and international arbitration, provides that *'If the parties have not agreed on the procedure for appointing the arbitrator(s):*

(1) Where there is to be a sole arbitrator and if the parties fail to agree on the arbitrator, he or she shall be appointed by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration;

(2) Where there are to be three arbitrators, each party shall appoint an arbitrator and the two arbitrators so appointed shall appoint a third arbitrator. If a party fails to appoint an arbitrator within one month following receipt of a request to that effect by the other party, or if the two arbitrators fail to agree on the third arbitrator within one month of having accepted their mandate, the person responsible for administering the arbitration or, where there is no such person, the judge acting in support of the arbitration, shall appoint the third arbitrator.'

With respect to the jurisdiction of the courts in support of the arbitration, Article 1505 CCP provides that *'in international arbitration, and unless otherwise stipulated, the judge acting in support of the arbitration shall be the President of the Tribunal de Grande Instance of Paris when: (1) the arbitration takes place in France; or (2) the parties agreed that French procedural law shall apply to the arbitration; or (3) the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or (4) one of the parties is exposed to a risk of a denial of justice'.*

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Article 1456 CCP, which applies to domestic and international arbitration, provides that *'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. Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate. If the parties cannot agree on the removal of an arbitrator, the issue shall be resolved by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration to whom application must be made within one month following the disclosure or the discovery of the fact at issue'.*

- (iii) **Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

In domestic arbitration, Article 1450 CCP provides that *‘only a natural person having full capacity to exercise his or her rights may act as an arbitrator. Where an arbitration agreement designates a legal person, such person shall only have the power to administer the arbitration’*. This Article is not applicable to international arbitration.

As to the arbitrators’ ethical duties, Article 1464 §3 CCP, which applies to domestic and international arbitration, provides that *‘[b]oth parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings [...]’*.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

Case law has repeatedly held that arbitrators have the duty to disclose *‘all circumstances likely to affect his or her judgment and that may provoke, in the eyes of the parties, a reasonable doubt concerning his or her impartiality or independence.’*⁹

In dealing with issues of arbitrators’ conflict of interest, French courts would normally not make direct reference to the IBA Guidelines on Conflicts of Interest in International Arbitration.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal’s decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

According to Article 1468 CCP, which is applicable to both domestic and international arbitration, *‘The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order. However, only courts may order conservatory attachments and judicial security. The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted’*.

⁹ *Qatar v. Creighton*, Cass. 1e civ., 16 March 1990, *Rev. Arb.* 1999.308.

As far as the taking of evidence is concerned, Article 1469 §1 CCP, which is applicable to both domestic and international arbitration, provides that *'if one of the parties to arbitral proceedings intends to rely on an official (acte authentique) or private (acte sous seing privé) deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the Tribunal de Grande Instance for the purpose of obtaining a copy thereof (expédition) or the production of the deed or item of evidence'*.

According to Article 1468 CCP, the arbitral tribunal can order any conservatory or provisional measures it deems appropriate and can even attach penalties to such order. However, Article 1468 CCP excludes the jurisdiction of the arbitral tribunal with respect to conservatory attachments and judicial security.

The Court of Appeal of Paris held that arbitrators may order provisional measures in the form of an award¹⁰. However, a subsequent decision of the French Supreme Court¹¹ (Cour de Cassation) has confirmed the existing case law according to which, in order to be enforced as an award, the arbitral tribunal's decision needs to decide in a final manner all or part of the merits, a question of jurisdiction or a question of procedure which is such as to put an end to the proceedings.

In addition, Article 1468 CCP grants to the arbitral tribunal the power to order judicial penalties to ensure the efficiency of their orders.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?**

Article 1449 CCP, which is applicable to domestic and international arbitration, provides that *'the existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures. Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the Tribunal de Grande Instance or of the Tribunal de Commerce who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement'*.

¹⁰ *Otor Participation v. Carlyle*, 7 October 2004, *J.D.I.*, 2005.341, note A. Mourre & P. Pedone.

