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The International Comparative Legal Guide to:

International Arbitration 2013

10th Edition

A practical cross-border insight into international arbitration work

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France

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of France?

A distinction must be made between domestic and international arbitration.

In domestic arbitration, the arbitration agreement must be in the form of an arbitration clause or a submission agreement. The arbitration agreement must:

- Be in writing: it can arise out of an exchange of written communications or be contained in a document to which reference is made in the main agreement.
- Designate the arbitrator(s) (should the case arise, by reference to arbitration rules), or at least provide for a procedure for their appointment.

A submission agreement must, in addition, define the subject matter of the dispute.

In international arbitration, there are no formal requirements as to the form of the arbitration agreement. Its existence must, however, be proved.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The existence of the agreement of the parties (evidenced in an arbitration clause or an arbitration submission) is sufficient *per se* as long as the intention of the parties is clear. However, tailoring an arbitration agreement has significant advantages.

The parties should consider the seat of the arbitration, the language of the proceedings, the choice between *ad hoc* arbitration and institutional arbitration (in which event, the reference to the accurate rules of the institution should be set forth), the laws applicable to the merits of the dispute (when different from those applicable to the contract) and, if agreed upon by the parties, the power of "*amiable compositeur*" of the arbitrator(s) (i.e. their power to rule in equity).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The legal environment in France is highly supportive of the conduct of arbitral proceedings subject to the intention of the parties and the authority of the arbitral tribunal, and therefore limits the level of the courts' involvement in the arbitration process. The French courts will assess the validity of an arbitration agreement without reference to domestic laws. They will give effect to an arbitration agreement, except when it is manifestly inexistent or inapplicable, although they must be requested to do so by a party, and even if the arbitration agreement would otherwise be declared invalid under the law applicable to it. As a result, French courts may find effective arbitration agreements where other jurisdictions refuse to enforce them under their domestic law.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in France?

French statutory provisions regarding arbitration are found in Book IV of the French Code of Civil Procedure ("CCP"), which is comprised of Title I regarding domestic arbitration and Title II (Articles 1504 *et seq.*) regarding international arbitration. These provisions entered into force on 1 May 2011 following the implementation of Decree No. 2011-48 of 13 January 2011.

The legislation that governs the enforcement of arbitration proceedings is specifically found in Articles 1487 and 1488 of the CCP for domestic arbitrations and Articles 1514 to 1527 of the CCP for international arbitration.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Although the same overarching arbitration law governs both domestic and international arbitration proceedings, distinctions are drawn between the two types, providing for a much more liberal regime with regard to international arbitrations. Examples of differences include the proclamation of confidentiality of domestic arbitration and the possibility, under certain circumstances, of appealing domestic awards. Moreover, the enforcement of a domestic award must not entail a breach of French public policy, whereas, with international awards, the breach must be that of the French conception of international public policy in order for enforcement to be denied. However, some articles applicable to domestic arbitration will also apply to international arbitration as they have been incorporated by reference.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The provisions applicable to international arbitration are not based

on the UNCITRAL Model Law but they do not materially differ from it.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in France?

Article 1510 of the CCP provides that the parties must be treated equally and that due process must be respected. Violation of these principles is sanctioned by annulment of the award under Article 1520 of the CCP, along with the failure for the arbitral tribunal to comply with its mission.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of France? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Articles 2059 and 2060 of the CCP allow for arbitration of all matters of which the parties are free to dispose, except (i) the civil status and capacity of juridical persons, (ii) divorce and judicial separation of spouses, and (iii) disputes concerning public authorities and public entities (this specific exception is highly debated under case law as it appears that contracts between private and public entities can be arbitrable in certain circumstances).

It should be noted that, in domestic arbitration, Article 2061 of the French Civil Code further provides that an arbitration agreement is valid when inserted in a contract concluded for the purposes of a "professional activity". The Supreme Court clarified in its decision of 29 February 2012 that such "professional activity" means that both parties should be business professionals.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

French arbitration law incorporates the *kompetenz-kompetenz* principle and both its positive and negative effects. Therefore, the arbitral tribunal has priority to rule on its own jurisdiction; unless one of the parties claims that the arbitration agreement is manifestly inexistent or inapplicable (for example, in cases before the courts handling labour disputes), the courts will refer the parties to arbitration without making any determination in relation to jurisdiction as it is for the arbitral tribunal to assess its own jurisdiction. However, once the award is rendered, the courts will, if requested, control the arbitral tribunal's decision as regards its jurisdiction.

