GENERAL

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

Since the implementation of major textual reforms that date back some thirty years to 1980 and 1981, French arbitration law has been among the most pro-arbitration bodies of law in the world. In the three decades since those legislative revisions, France has witnessed a particularly significant development of arbitration-related jurisprudence.

Collectively, these developments have confirmed the unique and exceptional nature of French arbitration law from a comparative law perspective and have, not incidentally, solidified virtually universal acceptance of France among the world’s leading commercial actors as either a preferred or, at a very minimum, wholly appropriate arbitration venue.

When describing the difference between French arbitration law and other nations’ systems of arbitration law, legal commentators tend to point to a given number of recurring characteristics, most notably:

- The autonomy of the arbitration clause (from both underlying agreement and national law) (see Question 7).
- Courts’ readiness to extend an arbitration agreement to non-signatory third parties (ratione personae extension) as well as to subject matters not explicitly covered by its terms (ratione materiae extension) (see Question 9).
- Unusually broad application of the principle of compétence-compétence (kompetenz-kompetenz) (see Question 19).
- The Cour de Cassation held that the annulment of a foreign arbitration award by the courts of the seat of arbitration is not a factor that by itself impedes recognition and enforcement of the award in France (Cass. 1st Civil Chamber, 29 June 2007).

The advantages of French arbitration as compared to French litigation include the following:

- Arbitration is inherently neutral and autonomous as far as domestic legal orders are concerned (hence its popularity in matters of international commerce).
- Arbitration provides great flexibility as to its rules, as the proceedings can readily be tailored on a case-by-case basis to match the particular needs and wishes of the parties (seat of arbitration, language(s) of the proceedings, choice of arbitrator, flexibility regarding the written and oral presentation of arguments and so on).

- International commercial arbitration based in France generally allows for greater discovery (instruction du dossier) than would normally be allowed in French judicial proceedings, due in particular to the widespread use by arbitrators in France-based commercial arbitrations of the International Bar Association’s Rules on the Taking of Evidence in International Commercial Arbitration (which represent a compromise between the civil law and common law traditions of pre-trial fact gathering).
- Arbitral awards are in general easier to enforce abroad than foreign court judgments.
- Rapidity, particularly in cases where the parties agree on accelerated proceedings.

One disadvantage of French arbitration as compared to French litigation is that arbitration is probably more costly, as generally, French judicial proceedings are not particularly cumbersome or lengthy (especially when compared to civil litigation in common law jurisdictions).

Other disadvantages include the difficulty or outright impossibility, depending on the particular facts, of consolidating separate but related arbitration matters and of joining non-signatory third parties (see Question 9). This disadvantage becomes particularly acute if multiple related disputes erupt on a single overall project but fall technically under different contracts involving partially or wholly overlapping parties and more or less similar arbitration clauses.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

The International Chamber of Commerce has been organising arbitration proceedings since the 1920s through its International Court of Arbitration (www.iccwbo.org). It is without a doubt the most highly reputed arbitration centre in France, if not in the world. It is the most commonly used arbitration centre in France for the resolution of large, international disputes. However, the ICC does not limit its scope to just large-scale disputes. Disputes with more modest amounts in question, as well as purely domestic arbitrations, also figure in its roster of cases.

In addition, the ICC is not the only Paris-based institution that administers arbitration. Others include:

Naturally, the world’s other leading international arbitration centres (including the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the American Arbitration Association’s International Centre for Dispute Resolution) are sometimes chosen to administer arbitrations with a seat of arbitration in France.


The drafting of French arbitration law is premised on a fairly original dualist logic that distinguishes between domestic arbitration (l’arbitrage interne) and international arbitration. A primary concern during the arbitration law reforms in the early 1980s was to ensure that the legislative texts applicable to international arbitration be non-onerous and streamlined. This explains why the French Code of Civil Procedure (CPC) contains only 16 specific provisions (Articles 1492-1507) dealing with international arbitration. Moreover, the definition of international is extremely broad and inclusive: an arbitration is considered international whenever it implicates the interests of international trade (Article 1492, CPC). The absence of a more detailed legislative text means that courts have had the opportunity to fill in some of the gaps, usually arriving at solutions that can be viewed as favourable to the continued development of arbitration in France.