¹¹ *GAT v. République du Congo*, Cass. 1^{er} civ., 12 October 2011.

Pursuant to this Article, provisional or conservatory measures may not be sought in court after the constitution of the arbitral tribunal.

Whether any court ordered provisional relief will remain in force after the constitution of the arbitral tribunal depends on the content of the court's order.

- (iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

See the response to question VI (ii) above.

VII. Disclosure/Discovery

- (i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**
- (ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**
- (iii) Are there special rules for handling electronically stored information?**

French law gives wide discretion to international arbitrators in the conduct of the proceedings, including with respect to the procedure and rules applicable to the taking of evidence and to the production of documents. As a consequence, an arbitral tribunal sitting in France may take any decision it deems appropriate with respect to the taking of evidence. As a matter of principle, many tribunals will agree with the parties that, in dealing with such matters, they will have the ability to make reference to the IBA Rules on the Taking of Evidence, either as a rule or as a source of inspiration.

As to electronically stored information, there is no specific rule in this respect in French law. Many arbitral tribunals will refer to the various existing guidelines: ICDR Guidelines for Arbitrators Concerning Exchanges of Information, AAA, 2008; CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, 2009; and CIArb Protocol for E-Disclosure in Arbitration, Oct. 2008.

VIII. Confidentiality

- (i) Are arbitrations confidential? What are the rules regarding confidentiality?**

Article 1464 §4 CCP, which is only applicable to domestic arbitration, provides that: *‘subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential’*.

As for international arbitration, there is no rule of confidentiality. Prior to the 2011 statute, case law had gone in different directions on this matter. The Paris Court of Appeal in 1986 held that *‘it is inherent in the nature of the arbitration process itself to ensure the greatest discretion for the resolution of disputes having a private character’*¹². But in 2004, the same court seemed to question the confidential nature of arbitration by requiring the party alleging that confidentiality had been breached to *‘explain itself on the existence and the reasons of a principle of confidentiality in French international arbitration law’*¹³.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal’s power to protect trade secrets and confidential information?

French law does not restrict in any manner the arbitral tribunal’s power to protect trade secrets and confidential information.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

Correspondence exchanged between members of the Bar is subject to privilege. In-house counsel, however, do not benefit from such rule in the European Union¹⁴. Arbitral tribunals are however free to adopt the rules they believe appropriate in this respect, in particular with the aim of protecting the principle of party equality. Arbitral tribunals may in this respect draw inspiration from or apply Article 9 of the IBA Rules on the Taking of Evidence (2010).

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? Is so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Although it is common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence as a rule or as a source of inspiration, there is no specific requirement in French law to do so.

¹² *Aïta v. Ojeh*, Paris Court of appeal, 18 February 1986, *Rev. Arb.* 1986.583.

¹³ *NAFIMCO v. Société Foster Wheeler Trading Company AG*, Paris Court of appeal, 22 January 2004, *Rev. Arb.* 2004.647.

¹⁴ *Akzo Nobel Chemicals & Akcros Chemicals v. European Commission*, ECJ, 14 September 2010.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Arbitral tribunals have full discretion in the conduct of the procedure of an arbitration, subject to the principles of due process, which in France form part of international public policy. Article 1510 CCP provides, to that effect, that *'irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process'*.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

As far as international arbitration is concerned, procedures conducted in France apply internationally recognised procedures, including the use of witness statements and cross-examination. In this respect, it is noteworthy that the Paris Bar recently clarified that it is not contrary to French lawyers' ethical duties to prepare witnesses according to established arbitral practice¹⁵.

Whether arbitrators would allow the direct examination or questioning of witnesses depends on the parties' agreement and the legal background of the arbitrators. There is no specific practice or provision in French law with respect to this issue.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

In international arbitrations seated in France, any party can appear as a witness. There are no mandatory rules in France on oath or affirmation.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

See answer to question IX (iv) above.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Subject to the general requirements of due process and the fairness of the arbitration, there are no specific formal requirements in France regarding the independence and/or impartiality of expert witnesses. It is generally accepted in

¹⁵ Resolution of the Paris Bar Council of 26 February 2008, Paris Bar Bulletin, 2008, n° 9, p. 4.

arbitrations conducted in France that experts owe a duty to the arbitral tribunal rather than to the parties.