3.3 What is the approach of the national courts in France towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As per question 3.2 above, French courts abide by the principle of *kompetenz-kompetenz*, according to which the arbitral tribunal must assess its own jurisdiction with priority, unless (i) the parties renounce – expressly or tacitly – the arbitration agreement, or (ii) the arbitration agreement is manifestly inexistent or inapplicable.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

A court can address the question of the jurisdiction and competence of an arbitral tribunal at two points during the proceedings.

First, before the arbitral tribunal is constituted, if the dispute is brought before it and one of the parties objects to the court's jurisdiction on the basis of the arbitration agreement. In such a case, the court will decline jurisdiction unless the arbitration agreement is manifestly inexistent or inapplicable (Article 1448).

Second, the court may assess the jurisdiction and competence of an arbitral tribunal when the award rendered is being challenged or the enforcement order is appealed on the basis that the arbitral tribunal's decision on jurisdiction is wrong (Articles 1492, 1520 and 1525). The French courts will then have greater power to review the arbitral tribunal's jurisdiction and competence.

3.5 Under what, if any, circumstances does the national law of France allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Although the principle under French law is that the effects of an arbitration agreement cannot be extended to non-signatories, from a comparative standpoint, France is one of the jurisdictions which is the most likely to allow the extension of arbitration agreements to non-signatories, provided the latter (i) knew of or could not ignore the existence and terms of the arbitration agreement, and (ii) participated in the performance of the contract in relation to which the dispute arises.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in France and what is the typical length of such periods? Do the national courts of France consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Commercial claims are barred 5 years after the event giving rise to the cause of action, subject to specific limitations provided for by law. However, there is an exception concerning construction (and sub-contractor) contracts, which are barred after 10 years.

French courts consider issues of statute of limitations to be a substantive point of law. Therefore, the law applicable to such issues is that which is applicable to the dispute.

3.7 What is the effect in France of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pending insolvency proceedings lead to a stay of domestic arbitration proceedings (Article 1471 of the CCP referring to Article 369 of the CCP). The arbitral proceedings will resume once the disputed claim has been registered as a liability of the estate. Such a stay is no longer applicable to international arbitration.

As regards international arbitrations, the Paris *Tribunal de grande instance* has ruled that the enforcement of an award rendered abroad condemning a party to pay damages when it is involved in insolvency proceedings is manifestly contrary to French international public policy. The rationale behind this decision is that such a finding would be contrary to the French principle of suspension of individual legal actions, according to which a juridical person cannot be condemned to pay damages if it has pending insolvency proceedings commenced against it (Paris *Tribunal de grande instance*, 2 February 1996).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to Article 1511 of the CCP, the law applicable in international arbitration to the substance of the dispute is that which the parties have chosen, whether at the time of the conclusion of the contract or subsequently thereafter.

Where the parties fail to make such a choice, the arbitral tribunal has great discretion as it applies the law "it considers appropriate", taking into account relevant trade usages. It is of particular importance to note that Article 1511 does not impose on the arbitral tribunal any choice of law method. The arbitral tribunal may thus choose to apply a specific law directly as opposed to a particular conflict of law rule.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In international arbitration, the parties' choice of law will only give way to mandatory laws if enforcement of the award would breach the international public policy of the seat or the *lex arbitri*. When enforcement is sought or an award is challenged, French courts will also refuse to give effect to an award if this would lead to a breach of international public policy.

Domestic arbitration is not as liberal and the French courts will set aside an award if its enforcement would have the effect of creating a situation contrary to French public policy, which is a much broader concept than the notion of the French view of international public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

When determining the law applicable to the formation, validity and legality of an arbitration agreement, the arbitral tribunal will apply the method prescribed by Article 1511 of the CCP, i.e., the law chosen by the parties or, if the parties have failed to determine a *lex arbitri*, the law it "considers appropriate", as explained in question 4.1 above.