The sections of the CPC relating to arbitration were enacted before the adoption of the UNCITRAL Model Law and therefore are not based on the Model Law. They have not been modified since the promulgation of the Model Law to resemble it more closely.

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

Unlike French law on domestic arbitration, French law on international arbitration sets out few mandatory rules. Therefore, French law of international arbitration places the emphasis on party autonomy and the ability to fashion arbitration proceedings that meet the parties’ shared expectations.

The mandatory rules apply to the following matters:

- **Arbitrability.** Resort to arbitration is limited to the areas of law that have traditionally been closely associated with the exercise of state judicial power (for example, certain family law matters, bankruptcy matters and so on).
- **Due process/Fair trial.** Certain rules have been implemented to ensure fairness and due process in arbitration. To illustrate, the well-known Dutc case (Cour de Cassation, 7 January 1992, Sociétés BKMI et Siemens v société Dutc) sets forth the rule of strict party equality in the constitution of arbitral tribunals (see Question 8). A more recent case (Cass. 1st Civil Chamber, 8 July 2009) confirms the principle of collegiality, that is, the rule that each arbitrator has a right to participate in the decision-making process with his colleagues.
- **International public policy.** A French court should decline to permit enforcement of a foreign arbitral award in conflict with fundamental principles that can be considered as part of international public policy. Therefore, a contract having corruption as one of its purposes (for example, influence peddling through the payment of bribes) can be deemed contrary to international public policy and treated as null and void by an arbitrator (Paris Court of Appeal, 30 September 1993, European Gas Turbines).

5. Are there any requirements relating to independence or impartiality?

Arbitrators are naturally subject to the duties of independence and impartiality under French arbitration law. These questions can be raised not only at the stage of designation of arbitrators, but also subsequently, if the grounds for an arbitrator’s recusal do not become apparent until later. These issues can even be raised in the context of the review of an arbitration award, if the ground for believing an arbitrator lacks independence or impartiality appears from the text of the arbitral award (Cass. 1st Civil Chamber, 24 March 1998). In such a case, the objecting party cannot be deemed as having waived the objection by failing to raise it earlier.

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.

A major new law (Law No. 2008-561) was enacted in France on 17 June 2008 to reform the statute of limitations regime. Under the revised Civil Code Article 2224, the catch-all limitation period for personal actions (actions personnelles ou mobilières) is five years (before the revision, the general applicable period was 30 years). A small number of other limitation periods exist, for example:

- Tort actions for personal injury are barred after ten years.
- Certain real estate disputes are subject to a 30-year limitation period.

The limitation period is interrupted on service of a request for arbitration.

No case law has yet developed as to how Law No. 2008-561 applies to arbitration awards, but some writers have speculated that the new five-year limitation period could arguably apply to actions seeking recognition and enforcement of foreign arbitral awards.
In addition, another provision of Law No. 2008-561 provides that once a judicial decision allowing enforcement of the award has been obtained, and that decision is not susceptible to any further challenge that suspends execution (a situation known in French law as possessing a titre exécutoire), the limitation period for enforcing that award is generally ten years (Article 3-1, Law 91-650 of 9 July 1991, introduced through Article 23, Law of 17 June 2008, and the existing Article 3, Law 91-650).

**ARBITRATION AGREEMENTS**

7. For an arbitration agreement to be enforceable:

- What substantive and/or formal requirements must be satisfied?
- Is a separate arbitration agreement required or is a clause in the main contract sufficient?

Except for rules on the arbitrability of the dispute, no substantive or formal requirements exist (under French international arbitration law) to make an arbitration agreement valid and enforceable. French law requires neither a written arbitration clause nor any other particular form for the arbitration agreement. Therefore, in theory, there is no formal prohibition against entering into an arbitration agreement by means of e-mail exchanges or even orally. However, the latter example must be extremely rare in practice.