As to the presentation of the expert testimony, there are no specific formal requirements in French law.

- (vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

An arbitral tribunal sitting in France may or may not, depending on the characteristics of each case, appoint experts in addition to those that have been appointed by the parties. Lists of experts are maintained by French courts, but there is no requirement that arbitrators sitting in France resort to lists when appointing experts.

- (viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

There is no specific legal provision in France in this respect. In practice, hot-tubbing tends to be used to examine experts as far as identified technical matters are concerned.

- (ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

There are no specific rules or requirements in French law as to the use of arbitral secretaries. As in other jurisdictions, arbitral secretaries may be used for administrative matters in complex cases. Arbitral institutions, such as the ICC, may provide guidance to arbitral tribunals in this respect.

X. Awards

- (i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Article 1481 CCP, which is applicable to both domestic and international arbitration, provides that *'the arbitral award shall state: (1) the full names of the parties, as well as their domicile or corporate headquarters; (2) if applicable, the names of the counsel or other persons who represented or assisted the parties;*

(3) the names of the arbitrators who made it; (4) the date on which it was made; (5) the place where the award was made’.

Article 1482 CCP, which is also applicable to both domestic and international arbitration, provides that *‘the arbitral award shall succinctly set forth the respective claims and arguments of the parties. The award shall state the reasons upon which it is based’*.

French law does not state any limitation on the type of permissible relief. However, the rules applicable to the substance may limit in certain cases the permissible relief (for example, specific performance with respect to certain types of *intuitu personae* obligations).

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators may award interest and compound interest. As to punitive and exemplary damages, there is no express provision in the French statute preventing arbitrators sitting in France from awarding such damages. It is however uncertain whether an award ordering punitive or exemplary damages would be considered as contrary to international public policy in the context of setting aside proceedings. There is no precedent on this point, but French courts have recently admitted the recognition in France of a US punitive damages judgment¹⁶.

(iii) Are interim or partial awards enforceable?

Interim or partial awards are enforceable in France provided that they comply with the conditions for the recognition and enforcement of any award¹⁷.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Dissenting opinions are not contrary to international public policy and cannot in and by themselves entail the nullity of the award¹⁸. There are no requirements of form or content relating to dissenting opinions. However, most scholars share the view that arbitrators should carefully draft their dissenting opinion in order not to violate the confidentiality of the arbitral tribunal’s deliberations¹⁹.

¹⁶ *Schlenzka v. Société Fountaine Pajot*, Cass. 1e civ., 1 December 2010.

¹⁷ *Otor Participation v. Carlyle*, 7 October 2004, *J.D.I.*, 2005.341, note A. Mourre & P. Pedone; *GAT v. République du Congo*, Cass. 1e civ., 12 October 2011.

¹⁸ *Merial v. Klocke Verpackungs*, Paris Court of appeal, 9 October 2008, *Rev. Arb.* 2009.352.

¹⁹ P. Fouchard, E. Gaillard & B. Goldman, *International Arbitration*, Kluwer Law International, The Hague 1999, §1398; G. B. Born, *International Commercial Arbitration*, Kluwer Law International 2009, p.2467; Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edn. Kluwer Law International 2005, p.285.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

There is no case law on whether or not an award by consent can be enforced as an award. Authors however agree that there should be nothing preventing the enforcement of an award by consent²⁰.

Arbitral proceedings may be terminated, other than by an award, by a procedural order in the case of the agreement of all parties or by a settlement agreement.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Article 1485 §1 and 2 CCP, which applies to domestic and international arbitration, provides that *‘Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award. However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard’*.