In international arbitration, however, no conflict of law rules are used to determine this law, as French courts consider arbitration agreements to be independent from the main contract, without reference to national law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The CCP specifies that, in domestic arbitration, the arbitrator must be a natural person and where an arbitration agreement designates a legal entity, this entity will only have the power to administer the arbitration (Article 1450 of the CCP). This restriction is not considered to be applicable to international arbitration, and therefore an arbitrator sitting over an international arbitration may be a legal entity in principle. National judges are prohibited from exercising as arbitrators.

Arbitrators must be independent except if all parties knew and accepted their lack of independence, even implicitly.

There is no statutory list of persons qualified to act as an arbitrator. The parties may stipulate specific requirements of the arbitrators (e.g. experience, languages) in the arbitration agreement.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In the event that the mechanism for the appointment of arbitrators fails, the person or entity responsible for administering the arbitration or the judge responsible for the conduct of the arbitration would provide a default procedure. In the case of international arbitrations, this would be the "*juge d'appui*", being the President of the *Tribunal de grande instance* in Paris. (Articles 1451 and 1452 of the CCP and Article 1453 of the CCP for multiparty arbitration cases.)

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court will intervene in the selection of arbitrators according to the provisions mentioned in question 5.2 above, upon the filing of an application before the *juge d'appui*.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within France?

Arbitrators are required to be independent and impartial both in international and domestic arbitration.

Arbitrators must disclose any circumstance that may affect his or her independence or impartiality, both before and after accepting a mandate (see Article 1456 of the CCP).

French courts have interpreted the arbitrator's duty of disclosure broadly. By a decision dated 9 September 2010, the Paris Court of Appeal established a general obligation of independence applicable to the arbitrator in his relations with the counsel of the parties by deciding that the relationship between arbitrators and counsel should also be examined upon assessing an arbitrator's independence. Recent case law, however, considers that the duty of disclosure only concerns facts that can create a reasonable doubt, regarding to independence and impartiality, in the parties' minds (Cass., 1ère civ., 4 July and 10 October 2012).

In the event that the parties are unable to agree on the removal of an arbitrator, the issue can be resolved by the person responsible for administering arbitration or by the *juge d'appui* to whom an application must be made. Such an application must be made within one month following the disclosure or the discovery of the fact at issue (Article 1456 of the CCP).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in France? If so, do those laws or rules apply to all arbitral proceedings sited in France?

The parties are free to determine the procedure applicable to their arbitration in their arbitration agreement, directly or by reference to arbitration rules or to procedural rules. If the parties fail do so, the tribunal has the power to define such procedure (Article 1509 of the CCP for international arbitration and Article 1464 of the CCP for

domestic arbitration). Certain specific procedural principles governing French court proceedings are applicable to domestic arbitration only (Article 1464 of the CCP). As provided in the CCP, both parties and arbitrators must act diligently and in good faith in the conduct of the proceedings (Article 1464, paragraph 3 of the CCP) and the arbitral tribunal's deliberations must be confidential (Article 1479 of the CCP).

6.2 In arbitration proceedings conducted in France, are there any particular procedural steps that are required by law?

There are no particular procedural steps required under French law in order to initiate arbitration proceedings in France. However, the existence of an unequivocal statement, communicated between the parties, of their decision to submit a dispute to arbitration is required. Parties should also take the necessary steps provided for in their contract to constitute the arbitral tribunal. Except as otherwise provided for in the arbitration agreement, failure to perform those steps will not be a basis for invalidating the notice commencing arbitration.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

The procedure governing arbitration can be agreed between the parties, failing which the arbitral tribunal will have the power to decide upon the applicable procedure. However, there are some rules that are applicable in all cases, notably: (i) in international arbitration, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process (Article 1509 of the CCP); (ii) in both international and domestic arbitration, the arbitral tribunal is free to call upon any person to provide testimony (Article 1467 of the CCP); and (iii) in both international and domestic arbitration, both parties and arbitrators must act expediently and in good faith (Article 1464 of the CCP).