In addition, the structure and contents of the arbitration agreement are not regulated by any particular French law. The agreement can be found in the contract to which it relates (clause compromissoire), which is most common, or in a separate written arbitration agreement entered into after a dispute has erupted (submission agreement or compromis d’arbitrage).

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?

In international arbitration, French law does not set out any particular requirements as to the number of arbitrators or their status, qualifications or other required characteristics. In domestic arbitration, however, French law requires that arbitrators be physical persons and that they be designated in an odd number. In both cases, and unless the parties agree otherwise, the choice of arbitrator(s) remains in the parties’ sole discretion (subject to the requirement of independence and impartiality) (see Question 5).

French law incorporates an important principle of the parties’ equality in the process of designating arbitrators. This principle was announced in the famous Dutco decision and rises to the level of public policy in France. Moreover, Dutco established that a party cannot validly renounce its right to equality before a dispute has arisen. The classic instance in which the problem arises consists of the multi-party arbitration in which an arbitration agreement entered into before the dispute arose allows a single claimant to name one arbitrator, while requiring multiple respondents to jointly name the other arbitrator. Under French law, such arbitration agreement cannot be enforced against a respondent’s objections.

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

The guiding principle of French law (as of other laws) is that a non-party to an arbitration agreement cannot invoke the agreement against other persons or have the agreement applied against it. However, French law has admitted the possibility of applying the arbitration agreement beyond the strict limits of the signatory parties. Two different notions should be distinguished in this respect.

**Transmission of the arbitration clause**

Transmission refers to situations in which the contract containing the agreement to arbitrate is the subject of a transfer to another entity (be it a transfer by operation of law or by agreement). The arbitration agreement is treated as inseparable from the overall contract economy. It therefore follows or accompanies the contractual relationship transferred, and produces its legal effect in relation to the person or entity that succeeds to the rights of the original ceding contracting party (Paris 1st Ch. Suppl., 28 January 1988, C.C.C. Filmkunst v E.D.I.F.). Case law has deemed a contractual arbitration clause to be transferred in a variety of factual circumstances, including:

- Substitution of rights holders (Cass. 1st Civil Chamber, 8 February 2000).
- Cases of contractual clauses benefiting third parties (Cass. 1st Civil Chamber, 11 July 2006).

**Extension of the clause**

The notion of extension of the arbitration clause refers to situations in which the binding force of the arbitration agreement is interpreted broadly to include new contracts not covered by the arbitration agreement or new entities that were not parties to the contract containing the arbitration agreement. Under certain circumstances, French jurisprudence has permitted the extension of an arbitration clause to situations involving chains or series of related contracts (Cass. 1st Civil Chamber, 27 March 2007 and Cass. Com., 5 March 1991) or in cases of groups of related companies involved in the performance of the contract (Cass. 1st Civil Chamber, 30 October 2006).

**PROCEDURE**

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

The parties to an arbitration agreement are, in theory, obliged to carry out the designation of arbitrators by their own initiative. In cases of difficulties, the most diligent party may solicit the assistance of the chief judge (Président) of the Paris Tribunal de Grande Instance (TGI), provided the arbitration has a connection to France. Two general types of connection are possible (Article 1493, CPC):

- The arbitration is proceeding in France.
The parties have agreed for the arbitration to be governed by French procedural law (this is less common).

In addition to these two well-defined cases, the Président also has jurisdiction to assist in the constitution of the arbitral tribunal, but only where there would be a denial of justice if the court did not act, and provided the case has at least some tenuous connection with France. This hypothesis was present in the famous case of NIIOC v Israel (Cass. 1st Civil Chamber, 1 February 2009).

The recusal of an arbitrator is permitted if the arbitrator lacks independence or impartiality. Requests to recuse an arbitrator may be addressed to the Président of the Paris TGI if the arbitration agreement does not empower another entity to rule on such requests (TGI Paris, 29 October 1996, General Establishment of Chemical Industries). In practice, the Président of the Paris TGI rarely rules on challenges to an arbitrator. This is because most sets of arbitration rules include provisions on recusal and identify the entity competent to rule on these recusal requests (or the manner for designating such entity).