Article 1485 §3 CCP, which only applies to domestic arbitration, provides that if the arbitral tribunal cannot be reconvened and if the parties cannot agree on the constitution of a new tribunal, the power to interpret or correct the award *‘shall vest in the court which would have had jurisdiction had there been no arbitration’*.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

French law does not provide for any rules on the allocation of costs. Such matter therefore falls under the arbitral tribunal’s discretion, subject to the parties’ agreement.

²⁰ P. Fouchard, E. Gaillard & B. Goldman, *International Arbitration*, Kluwer Law International, The Hague 1999, §19; G. B. Born, *International Commercial Arbitration*, Kluwer Law International 2009, p.2436 & pp.2438-2439; L. W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn. Oceana Publications Inc./ICC Publishing S.A., New York/Paris, 2000, p.358; Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edn Kluwer Law International 2005, p.288; R.V. Rhoades, D.M. Kolkey, R. Chernick, *Practitioner’s Handbook on International Arbitration and Mediation*, 2nd edn JurisNet 2007, p.221.

In the context of domestic arbitration, some arbitrators may draw inspiration from Article 696 CCP, which applies to all proceedings, and pursuant to which *‘[t]he legal cost will be borne by the losing party, unless the judge, by a reasoned decision, imposes the whole or part of it on another party’*.

(ii) What are the elements of costs that are typically awarded?

Costs typically awarded are the fees and expenses of the arbitral tribunal, the administrative expenses of the arbitral institution, the fees and expenses of the parties' counsels, the costs of experts and witnesses and any other expense incurred in relation to the arbitration proceedings.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

French case law has considered that arbitrators have no jurisdiction to decide on their own fees (as opposed to the allocation of the costs between the parties) and that the arbitral tribunal's decisions on its fees is therefore not binding upon the parties²¹. However, it is beyond doubt that the arbitrators have jurisdiction to decide on the allocation of the costs of the arbitration between the parties.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Subject to the parties' agreement, the arbitral tribunal has discretion to apportion the costs of the arbitration between the parties.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

There is no basis for the courts to review the arbitral tribunal's decision on the apportioning of costs. To the contrary, the arbitral tribunal's decision on the amount of its fees and expenses may be reviewed by courts except when the parties agree to entrust an arbitral institution of that task.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If

²¹ *SNCE v. Interim Nation*, Paris Court of appeal, 17 March 2005, *Rev. Arb.* 2005.790.

yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

International awards rendered in France may be challenged either by way of an action to set aside the award (Article 1518 CCP) or by way of an appeal against the order declaring the award enforceable (Article 1523 CCP).

Challenges shall be made before the court of appeal of the place where the award was made (Article 1519 CCP).

As to foreign awards, Article 1525 CCP provides for the possibility of a challenge against the order granting it recognition.

As far as awards made in France are concerned, Article 1519 CCP provides that *'an action to set aside shall be brought before the Court of Appeal of the place where the award was made. Such recourse can be had as soon as the award is rendered. If no application is made within one month following notification of the award, recourse shall no longer be admissible. The award shall be notified by service (signification), unless otherwise agreed by the parties'*.

As far as foreign awards are concerned, Article 1525 §2 CCP provides that *'the appeal shall be brought within one month following service (signification) of the order'*.

Challenge proceedings may last from 12 to 15 months.

In domestic arbitration, challenge proceedings have the effect of staying enforcement proceedings (Article 1496 CCP).

In international arbitration, to the contrary, Article 1526 CCP provides that *'Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award. However, the first president ruling in expedited proceedings (référé) or, once the matter is referred to him or her, the judge assigned to the matter (conseiller de la mise en état), may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties'*.

It is noteworthy that prior to the 13 January 2011 statute, a challenge had the effect of staying the enforcement in France of an international award.