6.4 What powers and duties does the national law of France impose upon arbitrators?

Arbitrators must act independently, impartially, expeditiously, diligently and in good faith in the conduct of the proceedings. Arbitrators should carry out their mandate until it is completed and ensure that the parties are treated equally, and they should respect the principle of due process.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in France and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in France?

Restrictions do exist concerning the appearance of lawyers from other jurisdictions in legal matters, but such restrictions are not applicable in the context of international arbitration proceedings sited in France.

6.6 To what extent are there laws or rules in France providing for arbitrator immunity?

There are no specific French laws or rules providing for arbitrator immunity. However case law extended the judges' immunity to arbitrators to preserve their freedom of decision and independence. Arbitrators cannot thus be held personally liable for making a wrong decision. Nevertheless, arbitrators may be found liable if they: (i) failed to disclose links with a party; (ii) committed wilful misconduct; or (iii) breached a specific duty owed to the parties (such as the duty to act expeditiously, diligently, not to let the arbitration expire, and to respect confidentiality).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The *juge d'appui* can intervene as regards the constitution of the arbitral tribunal, or the challenge or replacement of arbitrators.

The *juge d'appui* is territorially competent in domestic arbitration in Paris, as well as in international arbitration, and has jurisdiction to order conservatory attachments and judicial security, either prior to the initiation of the arbitration or during the proceedings. It may do so upon leave of the arbitral tribunal, once constituted, when a party wishes to rely on an official or private deed to which it is not a party, or on evidence held by a third party (Articles 1468 and 1468 of the CCP).

In a recent decision by the French Supreme Court, the Court confirmed that even if the seat of arbitration is abroad, the French *juge d'appui* retains jurisdiction to decide the validity of the appointment of an arbitrator who is domiciled in France (Cass., 1ère civ, 28 March 2013, n°11-11320).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in France permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

An arbitrator is permitted to order, upon the request of a party, any conservatory or provisional measures that it considers appropriate and may even attach penalties to these measures. However, only courts have the power to order conservatory attachments and judicial security (Article 1468 of the CCP). If rendered in the form of a provisional award, the order will be immediately enforceable by the courts, whereas this would not be the case if the measure were granted in the form of a procedural order.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to Article 1449 of the CCP, French courts are entitled to grant preliminary or interim relief in proceedings provided that the arbitral tribunal has not yet been constituted. Provisional relief may be ordered when the award of such relief is justified by the existence of a dispute as defined by the arbitration agreement, which does not present any serious controversy, or in the event of urgency. Conservatory measures will be ordered to preserve assets or evidence, to prevent the occurrence of an irreparable harm, or to halt an existing harm.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The French courts tend to respect the arbitral tribunal's jurisdiction. Requests for interim relief are only examined by French courts if the arbitral tribunal is not yet constituted, or after such constitution

upon leave of the arbitral tribunal. The French courts' intervention is, on the whole, limited to urgent situations. Also, the French courts must ensure that there is no agreement excluding or restricting the possibility of seizing the courts.

However, only courts have the power to order conservatory attachments and judicial security (Article 1468 of the CCP).

7.4 Under what circumstances will a national court of France issue an anti-suit injunction in aid of an arbitration?

French law is silent regarding anti-suit injunctions. However, the French courts are bound by the *West Tankers* decision of the ECJ, prohibiting any anti-suit injunction which is not in favour of an arbitration clause when the judicial proceedings take place within the EU.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

French law does not address the possibility of a court or an arbitral tribunal ordering security for costs. Although arbitrators and national courts have significant powers to order provisional or conservatory measures to grant such security for costs, this practice is uncommon in France.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in France?

Pursuant to Article 1467 of the CCP, the arbitral tribunal or, if authorised by the parties, one of its members, may "take all necessary steps concerning evidentiary and procedural matters", including summoning "any person" to testify (Article 1467, paragraph 2).

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

The arbitral tribunal has broad powers to order disclosure of documents and of discovery to the parties. As provided by Article 1467, paragraph 3 of the CCP, it has the authority, when a party is "in possession of an item of evidence", to "enjoin" production in a manner it determines and even has the possibility of attaching a penalty to such production.

Concerning disclosure of evidence held by a third party, the arbitral tribunal may authorise a party to the arbitral proceedings to obtain from the courts an order enjoining production from the third party (Article 1469).