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

French arbitration law affords parties the freedom to agree on the procedural rules applicable to their arbitration. Parties can elect to render the procedural law of a given state (for example, French arbitration law) applicable to their arbitration, or decide on specific procedural rules that will govern the proceedings (typically by electing an existing set of arbitration rules). If the arbitration agreement is silent on the governing procedural law, then the arbitrators are free to decide on procedural matters to the extent it is necessary to do so. They may do so either directly or by referring to a given arbitration law or arbitration rules. Arbitrators sitting in France may easily conform to prevailing international practice in international arbitration, for example, by drawing from institutional arbitration rules or specialised sets of rules such as the International Bar Association’s (IBA) Rules on the Taking of Evidence in International Commercial Arbitration.

Strictly speaking, French law does not set out procedural rules that automatically apply by default if the parties fail to set a governing rule on a given point. However, if the international arbitration is governed by French procedural law (by agreement of the parties or on the arbitrators’ determination), either generally or with respect to specific points, and the parties have provided no rule of procedure on a given point, then the French CPC’s procedural rules for domestic arbitration can be applied through the combined operation of Articles 1494 and 1495 of the CPC.

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

In the absence of any particular regulating provision in the parties’ arbitration agreement, arbitrators are generally free to exercise their discretion in resolving procedural points (see Question 11). For example, an arbitrator can instruct parties to produce documents, request that parties provide details about particular factual matters, engage experts and invite third parties to appear and testify as to the relevant facts.

However, due to the arbitrators’ limited power to compel, enforcement of the ordered measures can be complicated or even impossible. In particular, it is generally understood that forced execution is not possible against third parties, as the arbitral tribunal has no power to bind them.

One technique that an arbitral tribunal can adopt to foster the effectiveness of its discovery orders is to issue these orders by way of a partial or interim award that also calls for the payment of a daily or other periodic financial penalty for failure to comply (astreinte). Following a long-standing debate in the legal literature, the Paris Court of Appeal confirmed that arbitrators indeed have the power to include astreinte orders in their awards (Paris Court of Appeal, 7 October 2004). In any event, parties usually comply with tribunal orders calling for the production of documents to avoid any negative inferences being drawn by the tribunal as to the contents of the non-disclosed material (see, for example, Article 9(4.5), IBA’s Rules on the Taking of Evidence).

13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

French judicial procedure does not provide for a scope of pre-trial fact-finding that resembles the kind of discovery routinely associated with the common law tradition. Document production is particularly limited. Each party decides in the first instance what documents it shall annex to its pleadings and thereby place in issue. French judges can of course order the production of certain additional documents, but the scope of these orders is generally quite narrow, as French judges tend to order the production of only those documents that can be identified with a reasonable degree of precision and that are directly relevant to the issues in dispute.

However, the rules and practices of French court litigation are not particularly relevant to the manner in which arbitrators sitting in France proceed. First, this is so because it is within the parties’ power to agree on the type of pre-hearing fact-finding for their arbitration. Second, even if one can fairly conclude that the notion of discovery (as it is understood in common law jurisdictions) is alien to French civil procedure, nothing prevents arbitrators sitting in France from adopting a common law approach to a greater or lesser extent.

In practice, a tribunal always seeks the input of the parties as to the scope of discovery that they wish to implement. However, whatever flexibility arbitrators are allowed under French arbitration law, if the majority of the arbitrators, parties and counsel have their centre of gravity in civil law jurisdictions, then it is most unlikely that the tribunal will, barring exceptional circumstances, apply the full scope of discovery measures typical of common law countries. When the actors involved in a given case come from different legal traditions, tribunals endeavour to craft a solution on discovery that strikes a compromise between the different legal traditions. In any case, the IBA rules on evidence are employed on a regular basis in international arbitrations vened in France.
CONFIDENTIALITY

14. Is arbitration confidential?

Parties can naturally ensure the confidentiality of their arbitration proceedings by signing a confidentiality agreement or by agreeing to arbitrate under a set of rules containing a confidentiality obligation. Notably, many sets of arbitration rules contain such no obligation. The ICC Arbitration Rules, for example, do not apply a duty of confidentiality to either the parties or the arbitrators.

