

Concise International Arbitration

Second edition

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[Introductory remarks]

1. General. Provisions of French arbitration law essentially arise from the decree 2011-48 of 13 January 2011 (2011 decree), incorporated in arts. 1442 to 1527 of the French Code of Civil Procedure (CPC). These provisions replace those dating from 1981 which are commented on in the first edition of this book. Unless specified in the following article-by-article commentary, the provisions of the 2011 decree apply since 1 May 2011.

2. International as distinguished from domestic arbitration. The CPC distinguishes among those provisions that are applicable to international arbitration, contained in arts. 1504 to 1527 of the CPC (Book IV, Title V-VI), and those applicable to domestic arbitration, contained in arts. 2059 to 2061 of the French Civil Code and arts. 1442 to 1503 of the CPC (Book IV, Title I-IV). The provisions applicable to French domestic arbitration are generally not applicable to international arbitrations. However, art. 1506 makes certain provisions of French domestic arbitration applicable to international arbitrations unless the parties agree otherwise (see art. 1506). The following article-by-article commentary will address the international arbitration provisions contained in arts. 1504 to 1527 of the CPC as well as the provisions on French domestic arbitration which art. 1506 says are applicable to international arbitration.

3. French case law on arbitration. Pursuant to the French international private law tradition, issues not specifically addressed in the CPC provisions are often addressed in French court decisions most commonly rendered by the Court of Appeal of Paris or by the French Supreme Court (Cour de cassation). In certain cases, French court decisions made in the context of domestic arbitration may also apply to international arbitration. The following commentary will mainly refer to case law made in the context of international arbitrations, with the exception of domestic arbitration cases that are also relevant in the context of international arbitrations. Finally, the current CPC provisions applicable to international arbitration incorporate a significant amount of case law rendered prior to the 2011 decree (note 1). It remains the case that the CPC provisions on international arbitration should always be read in conjunction with applicable case law and that a significant number of cases mentioned in this commentary in respect of certain provisions may refer to the 1981 provisions rather than those of the 2011 decree. That is because these cases pre-date the 2011 decree's publication and should still be relevant and applicable today.

4. CPC provisions and international conventions on international arbitration. France is a party to the following international conventions related to international arbitration: the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Protocol on the Enforcement of Arbitration Clauses of 1923, the Geneva Convention of 21 April 1961 on International Arbitration, the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, as well as various bilateral and multilateral international conventions relating or referring to arbitration. These conventions provide minimum standards ratifying countries must observe in supporting international arbitration through the recognition and enforcement of arbitration agreements and awards. The French provisions on international arbitration set forth in the CPC are more favourable to arbitration than the international conventions to which France is a party. As a consequence, in reaching their decisions, French courts rely upon the relevant provisions of the CPC rather than upon the provisions set forth in these conventions (e.g., regarding the New York Convention of 1958, Cour de cassation, 29 June 2007, *Putrabali*).

5. Scope of French international arbitration law. With only a few exceptions, French international arbitration law generally applies to international arbitrations with their seat in France. It also applies before the French courts, to the recognition of international arbitration agreements and to the recognition and enforcement of international awards. Under French international arbitration law, there are two types of international awards: foreign awards (awards rendered in arbitrations where the seat of arbitration is outside France), and international awards rendered in France (awards rendered in international arbitrations – as defined below in art. 1504 – where the seat of arbitration is in France). Although both international awards rendered in France and foreign awards are ‘international awards’, French law draws certain distinctions between the two with respect to their enforcement. These distinctions are detailed below in the section concerning enforcement of awards (see arts. 1514 to 1527).

[Definition of international arbitration]

Article 1504

An international arbitration is one that involves the interests of international trade.

1. Definition of arbitration. There is no definition of the word ‘arbitration’ in French law. However, French authors generally agree that arbitration is a process whereby one or more individuals are entrusted by parties with the power to decide their dispute by way of one or more binding and final legal decisions. Arbitration is distinguished from expert determination in that an arbitrator’s mission involves deciding on one or more issues of law. It is

also distinguished from conciliation or mediation in that arbitrators make decisions that are binding upon the parties.

2. Definition of international arbitration and international arbitration awards. Under French law, an arbitration is international if the subject matter of the dispute is commercially connected with more than one country at the time the arbitration is commenced. Therefore, an arbitration is international even if the seat of arbitration is in France as long as the parties' dispute may be connected with more than one country. The intent of the parties to make, or not to make, the arbitration international is irrelevant (Cour de cassation, 20 November 2013, *Saica*). In particular, the nationality of the parties and the law applicable to the merits of the dispute or to the arbitration procedure do not in and of themselves, determine whether the arbitration is international (Cour d'appel Paris, 29 March 2001, *Carthago Films*). By way of example, arbitrations concerning the transfer of shares of a French company among shareholders of different nationalities are international arbitrations. Likewise, arbitrations among French companies concerning a dispute that involves deliveries, services or payments abroad are also international arbitrations under French law (Cour d'appel Paris, 7 April 2011, *Bourbon*). Moreover, both foreign awards and international awards rendered in France are considered international arbitral awards under French law. Foreign awards will be treated as international awards under French law even if they resolve a dispute that involves the economy of only one country (Cour de cassation, 17 October 2000, *Asecna*).

[Applicability of French domestic arbitration provisions to international arbitration]

Article 1506

Unless the parties have agreed otherwise, and subject to the provisions of this title, the following Articles shall apply to international arbitration:

(1°) 1446, 1447, 1448 (paragraphs 1 and 2) and 1449, relating to the arbitration agreement;

(2°) 1452 to 1458 and 1460, relating to the constitution of the arbitral tribunal and the procedure to be followed before the supporting judge;

(3°) 1462, 1463 (paragraph 2), 1464 (paragraph 3), 1465 to 1470 and 1472 relating to the arbitral proceedings;

(4°) 1479, 1481, 1482, 1484 (paragraphs 1 and 2), 1485 (paragraphs 1 and 2) and 1486 relating to the arbitral award; and

(5°) 1502 (paragraphs 1 and 2) and 1503 relating to the recourses other than appeal and action to set aside.

1. General. Art. 1506 provides that the above-listed provisions on domestic arbitration are part of French international arbitration law unless the parties

agree otherwise. The relevant commentary for each article listed in art. 1506 above will be made under the relevant article-by-article commentary below.

2. Mandatory provisions. The parties' agreement to deviate from the above-listed French domestic arbitration provisions is subject to the relevant provision not being mandatory. Arts. 1449, second paragraph, 1460, 1469, second to fifth paragraphs, and art. 1503 are the only mandatory provisions which parties cannot deviate from.

[The arbitration agreement]

Article 1507

The arbitration agreement is not subject to any formal requirement.

1. General. Art. 1507 incorporates previous French case law into the CPC (Cour d'appel Paris, 24 February 2005, *Sidermétal*). Under French international arbitration law, an arbitration agreement does not need to be in writing and does not need to be signed by the parties to the arbitration. Rather, an agreement to arbitrate may exist whenever evidence is provided that there is a 'common intent of the parties' to arbitrate their disputes (Cour de cassation, 20 December 2000, *FMT Productions*; see also art. 1520(1), note 13). Moreover, the existence, validity and scope of an arbitration agreement is only determined before the French courts based on the 'common intent of the parties' (subject to mandatory rules of French law and international public policy) and without reference to any national law (Cour de cassation, 20 December 1993, *Dalico*, and 5 January 1999, *Zanzi*) (see art. 1520(1), notes 12 and 13). A clause which provides for 'arbitration Paris' and nothing more will be sufficient to allow for the constitution of an arbitral tribunal with its seat in Paris (Cour d'appel Paris, 23 October 2008, *Limak*).

Article 1446

Parties may agree to arbitrate even while proceedings are already pending before a [State] court.

1. General. Art. 1446 is a French domestic arbitration provision made applicable to international arbitration by art. 1506. Art. 1446 encourages parties to submit their disputes to arbitration at any time before the parties' dispute is finally decided by a national court. Arbitration is indeed considered in France to be the 'normal means' of settling international business disputes. Art. 1446 therefore merely confirms that arbitration agreements may be entered into at any time, whether before a dispute arises, once the dispute has arisen or even once such dispute has already been submitted to a national judge. Where the dispute has already been finally decided by a national court at the time an award is rendered, *res judicata* issues may arise with regard to the

enforcement of the award in France (Cour d'appel Paris, 17 January 2012, *Planor*).

Article 1447

The arbitration agreement is independent from the contract to which it relates. The arbitration agreement shall not be affected by the inefficiency of such contract.

When it is void, the arbitration clause shall be deemed not written.

1. General. Art. 1447 is a French domestic arbitration provision made applicable to international arbitration by art. 1506. It also incorporates previous French case law on international arbitration into the CPC (see also art. 1520(1), notes 12 and 13).

2. Separability of the arbitration agreement. Arbitration agreements have long been considered under French international arbitration law as separable from the main contract that contains, or refers to them (Cour de cassation, 7 May 1963, *Gosset*). As a consequence, the existence, validity and scope of the arbitration agreement is to be evaluated independently from the enforceability of the main contract, and issues affecting the validity of the contract that contains or refers to the arbitration agreement at stake do not necessarily impair the existence, validity and scope of the arbitration agreement (Cour de cassation, 6 December 1988, *Navimpex*). An arbitration agreement is nevertheless considered ancillary to the contract that contains or refers to it. As a consequence, arbitration agreements are generally transferred to assignees of all or part of the contract that contains or refers to the arbitration agreement at stake, at the time of assignment (Cour de cassation, 8 February 2000, *Taurus Films*; Cour d'appel Paris, 20 April 1988, *Clark*), unless the arbitration agreement was expressly said to be non-assignable. Moreover, the invalidity of the assignment of all or part of a contract that contains or refers to an arbitration agreement does not necessarily prevent transfer of that agreement in accordance with the rule set forth in *Taurus Films* (Cour de cassation, 28 May 2002, *Ciments d'Abidjan*).

3. Arbitration agreement 'deemed not written'. An arbitration clause that is void is considered not written. This means, it does not affect the contract itself.

[Kompetenz-Kompetenz]

Article 1448

Where a dispute covered by an arbitration agreement is filed before a State court, the latter shall decline jurisdiction unless [(i) the dispute] has not yet been submitted to the arbitral tribunal and [(ii)] the arbitration agreement is manifestly void or manifestly inapplicable.

The State court may not decline jurisdiction on its own motion.

[...]

Article 1465

The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdictional power.

1. General. Arts. 1448 and 1465 are French domestic arbitration provisions made applicable to international arbitrations by art. 1506. Together, arts. 1448 and 1465 set forth the principle of *Kompetenz-Kompetenz* under French law. Art. 1448 is aimed at the French courts and specifically provides that when asked by a party to do so, French courts must decline jurisdiction over disputes already submitted to an arbitral tribunal. Further, even where a dispute has not yet been submitted to an arbitral tribunal (see art. 1456, note 1), the French court must still decline jurisdiction if asked by a party to do so, unless the arbitration agreement is ‘manifestly void’ or ‘manifestly inapplicable’ (see notes 3-5). This is true wherever the seat of the existing or as-yet unfiled arbitration may be. The French court may not decline jurisdiction on its own motion (Cour d’appel Paris, 12 March 2013, *Beten*); rather, it is up to the parties to raise any objection they may have with regard to the French court’s jurisdiction. Where a party participates in a court action on its merits, without first raising an objection to that court’s jurisdiction, that party will be considered to have renounced the arbitration agreement and waived its right to arbitrate the dispute (Cour de cassation, 23 January 2007, *Alix*; Cour d’appel Paris, 12 June 2012, *Commisimpex*). However, the participation of a party in expedited proceedings (*référé*) regarding provisional measures does not amount to a waiver of the arbitration agreement on the part of that party (see art. 1449).

2. Dispute already submitted to an arbitral tribunal. Pursuant to art. 1448, a French court faced with an objection to jurisdiction based on the existence of an arbitration agreement must decline jurisdiction over the dispute already submitted to an arbitral tribunal. A dispute is considered submitted to an arbitral tribunal under French arbitration law once all members of the tribunal have accepted the mission entrusted upon them (see art. 1456). There is no requirement that the arbitrators must have signed terms of reference for the tribunal to be considered constituted under French arbitration law.