- (ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

The new 2011 statute makes it possible for the parties to agree to waive the right to set aside an award made in France. Article 1522 CCP provides to that effect that *‘By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside. Where such right has been waived, the parties nonetheless retain their right to appeal an enforcement order on one of the grounds set forth in Article 1520. Such appeal shall be brought within one month following notification of the award bearing the enforcement order. The award bearing the enforcement order shall be notified by service (signification), unless otherwise agreed by the parties’.*

This provision is inspired from foreign statutes such as those of Switzerland and Belgium.²² However, unlike such statutes, which limit the right to waive the action to set aside to parties that are not nationals of or domiciled in the countries, French law does not subject the possibility of a waiver to such condition. Parties may therefore agree to waive the right to set aside irrespective of their domicile.

Given the requirement of a specific agreement for the waiver, the right to challenge an award will not be waived by reference to a general waiver clause, such as those included in certain arbitration rules.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

No recourse other than those provided by the law are possible against domestic and international awards.

Prior to the 2011 statute, Article 1482 CCP provided that an appeal on the merits was possible against domestic awards unless the parties agreed otherwise. Such rule is no longer into force. The new Article 1489 CCP reverses the rule and now provides that, in domestic arbitration, *‘an arbitral award shall not be subject to appeal, unless otherwise agreed by the parties’.*

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

There is no procedure for remand in French law.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court?

²² Article 192(1) of the Swiss Federal Statute on Private International Law; article 1717 (4) of the Belgian judicial Code.

Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

The regime for the recognition and enforcement of domestic awards is provided in Articles 1487 and 1488 CCP.

Article 1487 CCP provides that *‘an arbitral 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. Exequatur proceedings shall not be adversarial. Application for exequatur shall be filed by the most diligent party with the Court Registrar, together with the original award and arbitration agreement, or duly authenticated copies of such documents. The enforcement order shall be affixed to the original or, if the original is not produced, to a duly authenticated copy of the arbitral award, as per the previous paragraph’*.

Article 1488 CCP provides that *‘No enforcement order may be granted where an award is manifestly contrary to public policy. An order denying enforcement shall state the reasons upon which it is based’*.

The regime for the recognition and enforcement of arbitral awards made abroad or in international arbitration is provided in Articles 1514 to 1517 CCP.

Pursuant to Article 1514 CCP, *‘an arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy’*.

Article 1515 CCP states that *‘the existence of an arbitral award shall be proven by producing the original award, together with the arbitration agreement, or duly authenticated copies of such documents. If such documents are in a language other than French, the party applying for recognition or enforcement shall produce a translation. The applicant may be requested to provide a translation by a translator whose name appears on a list of court experts or a translator accredited by the administrative or judicial authorities of another Member State of the European Union, a Contracting Party to the European Economic Area Agreement or the Swiss Confederation’*.

Article 1516 CCP states that *‘an arbitral 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 or by the Tribunal de Grande Instance of Paris if the award was made abroad. Exequatur proceedings shall not be adversarial. Application for exequatur shall be filed by the most diligent party with the Court Registrar, together with the original award and arbitration agreement, or duly authenticated copies of such documents’*.

Pursuant to Article 1517 CCP, *'the enforcement order shall be affixed to the original or, if the original is not produced, to a duly authenticated copy of the arbitral award, as per the final paragraph of Article 1516. Where an arbitral award is in a language other than French, the enforcement order shall also be affixed to the translation produced as per Article 1515. An order denying enforcement of an arbitral award shall state the reasons upon which it is based'*.

As to the arbitral award, Article 1492 CCP provides, in domestic arbitration, that it may be set aside if *'(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) the award is contrary to public policy; or (6) the award failed to state the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having made the award; or where the award was not made by majority decision'*.

In international arbitration, pursuant to Article 1520 CCP, the award may be set aside if *'(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) the award is contrary to international public policy'*.

Since the entry into force of the 2011 statute, a challenge does not stay the enforcement in France of an international award. It is however possible to obtain a stay to enforce *'where enforcement could severely prejudice the rights of one of the parties'*.

To the contrary, in domestic arbitration, an appeal against the *exequatur* has the effect of staying enforcement proceedings (Article 1496 CCP).