Given the relative silence of the French legislature on the subject of confidentiality (with the exception of Article 1469 of the CPC, which provides that arbitrators’ deliberations are confidential, and which is applicable in domestic arbitration and international arbitrations subject to French procedural law), the French judiciary has begun to consecrate the notion of confidentiality in arbitration, particularly with respect to the obligation of the parties to maintain confidentiality (Paris Court of Appeal, 18 February 1986, Aïta v Ojjeh). Therefore, a party can seek injunctive relief when another party reveals the existence and contents of an arbitration proceeding to the public by means of a press release (Paris Commercial Court, 22 February 1999).

The duty of confidentiality shall not negatively affect a party’s right to have recourse to a state court judge in connection with arbitration proceedings (for example, a petition to set aside an award), even if this leads to a public disclosure of information disclosed during the arbitration (Paris Court of Appeal, 22 January 2004, Nafimco v Foster). However, when the resort to the state court judge can be characterised as abusive (for example, if the court manifestly has no jurisdiction over the matter), the party that began that action runs the risk of having a judgment entered in the face of an emergency situation, measures to extend the time period (if any) that the parties have -

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COURTS AND ARBITRATION

15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

French courts may only become involved in arbitration under very narrow circumstances, including, most notably, when the assistance of the state judiciary is necessary to ensure that the arbitral proceedings effectively get underway. This assistance is typically encountered during three steps of the arbitration:

- Courts can become involved with respect to difficulties in relation to the commencement of arbitration proceedings. The Président of the Paris TGI, acting as a judge in aid of arbitration (juge d’appui), has jurisdiction in certain circumstances:
  - concerning the designation or recusal of arbitrators (see Question 10); and
  - to extend the time period (if any) that the parties have granted to the arbitrators to complete their mission (for time periods, see Paris TGI, 6 July 1990).

- Parties can call on state courts in relation to provisional or conservatory measures. Though arbitrators and judges both have jurisdiction to order these types of measures, it is often more efficient to seek them directly from a state court, as only a state court enjoys the power to compel, which can render these measures truly effective. In France, several different types of measures can be sought in furtherance of arbitration:
  - in the face of an emergency situation, measures designed to maintain the status quo may be ordered by a judge sitting as a juge des référés (generally the Président of a TGI or a Commercial Court) (for example, the discontinuation of activities that create a manifestly illegal situation such as conduct amounting to patent infringement);
  - in certain limited situations, when the claimant can show a situation of some urgency and the arbitral tribunal has not yet been constituted, the juge des référés can order the payment of a provision towards the amount claimed, provided the claim is not subject to serious challenge (Cass. 1st Civil Chamber, 6 March 1990; Cass. 2nd Civil Chamber 13 June 2002); and
  - parties can always apply by an ex parte application for conservatory measures (for example, a conservatory seizure or freezing of assets, known as a saisie conservatoire) designed to facilitate later execution of the future arbitral award (Article 67, Law No. 91-650 of 9 July 1990).

- It may become necessary or useful to solicit the involvement of state courts regarding matters of proof. A party can, for example, ask a French judge, pending the constitution of the arbitration panel, to order discovery or fact-finding measures (mesures d’instruction) aimed at preserving or establishing elements of proof on which the resolution of the dispute will turn (Article 145, CPC).

The matter is less clear after the tribunal has been formed. Having recourse to a state court judge may be possible only in urgent situations to preserve proof (for example, from destruction). Beyond this, it is not entirely clear whether a French judge would become involved in discovery matters in support of an arbitration (including in relation to a request for the compulsory presence of a witness).