3. Dispute not yet submitted to an arbitral tribunal: ‘manifestly void’. Pursuant to art. 1448, a French court will also decline jurisdiction where the dispute has not yet been submitted to the arbitral tribunal, unless the arbitration agreement is ‘manifestly void’. When applying art. 1448 and determining whether or not the alleged agreement to arbitrate is ‘manifestly void’, the French court is barred from carrying out a substantive, in-depth

examination of the arbitration agreement (Cour de cassation, 7 June 2006, *Jules Vernes*). A clause that is ‘manifestly void’ is, as those words suggest, void on its face. In other words, under art. 1448, the French court will review the arbitration clause on a prima facie basis (Cour d’appel Paris, 15 June 2006, *Fincantieri*). Where there are any doubts, the French court should decline jurisdiction and the arbitral tribunal should, once constituted, rule on its own jurisdiction pursuant to art. 1465 (see note 7). In practice, cases where an arbitration clause could be found to be manifestly void are those where the issue in dispute is not arbitrable due to mandatory rules of French law or French international public policy. This may be the case, for instance, in a labour dispute where the employee first files his claim before a French labour court with jurisdiction (Cour de cassation, 9 October 2001, *Lopez-Alberdi*).

4. Dispute not yet submitted to an arbitral tribunal: ‘manifestly inapplicable’. Art. 1448 incorporates previous case law into the CPC (Cour de cassation, 16 October 2001, *Quatro Children’s Book*). This provision expressly provides that a French court must also decline jurisdiction where the dispute has not yet been submitted to an arbitral tribunal, unless the arbitration agreement at issue is ‘manifestly inapplicable’. Manifest inapplicability provides a basis for the French courts to retain jurisdiction where the arbitration clause at issue is ‘manifestly inapplicable’ to the dispute at hand or to one or more parties involved. For instance, an arbitration agreement contained in a contract was found ‘manifestly inapplicable’ to the claim based on the contract, against a party thereto, which was however filed by the other party’s liquidator on behalf and in the interest of this party’s creditors (Cour de cassation, 1 July 2009, *Encore*).

5. Dispute not yet submitted to an arbitral tribunal: burden on the party asking the French court to retain jurisdiction. The burden to show that an arbitration clause is ‘manifestly void’ or ‘manifestly inapplicable’ is on the party asking the French court to retain jurisdiction. In international arbitration, cases finding a clause ‘manifestly void’ or ‘manifestly inapplicable’ are rare, for several reasons. First, the French courts examine arbitration agreements on a prima facie basis when deciding whether they are ‘manifestly void’ or ‘manifestly inapplicable’ under art. 1448 (note 3). Secondly, French arbitration law requires that any doubts regarding the personal and material scope of that agreement be first resolved by the arbitral tribunal (Cour de cassation, 7 June 2006, *Jules Vernes*). Moreover, it is rare that an arbitration clause is found by the French courts to be void on its face. The reason is because, under French international arbitration law, it is rare for an arbitration agreement to be void at all. This is because French international arbitration law takes a liberal approach to finding arbitration agreements enforceable. To that end, French law has no formal requirements for an agreement to arbitrate to be valid (art. 1507), and arbitration agreements are separable from the main contract in which they are contained or that refers to them (see art. 1447).

6. Provisional measures. If a French court should decline jurisdiction over a dispute in favour of arbitration under art. 1448, provisional measures may nevertheless be obtained from a national court judge with jurisdiction until the arbitral tribunal is constituted (see arts. 1449 and 1456). Attachment of assets or judicial securities may not be granted by arbitral tribunals, and may only be obtained from national courts, even after the constitution of the arbitral tribunal (see art. 1449).

7. ‘Priority’ of the arbitral tribunal to decide on its own jurisdiction. Art. 1465 provides that arbitral tribunals have ‘exclusive jurisdiction’ to rule on objections to their jurisdiction. Pursuant to this provision, which is aimed at arbitral tribunals, arbitrators have the power to decide on their own jurisdiction when jurisdictional objections are raised in the arbitration. However, an arbitral tribunal that decides on its own jurisdiction pursuant to art. 1465 does not have the final say on the matter. This is because if, once the award is rendered, a party challenges the award (see art. 1518) or its enforcement in France (see arts. 1522, 1523 and 1525) on the grounds that the tribunal erred on the issue of jurisdiction (see art. 1520(1)), that question will be examined *de novo* by the Court of Appeal when deciding the issue (Cour de cassation, 11 July 2006, *Generali France*; Cour d’appel Paris, 16 September 2010, *Evertrade*; see also art. 1520, note 7). The French Court of Appeal has the power to later deny enforcement of an award or as the case may be, set the award aside, if it concludes that, in fact, the arbitral tribunal erred on the issue of jurisdiction. Accordingly, the *Kompetenz-Kompetenz* principle embodied in arts. 1448 and 1456 under French arbitration law, only grants arbitral tribunals a ‘priority’ to decide upon their jurisdiction, rather than ‘exclusive jurisdiction’ to do so.

Article 1449

The existence of an arbitration agreement shall not prevent a party from requesting a State court to grant an investigation measure, a provisional or conservatory measure, for so long as the arbitral tribunal is not constituted.

Subject to the provisions governing conservatory attachments and judicial securities, the request shall be filed before the President of the First Instance Court (Tribunal de grande instance) or of the Commercial Court (Tribunal de commerce), who shall decide upon the investigation measures under the conditions foreseen in Article 145 and, in case of emergency, on the provisional or conservatory measures requested by the parties to the arbitration agreement.

Article 145

If there is a legitimate reason to preserve or to establish, before any legal action, the evidence of facts upon which the resolution of the dispute

depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of an ex parte petition or by way of an expedited procedure (référé).

1. General. Art. 1449 is a French domestic arbitration provision which incorporates previous case law in the CPC and is made applicable to international arbitrations by art. 1506. Art. 1449 makes clear that despite the existence of an arbitration agreement: (i) until the arbitral tribunal is constituted, national courts may order conservatory or provisional measures and, (ii) at any time, provisional and conservatory measures which arbitral tribunals cannot take, such as conservatory attachments and judicial securities, may only be requested from, and decided by national courts with jurisdiction to do so. Moreover, art. 1449 confirms that under French arbitration law, the filing of a request for investigation, or for provisional or conservatory measures before a national court prior to the constitution of the tribunal, does not amount to a waiver of the arbitration agreement (see art. 1448, note 1).

2. Requests for provisional or conservatory measures once the arbitral tribunal is constituted. According to art. 1449, tribunals, once constituted (see art. 1456, note 1), have exclusive jurisdiction to order provisional or conservatory measures. However, conservatory or provisional measures which arbitral tribunals may not order, such as attachment of assets or judicial securities, may only be ordered by a national court with jurisdiction (see art. 1468).

3. Court with jurisdiction. Art. 1449, second paragraph, is a mandatory provision of French international arbitration law. As a consequence, parties may not agree to the contrary. Art. 1449 was originally drafted to cover domestic arbitration and does not envisage situations where the parties have no connection with, or assets in, France that justifies the jurisdiction of the French courts, as foreseen in the second paragraph of art. 1449. This provision therefore appears to suggest that only the President of a French court with personal or material jurisdiction would have the power to grant provisional or conservatory measures in the presence of an arbitration agreement. Actually, should international private procedural law grant jurisdiction to order any such measures to a court other than a French court, it will be for that foreign court to decide, rather than for the President mentioned in art. 1449, paragraph 2.

4. Type of measures. Pursuant to art. 1449, pending the constitution of the arbitral tribunal, a French court with jurisdiction, or the arbitral tribunal once constituted, may make orders for the preservation or production of evidence, the appointment of an expert, a provisional payment, or any sort of injunctive relief generally available before them (see art.1468).

5. Emergency requirement. Pending the constitution of the tribunal, French courts may only order provisional or conservatory measures where

there is evidence of an urgent need for the measure, unless the measure concerns the preservation or production of evidence, the appointment of an expert, or the attachment of assets or judicial securities.

[Constitution of the arbitral tribunal]

Article 1508

The arbitration agreement may, directly or by reference to arbitration or procedural rules, designate the arbitrator or arbitrators or provide for the terms and conditions of their appointment.

1. General. Pursuant to art. 1508, parties may agree on the procedure for the constitution of the tribunal including by reference to arbitration rules (see art. 1509). If parties agree on a specific procedure and the agreement on procedure is not followed, the ensuing award may be set aside or enforceable in France (see art. 1520(2), note 15).

2. Absence of parties' agreement on the constitution of the tribunal. In the absence of the parties' agreement on terms and conditions that are necessary for the constitution of the arbitral tribunal, arts. 1452 and 1453 shall apply.

Article 1452

In the absence of the parties' agreement on the terms and conditions of appointment of the arbitrator(s):

(1°) in case of an arbitration by a sole arbitrator, where the parties do not agree on the choice of the arbitrator, the latter shall be appointed by the entity in charge of administering the arbitration, failing which, by the supporting judge;

(2°) in case of an arbitration by three arbitrators, each party shall choose one and the two so chosen arbitrators shall appoint the third one; if a party fails to appoint an arbitrator within one month from receipt of the other party's request to do so, or if the two arbitrators fail to agree on the choice of a third one within a month from acceptance of their appointment, the entity in charge of administering the arbitration, and failing which, the supporting judge, shall proceed with this appointment.

1. General. Art. 1452 is a French domestic arbitration provision made applicable to international arbitrations by art. 1506.

2. Number of arbitrators. In the absence of the parties' agreement on the number of arbitrators, the 'supporting judge' (see note 3 and art. 1505) shall determine whether the dispute will be submitted to either one or three

arbitrators. Art. 1452 only envisages cases where there shall be one or three arbitrators on the panel. Under French international arbitration, parties may agree upon an even number of arbitrators and may also submit their dispute to more than three arbitrators. Such agreements are rare in practice because of the difficulty for an even number of arbitrators to reach a majority decision, as well as for time and costs concerns.

3. Supporting judge. Unless the parties agree otherwise, the supporting judge is the President of the Paris First Instance Court (Tribunal de grande instance, see art. 1505).

4. Three member arbitral tribunal: appointment of the chairperson. Under French international arbitration law, where there shall be three members on the tribunal and unless the parties have agreed otherwise, the chairperson shall be appointed by the co-arbitrators within one month from the acceptance of his/her mission by the second co-arbitrator, failing which the 'supporting judge' shall appoint the chairperson upon either a party's request or a co-arbitrator's request (see art. 1460).

Article 1453

When the dispute involves more than two parties and that they fail to agree on the terms and conditions for the constitution of the arbitral tribunal, the entity in charge of administering the arbitration, and failing which, the supporting judge, shall appoint the arbitrator(s).

1. Multiparty arbitration. Where there are more than two parties to an arbitration, art. 1453 grants the administering arbitral institution or the 'supporting judge' the power to appoint all members of the tribunal in order to ensure equal participation of the parties in the constitution of the tribunal. Indeed, under French international arbitration law, where a party has been deprived of its equal right to participate in the constitution of the arbitral tribunal, the ensuing award may be annulled or refused enforcement in France by the French courts, for irregular constitution of the arbitral tribunal (Cour de cassation, 7 January 1992, *Dutco*; see art. 1520(2), note 15).

Article 1454

Any other dispute relating to the constitution of the arbitral tribunal shall be settled, in the absence of the parties' agreement, by the entity in charge of administering the arbitration, and failing which, by the supporting judge.

1. Disputes relating to the constitution of the arbitral tribunal. Disputes relating to the constitution of the arbitral tribunal most obviously include issues regarding the appointment of arbitrators. Issues that fall within

the scope of this article include: (i) an objection to the appointment of an arbitrator (Cour d'appel Paris, 1 March 2007, *AGRR*); (ii) a request for an order against an arbitrator to disclose how many times he was appointed by the same party (Cour de cassation, 20 June 2006, *Nigioni*); (iii) issues arising from or relating to the appointment of an arbitrator, such as challenges and replacements (TGI Paris, 28 October 1988, 14 and 29 June 1989, 15 July 1989, *Philipp Brothers*); and (iv) cases where the arbitration clause is either vague or internally inconsistent with respect to how the arbitral tribunal is to be constituted (Cour de cassation, 20 February 2007, *UOP*).