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Before the constitution of the arbitral tribunal, a court can, upon the request of any concerned party, by way of a petition or expedited proceedings, order measures relating to the taking of evidence, when there is a legitimate reason to preserve or establish evidence upon which the resolution of a dispute may depend (Article 1449 and Article 145 of the CCP). After the constitution of the arbitral tribunal, when a party wishes to rely on an official or private deed to which it is not party, or on evidence held by a third party, it can request that that third party be summoned before the court, upon leave of the arbitral tribunal, in order to obtain it (Article 1469 of the CCP).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

Article 1467 of the CCP provides that any person can be called upon by the arbitral tribunal to testify, and that witnesses need not be sworn in. There are specific rules applicable to written and oral testimony (Title VII of the CCP) but they are not expressly applicable to arbitration. Some articles of the CCP related to the admission of evidence are expressly applicable to domestic arbitration and may have an impact on the production of written and/or oral witness testimony (Article 1464 of the CCP). In 2008, the Paris bar association expressly authorised witness preparation in international arbitration.

In international arbitration procedure, cross-examination of witnesses is allowed and it is a common practice once the parties so request in accordance with the arbitral tribunal.

8.5 What is the scope of the privilege rules under the law of France? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

All correspondence between French counsel (oral or written) is privileged *per se*. As a rule, such correspondence is not admissible in proceedings and cannot be subject to a waiver unless the specific correspondence is marked as being "official". Communications between in-house counsel and external counsel are not privileged as a rule, since the former are not covered by the rules of privilege applicable to external counsel. Correspondence between counsel and a client in the context of litigation proceedings is privileged and therefore cannot be required to be disclosed, except if such correspondence is marked as "official".

There are no specific privilege rules concerning documents in arbitral proceedings. In domestic arbitration, the principle of confidentiality of arbitral proceedings is expressly recognised (Article 1464, paragraph 4 of the CCP).

In international arbitration, the drafters of Decree No. 2011-48 of 13 January 2011 on the new French law on arbitration decided to not incorporate this principle of confidentiality in order to keep the provisions applicable to international arbitration neutral, thus reserving the possibility to have non-confidential arbitrations (i.e., with the example of the principle of transparency of investment arbitrations in mind).

It should be noted, however, that confidentiality of deliberations is expressly provided for in both domestic and international arbitrations (Article 1479 of the CCP).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of France that the Award contain reasons or that the arbitrators sign every page?

The award must state as follows:

- the first name/the surname/the corporate name of the parties, as well as their address/location of their registered office;

- if pertinent, the name of the counsel or any other representatives of the parties;
- the name(s) of the arbitrator(s);
- the date of the award; and
- the place where the award was made.

The award must be made by a majority decision and all the arbitrators must sign it. In the event where a minority of arbitrators refuses to sign, the award must state such fact and it will be nonetheless valid.

In the event that there is no majority decision (in international arbitration only), the chairman of the arbitral tribunal must rule alone, and if the other arbitrators refuse to sign the award, he/she must note this in the award. Once again, the award would be nonetheless fully effective. No similar provision exists in relation to domestic arbitration.

As to its content, the award must briefly set forth the arguments and claims of the parties, as well as the reasoning behind the award rendered by the arbitrators. Furthermore, the arbitral tribunal must rule according to the laws chosen by the parties and within the limits of its mandate as accorded by the parties. In international arbitration, trade usages may be taken into consideration.

In domestic arbitrations, unless otherwise agreed by the parties, the time limit for the arbitral tribunal to render its award is six months from its constitution (Article 1463, para. 1). In both domestic and international arbitrations, the statutory or conventional time limit to render the award may be extended by agreement of the parties or the *juge d'appui* (Article 1463, para. 2). Failure to render the award within the time limit is a ground for challenge of the award under Articles 1491 and 1520 of the CCP (i.e., failure for the arbitral tribunal to comply with the mandate it was given by the parties).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in France?