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once the *exequatur* is obtained, it is necessary to initiate an enforcement proceeding by, as the case may be, attaching the debtor's assets. In such case, the debtor may challenge the enforcement operations in the conditions provided to that effect by the CCP.

(iii) Are conservatory measures available pending enforcement of the award?

Enforcement of the award may entail measures of attachment and judicial seizures. Conservatory measures may also be available on a provisional basis in the case of a stay of the enforcement proceedings.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

French courts show a great degree of deference towards arbitral awards, which are rarely quashed, except for lack of jurisdiction, irregularity in the constitution of the arbitral tribunal, excess of powers or breach of due process. French courts take a narrow approach to the concept of international public policy, which may entail the annulment of the award only in case of a flagrant breach of the most fundamental rules.

French courts do not take into account the fact that judicial proceedings against the award are pending or that the award has been set aside at the place of arbitration. Courts have repeatedly held that the annulment of an award at the place of arbitration is not a ground for denying enforcement in France. The famous cases *Hilmarton*²³ and *Putrabali*²⁴ illustrate the French position, seeing in the award '*an international judicial decision*', '*which is not integrated in any national legal system*'.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

See response to question XII (i) above.

XIV. Sovereign Immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

French law traditionally distinguishes between jurisdictional immunities and enforcement immunities. As for jurisdictional immunities, French courts admit that the submission to arbitration is equivalent to a waiver of the immunity²⁵.

²³ *Hilmarton*, 23 March 1994, *Rev. Arb.* 1994.327

²⁴ *Putrabali*, 29 June 2007, *Rev. Arb.* 2007.507

²⁵ *République socialiste fédérale de Yougoslavie v. SEEE*, TGI Paris, 6 July 1970, *Rev. Arb.*, 1975.328; *S.E.E.E. v. Yougoslavie*, Cass. 1e civ., 18 November 1986, *Rev. Arb.*, 1987.149; *SOABI v. Sénégal*, Cass. 1e civ., 11 June 1991, *Rev. Arb.*, 1991.637; CA Paris, 30 March 2011, N°10-18825.

As for enforcement immunities, French law provides sovereign states with immunity for actions realised *de jure imperii* (that is, actions with respect to assets allocated to a sovereign activity) as opposed to actions performed *de jure gestionis* (actions with respect to assets allocated to an economic or a commercial activity). International organisations may benefit, based on the relevant treaties, from special immunities.

In its *Creighton* decision rendered in 2000²⁶ the Cour de Cassation ruled that an implicit waiver of the enforcement immunity results from the submission to ICC arbitration. The decision states that '[t]he obligation entered into by the State by signing the arbitration agreement to carry out the award according to Article 24 of the International Chamber of Commerce Arbitration Rules [Article 28(6) of the ICC 1998 Rules of Arbitration] implies a waiver of the State's enforcement immunity'.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

Similarly to question XIV (i) above, French case law uses the distinction between assets allocated to a sovereign activity (*jure imperii* activity), which are protected assets, and those allocated to an economic or a commercial activity (*jure gestionis* activity), which are not protected by the states' immunity.

Special rules will apply to the enforcement of an award against an entity that is a state emanation. As for enforcement of awards against state instrumentalities, see E. Gaillard and J. Younan, *State Entities in International Arbitration*²⁷.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

France signed the Washington Convention in 1965. It entered into force on 20 September 1967. To our knowledge, France has not signed any other multilateral treaty on the protection of investments.

(ii) Has your country entered into bilateral investment treaties with other countries?

²⁶ *Creighton v. Ministère des Finances de l'Etat du Qatar*, Cass. 1e civ., 6 July 2000, *J.D.I.*, N°127, pp.1054-1055, 2000.

²⁷ E. Gaillard and J. Younan, *States Entities in International Arbitration*, in International Arbitration Institute Series on International Arbitration, N°4, 2008.