Article 1455

Where the arbitration clause is either manifestly void or manifestly inapplicable, the supporting judge shall declare that there will be no such appointment.

1. General. In international arbitration, the 'supporting judge' (see art. 1505) has exclusive jurisdiction to decide any dispute relating to the constitution of the arbitral tribunal (see art. 1454), unless the parties agree otherwise or the arbitration agreement is 'manifestly void' or 'manifestly inapplicable'. This means the 'supporting judge' has no jurisdiction and cannot proceed under arts. 1452 to 1455 if he finds, upon the allegation of a party, that the arbitration clause upon which the request is based, is 'manifestly void' or 'manifestly inapplicable' (see art. 1448, notes 3-5). In either case, the 'supporting judge' will decline jurisdiction.

2. Appeal of the decision of the 'supporting judge'. Only if the 'supporting judge' declines jurisdiction under art. 1455 is appeal of that decision available (see art. 1460, note 3).

Article 1505

In international arbitration and subject to any provision to the contrary, the supporting judge shall be the President of the Paris First Instance Court when either:

- (1°) the arbitration takes place in France,
- (2°) the parties have agreed to submit the arbitration to French procedural law,
- (3°) the parties have expressly granted jurisdiction to the French state courts over disputes relating to the arbitral procedure, or
- (4°) one of the parties is facing a risk of denial of justice.

1. General. Unless the parties agree otherwise, and subject to the provisions of art. 1455, the President of the Paris First Instance Court (Tribunal de grande instance) has jurisdiction and power to act as 'supporting judge'

for all arbitrations having their seat in France. The President of the Paris First Instance Court may delegate his powers to another judge within the same court. The President's jurisdiction is neither mandatory nor exclusive, since parties may agree to designate any entity or person, such as an arbitral institution or another judge, to decide upon all matters that would otherwise fall to the President under French arbitration law. In such a case, the parties' choice will prevail and only the failure of an entity or person agreed upon by the parties to act, will give rise to the exclusive jurisdiction of the President of the Paris First Instance Court (Cour d'appel Paris, 5 June 2003, *Rose*). Parties may of course agree to submit their arbitration to institution rules, in which case, and subject to any agreement to the contrary, it will be for the administering institution to decide upon issues which would have otherwise been within the scope of the jurisdiction and powers of the 'supporting judge'.

2. Seat of arbitration outside France. Art. 1505(2) and (3) envisage that the President of the Paris First Instance Court may act as a 'supporting judge', if the seat of arbitration is outside France and the parties agree that either French arbitration law should apply to the arbitration, or that the French 'supporting judge' should act in such capacity in relation to their arbitration. These provisions will most probably have a limited impact from a practical standpoint, because such type of elections is not recommended.

3. Denial of justice. Art. 1505(4) incorporates in the CPC previous French arbitration case law according to which where the seat of arbitration is outside France, the French judge may also have jurisdiction to decide issues concerning the constitution of the arbitral tribunal, where the arbitration is connected with France and a party would otherwise suffer a 'denial of justice' if the French courts did not act (Cour de cassation, 1 February 2005, *NIOC*). However, under art. 1505(4), the requirement set forth in *NIOC* of a 'connection with France' is not applicable. Hence, parties to an arbitration agreement with no connection with France may refer issues related to the constitution of the tribunal to the French 'supporting judge' where a party only provides evidence that it would suffer from a 'denial of justice' were the 'supporting judge' to deny jurisdiction.

4. Effect of the reference to arbitration rules in the parties' arbitration agreement. The reference in the parties' arbitration agreement to a set of arbitration rules that grants certain or all of the powers of the 'supporting judge' to a person or to an arbitral institution deprives the 'supporting judge' of these powers (TGI Paris, 18 January 1991, *Chérifienne des Pétroles*). Should the parties' agreement only grant certain tasks to that person or arbitral institution, such as, for instance, the appointment of arbitrators, then the 'supporting judge' will still have exclusive jurisdiction with regard to any other issues affecting the constitution of the arbitral tribunal, such as challenges or replacement of arbitrators (TGI, Paris 29 October 1996, *GECI*).

Article 1460

A request before the supporting judge shall either be filed by a party, the arbitral tribunal, or one of its members.

The application is filed, heard and decided as in expedited proceedings (*référé*).

The supporting judge shall decide by way of an order against which no recourse is available. However, this order may be subject to appeal when the judge declares that there can be no appointment for any reason provided under Article 1455.

1. General. Art. 1460 is a French domestic arbitration provision made applicable to international arbitrations by art. 1506 CPC, and is mandatory. This is to say parties may not agree otherwise where the ‘supporting judge’ has jurisdiction (see art. 1505, note 1). Under art. 1460, requests to the ‘supporting judge’ (see art. 1505) may be made by the parties, the arbitral tribunal or one of its members. In practice, however, it is the parties, not the arbitrators, who usually apply to the ‘supporting judge’ to resolve issues affecting the constitution of the arbitral tribunal.

2. Decision ‘as in expedited proceedings’. The ‘supporting judge’ deciding ‘as in expedited proceedings’ means that the judge decision shall be made ‘as if’ it were made in an French expedited proceedings (*référé*). However, unlike decisions taken made in expedited proceedings in France (*référé*), the decision under art. 1460 will be issued in the form of a judgment with full *res judicata* effect. Moreover, parties seeking action from the ‘supporting judge’ should neither follow the procedure applicable in expedited proceedings in France, nor direct their request to judges in charge of such proceedings in France (*juge des référés*). Indeed, these judges have no jurisdiction to decide upon such applications. Moreover, parties seeking action from the ‘supporting judge’ do not have to satisfy any of the criteria that a French *juge des référés* may require to retain jurisdiction such as, for example, urgency or likelihood of success on the merits (Cour de cassation, 14 November 2007, *Vinexpo*). Rather, the only requirement under art. 1460, is that the application relates to an issue affecting the constitution of the tribunal as foreseen in arts. 1452 to 1454 above.

3. Recourse against the decision of the ‘supporting judge’. As a general rule, the decisions of the ‘supporting judge’ on issues affecting the constitution of the tribunal cannot be appealed. However, the third paragraph of art. 1460, allows a party to appeal the decisions of the ‘supporting judge’ if that judge finds the arbitration agreement to be ‘manifestly void’ or ‘manifestly inapplicable’ (see art. 1455). Having said this, actions against other decisions made by the ‘supporting judge’ on issues affecting the constitution of the arbitral tribunal may still be available where the President’s decision is grossly affected by a violation of a fundamental principle of procedure or a

violation of public policy, including a violation of due process (Cour d'appel Paris, 19 December 1995, *GECI II*), or if the 'supporting judge' has exceeded his powers. For example, an excess of powers would occur if the President were to appoint a replacement arbitrator without first offering the party who had appointed the departing arbitrator an opportunity to propose another arbitrator (Cour d'appel Paris, 1 March 2007, *AGRR*; 10 October 2002, *Gastrolouvre*; and Cour de cassation, 16 March 2000, *Sechet*).

Article 1456

The arbitral tribunal is constituted once the arbitrator(s) have accepted the mission entrusted upon them. As of that date, the tribunal is in charge of the dispute.

The arbitrator must, prior to accepting his or her mission, disclose any circumstance which may affect his or her independence or impartiality. He or she must also disclose without any delay any circumstance of the same nature which may arise after the acceptance of his or her mission.

In case of a dispute as to whether an arbitrator should remain [on the tribunal], the issue shall be decided by the entity in charge of administering the arbitration, and failing which, decided by the supporting judge upon request to be filed within one month following the disclosure or discovery of the disputed fact.

1. General. Art. 1456 is a French domestic arbitration provision made applicable to international arbitrations by art. 1506 CPC. Pursuant to this provision, a tribunal is considered constituted once all members have been appointed, they have satisfied their duty to disclose (see note 2) and they have accepted their mission.

2. Arbitrator's duty to disclose. According to the second paragraph of art. 1456, in order to establish and maintain trust among the parties and the arbitrators, arbitrators have a duty to disclose facts and circumstances that may affect their judgment and create, in the mind of the parties, a reasonable doubt as to their independence or impartiality. The arbitrators' disclosure duty applies from the time of their appointment until the end of the arbitration. Under this duty, arbitrators must disclose their business relationship with the parties, with the parties' counsel in the arbitration (Cour d'appel Paris, 9 September 2010, *SGS*), and with companies of the same group as the parties (Cour de cassation, 20 October 2010, *Prodim*, Cour de cassation, 20 October 2010, *Somoclest*). A breach of an arbitrator's duty to disclose is a ground for challenge to that arbitrator (see note 4) as well as for the setting aside, or non-recognition, of the award in France (see art. 1520(2) and (5)). It may also give rise to the personal liability of the arbitrator (Cour d'appel Paris, 9 April 1992, *L'Oréal*).

3. Objections and challenges to arbitrators. Should an arbitrator disclose or fail to disclose upon his appointment, any fact or circumstance that may affect his judgment and create, in the mind of the parties, a reasonable doubt as to his independence or impartiality, any party may object to the appointment of that arbitrator before either the ‘supporting judge’ (see art. 1505) or the person or institution designated under the parties’ agreement to resolve issues relating to the constitution of the tribunal (see art. 1454). Similarly, if the arbitrator discloses or fails to disclose, in the course of the proceedings, a fact or circumstance that may affect that arbitrator’s independence or impartiality, any party may challenge that arbitrator. By way of example, the repetitive and frequent appointment of the same arbitrator by the same party in similar disputes may create a reasonable doubt as to the independence of that arbitrator (Trib. com. Paris, 6 July 2004, *Chomat*). An arbitrator who sits in two parallel arbitrations involving similar issues also runs a risk of challenge. Any decision the arbitrator renders in one of the cases may be seen as a prejudgment of any similar issues still awaiting decision in the other case. Such prejudgment may be considered to affect that arbitrator’s independence and impartiality and justify the challenge of that arbitrator (Cour d’appel Paris, 2 April 1998, *Asmidal*). If a party discovers, after an arbitrator is appointed, that the arbitrator breached his duty to disclose, that party may challenge the arbitrator before the ‘supporting judge’ or any other person or arbitral institution designated under the parties’ agreement to resolve issues relating to the constitution of the tribunal. In evaluating a challenge based on an arbitrator’s alleged breach of the duty of disclosure, the ‘supporting judge’ will take into account whether the information at issue was publically known and whether it would have affected the arbitrator’s judgment (Cour d’appel Paris, 28 June 1991, *KFTCIC*). In both cases of challenge or of objection to the appointment of an arbitrator, it will be for the ‘supporting judge’ or any other person or institution designated under the parties’ agreement to decide whether the arbitrator may stay on the tribunal. If an arbitral institution designated under the parties’ agreement to resolve issues relating to the constitution of the tribunal decides the arbitrator may stay on the arbitral tribunal, the enforceability of the ensuing award or its enforcement in France may still be in jeopardy before the French courts pursuant to art. 1520(2) or (5). Conversely, in case such a decision was made by the ‘supporting judge’ and has become final at the time the Court of Appeal decides on the challenge to the award, the factual grounds raised in respect of the arbitrator’s challenge shall be inadmissible before the Court of Appeal as grounds for challenge of the award or enforcement order, on the basis of art. 1520(2) (Cour de cassation, 13 March 2013, *Carrefour*; and Cour d’appel Paris, 6 March 2012, *Carrefour*).

4. Deadline for the filing of a challenge against an arbitrator. The filing of a challenge against an arbitrator before the ‘supporting judge’ is only admissible within one month following the disclosure or discovery of the underlying facts or circumstances. This deadline is not applicable where the relevant institutional rules provide for another deadline. However, arbitration rules

may not prevent a party from filing a challenge against an arbitrator based on facts discovered after the deadline provided for in the institution's rules (Cour d'appel Paris, 30 October 2012, *Nykcool*). Finally, if a party fails to challenge an arbitrator on the basis of facts disclosed or discovered during the arbitration within the deadline foreseen under the arbitration rules applicable to the arbitration, that party's challenge against the award, based on the same facts, on the ground that the tribunal was irregularly constituted will not be admissible before the French courts (Cour de cassation, 25 June 2014, *Tecnimont*).

