



# Arbitration

in 49 jurisdictions worldwide

# 2014

Contributing editors: Gerhard Wegen and Stephan Wilske



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*Getting the Deal Through* is delighted to publish the ninth edition of *Arbitration*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 49 jurisdictions featured. New jurisdictions this year include Equatorial Guinea, Mexico, Nigeria and Scotland.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors Gerhard Wegen and Stephan Wilske of Gleiss Lutz for their continued assistance with this volume.

**Getting the Deal Through**

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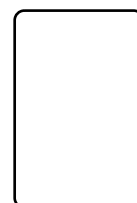
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# France

**Nathalie Meyer Fabre**

Meyer Fabre Avocats

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## Laws and institutions

### 1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention came into force in France in 1959. France initially made the reciprocity declaration and the so-called ‘commercial reservation’ under article I of the Convention. The ‘commercial reservation’ was withdrawn in 1989. The reciprocity declaration no longer has any significant impact, because French arbitration law generally prevails over the Convention by virtue of article VII(1) of the Convention, as it is more favourable to the recognition and enforcement of foreign awards.

Other multilateral conventions on arbitration to which France is a party include:

- the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
- the 1961 European Convention on International Arbitration; and
- the 1994 Energy Charter Treaty.

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### 2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

France has entered into 102 bilateral investment treaties among which 91 are in force.

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### 3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The main statutory provisions on arbitration are to be found in Book IV of the Code of Civil Procedure (CCP) which, as of 1 May 2011 (entry into force of the Decree No. 2011-48 of 13 January 2011), replaced prior provisions applicable since 1980/1981. An English translation of the 2011 Decree can be found at [www.parisarbitration.com/French-Law-on-Arbitration.pdf](http://www.parisarbitration.com/French-Law-on-Arbitration.pdf). Depending on the date of the arbitration agreement, the constitution of the arbitral tribunal or the award, it may be necessary to refer to the previous provisions, an English translation of which can be found at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

The 2011 Decree codified a number of judge-made solutions elaborated over the last 30 years and case law undoubtedly continues to play an important part in the development of French arbitration law.

French law makes a distinction between domestic arbitration (articles 1442 to 1503 CCP) and international arbitration (articles 1504 to 1527 CCP). Arbitration is international ‘when international trade interests are at stake’ (article 1504 CCP), that is, according to French case law, when the underlying economic transaction involved transborder flows of capital, goods or services – irrespective of the nationality of the parties, the applicable law or the seat of the arbitration. Notwithstanding this seminal distinction, a significant number of the provisions governing domestic arbitration are also applicable to international arbitration, ‘unless the parties have otherwise agreed’ (article 1506 CCP). It should also be noted that the provisions relating to the recognition and enforcement of arbitral awards ‘made abroad’ apply irrespectively of their ‘international’ nature under the above test.

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### 4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UNCITRAL Model Law has not been adopted in France. Among the dissimilarities, mention could be made of the economic rather than legal definition of ‘international’ arbitration under French law, the adoption by French law of the ‘direct’ method for selecting the rules applicable to the merits, the absence of any formal requirement for the validity of international arbitration agreements and the possibility existing under French law for the parties to waive their right to bring an action to set aside the award.

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### 5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Both in domestic and international arbitration, arbitrators are free to define the procedure to be followed in the arbitration, subject to any agreement between the parties (articles 1464 section 1 and 1509 section 2 CCP).

However, pursuant to article 1464 section 2 CCP, domestic arbitral tribunals must respect certain fundamental principles governing court proceedings, relating principally to the definition of the subject matter of the dispute, the establishment of the facts and the law, and due process requirements.

In international arbitration, the only mandatory rule on procedure is article 1510 CCP, providing that ‘the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.’

## 6 Substantive law

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 international arbitration, pursuant to article 1511 CCP, the arbitral tribunal must decide the case in accordance with the 'rules of law' chosen by the parties. Where no such choice has been made, the tribunal should apply 'the rules of law it deems appropriate', without having to resort to any specific rules of conflict. The expression 'rules of law' includes any national law, transnational or supranational rules and general principles of law. Arbitrators may thus apply rules from the *lex mercatoria* or the UNIDROIT Principles, for example. In any case, the arbitral tribunal 'shall take trade usages into account'. If empowered to do so, the arbitral tribunal shall rule as *amiable compositeur*, in other words, *ex aequo et bono* (article 1512 CCP).

Domestic arbitral tribunals must decide the dispute 'in accordance with the law', that is to say, French law, unless the parties have agreed that the tribunal shall rule as *amiable compositeur* (article 1478 CCP).

## 7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

First and foremost, the International Court of Arbitration of the International Chamber of Commerce is located in Paris ([www.iccwbo.org/court](http://www.iccwbo.org/court)). A revised version of the ICC Rules of Arbitration (the ICC Rules) entered into force on 1 January 2012.

France also hosts other important arbitration institutions, such as:

- Association Française d'Arbitrage (AFA) ([www.afa-arbitrage.com](http://www.afa-arbitrage.com));
- Centre de Médiation et d'Arbitrage de Paris (CMAP) ([www.cmap.fr](http://www.cmap.fr));
- Chambre Arbitrale Internationale de Paris ([www.arbitrage.org](http://www.arbitrage.org)); and
- Chambre Arbitrale Maritime de Paris (CAMP) ([www.arbitrage-maritime.org](http://www.arbitrage-maritime.org)).