An arbitral award may only be challenged in very limited circumstances (Articles 1492 and 1520 of the CCP for domestic and international arbitration respectively), namely:

- the arbitral tribunal wrongly upheld or denied jurisdiction;
- the arbitral tribunal was not properly constituted;
- the arbitral tribunal failed to comply with the mandate it was given by the parties;
- there was a violation of due process; or
- enforcement of the award would lead to a breach of public policy in domestic arbitration or international public policy in international arbitration.

In domestic arbitration, a further ground for setting aside an award is failure to meet the legal requirements of an arbitral award under Articles 1481 and 1482 of the CCP (see question 9.1 above).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

In international arbitration, the parties may agree to exclude the possibility of challenging the arbitral award as a whole, provided such agreement is express. This exclusion, however, is not extended to the appeal of an enforcement order (Article 1522 of the CCP).

Domestic arbitration differs slightly as Article 1491 of the CCP provides that an award may always be challenged, unless it can be appealed. This provision is mandatory.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Pursuant to Articles 1489 and 1490 of the CCP, if the parties agree that a domestic award may be appealed, the courts will decide within the scope of the arbitral tribunal's mandate.

Appeal of an international award is not permitted under French law.

10.4 What is the procedure for appealing an arbitral award in France?

As stated in question 10.3 above, appeal against an award is only permitted in domestic arbitration. Such an appeal is brought before the court of appeals of the place in which the award was made, within a month of its notification (Article 1494).

The procedure is that of a regular appeal (Article 1495).

As a rule, appealing an award suspends the enforcement thereof, unless it is provisionally enforceable (Article 1496), in which case expedited proceedings are available to stay enforcement of the award (Article 1497).

11 Enforcement of an Award

11.1 Has France signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force in France on 24 September 1959.

Besides the reciprocity reservation, no other restrictions exist regarding the Convention's application since France withdrew its commerciality objection in 1990.

11.2 Has France signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

France is also a party to the 1961 European Convention on International Commercial Arbitration.

11.3 What is the approach of the national courts in France towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

French courts are extremely favourable to the recognition and enforcement of arbitral awards, which is quasi-automatic if (i) the party requesting recognition and enforcement proves the award's existence, and (ii) recognition and enforcement is not manifestly contrary to international public policy (Article 1514).

In practice, the party requesting recognition and enforcement must provide the award and the arbitration agreement (or authenticated copies thereof), translated into French if applicable. An official translation may be requested (Article 1515).

However, courts will closely examine any appeal of the

enforcement order on the basis of the grounds stated in Article 1520 (see question 10.1).

11.4 What is the effect of an arbitration award in terms of *res judicata* in France? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Pursuant to Article 1484 of the CCP, *res judicata* takes effect "as soon as it is made" with regards to the claims it settles. Therefore, a national court may not re-hear the claims adjudicated in the award unless, in domestic arbitration, the parties have agreed that the award may be appealed (Article 1489). A recent case confirmed that the totality of the circumstances of the case is applicable in arbitration, meaning that if the two procedures in question concern the same issue or cause, then the second dispute would be barred due to *res judicata* (Cass., 1ère civ., 12 April 2012).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

As explained in section 10 above, the standard for refusal of enforcement of an award differs in domestic and international arbitration. In domestic arbitration, enforcement of the award must have the effect of violating French public policy, which is a broader concept than international public policy, the violation of which is necessary for refusal under international arbitration. Moreover, it should be stressed that the violation of international public policy by giving effect to an international award must be flagrant, effective and concrete (*Thalès v. Euromissile*, Paris Court of Appeal, 18 November 2004).

12 Confidentiality

12.1 Are arbitral proceedings sited in France confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The principle of confidentiality of arbitral proceedings is expressly recognised in domestic arbitration but not in international arbitration (Article 1464, paragraph 4 of the CCP). Therefore, in the latter case, parties are advised to agree specifically on the question of confidentiality at the outset of the arbitral proceedings. The confidentiality of the deliberations of the arbitral tribunal is expressly applicable in all types of arbitration (Article 1479 of the CCP).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

No specific rule exists concerning the possibility of referring to or relying on information disclosed in arbitral proceedings in subsequent proceedings. Parties are free to agree on a set of guidelines regarding this question.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Remedies must be decided in conformity with law or equity ("*amiable compositeur*") and with public policy (domestic or international). French law applies the principle of full compensation of the damage suffered by the claimant and takes into account all type of damages, such as costs incurred, lost profits and moral damages. Remedies can take the form of, *inter alia*, specific performance of contractual obligations, an injunction to refrain from specific conduct or payment of a sum of money. The Supreme Court has stressed that damages must not be disproportionate to the harm suffered and that punitive damages are not, *per se*, contrary to French public policy (1 December 2010).