Article 1457

The arbitrator must carry out his or her mission until completion unless he or she shows evidence of an impediment or legitimate ground for refraining or resigning.

In case of a dispute regarding the reality of the reason invoked, the issue shall be settled by the entity in charge of administering the arbitration, and failing which, by the supporting judge upon request to be filed within one month following the impediment, failure to perform or resignation.

Article 1458

The arbitrator may only be dismissed by the unanimous consent of the parties. In the absence of unanimity, the provisions of the last paragraph of Article 1456 shall be followed.

1. General. Arts. 1457 and 1458 are French domestic arbitration provisions made applicable to international arbitrations by art. 1506 CPC. Art. 1457 imposes a duty on arbitrators to complete their mission. Although this is rare in practice, art. 1458 clarifies that parties may unanimously agree to dismiss an arbitrator.

2. Arbitrators' resignation. According to arts. 1457 and 1458, an arbitrator may resign subject to the parties' agreement. In the absence of such an agreement, the arbitrator's resignation is subject to the approval of the institution administering the arbitration, or as the case may be (see art. 1454), by the 'supporting judge'. If an arbitrator's resignation is accepted or approved, the arbitral tribunal will have to stay the proceedings until a replacement arbitrator accepts his mission (see arts. 1456 and 1472). If an arbitrator's resignation is not approved, that arbitrator may be enjoined to stay on the tribunal, participate in the deliberations and sign the award against his will. In these circumstances, and where the arbitrator continues to refuse to take part in the deliberations and sign the award, the award should not be affected (see art. 1513).

3. Arbitrators' dismissal. In the absence of the parties' unanimity to dismiss an arbitrator, any party may ask the 'supporting judge', or the arbitral

institution in charge, to dismiss the arbitrator pursuant to art. 1458. Art. 1458 does not cover challenges and resignations of arbitrators, which are specifically dealt with under arts. 1456 and 1457. Art. 1458 deals with other types of concerns. For example, art. 1464 third paragraph, imposes a duty on arbitrators to act with celerity and loyalty in the conduct of the arbitration procedure (see art. 1464). Should an arbitrator's negligence or conduct in the arbitration cause significant delays or other concerns, and the parties cannot agree to dismiss the arbitrator, a party or an arbitrator may then request the 'supporting judge' to dismiss the arbitrator on the basis of art. 1458 and pursuant to the procedure set forth under the third paragraph of art. 1456.

4. Arbitrators' liability. An arbitrator that resigns or refrains from acting for no legitimate reason may be liable. Under French torts and international arbitration law, evidence must be brought to a French court that the arbitrator committed an intentional tort, a fraud, or a denial of justice in order to trigger his liability; mere negligence is insufficient (Cour de cassation, 15 January 2014, *M. Z.*, see also arts. 1456, note 2 and 1463). Neither the 'supporting judge', nor the administering institution have jurisdiction to decide upon an arbitrator's liability. It will be for the national judge with jurisdiction under the applicable rules of international procedure law to decide the issue.

[Procedural rules applicable during the arbitration proceedings]

Article 1462

The dispute shall be submitted to the arbitral tribunal either by the parties jointly, or by the most diligent party.

1. General. Art. 1462 is a French domestic arbitration provision made applicable to international arbitration by art. 1506. The 'most diligent party' in art. 1462 is any party to the arbitration that submits the dispute to the tribunal once constituted. This submission may be done jointly by the parties or by the filing of a written request to the tribunal submitted by either party. French international arbitration law does not impose any timing, content or form to the request for arbitration or to the submissions to be made by parties in the course of an arbitration. Where parties have agreed that institutional arbitration rules shall be applicable to their dispute, these rules generally set forth the requirements for the timing, content and form of the request for arbitration and answer thereto.

Article 1509

The arbitration agreement may, directly or by reference to arbitration or procedural rules, determine the procedure to be followed in the arbitration proceedings.

Where the arbitration agreement is silent, the arbitral tribunal shall determine the procedure as need be, either directly or by reference to arbitration or procedural rules.

1. General. Art. 1509 generally addresses the issue of the procedure to be followed in the arbitration proceedings. This includes the procedure to be followed from and including the constitution of the arbitral tribunal until the rendering of its final award, including correction and interpretation of awards. This provision does not concern the issue of the law applicable to the merits of the parties' dispute (see art. 1511). Pursuant to art. 1509, parties are free to agree on the procedure to be followed during the arbitration, whether or not by reference to a pre-existing set of rules, such as for example, the UN-CITRAL Arbitration Rules or the International Chamber of Commerce Rules of Arbitration. Should the parties designate an arbitral institution in their arbitration agreement, such designation will be considered as an agreement that that institution's rules govern the conduct of the arbitration (Cour d'appel Paris, 15 May 1985, *Raffineries de Pétrole d'homs et de Banias*). Where the parties agree upon rules to govern the arbitral proceedings, the arbitral tribunal must conduct the proceedings in accordance with those rules. In all cases, the parties' agreement will bind the tribunal, so long as that agreement is express and sufficiently specific (Cour de cassation, 8 March 1988, *Sofidif*). If the arbitrators breach the parties' procedural agreement, the award may be denied enforcement or set aside in France for failure of the tribunal to comply with its mission (see art. 1520(3)). Failing an express and specific agreement of the parties on any part of the procedure, the tribunal may freely establish procedural rules without reference to any national procedural law or pre-existing set of arbitration rules. That discretion also applies to any procedural issue that may arise in the course of the arbitration procedure, such as the production and admissibility of evidence, procedural calendars, the sequence or form of written or oral pleadings, hearing of witnesses and experts (as well as expert appointments), and the taking and notification of procedural decisions. In any event, all procedural decisions made by the tribunal must be made in conformity with French procedural international public policy, such as the principles of due process and equality among the parties.

Article 1510

Whatever may be the chosen procedure, the arbitral tribunal shall ensure equality among the parties and abide by the principle of due process.

1. General. Art. 1510 incorporate into the CPC existing case law that makes equal treatment of the parties and abidance by due process part of French international procedural public policy. The tribunal's breach of either

duty is a ground for the non-recognition or setting aside in France of the award (see art. 1520(2), (4) and (5)).

2. Equality among the parties. Equal treatment of the parties only requires that the parties are treated in such a manner throughout the arbitration that no party may be put at a material disadvantage vis-à-vis the other parties to the case (Cour d'appel Paris, 12 June 2003, *Citel*). However, this principle of equal treatment does not require that the arbitral tribunal grant each party the exact same number of days to file their respective submissions (Cour d'appel Paris, 15 June 2006, *Prodoil Gabon*).

3. Due process. Pursuant to art. 1510, all parties must be afforded due process throughout the arbitration (Cour d'appel Paris, 12 June 2003, *Citel*; Cour d'appel Paris, 27 November 1987, *Sulzer*). Due process requires that every party to an arbitration be given a reasonable opportunity to present its case. This means that all information submitted to the tribunal by a party to the arbitration must be provided to all other parties as well (Cour d'appel Paris, 17 December 2009, *Fichtner*). It also means that every party must have a reasonable opportunity to present its factual and legal arguments, and a reasonable opportunity to respond to the arguments put forth by the other parties before the arbitral tribunal decides on any issue in the case (Cour d'appel Paris, 2 April 2013, *Blow Pack*). These requirements apply to decisions taken by way of procedural order or award. Furthermore, in situations where the arbitral tribunal believes that there is any factual or legal issue material to the case that has not been raised by the parties, the arbitral tribunal should raise the issue with the parties, and invite their comments before taking any decision with respect to that issue (Cour de cassation, 23 June 2010, *Malicorp*; Cour d'appel Paris, 14 June 2007, *Ciech*, Cour d'appel Paris, 3 December 2009, *Engel*). For example, a tribunal fixing an intermediary interest rate in the award, when the parties claim that only the legal or the contractual rate applies, breaches due process (Cour de cassation, 12 October 2011, *Groupe Antoine Tabet II*).

Article 1464

[...]

The parties and the arbitrators shall act with celerity and loyalty in the conduct of the proceedings.

[...]

1. General. Article 1464, third paragraph, is a provision of French domestic arbitration law made applicable to international arbitration law by art. 1506. This provision imposes on the parties and the arbitrators to act 'loyally' and 'swiftly' in the arbitration proceedings. French international arbitration law does not define the 'duty of loyalty'.

2. Arbitrators' duty of loyalty. The 'duty of loyalty' imposes on arbitrators, among other things, not to surprise the parties in the conduct of the proceedings, to abide by due process (see art. 1510), and remain independent and impartial throughout the arbitration (see art. 1456, notes 2 and 3). An arbitrator sitting in two parallel arbitrations who provides erroneous information to one of the tribunals with respect to the other arbitration influencing that tribunal's award on jurisdiction creates an imbalance among the parties and is in breach of his 'duty of loyalty' (Cour de cassation, 24 March 1998, *Excelsior Films*).

3. Parties' duty of loyalty. Parties are to submit their objections, claims and arguments in due course within the arbitration (see art. 1466), abide by due process (see art. 1510), submit their procedural objections as soon as possible in the arbitration (art. 1466), and not contradict themselves to the detriment of the other parties to the arbitration (see arts. 1466, note 3 and 1520, note 5).

4. Sanctions. Art. 1464 paragraph 3 does not provide for the sanction of either duty's breach. Should a party breach any duty imposed under that provision, it will be for the tribunal to determine the appropriate sanction. If an arbitrator breaches any of these duties, that arbitrator could be dismissed and that arbitrator's liability may be at stake (see art. 1458, notes 3 and 4). Art. 1464 may be a basis for liability where the arbitrator is responsible for rendering an award outside the time limit agreed upon by the parties. The validity or enforcement of the award may also be endangered where the arbitrator's breach of the duty of loyalty amounts to a violation of art. 1520(5) (see art. 1520(5), note 21).

5. No express confidentiality of international arbitration. The fourth paragraph of art. 1464 is not reproduced above because it is not applicable to international arbitration. It deserves mention however, because it provides that French domestic arbitration is generally confidential. French international arbitration law does not expressly provide that international arbitrations seated in France are confidential. Therefore, in order to ensure confidentiality (or non-confidentiality) of an international arbitration in France, parties should expressly agree on this issue.

Article 1472

The arbitral tribunal may, if need be, stay the proceedings. Such decision shall suspend the course of the proceedings for the time-period, or until the occurrence of the event, this decision determines.

The arbitral tribunal may, according to the circumstances, lift the stay or shorten its duration.

1. General. Art. 1472 is a domestic arbitration provision made applicable to international arbitration by art. 1506. Art. 1472 makes clear that arbitral

tribunals may stay the arbitration, lift the stay or shorten its duration. They are generally under no obligation to do so. However, arbitral tribunals sitting in France must stay the arbitration where a party claims that a document submitted as evidence, which was entered into before a French notary, is a forgery (see art. 1470). There is no such duty to stay the arbitration if the tribunal considers it may settle the dispute without reference to such document (see art. 1470). A tribunal will also have to stay the proceedings where an arbitrator is dismissed or resigns (see arts. 1457 and 1458, notes 2-3). Art. 1472 also makes clear that where the final award is to be rendered within a certain deadline (see art. 1463), the deadline is extended for the duration of the stay. Where an arbitral tribunal sitting in France renders a partial award finding it has jurisdiction, an action to set aside that award does not require the tribunal to suspend its work (Cour d'appel Paris, 9 July 1992, *GECI*). However, where that action is eventually successful for lack of jurisdiction, the ensuing final award may be set aside (see art. 1520(1), note 13).

Article 1466

The party which knowingly and without any legitimate reason, fails to timely object to an irregularity before the arbitral tribunal is deemed to have waived the right to rely upon such irregularity.

1. General. Art. 1466 is a domestic arbitration provision made applicable to international arbitration by art. 1506 and incorporates previous French arbitration case law into the CPC. Pursuant to art. 1466, a party should raise appropriate objections as soon as possible during the arbitration proceedings. Otherwise, that party may be deemed to have waived its right to complain at the time of enforcement or recognition of the ensuing award (see art. 1520, note 5). This provision also allows arbitrators sitting in France to dismiss a party's belated procedural complaint during the arbitration.