## Arbitration agreement

### 8 Arbitrability

Are there any types of disputes that are not arbitrable?

There are very few restrictions on the arbitrability of disputes, in particular in international cases.

The Civil Code provides that anyone can agree to arbitration in respect of his freely alienable rights (article 2059). Matters such as civil status and capacity of individuals, divorce and judicial separation are non-arbitrable (article 2060). Article 2060 further broadly describes as non-arbitrable 'disputes involving public entities' and 'more generally all matters in which public policy is concerned'. However, these provisions no longer reflect the actual status of the law.

First of all, the Court of Cassation has long admitted that, in international cases, the restriction on the arbitrability of disputes involving states or public entities does not apply (Civ 1, 2 May 1966, *Galakis*). In domestic cases, the prohibition for French public entities to agree to arbitration remains the rule, but there are many statutory exceptions.

It is also well established that there is no general 'public policy' exception to the arbitrability of disputes. Disputes involving issues governed by public policy rules may well be arbitrated; only the conformity of the arbitral award with public policy requirements is subject to limited *ex post* court review. For example, international

disputes involving antitrust or competition law issues may be submitted to arbitration. Disputes relating to the ownership or exploitation of intellectual property rights are also arbitrable (as expressly confirmed by Law No. 2011-525 of 17 May 2011). Arbitrators can also rule, as between the parties, on the validity of a patent, when the question arises as an ancillary issue (Civ 1, 12 June 2013, No. 12-16864). It is also worth mentioning that French courts have enforced arbitration clauses included in international consumer contracts (Civ 1, 21 May 1997, *Jaguar*, No. 95-11427; 30 March 2004, *Rado*, No. 02-12259). By contrast, although labour law disputes are not *per se* non-arbitrable, they may only be submitted to arbitration by an agreement made after the employment contract has been terminated.

In domestic cases, arbitration clauses (as opposed to arbitral submission agreements concluded after the dispute has arisen) are valid only if included in a contract 'concluded by reason of a professional activity' (article 2061 of the Civil Code).

### 9 Requirements

What formal and other requirements exist for an arbitration agreement?

Domestic arbitration agreements must be in writing. They may be contained in an exchange of letters or in a document to which reference is made in the main contract (article 1443 CCP). Since the entry into force of the 2011 Decree, it is no longer required that the agreement provide for the appointment (or the method for the appointment) of the arbitrator(s), default provisions being applicable if it does not (article 1444 CCP). Arbitral submission agreements (*compromis*) must define the subject matter of the dispute (article 1445 CCP).

In international arbitration, 'an arbitration agreement shall not be subject to any requirements as to its form' (article 1507 CCP). It does not need to be in writing. An arbitration agreement is valid and enforceable on the sole condition that the consent of the parties exists and can be proven as a matter of fact.

### 10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The 'separability' or 'autonomy' of the arbitration agreement from the underlying contract has long been recognised by French courts with the consequence that the invalidity or unenforceability of the underlying contract for any reason does not affect the validity and enforceability of the arbitration agreement (Civ 1, 7 May 1963, *Gosset*). Article 1447 CCP now codifies this rule in both domestic and international arbitration.

There may be grounds however for the arbitration agreement itself to be void, for example if the dispute is non-arbitrable or if there is a lack of consent to submit to arbitration. As a consequence of the 'autonomy' of the arbitration agreement, its validity and enforceability is not subject to any specific national law and must be assessed on the basis of a purely factual analysis of the parties' consent (Civ 1, 20 December 1993, *Dalico*, No. 91-16828).

If waived by all the parties, an arbitration agreement is no longer enforceable.

The insolvency, death or legal incapacity of a party does not in itself affect the enforceability of the arbitration agreement. The insolvency of a party has, however, important consequences on the course of arbitration proceedings and on the scope of the arbitrable issues, due to the interference of mandatory rules governing insolvency proceedings.



**11 Third parties – bound by arbitration agreement**

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In principle, arbitration agreements are not binding on third parties or non-signatories. There are, however, two broad types of exceptions, which tend to be very broadly construed by the Court of Cassation.

Third parties may be bound by virtue of a mechanism of representation or succession (agency, insolvency, etc) or as a result of a transfer of rights and obligations (assignment, subrogation, novation, delegation, etc). In a chain of contracts for the transfer of ownership rights, the arbitration agreement is 'automatically transmitted [to the sub-buyer] as an auxiliary component of the rights transferred' (Civ 1, 27 March 2007, *Alcatel Business Systems*, No. 04-20842). No proof of consent or actual knowledge of the existence of the arbitration agreement is required.

The binding effect of an arbitration agreement may also be 'extended' to non-signatories which have been involved in the negotiation, performance or termination of the underlying agreement. The Court of Cassation thus held that 'the effect of an international arbitration agreement extends to the [non-signatory] parties directly involved in the performance of the contract and the ensuing disputes' (Civ 1, 27 March 2007, *Alcatel Business Systems*, No. 04-20842).

**12 Third parties – participation**

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Arbitration having a contractual foundation, third-party participation in the proceedings is not permitted unless all parties and the tribunal agree.