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

An arbitration agreement has a dual effect in that:

- It provides the groundwork for the arbitral tribunal’s jurisdiction (known as the positive effect). No party can escape the tribunal’s jurisdiction. Only mutual consent by the parties to forego their agreement to arbitrate permits them to litigate their dispute in court.

- It precludes state courts from exercising jurisdiction over the matters falling under the arbitration tribunal’s jurisdiction (known as the negative effect (Article 1458, CPC)).
This is useful to defeat an attempt by the other party to slow down the commencement of the arbitration or other delaying measures. The negative effect applies in two circumstances:

- when a dispute that is already pending before an arbitration tribunal is brought before a state court, the court must automatically declare that it has no jurisdiction to address the merits of the case or the validity or scope of the arbitration agreement; and
- if the dispute has not yet been entrusted to an arbitral tribunal, then the state court must still declare itself without jurisdiction, unless the arbitration clause is manifestly null or inapplicable (Cass. 1st Civil Chamber, 11 February 2009; Cass. 1st Civil Chamber, 11 July 2006; Cass. 1st Civil Chamber, 25 April 2006).

17. 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?

When a dispute subject to an arbitration clause is submitted to a state court for resolution, that court must declare jurisdiction. Only the manifest nullity or inapplicability of the arbitration clause permits an exception to this principle, and only if the matter was referred to the judge before the tribunal’s constitution (Cass. 1st Civil Chamber, 1 July 2009 and Cass. 1st Civil Chamber, 25 April 2006). Moreover, the notions of nullity and inapplicability have been narrowly construed by French jurisprudence (Cass. 1st Civil Chamber, 7 June 2006, Jules Verne). According to the Cour de Cassation, the French state judge is not authorised to engage in a substantial and detailed examination of the arbitration agreement before the arbitral tribunal has had a chance to rule on the validity and scope of the agreement.

If an arbitration were commenced, despite the absence of an arbitration clause and in violation of a forum selection clause referring disputes to a state court, the arbitral tribunal must decline to pursue the arbitration. In such a case, the arbitral respondent could also commence a state court action on the merits without being obliged to await the outcome of the groundless arbitration. The French judge is likely to retain jurisdiction over the matter, as long as an arbitration clause does not arguably exist.

In international arbitration, the purpose of an anti-suit injunction is to prevent a party to an arbitration agreement from commencing a court action before a foreign jurisdiction when the commencement of such an action conflicts with the arbitration clause. Anti-suit injunctions are generally considered alien not only to French procedural law but to the laws of civil law countries generally, and their issuance has been the object of some criticism. A recent decision of the European Court of Justice (ECJ) disapproved of the use of these injunctions within the EU (West Tankers, 10 February 2009).

However, a recent decision of the Cour de Cassation (1st Civil Chamber, 14 October 2009) seems to approve, outside the scope of EU conventions and law, the enforcement in France of an anti-suit injunction ordered by a foreign court to render effective a contractually agreed forum selection clause.

19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

From a comparative law perspective, French law was among the first national laws to subscribe to the principle of *compétence-compétence*, and even today, it remains one of the few laws concurring both the accepted positive and negative effects of that principle. The positive aspect of the doctrine allows arbitrators, whenever their jurisdiction is challenged, to rule on that challenge, subject to later review by the state courts. On the negative aspect, see Question 16.

*Compétence-compétence* is sometimes presented as a corollary to the well-established principle in French law of the autonomy of the arbitration clause from the contract in which it is included (Cass. 1st Civil Chamber, 7 May 1963, Gosset). It is the autonomy principle that allows an arbitral tribunal to have jurisdiction to conduct an arbitration, leading to an award that declares the contract under dispute to be null and that addresses the consequences flowing from such nullity.

**REMEDIES**

20. What interim remedies are available from the tribunal? Can the tribunal award:

- Security for costs?
- Security or other interim measures?

Arbitrators sitting in France have the power to order interim measures, even though no specific article of the CPC applicable to arbitration provides so explicitly. Certain sets of institutional arbitration rules set out this power explicitly (for example, Article 23, ICC Rules of Arbitration or Article B, CMAP Arbitration Rules).