2. Waiver versus estoppel. The French courts distinguish the waiver of a parties' right to complain from estoppel. Indeed, a party that starts an arbitration without objecting to jurisdiction shall rather be estopped from later raising a claim before the French Court of Appeal that no arbitration agreement exists (Cour de cassation, 6 July 2005, *Golshani*). That is because that party contradicted itself to the detriment of the other party, rather than failed to complain in due course (Cour de cassation, 3 February 2010, *Meriel II*).

Article 1467

The arbitral tribunal shall proceed with the necessary steps for the taking of evidence unless the parties authorize the tribunal to assign such task to one of its members.

The arbitral tribunal may hear any person. Such hearing shall take place without the taking of oath.

If a party is in possession of an item of evidence, the arbitral tribunal may order that party to submit such evidence according to the terms and conditions the tribunal decides and, as need be, under penalty.

Article 1469

In case a party to the arbitral proceedings intends to rely upon a notarized (*acte authentique*) or private contract to which it was not a party, or a piece of evidence held by a third party, it may, upon the arbitral tribunal's invitation, file a claim against that third party before the President of the First Instance Court in order to obtain a copy thereof, or the submission of the document or piece of evidence.

The territorial jurisdiction of the President of the First Instance Court shall be determined in accordance with Articles 42 to 48.

The request shall be filed, heard and decided as in expedited proceedings.

If the President considers that the request is justified, he or she shall order the delivery or submission of an original, copy or abstracts, as the case may be, of the document or evidence, under the conditions and guarantees that he or she shall determine, and as need be, under penalty.

Such decision is not enforceable as of right.

Such decision may be subject to appeal within fifteen days following service [by bailiff] of the decision.

Article 1470

Unless otherwise provided, the arbitral tribunal has the power to settle disputes concerning the authentication of handwriting or a claim of forgery, in accordance with the provisions of Articles 287 to 294 and Article 299.

In case of an incidental claim of forgery, Article 313 shall apply.

1. General. Arts. 1467, 1469 and 1470 are French domestic arbitration provisions on production of evidence, made applicable to international arbitration by art. 1506.

2. Production of evidence. Art. 1467 makes clear that arbitral tribunals sitting in France may order the production of evidence from a party and sanction a party's failure to obey the order for production by way of a monetary penalty to the benefit of the other parties in the arbitration.

3. Evidence in the hands of a third party. Art. 1469 (second to fifth paragraph) is a mandatory provision. Parties may not deviate from this provision by agreement. This provision grants arbitral tribunals sitting in France the power to allow a party to request the President of the French First Instance Court with territorial jurisdiction to order production of evidence from a third

party. The request for a document production order against a third party is to be made ‘as in expedited proceedings’ (see art. 1460, note 2). The judge’s order made pursuant to art. 1469 may be appealed within 15 days from the date of its notification (by bailiff). The order may not be enforced during that deadline, or as the case may be, pending notification of the appellate decision.

4. Judge with territorial jurisdiction. According to arts. 42 to 48 CPC, a judge with jurisdiction in France is in principle a judge with jurisdiction over the third party’s place of residence or the place ‘where the damage was suffered’. Art. 1469 was originally drafted for domestic arbitration and there is currently no case law applying or interpreting this new provision of French international law.

5. Witnesses. Art. 1467 makes clear that an arbitral tribunal sitting in France may hear any person including a legal representative of a party (Cour d’appel Paris, 17 December 2009, *Fitchner*) and that witnesses (of fact or experts) are not heard under oath before tribunals sitting in France. Notably, arbitral tribunals sitting in France are not required to hear all of the witnesses a party intends to submit for examination at a hearing.

6. Claims of document forgery and document authentication disputes. Pursuant to art. 1470, tribunals sitting in France may also decide upon allegations of document forgery made in the arbitration, unless the document concerned was entered into before a French notary, and the tribunal cannot decide the dispute without deciding the forgery claim. In such a case, the French First Instance Court has exclusive jurisdiction to decide upon the forgery claim (see also art. 1472).

[Law applicable to the merits]

Article 1511

The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties, failing which, in accordance with the rules of law the tribunal considers appropriate.

The tribunal shall in all cases take trade usages into account.

1. General. Art. 1511 addresses the determination of the law applicable to the merits of a dispute submitted to arbitration and confirms that arbitral tribunals shall decide the dispute in accordance with the law chosen by the parties. This provision does not address the law applicable to the arbitration agreement itself or to the arbitration procedure, if any (see arts. 1509 and 1520(1), note 12). Moreover, under French international arbitration law, the law chosen by the parties to apply to the merits of a dispute is no indication of a choice of law to govern either the arbitration agreement or procedure,

unless this has been expressly agreed upon by the parties (Cour de cassation, 10 May 1988, *Wasteels*).

2. Party autonomy in international arbitration. Art. 1511 confirms that parties are free to choose the rules of law applicable to the merits of their dispute. That means they are free to agree upon the rules of law that the tribunal is to apply to settle their dispute, whether or not those rules are connected to the parties' relationship. The parties' choice of law may be express or implicit. Where the parties have agreed on rules of law to govern the merits of their dispute, the arbitral tribunal must apply those rules of law in its awards (see art. 1520(3), note 16). In the absence of an agreement by the parties on the rules of law applicable to the merits of their dispute, the tribunal has complete discretion to determine which rules of law shall apply. The tribunal does not need to refer to any conflict of laws rules in order to determine the applicable rules of law. To satisfy in practice the requirements of art. 1511, the arbitral tribunal needs merely to state in the award that the rules of law selected and applied by the tribunal are 'appropriate in the circumstances'. Should the arbitral tribunal consider that it may be appropriate to apply rules of law that have not been suggested by any party, the tribunal must first request the parties' comments on such rules of law before taking a decision, in order to comply with the requirements of due process (see arts. 1510, note 3 and 1520(4)).

3. Parties and tribunals may select 'rules of law' rather than national laws. The wording 'rules of law' used in art. 1511 includes, but is not limited to, national law. Indeed, in exercising their autonomy, the parties and arbitrators are not bound to choose a national law to govern the merits of the parties' dispute. 'Rules of law' include, among other things, 'a-national' or transnational rules of law, as well as general principles of law (UNIDROIT principles, for instance). Thus, an award which relies upon 'rules of international commerce determined by practice recognized in national court case law' was held to have been made in accordance with 'rules of law' (Cour de cassation, 22 October 1991, *Compania Valencia de Cementos Portland*).

4. Tribunals must take trade usages into account. According to art. 1511, the arbitral tribunal must in all cases take trade usages into account. Despite the use of the words 'shall' and 'in all cases' in art. 1511, there is no French case law annulling an award on the basis that a tribunal failed to take trade usages into account. Trade usages are generally defined as the 'usual practices observed in the parties' area of business' and include the parties' past practices in dealing with each other.

[Amiable composition]

Article 1512

The arbitral tribunal shall decide as amiable compositeur if the parties have entrusted the tribunal with such mission.

1. General. An arbitral tribunal may only decide as *amiable compositeur* when empowered to do so by the parties' agreement. In such cases, the arbitral tribunal cannot limit its reasoning only to the strict application of the law or that of the parties' contract terms, but must also take fairness into account. Failing an agreement from the parties to vest the arbitral tribunal with the power of *amiable compositeur* (which is also sometimes referred to as the power to decide *ex aequo et bono* or in an 'equitable manner' (*équité*)), the tribunal would fail to comply with its mission if it expressly relied upon these concepts in reaching the decisions in its award (see art. 1520(3), note 16). In all cases, an arbitral tribunal vested with powers of *amiable compositeur* must abide by due process and other fundamental rules of procedural international public policy (see art. 1510 and Cour d'appel Paris, 28 November 1996, *Minhal*, see also art. 1520(5), note 21).

2. Definition of amiable composition. An arbitrator is empowered to rule as *amiable compositeur* when vested with the powers to decide the parties' dispute either in *amiable composition*, *ex aequo et bono* or in an equitable manner (*équité*). French courts generally understand these concepts to have similar meanings in the context of international arbitration. Under French arbitration law, such powers amount to a waiver of the effects and benefits of the rule of law, whereby arbitrators are granted the power to moderate the consequences of contractual provisions, where required, by fairness or the common interest of the parties, and the parties lose their right to expect a strict application of the rule of law (Cour d'appel Paris, 28 November 1996, *Minhal*). Although the tribunal may moderate the effects of the parties' contractual agreement, such power is not without limit. The arbitral tribunal cannot go so far as to create a new contract that was not envisaged by the parties (Cour d'appel Paris, 4 November 1997, *Taurus Films*).

3. Powers and duties of a tribunal deciding as amiable compositeur. A tribunal sitting in France that is entrusted with the powers of *amiable compositeur* must indicate in the award, either expressly or implicitly, that the solution reached in the award complies with the tribunal's own sense of fairness (Cour d'appel Paris, 9 December 2010, *Energia*). The mere absence of a reference to the powers of *amiable compositeur* in an award rendered by an *amiable compositeur* is not, in and of itself, a ground for annulment of the award (Cour de cassation, 28 November 2007, *C et al.*). The strict application of the parties' contractual terms or legal provisions, with no reference to the powers of *amiable compositeur* and no consideration of fairness, could jeopardise the enforcement or the validity in France of an award rendered by an *amiable compositeur* (Cour d'appel Paris, 3 July 2007, *Bachelier*, see also art. 1520(3), note 16). A tribunal vested with such powers may refer to rules of law and adopt such rules if the tribunal considers these rules to provide a fair solution. The tribunal's reasoning should not be limited only to the strict application of rules of law, but should also indicate or at least implicitly suggest that the decision reached by the tribunal complies with

that tribunal's own sense of fairness (Cour d'appel Paris, 15 March 1984, *Soubaigne*).

4. Amiable composition and choice of law. In rare cases, parties agree that certain rules of law shall apply to the merits of their dispute, and vest the tribunal with the powers of amiable compositeur. In such cases, the tribunal should first apply the rules of law chosen by the parties to the dispute and thereafter compare the solution reached at law with fairness, and decide in accordance with its own sense of fairness. This comparison may be implied from the content of the award (Cour de cassation, 15 February 2001, *Hanin*, and Cour d'appel Paris, 4 December 2003, *Gutzwiller*; see also Cour d'appel Paris, 15 January 2004, *Vanoverbeke*).

[Provisional measures before the arbitral tribunal]

Article 1468

The arbitral tribunal may order any conservatory or provisional measure upon the parties that it deems appropriate under the conditions it determines and, as need be, under penalty. However, the State court has exclusive jurisdiction to order conservatory attachments and judicial securities.

The arbitral tribunal may amend or add to the conservatory or provisional measure it has ordered.

1. General. Art. 1468 is a French domestic arbitration provision made applicable to international arbitration by art. 1506 and incorporates previous French arbitration case law into the CPC. Art. 1468 makes clear that arbitral tribunals sitting in France may order provisional and conservatory measures in the course of the arbitration against a party to the arbitration, and under penalty (Cour d'appel Paris, 7 October 2004, *Otor*). Once constituted and until the rendering of the final award, the tribunal has exclusive jurisdiction to make such orders, if the measure requested is connected to the dispute and creates no conservatory attachment or judicial security (see also art. 1449, note 2).

2. Form of the measure: procedural order or award. Art. 1468 does not indicate whether orders made under this provision should be in the form of an award or a procedural order. The order should be made in the form of an award if it qualifies as an award under French arbitration law (see art. 1513, note 2). Arbitral tribunals' procedural orders may not be enforced by the French courts and there is no recourse available in France against these orders, independently of the ensuing award (Cour de cassation, 12 October 2011, *Groupe Antoine Tabet*; Cour d'appel Paris, 21 January 2010, *Fruidor*).

[The award]

Article 1463

[...]

The legal or conventional time-limit may be extended by agreement of the parties or, failing which, by the supporting judge.