Institutional rules, to which the parties can refer in their arbitration agreement, sometimes contain appropriate mechanisms in this regard. The revised ICC Rules, for example, set out detailed provisions regarding complex arbitrations, joinder, multiparty, multi-contract disputes, and consolidation (articles 7 to 10).

**13 Groups of companies**

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

French law is often improperly cited as recognizing the so-called 'group of companies' doctrine. Quite to the contrary, it is a well-established principle of French company law that affiliated companies are independent legal entities.

As a matter of fact, however, it is often in the context of a group of companies that one member of the group gets involved in the negotiation or performance of a contract signed by another in such a way that the effect of the arbitration agreement can be extended to the non-signatory (see question 11). However, the existence of a group of companies is neither a necessary nor a sufficient condition for such an extension.

**14 Multiparty arbitration agreements**

What are the requirements for a valid multiparty arbitration agreement?

The Court of Cassation held that the principle of equality between the parties in the appointment of arbitrators cannot be waived before the dispute has arisen (Civ 1, 7 January 1992, *Dutco*, No.

89-18708). This means, in practice, that an arbitration clause providing, for example, that several parties having the same interests shall jointly appoint an arbitrator, is not enforceable. Article 1453 CCP now expressly addresses this issue by providing that, where there are 'more than two parties to the dispute' and if they fail to agree on the constitution of the arbitral tribunal, the arbitrator(s) shall be appointed by the person responsible for administering the arbitration or, failing such person, by the judge acting in support of the arbitration. The ICC Rules contain similar provisions to accommodate the equality requirement (article 12(6-8)).

**Constitution of arbitral tribunal****15 Eligibility of arbitrators**

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Active judges cannot act as arbitrators, but retired judges can. There are no other restrictions as to who may act as an arbitrator. Arbitrators need not be selected from any list. In international arbitration, even a legal person could be appointed as arbitrator. Article 1450 CCP providing that 'only a natural person' may act as an arbitrator applies only to domestic arbitrations.

There is no reported case in France on how the prohibition of discrimination could interfere with contractual requirements regarding the nationality, religion or gender of arbitrators. In particular, the validity of the requirement that the sole arbitrator or the president of the tribunal be of a nationality other than those of the parties, which is very common in arbitration agreements and arbitration rules, does not seem to have been challenged before the French courts. However, given the broad definition of the offence of discrimination in the French Criminal Code and the limited scope of the admitted exceptions to the prohibition of discrimination (articles 225-1 to 225-4), the risk that contractual requirements for arbitrators based on such criteria be found illegal cannot be excluded.

**16 Default appointment of arbitrators**

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

As modified by the 2011 Decree, French law now provides for default rules for the constitution of the arbitral tribunal (articles 1451 to 1454 CCP). In proceedings with a sole arbitrator, the arbitrator is in principle chosen by the parties. Where there is a three-member panel, each party chooses one arbitrator and the two arbitrators thus appointed choose the third arbitrator. If there is a need to call upon an appointing authority, the appointment is made by the arbitration institution chosen by the parties or, in ad hoc arbitrations, by the judge acting in support of the arbitration (*juge d'appui*). The institution or the *juge d'appui* also has the power to decide 'any other dispute relating to the constitution of an arbitral tribunal'.

In domestic cases, if the arbitration agreement provides for an even number of arbitrators, an additional arbitrator must be appointed (article 1451 CCP).

The ICC Rules contain detailed provisions regarding the constitution of the tribunal (articles 11 to 13). A novelty in the revised rules is that, in certain circumstances, the ICC Court is now entitled to directly appoint any person whom it regards as suitable, without having to involve any national committee.

### 17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators have a duty to disclose any circumstance that may affect their independence or impartiality (article 1456 section 2 CCP), and lack of independence or impartiality is a ground for challenge. Arbitrators may also be challenged on the basis that they do not meet any specific requirement set out in the arbitration agreement.

Arbitrators have a duty to carry out their mandate until it is completed. They may refuse to act or resign only if they have 'a legitimate reason' to do so or are 'legally incapacitated' (article 1457 section 1 CCP).

If a disagreement arises regarding the challenge, removal, refusal to act or resignation of an arbitrator, the issue is to be resolved by the arbitration institution chosen by the party or, in ad hoc arbitrations, by the *juge d'appui*, to whom application must be made within one month from the disclosure or discovery of the fact giving rise to the difficulty (articles 1456 section 3, 1457 section 2 and 1458 CCP).

In domestic arbitration, unless otherwise agreed, article 1473 CCP provides for a stay of the arbitration in the event of the death, legal incapacity, refusal to act, resignation, challenge or removal of an arbitrator, until a substitute arbitrator has accepted his mandate. This provision is not applicable in international arbitration.

Although arbitrators and counsel may often seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration, there does not seem to be any reported French court decision relying on them.

### 18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The arbitrators' mission is jurisdictional but they have a contractual relationship with the parties. Whether party-appointed or designated by an institution or a court, an arbitrator does not represent the interests of any of the parties. He must be and remain independent and is required to act fairly and impartially.

Arbitrators are entitled to the payment of reasonable fees and expenses, for which parties are jointly and severally liable. French law does not dictate how arbitrators' remuneration should be calculated. In exceptional cases, the fees may be adjusted by the courts.