To date, France has entered into 153 Bilateral Investment Treaties²⁸, 90 of which are currently in force.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Main treatises on arbitration in France in English:

- G. B. Born, *International Commercial Arbitration*, Kluwer Law International 2009, 3440 pages.
- Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2d edn Kluwer Law International 2005.
- J.-L. Delvolvé, J. Rouché & G. Pointon, *French Arbitration Law and Practice*, 2nd edn. Kluwer Law International 2009. 364 pages.
- P. Fouchard, E. Gaillard & B. Goldman, *International Arbitration*, Kluwer Law International, The Hague 1999, 1280 pages.
- L. W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn. Oceana Publications Inc./ICC Publishing S.A., New York/Paris, 2000, 717 pages.
- J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, 904 pages.
- J.-F. Poudret & S. Besson, *Comparative Law on International Arbitration*, 2nd edn. Thomson – Sweet & Maxwell, 2007, 952 pages .

Main treatises on arbitration in France in French:

- M. de Boissésou, *Le droit français de l'arbitrage, interne et international*, (GLN-Joly, Paris 1990), 1131 pages.
- D. Cohen, *Arbitrage et Société*, (LGDJ, Paris 1992,) 368 pages.

²⁸ ICSID website.

- T. Clay, *L'arbitre*, Nouvelle Bibliothèque de thèses, (Daloz, Paris 2001), 930 pages.
- P. Fouchard, E. Gaillard & B. Goldman, *Traité de l'arbitrage commercial international*, (LITEC, Paris 1996), 1225 pages.
- E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, Les livres de poche de l'Académie de droit international de La Haye, Martinus Nijhoff, 2008, 240 pages.
- M. Henry, *Le devoir d'indépendance de l'arbitre*, Bibliothèque de droit privé, Tome 352 (LGDJ, Paris 2001) 404 pages.
- J.-B. Racine, *L'arbitrage commercial international et l'ordre public*, Bibliothèque de droit privé, Tome 309, (LGDJ, Paris 1999), 623 pages.
- J. Robert, *L'Arbitrage – droit interne, droit international privé*, 6th edn. (Daloz, Paris 1993,) 459 pages.
- C. Seraglini, *Lois de police et justice arbitrale internationale*, Nouvelle bibliothèque de thèses (Daloz, Paris 2001), 571 pages.

Journals :

- The *Revue de l'Arbitrage* (Rev. Arb.), edited by the *Comité français de l'arbitrage* (CFA), Editor in Chief : Charles Jarrosson.
- *Cahiers de l'Arbitrage / Paris Journal of International Arbitration*, Editors in Chief Charles Kaplan & Philippe Pinsolle.

Chronicles:

- Thomas Clay *in* Dalloz.
- Jacques Béguin, Jérôme Ortscheidt and Christophe Seraglini *in* *Semaine Juridique* (JCP).
- The *Journal du droit international* (Clunet or JDI).
- The *Revue Critique de Droit International Privé* (Rev. Crit. Dr. Int. Pr.).
- *International Business Law Journal* (IBLJ).

- (ii) **Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

Educational events:

- Arbitration academy (www.arbitrationacademy.org)
- ICC International Commercial Mediation Competition (www.iccwbo.org/court/adr/id43685/index.html)

ICC pre-moot (arbitration): application are usually opened on early October. For the 19th Willem C. Vis Moot, see (www.iccwbo.org/court/arbitration/index.html?id=46228)

- ICC Institute Annual Conference: The next Conference will be held in Paris on 26 November 2012. For further information, see (www.iccwbo.org/business_law)

XVII. Trends and Developments

- (i) **Do you think that arbitration has become a real alternative to court proceedings in your country?**

Arbitration is considered to be the normal method of solving international business disputes.

- (ii) **What are the trends in relation to other ADR procedures, such as mediation?**

There is a trend to an increased use of mediation, both in the arbitration process and court litigation.

- (iii) **Are there any noteworthy recent developments in arbitration or ADR?**

The adoption of the 2011 statute is a major development for the law on arbitration in France.