1. General. Art. 1463 is a domestic arbitration provision that is made in part applicable to international arbitration by art. 1506. The first paragraph of art. 1463 which is not reproduced above because it is not applicable to international arbitration, provides that unless the parties agree otherwise, the award shall be rendered within six months from the date the arbitral tribunal is charged of the matter. There is no such time limit to render the award under French international arbitration law, unless the parties agree otherwise. The only requirement of French international arbitration law regarding the duration of the procedure is that parties and arbitrators should act with celerity (see art. 1464). The parties may however contractually agree that the award should be rendered within a specified deadline. In such a case, art. 1463 allows the parties, the tribunal or any arbitrator, to request the ‘supporting judge’ to extend the deadline for the rendering of the award. In institutional arbitration, most arbitration rules provide for a deadline to render the award and at the same time, grant the arbitral institution the power to extend that deadline. An award rendered outside the applicable deadline may be annulled or not recognised in France if the deadline is not extended prior to its expiry. The rendering of an award outside the agreed time limit may also trigger the arbitrators’ liability if the award is refused recognition or set aside for that reason. Indeed, arbitrators may be held personally liable for damages a party suffers from the setting aside of an award rendered after the expiry of the applicable time limit (TGI Paris, 29 November 1989, *République de Guinée* and Cour de cassation, 6 December 2005, *Juliet*).

Article 1479

The deliberations of the arbitral tribunal shall be confidential.

1. General. Art. 1479 is a French domestic law provision made applicable to international arbitration by art. 1506. Art. 1479 prohibits arbitrators and third parties who may attend the tribunal’s deliberation, such as an administrative secretary, from divulging the content of the tribunal’s discussions which are not specifically revealed in the tribunal’s procedural order or award. An arbitrator’s breach of confidentiality under art. 1479 is not a ground for challenging the award under French international arbitration law. Moreover, arbitrators may issue dissenting or separate opinions (Cour d’appel Paris, 9 October 2008, *Meriel II*). However, if the opinion so issued reveals an absence of deliberation or a breach of collegiality (see art. 1520(3), note 18)

the validity or enforcement of the award may be endangered (Cour d'appel Paris, 7 April 2011, *Merial III*).

Article 1513

Where the arbitration agreement is silent, the award shall be rendered by a majority of votes. The award shall be signed by all the arbitrators.

However, should a minority among them refuse to sign the award, the other arbitrators shall mention it in the award.

In the absence of a majority, the President of the arbitral tribunal shall decide alone. If the other arbitrators refuse to sign the award, the President shall mention it in the award, which he or she shall then sign alone.

The award rendered in the circumstances foreseen in one of the two preceding paragraphs shall produce the same effects as if it had been signed by all the arbitrators or rendered by a majority of votes.

1. General. Art. 1513 only applies to awards rendered by arbitral tribunals constituted after 1 May 2011. Awards rendered by tribunals constituted prior to that date are subject to the former art. 1470 which only provides that awards are rendered by a majority vote. Under the former regime, the chairperson could not render the award alone, unless the parties agreed otherwise. Under both the former regime and the 2011 Decree, an arbitrator's refusal to sign the award does not affect the award's validity or enforceability in France, so long as this refusal is mentioned on the award.

2. Definition of an award under French arbitration law. Under French international arbitration law, an award is any decision rendered by an arbitral tribunal which finally settles all or part of the parties' dispute submitted to it, and which addresses either jurisdiction, the merits of the dispute, or a procedural issue that terminates the procedure (Cour d'appel Paris, 25 March 1994, *Sardisud*). Only decisions of arbitral tribunals that satisfy this definition may be recognised, stamped with an enforcement order, and set aside or executed in France. It is not for the arbitral tribunal or for the parties to say whether a decision is an award or not. The agreement of the parties to name a decision an award or a procedural order is not binding on the French courts. It is always for the French judge to decide for himself whether the document before him is an award or not (Cour d'appel Paris, 1 July 1999, *Brasoil*). The French law definition of an award encompasses partial, interim and final awards. Arbitral tribunals' decisions on provisional measures that finally settle all or part of the parties' dispute may also constitute awards under French law (Cour d'appel Paris, 7 October 2004, *Otor*). Arbitral tribunals' decisions that are not considered awards under French law include procedural decisions which do not terminate the procedure (Cour d'appel Paris, 29 November 2007, *Crédirente*), and decisions that refuse to order a provisional payment

before the parties have fully argued the matter (Cour d'appel Paris, 11 April 2002, *ABCI*). It is questionable whether an award by consent that is deprived of reasoning is an award under French international arbitration law (Cour de cassation, 14 November 2012, *M. X*). Decisions of arbitral institutions (Cour d'appel Paris, 5 January 1985, *Opinter*) and decisions rendered in the course of an ICC pre-arbitral referee procedure (Cour d'appel Paris, 29 April 2003, *SNPC*) are not awards. Moreover, dissenting opinions are generally not considered to form part of the award to which they relate.

3. No writing requirement. There is no express requirement under French international arbitration law that an award be made or rendered in writing. However, arts. 1481 and 1482 provide that awards rendered in France should contain certain references. More importantly, pursuant to art. 1514, the party requesting recognition and enforcement of an international award bears the burden of proving the existence of the award (see art. 1514, note 1) and art. 1515 provides that proving the existence of an award is established by the production of an original or certified copy of the award (see art. 1515, note 1).

4. Majority rule. According to art. 1513 and as a matter of principle, awards are to be rendered by a majority. However, this provision allows parties to agree that the award be rendered unanimously, which is rare in practice for arbitral tribunals of more than one arbitrator. Art. 1513 also allows the chairperson to decide alone on any or all issues, in the absence of a majority. This provision does not affect a chairperson's duty to deliberate with co-arbitrators and ensure collegiality within the tribunal, from the constitution of the tribunal until the rendering of the final award (see art. 1520(3), note 19).

5. Refusal of an arbitrator to sign the award. Pursuant to art. 1513, the validity or recognition of an international award will not be affected in France by an arbitrator's refusal to sign the award so long as such refusal is mentioned in the award.

[Content and *res judicata* effect of the award]

Article 1481

The arbitral award shall mention:

(1°) the last name, first names or corporate name of the parties as well as their domicile or registered office;

(2°) as the case may be, the name of counsel or any person who represented or assisted the parties;

(3°) the name of the arbitrators who rendered the award;

(4°) its date; and

(5°) the place where the award was rendered.

Article 1482

The arbitral award shall succinctly state the respective claims and arguments of the parties.

The award shall be reasoned.

1. General. Arts. 1481 and 1482 are domestic arbitration provisions made applicable to international arbitration by art. 1506. Arts. 1481 and 1482 are applicable to international arbitration unless the parties agree otherwise. Hence, under French international arbitration law, parties may waive the requirements set forth under arts. 1481 and 1482 according to which the award must identify the seat, the parties and the arbitrators, and indicate the date upon which it is rendered (see art. 1484). It also imposes that the name of counsel in the arbitration, if any, be mentioned in the award. These references are not mandatory under French international arbitration law, but are of course highly recommended to reduce the risks of further disputes at the time of enforcement. Art. 1482 requires that the award succinctly states the parties' claims and arguments, as well as the tribunal's reasoning. There is no requirement as to the form or length of the summary of the parties' position in the award, which may be minimalistic. The same is true with regard to the award's reasoning (see also art. 1520, note 6). A determination that follows an examination of the parties' position may constitute, in and of itself, a reasoning (Cour d'appel Paris, 1 April 2010, *CAT I*) and decisions made in the award do not have to be expressly mentioned in a dispositive section (Cour d'appel Paris, 2 October 2012, *Cevede*).

2. Sanction. The absence of any mention provided for in art. 1481 in the award should not disqualify the award or affect its validity (Cour d'appel Paris, 29 September 2011, *Techman Head II*). There is nothing in French international arbitration law which suggests that in the absence of any such references in an international award, the award would be void in France. It may however in practice affect the award's enforceability in France as well as the deadlines for action against the award (see art. 1519, note 3). Actually, art. 1483, which is not applicable to international arbitration, states in essence that an award which does not mention the name of the arbitrators, the date of the award, or is deprived of reasoning, is void, unless there is evidence of these names, date and reasoning in the arbitration file. On the other hand, unless the parties have specifically agreed otherwise, the absence of reasoning and summary of the parties' position in an award as provided for under art. 1482 may affect the award's validity in France.

Article 1484

As soon as it is made, the arbitral award is *res judicata* with regard to the dispute it settles.

The award may be declared provisionally enforceable.

[...]

1. General. Art. 1484 is a French domestic arbitration provision made applicable to international arbitration by art. 1506.

2. Res judicata effect of the award. Pursuant to art. 1484, an international award – be it a foreign award or an international award rendered in France – has res judicata effects in France as soon as it is rendered, without further formalities. Accordingly, once rendered, an international award may be raised in a French litigation against another party to the award to prevent re-litigation of the same matters in France. Specifically, for an international award rendered in France to have res judicata effects in France, there is no need to obtain an enforcement order in France. The fact that an award may be, or is, actually challenged at the seat of arbitration does not deprive the award of res judicata effects in France.

2. Provisional execution of awards. Arbitral tribunals may decide in the award that the award shall be executed provisionally. An express decision of the arbitrators to that effect in the award is not necessary for enforcement of international awards rendered in France since 1 May 2011. Whether or not the tribunal makes such a decision, execution of the award in France against a party may be immediately pursued upon service to that party of the award bearing a French judge's enforcement order (*exequatur*). That is because the filing of an appeal against an international award's enforcement order under art. 1525, or the filing of a setting aside action against an international award rendered in France under art. 1518, does not suspend execution of the award (see art. 1526).

[Correction and interpretation of the award]

Article 1485

The award discharges the arbitral tribunal from the dispute the award settles.

However, at a party's request, the arbitral tribunal may interpret the award, rectify clerical errors and omissions affecting the award, or add to the award if the tribunal failed to decide a claim. The arbitral tribunal shall decide after having heard the parties or having called upon them [to be heard].

[...]

Article 1486

Claims made pursuant to the second paragraph of article 1485 shall be filed within three months from the notification of the award.

Unless otherwise agreed, the corrective or amended award shall be rendered within three months from the date the arbitral tribunal is

charged with the request. This time-limit may be extended in accordance with the second paragraph of Article 1463.

The corrective or amended award shall be notified in the same manner as the initial award.

1. General. Arts. 1485 and 1486 are French domestic arbitration law provisions made applicable to international arbitration by art. 1506. Pursuant to arts. 1485 and 1486, once an international award is rendered in France, the arbitrators are said to be *functus officio* with regard to the dispute(s) settled in the award. However, the tribunal may decide to make clerical or computational corrections or amendments to the award, or provide the parties with an interpretation of the award. Arbitrators may not otherwise change or amend their decision in a manner that modifies the parties' rights and obligations as they arise out of the original award.

2. Infra petita. Art. 1485 allows arbitral tribunals sitting in France to complete their awards upon a party's request, where the tribunal failed to decide all or part of a claim (see art. 1520(3)).

3. Procedure. Unless otherwise agreed by the parties, a request made on the basis of art. 1485 must be filed by a party within three months from service of the award (see art. 1525, notes 3 and 4) and the corrective award or decision refusing the request should be made within three months. During the process, the parties and arbitrators are to abide by the rules of procedure governing the arbitration as described in the above section on the arbitration procedure (see arts. 1462 to 1513).

[Recognition and enforcement in France of international awards]

Article 1514

Arbitral awards shall be recognized or enforced in France if their existence is proven by the party relying upon the award and if said recognition is not manifestly contrary to international public policy.

1. General. Art. 1514 sets forth the conditions for recognition and enforcement in France of both international arbitration awards rendered in France and foreign awards. Recognition and enforcement is only subject to the verification that the award exists and that, *prima facie*, recognition or enforcement of the award is not contrary to French international public policy (see notes 4-5 and art. 1520(5), note 22). In practice, a party that wishes to have an international award executed in France initiates an *ex parte* procedure by submitting the text of the award, together with that of the arbitration clause pursuant to which the award was rendered, before the President of the Court of First Instance with jurisdiction (see arts. 1515 and 1516). After verifying that on its face enforcement of the award does not appear to violate

French international public policy, the judge will stamp the award with an ‘enforcement order’ (exequatur) which mandates the French authorities to assist with execution of the award in France (see note 3).