### 19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators enjoy a form of immunity regarding their jurisdictional function, in that they shall not be held liable for having reached an unlawful, wrongful or unfair decision in their award. An arbitrator may only be held personally liable for 'willful misconduct, gross negligence, or denial of justice' (CA Paris, 1 March 2011, No. 09/22701). It was held that, where a specific time limit has been set for the arbitration, the arbitrators are strictly liable for the damage caused by the annulment of the award following their having let the limit pass without having sought an extension (Civ 1, 6 December 2005, No. 03-13116). By contrast, the arbitrators' duty to 'act diligently and in good faith in the conduct of the proceedings' (article 1464 CCP) is only a best efforts obligation (Civ 1, 17 November 2010, No. 09-12352). The limited immunity from suit granted to arbitrators does not extend to criminal liability (article 434-9 of the Penal Code punishing bribery and corruption, specifically applies to arbitrators).

### Jurisdiction and competence of arbitral tribunal

#### 20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

When court proceedings are initiated on the merits before a French court despite an existing arbitration agreement, the court's jurisdiction to hear the case on the merits can be challenged in *limine litis* (at the outset of the proceedings, before any defence is raised as to the admissibility or the merits of the claim). As a result of such a challenge, the court must decline jurisdiction unless two cumulative conditions are met: (i) no arbitral tribunal has yet been seized, and (ii) the arbitration agreement is 'manifestly void or manifestly inapplicable' (article 1448 CCP), an exception which is very narrowly construed by French courts. This rule is known as the 'negative effect' of competence-competence.

#### 21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Pursuant to article 1465 CCP, which codifies the 'positive effect' of competence-competence, 'the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction'. As a result of this rule, combined with article 1448 CCP (see question 20), once the arbitral tribunal has been seized, French courts have no power to rule on such jurisdictional objections. Court review is possible only in the context of a challenge against the award or its enforcement.

No specific procedure or time limit applies. Any challenge to the tribunal's jurisdiction must however be raised before any step is taken which could amount to a waiver of the right to object. More generally, under article 1466, 'a party which, knowingly and without legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.'

### Arbitral proceedings

#### 22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

French law contains no specific default mechanism to determine the place and language of arbitration in the absence of agreement between the parties. These issues are to be decided by the arbitral tribunal under its broad power to determine procedural issues (articles 1464 section 1 and 1509 section 2 CCP).

Institutional rules often contain specific provisions in this regard. For example, under the ICC Rules, in the absence of agreement between the parties, the place of arbitration shall be fixed by the ICC Court (article 18) and the language(s) shall be determined by the arbitral tribunal 'due regard being given to all relevant circumstances, including the language of the contract' (article 20).

#### 23 Commencement of arbitration

How are arbitral proceedings initiated?

There is no specific requirement regarding the initiation of arbitral proceedings, whether in domestic or international arbitration. In practice, the party wishing to submit a dispute to arbitration must inform the other party of its decision, in accordance with any requirement set out in the arbitration agreement or in the arbitration rules the parties may have chosen. If the arbitration agreement provides for a negotiation phase or any other ADR mechanism before the



dispute can be submitted to arbitration, no arbitration can validly be initiated before the agreed procedure has been followed.

The ICC Rules provide for detailed rules regarding the commencement of arbitration. With a view to streamline the first phase of the proceedings, the revised rules require the claimant to indicate at the outset 'the basis upon which the claims are made' and the amounts at stake, in addition to information regarding the parties, the nature and circumstances of the dispute, the relief sought and the tribunal's constitution.

#### 24 Hearing

Is a hearing required and what rules apply?

A hearing is not required under French law and no specific rules apply. This issue is covered by the general rule allowing the parties to agree on the procedure to be followed and, failing such agreement, giving the arbitral tribunal the power to determine the procedure. In practice, it is usual for arbitration tribunals to hold hearings for oral testimony and oral submissions, in particular in international arbitrations, but document-only proceedings are perfectly admissible.

Under the ICC Rules (article 25(6)), 'the arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing'. When a hearing is to be held, article 26 applies to the summoning of the parties and the conduct of the hearing.

#### 25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Provided they respect due process and equality between the parties at all times, arbitral tribunals have very broad discretion in deciding how to carry out their fact-finding mission, what types of evidence are admissible and how the taking of evidence shall be conducted. Article 1467 CCP, applicable to both domestic and international arbitrations, provides that the arbitral tribunal 'shall take all necessary steps concerning evidentiary matters', which includes calling any person to provide testimony (without taking an oath), enjoining a party to produce documents or information in its possession, if necessary under a financial penalty (which will, however, not be enforceable without court intervention). Arbitral tribunals may also appoint technical experts, hear party-appointed experts, order site visits, and so on. Guidance is often sought from the IBA Rules on the Taking of Evidence in International Arbitration.

#### 26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The role of the *juge d'appui* to assist in the constitution of the arbitral tribunal and solve any difficulty in this regard is described above (questions 16 and 17). The courts' involvement regarding interim measures (question 28) and ex post review (questions 42 to 44) is discussed below.

Before the constitution of the arbitral tribunal, article 1449 CCP allows any party to apply to a court of competent jurisdiction, in summary proceedings (*référé*), to obtain measures relating to the taking of evidence in accordance with article 145 CCP, that is to say, 'where there is a legitimate reason to preserve or establish evidence upon which the resolution of a dispute may depend.'