Still, measures ordered by a tribunal do not always enjoy the same concrete effect or scope as the measures that a court can order. For example, given the contractual nature of arbitration, arbitrators lack jurisdiction to order measures aimed at third parties.

In practice, an arbitration tribunal can order measures designed to:

- Ensure execution of the forthcoming award such as an order forbidding a party to dispose of some or all of its assets.

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21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

On issuance, the arbitral award is final (res judicata effect) in relation to the dispute it resolves. In their award, arbitrators can order the losing party to pay a sum of money corresponding to the harm suffered by the claimant, along with accrued and future interest. The arbitrators can also include a component for moral damage. In addition, they can, in their discretion, apportion and assign among the parties their respective shares of responsibility for the overall costs of arbitration, including the administrative fees of any arbitration institute, the costs of any experts, and the fees and expenses of the arbitrators and counsel.

One controversial issue, to which there is currently no clear answer, concerns the arbitrators’ power to award punitive damages and if so, in what amount. The concern is that excessive awards of punitive damages could violate the principle of proportionality between the harm and the remedy, and such an award would run the risk of being deemed contrary to the French conception of international public policy and hence unenforceable in France. A court of appeal has refused to enforce a judicial decision from the United States on this basis (Court of Appeal of Poitiers, 26 February 2009). The same reasoning could apply in international arbitration.

APPEALS AND CHALLENGES

22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal or challenge?

An enforcement order issued by the TGI relating to an award issued in France in international arbitration may be the subject of an appeal, provided it is based on one of a limited number of grounds enumerated in the CPC (see below). Similarly (in relation to awards issued in France in international arbitration), a petition to set aside the award may be made immediately by the losing party, without a requirement to wait for an enforcement order to be entered against it. In either case, the grounds of appeal are as follows:

- Entry of an award in the absence of an arbitration agreement or on the basis of an invalid or expired agreement to arbitrate.
- Irregularities in the designation of the tribunal.
- An arbitrator’s failing to respect the mission bestowed on him.
- Failure to respect the principles of due process and fair trial (le contradictoire).
- Existence of a conflict between recognition or enforcement of the award and international public policy.

For further details, see Question 25. For international arbitration awards rendered abroad, see Question 27.

Unlike the law of certain jurisdictions, French arbitration law does not afford parties the possibility of agreeing in advance to waive their respective right to commence a petition to set aside any future international award issued in France.

COSTS

23. What legal fee structures can be used? For example, hourly rates and task-based billing? Are fees fixed by law?

Counsel fees are determined by agreement between the attorney and the client. French law generally prohibits an attorney from employing a success fee arrangement (pacte quota litis) when it represents the entirety of the attorney’s fees (Article 10, Law No. 71-1130 of 31 December 1971). However, the ban on pure success fee arrangements (which is absolute in judicial representation matters) may be somewhat eased when an attorney’s mission relates to international arbitration (even one with its seat in France), provided the agreed fees are not manifestly excessive (Paris Court of Appeal, 10 July 1992).

French law is silent on the fees of the arbitrators, which may be set either by the arbitrators themselves or, in institutional arbitration, by an arbitration institution. The fees tend to be a function of the number of hours worked (the LCIA’s practice) or of the amount in dispute (the ICC’s practice). Other factors, such as the complexity of the case and the reputation of the arbitrators are also sometimes taken into account.

24. 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?

French law does not set out an obligation for the unsuccessful party to bear its opponent’s fees and costs. Decisions regarding the possible division of responsibility between the prevailing party and the losing party for the costs of arbitration and for the prevailing party’s counsel fees are generally left to the discretion of
the arbitrators (barring any alternate contractual arrangement between the parties or presumption in the governing rule of arbitration). Such decisions are typically found in the final arbitral award.