2. International awards rendered in France and foreign awards. In considering issues of enforceability of international awards in France, it is important to always bear in mind that there are two types of international awards under French law: foreign awards (that is, awards rendered in arbitrations where the seat of arbitration is outside France), and international awards rendered in France (see Introductory remarks, note 5). There are minor differences in the regimes applicable to actions against foreign awards and international awards rendered in France that will be detailed hereafter (see arts. 1518, 1522 and 1525).

3. Recognition, enforcement and execution: three different concepts. Requests for recognition of an international award may be made before any French court where the award is submitted as evidence or before which a party merely intends to benefit from the *res judicata* effects of that award (see art. 1484). Recognition takes place when a French court takes note of the award’s existence (see art. 1515, note 1) and that the award does not blatantly violate French international public policy (see note 6 and 7). Enforcement is the process pursuant to which a party obtains an enforcement order stamped on the award. In principle, the judge with jurisdiction to stamp the enforcement order on the award is the President of the First Instance Court with jurisdiction (see art. 1516). Once an enforcement order is stamped in France on an international award, the award bearing that order becomes part of the French legal order and is considered a French court decision for the purpose of execution. Execution of an award is the process pursuant to which a party actually proceeds with the seizure of assets in France or otherwise goes about getting what it was awarded against a party to the award (see arts. 1516, notes 1-5 and 1526.). A party may request the recognition and enforcement of an award in France, even where the award cannot be executed in France in the absence of assets of the debtor in France (Cour d’appel Paris, 15 January 2013, *Sibirskiy Cement*).

4. French international public policy. Under art. 1514, an international award shall not be recognised or enforced in France if recognition or enforcement would be ‘manifestly contrary’ to international public policy. French courts apply their own definition of international public policy. French international public policy is defined as the ‘set of rules and values that the French legal order cannot accept to be disregarded, even in situations having an international character’ (Cour d’appel Paris, 27 October 1994, *LTDC*). That set of rules and values is not clearly determined and may vary with time. Those rules may generally be found in fundamental principles of procedure as well as in certain stock exchange regulations, currency control regulations, bankruptcy rules, criminal law, and European consumer protection regulation and competition law provisions. For concrete examples of

French international public policy, including procedural public policy (see art. 1520(5), notes 20-22).

5. French international public policy versus French domestic public policy. French courts distinguish between French international public policy and French domestic public policy. French domestic public policy is considerably broader than French international public policy. As a consequence, breach of French domestic public policy does not necessarily entail breach of French international public policy (Cour d'appel Paris, 12 March 1985, *Intrafor*). Moreover, French international public policy is applied less rigorously than French domestic public policy (Cour de cassation, 15 March 1988, *Grands Moulins de Strasbourg*; and 19 November 1991, *Grands Moulins de Strasbourg II*).

6. 'Manifestly contrary' and the extent of the judge's review under art. 1514. In deciding whether or not to recognise or order enforcement of an international award in France in accordance with art. 1514, the President of the First Instance Court with jurisdiction may only verify that the award exists and that recognition and enforcement of the award is not 'manifestly contrary' to French international public policy (Cour de cassation, 15 March 1988, *Grands Moulins de Strasbourg*). As the word 'manifestly' suggests, in determining whether recognition or enforcement of an international award would be manifestly contrary to French public policy, the President of the First Instance Court carries out a *prima facie* review. Moreover, and as mentioned in note 1, that review is usually carried out in *ex parte* proceedings where the party against whom enforcement is sought is not present. As a result, decisions that refuse to recognise or enforce an international award under art. 1514 on the basis that the award manifestly violates French international public policy are rare.

7. Review under art. 1514 should not be confused with review under art. 1520. Under art. 1514, the President of the First Instance Court with jurisdiction will not examine whether the international award at issue may be unenforceable on any of the grounds set forth art. 1520(1) to (4) (lack of jurisdiction of the tribunal, irregular composition of the tribunal, failure of the tribunal to fulfil its mission, denial of due process) (see art. 1520, notes 6-19). Moreover, although art. 1514 and art. 1520(5) both provide that an award may be denied enforcement on grounds of breach of French international public policy, these provisions apply differently. Specifically, a President of a First Instance Court with jurisdiction examining whether enforcement of an international award would be manifestly contrary to French international public policy under art. 1514, may look no further than the face of the award at issue. The Court of Appeal examining whether enforcement of an international award may be contrary to French international public policy under art. 1520(5), may in fact look further than that (see art. 1520(5), notes 6-8 and 19-21). Moreover, whereas the President of the First Instance Court acting under art. 1514 makes his decision based on *ex parte*

proceedings where the party against whom enforcement is sought is not present, the Court of Appeal acting under art. 1520(5) makes its decision after hearing both sides.

8. Powers of the judge in charge of making the enforcement order. The judge with jurisdiction may only grant or refuse recognition or enforcement under art. 1514, and may not add to the award or otherwise alter its content in any way (Cour de cassation, 14 December 1983, *Convert*). Having said this, the judge may recognise or grant an order enforcing only part of an award if, for instance, part of the award is separable from other parts that the judge finds would be manifestly contrary to French international public policy to recognise or enforce in France. Of note, awards that bear an enforcement order are considered French court's decisions for the purpose of execution. As a consequence, where an arbitral tribunal did not decide in its award on the issue of post-award interest on damages and that this issue may no longer be submitted to that same tribunal (see art. 1486), the award of damages will nevertheless bear interest for the purpose of execution of the award in France, at the French legal rate, from the date of the award (Cour de cassation, 30 June 2004, *BAII*) (see also art. 1520, note 8).

9. Sovereign States' immunity from execution. In France, sovereign States benefit from immunity against enforcement of judicial decisions, including awards. However, if a sovereign State signs an arbitration clause which contains an express undertaking to carry out the award, such as the undertaking contained in art. 34(6) of the 2012 ICC Arbitration Rules, French courts will consider that State to have waived its immunity from execution of the award in France (Cour de cassation, 6 July 2000, *Creighton*). In any event, assets belonging to a State may only be seized in France on the basis of an arbitral award if these assets were used by that State for an economical and commercial purpose connected with the transaction at issue in the award (Cour de cassation, 14 March 1984, *Eurodif*; and Cour d'appel Paris, 5 January 2012, *Sinequanon*).

Article 1515

The existence of an arbitral award is established by submission of an original thereof together with the arbitration agreement, or of copies of such documents satisfying the conditions required to ascertain their authenticity.

If such documents are not drafted in the French language, the requesting party shall submit a translation thereof. The requesting party may be invited to submit a translation established by a translator registered on a list of court experts or by a translator accredited by the administrative or judicial authorities of another Member State of the European Union, a Contracting Party to the European Economic Area Agreement or to the Swiss Confederation.

1. Evidence of the existence of an international award. In order to obtain recognition and enforcement of an international award in France – be it an international award rendered in France or a foreign award – the requesting party must file an original or a certified copy of the award, together with a copy of the arbitration clause pursuant to which the award was rendered, with the President of the First Instance Court with jurisdiction (see art. 1516, notes 3 and 4). In practice, the Paris Court generally requires that both an original and a certified copy of the award be filed with the Court. What constitutes a certified copy acceptable under art. 1515 will vary depending on the seat of arbitration where the award was rendered. France has bilateral treaties with different countries around the world and there is no uniform format for the conditions a document must satisfy in order for French courts to accept their authenticity.

2. Translation requirement. For the purpose of its enforcement in France, an award must be translated into French. That translation must only be performed by an accredited translator if the President of the First Instance Court with jurisdiction so requests.

[Formalities for execution of awards in France; form of the enforcement order]

Article 1516

The arbitral award may only be executed pursuant to an enforcement order (*exequatur*) issued by the First Instance Court (Tribunal de grande instance) with jurisdiction at the place where the award was rendered, or by the Paris First Instance Court when the award was rendered abroad.

The procedure relating to the request for enforcement shall be *ex parte*.

The request shall be filed by the most diligent party with the secretariat of the court together with the original of the award and of the arbitration agreement or their copies satisfying the conditions required to ascertain their authenticity.

Article 1521

The First President or, as soon as in charge, the judge in charge of the procedure (*conseiller de la mise en état*), may grant enforcement to the award.

1. General. Art. 1516 addresses the formalities necessary in order to execute an international award in France (see art. 1514, note 3), be it a foreign award or an international award rendered in France. Specifically, an international award must be stamped with an enforcement order (*exequatur*) in order to be executed in France. The ‘most diligent party’ referred to in art.

1516 is any party to the arbitration who files the request for the enforcement order.

2. Execution of international awards. An international award may only be executed in France once the award is stamped in France with an enforcement order and the award bearing the enforcement order has been served on the party against whom the award is to be executed. Having said this, as soon as the award is rendered, it is a legal title with *res judicata* effects in France, pursuant to which, conservatory attachment may be obtained in France (Cour de cassation, *Motokov*, and Cour d'appel Paris, 9 July 1992, *Norbert Beyrard*).

3. Jurisdiction of the President of the First Instance Court to grant enforcement orders on awards. According to art. 1516, enforcement orders on awards are granted by the President of the First Instance Court (Tribunal de grande instance) with jurisdiction at the place where the award was rendered, or by the Paris First Instance Court when the award is a foreign award. The President may delegate this power to another judge within his court. However, the President's jurisdiction is not exclusive (see notes 4-6).

4. Exceptions to the President of the First Instance Court's jurisdiction to grant the enforcement order. First, pursuant to art. 1524, the filing with the Court of Appeal of an action to set aside an international award rendered in France, terminates the President's jurisdiction to grant an enforcement order. In such cases, art. 1521 provides that pending the decision on the setting aside of the award, the First President of the Court of Appeal or, as soon as in charge, the judge in charge of the procedure (conseiller de la mise en état) before the Court of Appeal, may grant the order upon request of a party. On the same basis, these judges also have exclusive jurisdiction to grant an enforcement order on the award where no request for such order was filed before the filing of the action to set aside the award. In such cases, the First President of the Court of Appeal has exclusive jurisdiction to grant the enforcement order on the award until the appointment of the judge in charge of the procedure is notified to the parties. Once this notification occurs, only the judge in charge of the procedure (juge de la mise en état) before the Court of Appeal may grant the enforcement order on the award (Cour d'appel Paris, 26 September 2013, *Man Diesel*). Secondly, where a Court of Appeal dismisses an action to set aside an international award rendered in France, or rejects an appeal filed against an award's enforcement order, the enforcement order is automatically granted to the award (see art. 1527). Thirdly, only the French administrative courts may grant an enforcement order on international awards rendered in specific contract disputes with French public entities that concern contracts on the occupancy of French public property, public procurement contracts, PPP contracts, and contracts delegating the performance of public services (Cour d'appel Paris, 10 September 2013, *SMAC*). This exclusive jurisdiction of the administrative courts extends to the setting aside of these awards, and

appeals against enforcement orders on these awards (Tribunal des conflits, 17 May 2010, *INSERM*).

[Form of the enforcement order; refusal must be reasoned]

Article 1517

The enforcement order (*exequatur*) shall be affixed on the original or, if the original is not submitted, on the copy of the arbitral award complying with the conditions foreseen under the last paragraph of Article 1516.

Where the arbitral award is not drafted in the French language, the enforcement order shall also be affixed on the translation established in accordance with the conditions foreseen under Article 1515.

The order which denies enforcement (*exequatur*) to the arbitral award shall be reasoned.

1. Order granting enforcement. When granted, the enforcement order requested is merely stamped on the original or on the certified copy of the award, as well as on its translation if the award was drafted in a language other than French (see art. 1515). As discussed under art. 1525 below, an order to enforce a foreign award may be appealed to the Court of Appeal. An order to enforce an international award rendered in France may not be appealed, unless the parties have expressly waived their right to request the setting aside of the award pursuant to art. 1522 (see arts. 1518, 1519, 1524 and 1522).