Once the arbitral tribunal is constituted, the French courts' involvement in evidentiary and procedural matters is extremely limited. Article 1469 CCP provides that a party to arbitration proceedings may, upon leave of the arbitral tribunal, summon a third party in summary proceedings before the court of competent jurisdiction (as determined pursuant to the ordinary domestic jurisdictional rules)

to obtain evidence held by a third party. Finally, an application to the *juge d'appui* can be made to obtain an extension of statutory or contractual time limits in the arbitral proceedings (article 1463 section 2 CCP).

No application can be made to the court to obtain a ruling on jurisdictional issues relating to the validity, scope and enforceability of the arbitration agreement.

#### 27 Confidentiality

Is confidentiality ensured?

In domestic arbitration, it is now expressly provided that 'subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential' (article 1464 section 4). There is no similar provision regarding international arbitration and the parties should therefore expressly agree that the proceedings are confidential if they wish them to be so.

The arbitrators' deliberations are always confidential (article 1479 CCP).

The ICC Rules do not provide for the confidentiality of proceedings conducted under the ICC's auspices. However, the new rules expressly allow any party to apply to the arbitral tribunal for an order concerning 'the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration' (article 22(3)).

#### Interim measures and sanctioning powers

#### 28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before the constitution of the arbitral tribunal, the parties may apply to any court of competent jurisdiction to obtain provisional or conservatory measures in summary proceedings, unless the parties have agreed otherwise, and provided 'the matter is urgent' (article 1449 section 1 CCP, applicable to both domestic and international arbitration). Interim relief that can be sought from the French courts typically includes measures intended to maintain the status quo or to prevent irreparable harm pending final determination of the dispute. Provisional relief, such as the provisional payment of whole or part of the claim, is conditioned upon a finding that the claim is 'not seriously disputable'.

Once the arbitral tribunal has been constituted, it is no longer permitted to apply to the courts for interim relief, unless the parties otherwise agree.

However, whether before or after the constitution of the tribunal, the French courts have exclusive jurisdiction to authorise conservatory attachments and judicial securities (articles 1449 section 2 and 1468 section 1 CCP). Such measures can be obtained without initially summoning the debtor, on a finding that the claim appears 'well founded in principle' and that there are circumstances likely to threaten recovery of the debt. French courts have jurisdiction to grant such measures if attachable assets belonging to the debtor are found on the French territory.

#### 29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The revised ICC Rules offer a procedure for the parties to seek urgent interim or conservatory measures that cannot await the constitution of the arbitral tribunal (article 29). Provided the arbitration agreement was concluded after the entry into force of the new Rules (1 January 2012), the emergency arbitrator provisions apply unless the parties have opted out of these provisions or have agreed to another pre-arbitral procedure for the granting of interim measures.

The emergency arbitrator provisions do not prevent any party from seeking emergency measures from a competent judicial authority. The procedure to be followed is described in Appendix V to the Rules. It is intended to last no longer than three weeks. An application for emergency measures can be made before or after the filing of a request for arbitration, provided however that the file has not yet been transmitted to the arbitral tribunal. The applicant must advance US\$40,000 representing the minimum amount of the costs of the emergency arbitrator proceedings. The emergency arbitrator is appointed by the president of the ICC Court. His decision is characterised by the ICC Rules as an 'order', which the parties undertake to comply with, but which is not binding in any respect on the arbitral tribunal. It is unclear whether and how the enforcement of an emergency arbitrator's 'order' can be obtained before the courts.

### 30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Pursuant to article 1468 CCP, applicable in 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 orders.' There is no provision dealing specifically with security for costs.

Once the arbitral tribunal is constituted, there is no longer any concurrent power of the courts to order such measures, unless the parties otherwise agree and subject to the courts' exclusive jurisdiction to order conservatory attachments and judicial securities.

### 31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration?

Article 1464 section 3 CCP expressly provides that 'the parties and the arbitrators shall act diligently and in good faith in the conduct of the proceedings.' However, the Code does not provide for any specific sanction in the event of a violation of this obligation. No specific sanctioning powers are granted to the arbitral tribunal against the use of 'guerrilla tactics' by the parties or their counsel. The arbitral tribunal may, however, counter such tactics by exercising its more general powers, based on its overarching duty to ensure the respect of due process and the equality between the parties (article 1464 section 2 and article 1510 CCP). In order to sanction 'guerrilla tactics', the arbitral tribunal may use its powers to grant 'any conservatory or provisional measures that it deems appropriate' (question 30) and to 'take all necessary steps concerning evidentiary matters' (question 25), but court intervention is needed if there is a need to enforce such decisions. Bad faith can also be sanctioned by excluding evidence improperly obtained. Finally, the allocation of fees and costs may also be based on the good or bad faith conduct of the parties during the proceedings.

Similarly, although the ICC Rules do not specifically address the issue of 'guerrilla tactics', the arbitral tribunal and the parties have a duty to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner' (article 22(1)). The arbitral tribunal has the power to 'adopt such procedural measures as it considers appropriate' in order to ensure effective case management (article 22(2)), provided that 'in all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case' (article 22(4)). The arbitral tribunal's discretion to 'conduct hearings and meetings at any location it considers

appropriate' (article 18(2)) may be used for the purpose of preventing witness intimidation. Finally, when allocating costs, the arbitral tribunal is expressly invited to take into account 'the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner' (article 37(5)).