ENFORCEMENT

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

In principle, an arbitration award should be, and very often is, executed instantly by the losing party, as the losing party will prefer to stem its losses and avoid further expense of a probably fruitless annulment proceeding. If a party does not voluntarily execute the award, an enforcement proceeding is required.

The enforcement proceeding is commenced before the enforcement judge of the TGI within the territorial jurisdiction of which the award was issued (Article 1477, CPC). The process for requesting recognition and enforcement (demande d’exequatur) is extremely simple, and the request is made ex parte. The request consists of a very short demand in more or less standard language that is typically hand written on the original of the award. This is submitted to the TGI along with a copy of the arbitration agreement (and a certified translation of these documents if they are not in French) (Article 1499, CPC). Generally, within a few weeks (at most) the enforcement judge issues an order. The judge will recognise and order enforcement of the award if he finds that the award’s authenticity has been proven by the party seeking its recognition and enforcement, and provided that recognition and enforcement are not contrary to international public policy. The order allowing recognition and enforcement (ordonnance d’exequatur) consists of a standard order which is simply stamped on the face of the award. In the rare instances when the order is denying enforcement, it must state its reasons.

An appeal against a TGI decision granting an enforcement order concerning an international arbitration award rendered in France may be filed based on any of the grounds set out in Question 22 (Article 1502, CPC). This petition is brought before the Court of Appeal and must be filed within one month of formal service of the enforcement order (extended to three months if the party served resides abroad) (Article 643, CPC). Similarly, an international award issued in France is immediately subject to the same procedures as set out in Article 1504, CPC.

Notably, an international arbitration award has res judicata effect as from its pronouncement. This allows conservatory measures (seizures, mortgage liens and so on) to be undertaken immediately without having to seek a special authorisation and even before an enforcement order is obtained (Article 68, Law No. 91-650 of 9 July 1991 and Cass. 2nd Civil Chamber, 12 October 2006).

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Thanks to the existence of international conventions, and in particular the New York Convention, it is, as a practical matter, simpler to execute a foreign arbitral award in France than a foreign judgment. The New York Convention entered into force in France on 24 September 1959. France is also a signatory to the European Convention on International Commercial Arbitration 1961 (Geneva Convention), which entered into force in France on 7 January 1964.

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

Generally, French law is more generous on questions of recognition and enforcement of foreign arbitration awards than required by the New York Convention. Two characteristic features of French law warrant particular mention.

First, the process for obtaining a recognition and enforcement order is the same as that applicable to international awards issued in France, except that the party requesting a recognition/enforcement order for a foreign award can generally seek it from the Paris TGI in addition to any other TGI that is territorially competent to consider recognition and enforcement with regard to a given party or its assets. If an enforcement order is granted with respect to a foreign arbitral award, then the party against whom the award is sought to be enforced may file an appeal of that order on the basis of the same grounds as set out in Question 22 (Article 1502, CPC).

Second, French law is rather unique in that even if an award issued abroad has been annulled by the courts of the place of arbitration, this does not constitute a basis on which recognition and enforcement can be refused in France (Cass. 1st Civil Chamber, 20 June 1997, Hilmarton v OTV and Cass. 1st Civil Chamber, 26 June 2007, Putrabali).

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

Obtaining an enforcement order with respect to international arbitration awards (be they rendered in France or abroad) is a rather rapid, ex parte process. It generally takes between ten days and a few weeks.

If a permitted form of recourse is not exercised against either the arbitral award or the TGI’s enforcement order during the period allowed for the exercise of this right (one month following formal service of the enforcement order on the party against whom enforcement is sought, if the party resides in continental France, or in the three months following the service, if the relevant party resides abroad (Articles 643 and 1506, CPC)), then forced execution may be sought following expiration of that period. If, however, recourse is exercised during the relevant period, then enforcement remains suspended while the recourse action is pending before the Court of Appeal.

Despite the above, an award can be enforced during the period when a recourse action can be undertaken, and during the pending of the recourse whenever the award is declared provisionally enforceable (either by the arbitrators in the award or by the Court of Appeal) (Articles 525, 525-1, 1479 and 1500, CPC).

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