13.2 What, if any, interest is available, and how is the rate of interest determined?

As a rule, interest is governed by the law applicable to the merits of the case. French law authorises the award of interest rate for late payments of a debt arising from statutory provisions or contractual obligations. Under French law, a person condemned to pay damages by a tribunal must pay the legal interest rate (fixed at 0.04% for 2013, as per the Decree n°2013-178 of 27 February 2013). In principle, interest runs from the date of the decision and can be increased by 5 points two months after the decision has become enforceable.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

There are no specific rules regarding the parties' entitlement to recover fees and/or costs. If the institutional rules (where pertinent) are silent, the arbitral tribunal has the power to determine the amount and the allocation of fees and costs in its award.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

In principle, an arbitration award is not subject to tax. Nevertheless, the fees and costs of an arbitrator may be subject to VAT.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of France? Are contingency fees legal under the law of France? Are there any "professional" funders active in the market, either for litigation or arbitration?

There is no specific French legislation on third party funding and such funding does not appear to be contrary to any rule or case law (see the recent decision of the Court of Appeal of Versailles, *Foris AG v. SA Veolia Propreté* (formerly SA Onyx)). Contingency fees are not permitted under French law, except to the extent that they are added to a fixed fee arrangement.

Professional funders for international arbitrations are becoming increasingly active in France, and the first two French third party funders were recently created.

14 Investor State Arbitrations

14.1 Has France signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

France adopted the Washington Convention on the Settlement of

Investment Disputes Between States and Nationals of Other States of 18 March 1965 by Law No. 67-551 of 8 July 1967 (J.O. 11 July 1967, p. 6931). The Convention entered into force on 20 September 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is France party to?

The 2006 French model BIT contains a clause allowing recourse to arbitration under the aegis of the ICSID (Article 8). France is a party to approximately one hundred BITs containing an arbitration clause, the majority of which are in force, and several multilateral treaties, including the 1994 Energy Charter Treaty. This Treaty entered into force in France on 27 December 1999.

14.3 Does France have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

As stated in question 14.2 above, France has a model BIT. The latest version was adopted in 2006. It contains a wide definition of the notion of "investment", of fair and equitable treatment, national treatment and most favoured nation clauses, as well provisions regarding expropriation and the free transfer of funds. This model BIT is very similar to other European model BITs.

14.4 What is the approach of the national courts in France towards the defence of state immunity regarding jurisdiction and execution?

France has not ratified the 1972 European Convention on State Immunity. It signed (in 2007) and approved the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property on 12 August 2011, but this convention has not yet entered into force. Therefore, French law on State immunity, such as it exists, has been developed by the courts.

As regards immunity from jurisdiction, French courts consider that a State's consent to an arbitration agreement amounts to a waiver of its immunity (*Federal Socialist Republic of Yugoslavia v. SEEE, Supreme Court*, 1st Civil Chamber, 18 November 1986).

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in France (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

A noteworthy issue affecting the use of arbitration in France is the entry into force, as of 1 May 2011, of the new Decree No. 2011-48 of 13 January 2011 on the new French law on arbitration. Although the Decree mainly codifies court practice as regards arbitration, it remains to be seen how certain new provisions will be interpreted by the French courts in the near future (e.g. Article 1526, which provides that neither the challenge of an award nor the appeal of the decision granting execution suspends enforcement of the award).

15.2 What, if any, recent steps have institutions in France taken to address current issues in arbitration (such as time and costs)?

See question 15.1 above. It is also of interest to note that on 1 January 2012 the new Arbitration Rules of the ICC, which is based in Paris, entered into force. Its key new features include measures to control the time and costs of the procedure, as well as other important modifications such as new provisions on an emergency arbitrator, case management, joinder and multi-party arbitration.

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