## Awards

### 32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In domestic arbitration, to be valid, the award requires a majority decision, and if the minority refuses to sign, the award must so state (articles 1480 and 1483 CCP).

In international arbitration, the default rule is a majority decision but, where no majority can be found, the chairman may rule alone. In principle, all the arbitrators should sign the award. Otherwise, it shall be so stated in the award. None of these circumstances affects the validity of the award (article 1513 CCP).

### 33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

There is no provision prohibiting an arbitrator from expressing the reasons for his disagreeing with the majority opinion. The Paris Court of Appeal recently held that a breach of the confidentiality of the arbitral deliberations (article 1479 CCP) is not in itself a basis for challenging the award, and that the expression of a dissenting or separate opinion does not violate international public policy unless there was no collegial deliberation at all (CA Paris, 7 April 2011, No. 10/09268).

### 34 Form and content requirements

What form and content requirements exist for an award?

In domestic arbitration, article 1481 CCP specifies the information that must be stated in the award regarding the identity of the parties, their counsel, the arbitrators and the date and place where the award was made. Moreover, the award must contain a summary of the parties' claims and arguments and set forth the reasons for the arbitrators' ruling (article 1482 CCP). Failure to state the reasons, the date of the award, the names or signatures of the arbitrator(s) having made it and, as the case may be, that there was no majority, are grounds for nullity of the award (article 1492-6° CCP).

Article 1481 and 1482 CCP apply in international arbitration unless the parties have otherwise agreed. However, non-compliance with any of the formal requirements is no grounds for challenging the award. In particular, failure to state the reasons for the award is not in itself contrary to international public policy, unless it dissimulates a denial of due process (CA Paris, 18 November 2010, No. 09/20069).

### 35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

In domestic arbitration, unless otherwise agreed, the time limit is six months (article 1463 section 1 CCP). There is no statutory time limit applicable to international arbitration. In both domestic and international proceedings, statutory or contractual time limits may be extended by agreement of the parties or, failing which, by the *juge d'appui* (article 1463 section 2 CCP).

Under the ICC Rules (article 30), the normal time limit for the award is six months as from the signature or approval of the terms of reference. The ICC Court may extend the time limit upon a request of the arbitral tribunal or on its own initiative.

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### 36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The action to set aside a domestic award or an international award made in France can be brought as soon as the award is rendered and during one month (three months for parties residing abroad) following the date of its notification, such notification being made by service, unless otherwise agreed by the parties (articles 1494 section 2 and 1519 section 2 CCP).

In both domestic and international arbitrations, the arbitral award is *res judicata* as soon as it is made with regard to the claims it adjudicated (article 1484 section 1 CCP) and puts an end to the arbitral tribunal's power to rule on the claims adjudicated therein (article 1485 section 1 CCP), subject to the possibility to correct or interpret the award (see question 41).

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### 37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

As a matter of French law, there is no limit as to the types of awards that can be made (eg, final award, partial award, interim award, award by consent).

The only limit expressly placed upon the types of relief that may be granted by arbitrators relates to conservatory attachments and judicial securities, which may only be granted by French courts (articles 1449 section 2 and 1468 section 1 CCP). Beyond that, provided they respect their mandate and comply with public policy requirements, arbitrators may order any type of relief (payment of sums of money, specific performance, annulment or rescission of contracts, injunctive relief, etc).

What constitutes an arbitral award is defined by the courts, irrespective of the characterisation given by the parties or the arbitral tribunal. Only a decision putting an end to a dispute regarding the merits or the admissibility of a claim, or a decision ruling on a procedural objection thereby putting an end to the case will be regarded as an award (Civ 1, 12 October 2011 No. 09-72439).

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### 38 Termination of proceedings

By what other means than an award can proceedings be terminated?

In domestic arbitration, following a stay or abatement, if the parties fail to take action towards resuming the proceedings, the arbitral tribunal may terminate the proceedings (article 1474 section 2 CCP). Furthermore, article 1477 CCP expressly provides that domestic arbitral proceedings shall come to an end upon expiration of the time limit set for the arbitration (unless extended). These rules do not apply to international arbitration.

In both domestic and international arbitration, default by one party during the proceedings does not terminate the proceedings, unless that party is the claimant and no claim is made against it. Proceedings may be terminated if the parties reach a settlement, either by way of an award by consent or by the withdrawal of all the parties from the proceedings. No formal requirement is applicable.

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### 39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards?

In the absence of agreement between the parties or applicable institutional rules, the assessment and allocation of costs in both domestic and international arbitration is left to the discretion of the arbitral

tribunal. Arbitrators' fees and expenses, or at least the method or pre-established scale according to which they shall be determined, should preferably be agreed with the parties at the outset of the proceedings. The payment of provisions on costs may be required from the parties. The tribunal has the power to fix the recoverable amount of the parties' costs (such as attorney's fees and expenses and in-house costs). The final apportionment of the costs is also within the tribunal's discretion. In practice, at least part of the costs usually follows the event.

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### 40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest on any monetary claim may be awarded by arbitral tribunals. In international cases, arbitral tribunals tend to apply the *lex causae* to determine whether and as from when interest is due, whereas the rate is often fixed by reference to the *lex monetae* or relevant market conditions. The Paris Court of Appeal held that a rate that would be considered as usury under French domestic law is not per se contrary to international public policy (CA Paris, 27 October 2011, No. 10/12982). Where an award does not provide for post-award interest, if enforcement is sought in France, interest at the French legal rate (fixed every year by decree) automatically applies as from the date of the enforcement order of the award, pursuant to article 1153-1 Civil Code.

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### Proceedings subsequent to issuance of award

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#### 41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under article 1485 CCP, applicable to both domestic and international arbitration unless the parties have otherwise agreed, the arbitral tribunal has the power 'on application of a party' to correct or interpret the award or make an additional award where it failed to rule on a claim, after having heard the parties or given them the opportunity to be heard. Such an application can be filed within three months following the notification of the award (article 1486 section 1 CCP).

Under the ICC Rules (article 35), the arbitral tribunal is entitled 'on its own initiative' to correct clerical errors within 30 days of the date of the award. A 30-day time limit from the receipt of the award applies for any party to apply for such a correction or for the interpretation of the award.

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#### 42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

As far as domestic awards are concerned, the 2011 Decree has reversed the previous rule: unless otherwise expressly agreed by the parties, an arbitral award is not subject to any *de novo* appeal, but only to an action to set aside the award on the basis of limited grounds (articles 1489 and 1491 CCP). In both cases, the recourse is to be brought before the court of appeal of the place where the award was made, and is available until one month following notification of the award (extended to three months for a party residing abroad). Save where otherwise agreed by the parties, if it annuls the award, the court of appeal has the power to rule on the merits of the case within the limits of the arbitrators' mandate (article 1493 CCP). Unless the arbitral tribunal has ordered provisional enforcement or unless the award is made provisionally enforceable by the court of appeal, the period for appealing or applying for annulment and the filing of any such recourse suspend the enforceability of the award (article 1496 CCP).

International awards made in France are subject to an action to set aside on the basis of limited grounds (article 1518 CCP). Any such action must be brought before the court of appeal of the place where the award was made within one month following notification of the award (extended to three months for a party residing abroad). The 2011 Decree has brought two major changes to previous rules. First, in principle, an action to set aside an international award does not suspend its enforcement. Second, the parties may, by specific agreement, expressly waive their right to bring such an action (article 1522 CCP). In such a case, they nevertheless retain the right, which cannot be waived, to oppose the enforcement of the award.

Four of the grounds for setting aside an arbitral award are drafted in the same manner in both domestic (article 1492 CCP) and international (article 1520 CCP) arbitration:

- the arbitral tribunal wrongly upheld or denied jurisdiction;
- the arbitral tribunal was not properly constituted;
- the arbitral tribunal did not comply with the mandate conferred upon it; or
- due process was violated.

The fifth ground relates to public policy. A domestic award may be annulled if it 'is contrary to public policy', whereas the setting aside of an international award may be obtained only if its 'recognition and enforcement is contrary to international public policy', judicial control being limited to 'flagrant, effective and concrete' violations (Civ 1, 4 June 2008, *SNF/Cytec*, No. 06-15320; 29 June 2011, *Smeg*, No. 10-16680).

A sixth ground of annulment, applicable only to domestic awards, is the failure to state the reasons for the award, the date on which it was made, the names or signatures of the arbitrator(s); or where the award was not made by a majority decision.

No direct challenge against awards made abroad is admissible, only an action to oppose enforcement of such awards may be brought.

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#### 43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards are not subject to any appeal *de novo* (except in domestic cases if the parties have so agreed). The only possibility to challenge an award is an action to set aside a domestic or international award made in France or an action to oppose enforcement. In both cases, the action is brought directly before the court of appeal. Decisions by the court of appeal are subject to further review, on points of law only, by the Court of Cassation. Depending on the outcome, the case may end after the decision of the Court of Cassation or be remanded to another court of appeal.

Proceedings before the court of appeal and before the Court of Cassation usually last for 12 to 18 months, but may in some cases be longer. Costs to be considered include court costs and costs incurred in the service of process by a bailiff (which are both moderate), as well as variable translation costs and attorneys' fees. French courts do not usually impose very large costs orders on the losing party, although recent case law shows an increase in amounts awarded on account of costs, especially against authors of inconsiderate challenges.

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#### 44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitral award can only be enforced in France by virtue of an enforcement order issued in *ex parte* proceedings by the first instance court of the place where the award was made or Paris if the award

was made abroad (articles 1487 and 1516 CCP). The applicant must establish the existence of the award (by producing the original award and the arbitration agreement, or authenticated copies of these documents, as well as an official translation if they are not in French). The only additional requirement is that the award must not be 'manifestly contrary to public policy' (domestic awards) or its recognition and enforcement 'manifestly contrary to international public policy' (awards made abroad or in international arbitration).

If the above requirements are satisfied, the enforcement order is affixed to the award, which is then enforceable in the same manner as a court judgment.

No separate recourse is available against an order granting enforcement of an award made in France, but a challenge directed against the award also affects the enforcement order (articles 1499 and 1524 CCP). However, a separate appeal against the order granting enforcement of an international award made in France is possible, on the same grounds as those for setting aside such an award (see question 41), where the parties have waived their right to apply for the setting aside (article 1522, section 2 CCP). An order denying enforcement of an award made in France may be appealed (articles 1500 and 1523 CCP).

An order granting or denying enforcement of an award made abroad may be appealed. The court of appeal may only deny enforcement on the grounds set forth for setting aside international awards made in France (article 1525 CCP) (see question 41).

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#### 45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Decisions of foreign courts annulling an arbitral award are not taken into consideration by French courts when ruling on the enforcement of the said award in France (see the decisions of the Court of Cassation in *Norsolor* (Civ 1, 9 October 1984, No. 83-11355), *Hilmarton* (Civ 1, 23 March 1994, No. 92-15137, and 10 June 1997, No. 95-18402), and *Putrabali* (29 June 2007, No. 05-18053)). International awards are considered as disconnected from any national legal system and the only relevant test for them to be enforced in France is whether they meet the French criteria for enforcing foreign awards (articles 1525 and 1520 CCP), which in this respect are more favorable than those set out by the New York Convention.

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#### 46 Cost of enforcement

What costs are incurred in enforcing awards?

Costs such as lawyers' fees and costs incurred in the tracing of assets may be significant and are not, for the most part, recoverable. Other costs are determined on a fixed scale and are recoverable. They include courts', bailiffs', and other administrative costs, depending on the means of enforcement used (seizures, attachments, pledges and mortgages, public sales of assets, etc). To some extent, translation costs are also recoverable.

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#### Other

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#### 47 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The French judicial system is one of civil law. Judges take an active role in the fact-finding process and often rely on court-appointed experts to conduct factual and technical investigations, in which it is important for the parties to actively participate. Documentary evidence, in particular if it is contemporaneous to the disputed facts, has much more weight than witness testimony and the hearing of witnesses is a rarity in civil and commercial matters. Although judges have the power to order a party or a third party to produce



### Update and trends

One of the recently debated topics in French courts and arbitration circles concerns the question of the right of access to justice by a party unable to pay the arbitration fees. In the matter of *Licensing Projects v Pirelli*, an award had been set aside by the Paris Court of appeal for denial of due process caused by the circumstances in which the respondent's counterclaim had been withdrawn, in accordance with the ICC rules of arbitration, as a result of the non-payment of the corresponding advance costs due to the respondent's impecuniosity. The Court of Cassation overruled the Court of Appeal's decision, considering that the impossibility to raise a counterclaim may violate the right of access to justice and the principle of the equality of the parties, but only if the counterclaim is non-separable from the main claim (Civ 1, 28 March 2013, No. 11-22770). The criteria to distinguish separable and non-separable counterclaims remain to be determined. The inability to pay the arbitration costs may also be a problem for the claimant, as was alleged in another case brought before the Paris Court of Appeal. The Court held that a party's alleged inability to pay the arbitration costs and the ensuing denial of justice do not render the arbitration agreement manifestly inapplicable (which would allow the case to be heard by a state court despite the existence of an arbitration agreement). Putting the ball in the arbitrators' court, the Court further observed that it is up to the arbitral tribunal to ensure access to justice, subject to ex-post judicial control over the award and sanction of any possible denial of due process (CA Paris, 26 February 2013, No. 12/12953).

Although issued in respect of the enforcement of foreign court decisions rather than arbitral awards, the recent position affirmed by the Court of Cassation in *NML Capital v Argentina* regarding sovereign immunity may be of interest to arbitration specialists (Civ 1, 28 March 2013, No.10-25938, No. 11-10450 and No.11-13323). In three decisions issued on the same day, the Court held that in order to effectively allow enforcement on public assets, such as tax and social revenues, a waiver of the immunity from execution should expressly and specifically mention the assets or categories of assets to which the waiver applies. This new rule is likely to considerably limit the scope of the solution adopted by the Court of cassation in *Creighton v Qatar* (Civ 1, 6 July 2000, No. 98-19068), where it was held that an implicit waiver of the immunity from execution resulted from the agreement by a state to submit to ICC arbitration.

Mention should finally be made of a recent exacerbation of the criticisms addressed to the arbitral process in France, through certain highly publicised cases (particularly the 'Affaire Tapie' which, due to its political dimension, has gained the attention of the general public), in which allegations of fraud are made, and criminal investigations are pending. It is too early for specific comments on these cases. What these recent developments clearly show, however, is that there is still a need to reinforce the legitimacy and integrity of arbitration.

specifically identified documents in their possession, there is no US-style discovery, and there is no obligation on the parties to disclose all relevant documents.

Domestic arbitrations are influenced by the above-described procedure, although a flexible approach is generally adopted, in particular regarding witness testimony, which is much more common than in court proceedings. In international arbitrations, there is a clear trend to adopt a syncretic approach, borrowing from the civil law and common law procedural traditions. For example, oral evidence, cross-examination of witnesses, party-appointed expert evidence, and substantial requests for the production of documents are common practice in international arbitrations conducted in France.

### 48 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no restrictions or unusual rules applying specifically to persons acting as counsel or sitting as arbitrator in arbitral proceedings in France. Counsel and arbitrators resident in France are subject to VAT on their fees, regardless of the nationality of the parties or the place of the arbitration.

The French legal and judicial system has a long established pro-arbitration approach which, coupled with a large community of experienced professionals and excellent facilities for the holding of arbitration hearings, make France, and Paris in particular, a very propitious venue for international arbitration proceedings.



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