2. Order refusing enforcement. The decision refusing enforcement of an award must be reasoned. This is true whether the international award at issue is a foreign award or an international award rendered in France. If the French judge refuses to grant an enforcement order on an award, he must render a decision and reason that decision. The refusal to recognise or enforce an international award is only possible where either the decision at issue is not an award or because enforcement of all or part of that award would be manifestly contrary to French international public policy (see art. 1514). As discussed under arts. 1523 and 1525 below, a French judge's decision refusing enforcement of an award may be appealed to the Court of Appeal.

[Appeal against a decision granting or refusing an enforcement order on a foreign award]

Article 1525

The decision ruling on a request for recognition or enforcement of an arbitral award rendered abroad may be appealed.

The appeal shall be filed within one month from service (by bailiff) of the decision.

The parties may nevertheless agree upon another means of notification when the appeal is filed against the award bearing the enforcement order.

The court of appeal may only refuse recognition or the granting of an enforcement order on the arbitral award for the grounds set forth in Article 1520.

1. General. French arbitration law allows for awards rendered in French domestic arbitration to be appealed or deprived of enforcement in France under specific circumstances (see Introductory remarks, note 1). No appeal is available under French international arbitration law against international awards. Art. 1525 only applies to foreign awards. Pursuant to art. 1525, parties may appeal the French judge's decision granting or refusing enforcement of a foreign award. Parties may not appeal an enforcement decision granted on an international award rendered in France, unless they expressly waived their right to request the setting aside of the award (arts. 1522 and 1524). Where the parties did not waive such right, the only action available in France against an international award rendered in France is a request for setting aside the award (see art. 1518). The exclusive grounds for both appeal of an enforcement order and the setting aside of an award are set forth under art. 1520.

2. Court with jurisdiction. When available, the appeal against a French court decision granting or refusing enforcement of an international award under arts. 1522, 1523 or 1525 is to be filed with the Court of Appeal with jurisdiction over the judge who made that decision in accordance with the rules governing the procedure before the Court of Appeal.

3. Time limit for appeal. A party's appeal of an enforcement order is only admissible within one month from service of that order on that party. When the party upon whom the enforcement or recognition decision has been served is domiciled outside France, that time limit may be extended by two more months. If no appeal is filed within the time limit specified, then the decision of the President of the First Instance Court becomes final. Under French law, service requires that delivery of the decision be made on the parties by a French bailiff (*huissier de justice*) upon the request of a party.

4. Waiver of the notification by bailiff requirement. The third paragraph of art. 1525, allows parties to waive the notification by bailiff requirement. In such a case, the one-month deadline will start running as from the date of receipt of the award in accordance with the parties' agreement. This provision is destined to facilitate the running of the one-month deadline where notification by bailiff may either last several months or is practically impossible in view of the foreign authorities' lack of cooperation. For all practical reasons, the parties' alternative agreement should allow the notifying party to swiftly receive evidence of the date of delivery of the award bearing the enforcement order to the other parties.

5. Grounds for appeal. Where the appeal bears upon an order that refuses to recognise or enforce an award in France, the Court of Appeal will only review whether the President of the First Instance Court reasoned his decision and correctly refused enforcement or recognition because the decision is not an award or because the enforcement of the award would manifestly be contrary to French international public policy (see art. 1514). Where the appeal bears upon an order that recognises or enforces an international award – be it a foreign award or an international award rendered in France (see arts. 1518 to 1524) – the only grounds available for appeal are set forth in art. 1520.

[Setting aside of international awards rendered in France]

Article 1518

The arbitral award rendered in France in an international arbitration may only be subject to an action to set aside.

Article 1519

The action to set aside shall be brought before the court of appeal with jurisdiction over where the award was rendered.

Such recourse is admissible as from the rendering of the award. It is no longer admissible if not filed within one month from notification of the award.

Notification shall be made by service (bailiff) unless otherwise agreed by the parties.

Article 1524

The order granting enforcement is not subject to any recourse except in the case foreseen in the second paragraph of Article 1522.

However, the action to set aside the award shall, as of right and within the limits of the court's mission, either constitute recourse against the order of the judge who decided on the enforcement, or shall end that judge's mission.

1. General. Arts. 1518, 1519 and 1524 only apply to international awards rendered in France. In principle, international awards rendered in France may only be the subject of an action to set aside before the Court of Appeal with jurisdiction (setting aside is also sometimes referred to as 'annulment'). Art. 1518 only allows the setting aside of an international award rendered in France on the grounds provided under art. 1520. Unless the parties expressly waive their right to request the setting aside of an international award rendered in France (see art. 1522), it is not possible to appeal decisions granting recognition and enforcement on such awards (art. 1524). Indeed, pursuant to art. 1522, parties may expressly waive their right to ask for the setting

aside of an international award rendered in France. In such cases, the parties may then appeal the enforcement order granted on the award. Foreign awards may not be set aside by the French courts. It is, however, possible to appeal decisions granting enforcement of foreign awards.

2. Court with jurisdiction. Art. 1519 makes clear that the action to set aside an international award rendered in France must be brought before the Court of Appeal having jurisdiction over the place where the award was rendered.

3. Timing. The action to set aside an international award rendered in France may be brought by any party named in the award as from the date of the award; that is to say even before an enforcement order has been made with respect to the award (see art. 1524). The action is admissible until one month after the award is served by bailiff on the moving party. When the party upon whom the award has been served is domiciled outside France, that time limit may be extended by two more months. Parties may however waive the service by bailiff requirement (see art. 1525, note 4).

[Waiver of the action to set aside an international award rendered in France]

Article 1522

By way of a specific agreement, the parties may at any time expressly waive their right to file an action to set aside.

In such a case, they may nevertheless appeal the enforcement order on one of the grounds set forth in Article 1520.

The appeal shall be filed within one month from service of the award bearing the enforcement order.

Notification shall be made by service (by bailiff), unless otherwise agreed by the parties.

Article 1523

The decision refusing recognition or enforcement (*exequatur*) of an international arbitration award rendered in France may be appealed.

The appeal shall be filed within one month from service (by bailiff) of the decision.

In such a case, the court of appeal shall decide, at a party's request, on the action to set aside the award, unless such party has either waived the right to initiate such action, or the time-limit for filing such action has expired.

1. General. Arts. 1522 to 1523 only apply to international awards rendered in France. As a general rule, parties may always appeal a decision refusing enforcement of an international award (arts. 1523 and 1525). In principle,

the only action available in France against an international award rendered in France is for the setting aside of the award (see art. 1518). However, parties may appeal an enforcement order made on an international award rendered in France if they have expressly waived their right to request the setting aside of the award under art. 1522. Art. 1522 is a new feature of French international arbitration law introduced by the 2011 decree (see Introductory remarks, note 1) and only applies to awards rendered by tribunals constituted since 1 May 2011. The waiver of the parties' right to request the setting aside of an international award rendered in France under art. 1522 still allows a party to oppose the enforcement of the award in France on the same grounds (see art. 1520, note 2). However, in the case of such a waiver, there will be no possibility for either party to obtain the setting aside (or annulment) of the award at the place where the award was rendered.

2. Court with jurisdiction. The appeal against an enforcement order decision is to be filed with the Court of Appeal with jurisdiction over the judge who made that decision (see arts. 1525, note 2 and 1527).

3. Timing. The appeal against a decision on the enforcement order may be brought by any party named in the award within the month following either the date upon which the refusal to recognise or enforce the award was notified (art. 1523) or the date upon which the award bearing the enforcement order was notified (see also art. 1527). In the latter case, parties may waive the requirement of service by bailiff (see art. 1525, note 4). When the party upon whom the decision has been served is domiciled outside France, the one-month time limit may be extended by two more months.

4. Effect on the enforcement order of the filing of an action to set aside. According to art. 1524, second paragraph, when an action to set aside an international award rendered in France is filed after the enforcement order was made on the award, it has, for all practical purposes, the same effect as an appeal on the enforcement order, were the appeal allowed (which it is not). Where a request for an enforcement order has been filed but not yet decided, the filing of an action to set aside the award deprives the enforcement judge of jurisdiction to make the order. Should a party then nevertheless wish to obtain the enforcement order on the award pending the decision on the setting aside, that party must file its request for an enforcement order before the President of the Court of Appeal with jurisdiction (see arts. 1516 and 1521, note 4), unless the appointment of the judge in charge of the procedure (*juge de la mise en état*) has been notified to the parties, in which case the request must be made directly to that judge.

[Grounds for setting aside and for appeal of an enforcement order]

Article 1520

The action to set aside is only available where:

(1°) the arbitral tribunal has wrongly retained or denied jurisdiction,

- (2°) the arbitral tribunal was improperly constituted,
- (3°) the arbitral tribunal ruled without complying with the mission conferred upon it,
- (4°) the principle of due process was not complied with, or
- (5°) recognition or enforcement of the award is contrary to international public policy.

1. General. The exclusive grounds for appeal of an enforcement order and for the setting aside of an international award rendered in France are set forth under art. 1520. There are no other grounds for appeal of an enforcement order or for the setting aside of an international award rendered in France.

2. Identity of the grounds for setting aside and appeal of an enforcement order. The grounds mentioned in art. 1520 are interpreted and applied in exactly the same way for the setting aside of international arbitration awards rendered in France and for appeals of enforcement orders on international awards. Thus, circumstances that would lead the Court of Appeal to sustain or reject an appeal on the enforcement order of an international award under art. 1520 would also lead the Court of Appeal to sustain or reject an action to set aside an international award rendered in France. Thus, if in principle no appeal is available in France against the enforcement order of an international award rendered in France (see however arts. 1524 and 1522), a party may still escape enforcement of that award in France by having the award set aside on the same grounds.

3. Grounds for appeal or setting aside of an award may not be modified. The grounds set forth in art. 1520 are limitative. For example, the allegation that an enforcement order was granted on a poor translation of the award is not a ground for appeal of that order (Cour d'appel Paris, 21 January 2014, *Dakin*). The parties may not agree to expand these grounds. For example, where an arbitration agreement provides that the award shall be subject to appeal before a national court, then that provision of the arbitration agreement will be considered null and void by the French courts without affecting the arbitration agreement in any other manner (Cour de cassation, 13 March 2007, *Chefaro*, and Cour d'appel Paris, 4 November 2010, *Dyncorp*). Parties may also not agree to further restrict the grounds for appeal in art. 1520. Having said this, a party's conduct in the course of the arbitration may be considered, by the French courts, as amounting to a waiver of that parties' right to appeal against the enforcement order or to request the setting aside of an award upon certain grounds provided for in art. 1520 (see art. 1466, note 5).

4. The setting aside or suspension of a foreign award at the seat of arbitration. Under French international arbitration law, all international awards are international judicial decisions that are not in and of themselves related to any national legal order (Cour de cassation, 29 June 2007, *Putrabali*).

Accordingly, French courts consider that the validity of an international award should be examined in light of the rules applicable at the place where its recognition and enforcement are sought. As a consequence, the setting aside of a foreign award by a court at the seat of arbitration is not, in and of itself, a ground for denying enforcement of that award in France (Cour d'appel Paris, 24 November 2011, *EGPC*). A foreign award set aside at the seat of arbitration may still be recognised and enforced in France (Cour de cassation, 9 October 1984, *Norsolor* and Cour de cassation, 23 March 1994, *Hilmarton*), or not (Cour de cassation, 26 June 2013, *EGPC*). Moreover, once the enforcement order granted in France of such an award is *res judicata* in France, a new award rendered between the same parties with regard to the same matter will not be recognised or enforced in France (Cour de cassation, 29 June 2007, *Putrabali*). Similarly, the filing of an action to set aside a foreign award at the seat of arbitration does not affect the recognition and enforcement of that award in France. In the same vein, the suspension of a foreign award at its seat of arbitration is not a ground for non-enforcement of that award in France (Cour de cassation, 10 March 1993, *Polish Ocean Lines*).

5. Timely objection and waiver. In order for an action based on any of the grounds provided in art. 1520(1) to (4) to be admissible before the Court of Appeal, the moving party must have raised appropriate objections as soon as possible during the arbitration proceedings (see art. 1466). Otherwise, that party may be deemed to have waived its right to complain before the Court of Appeal. For example, the participation of a party in an arbitration without objection amounts to a waiver of that party's right to claim that the arbitration clause is null and void (Cour de cassation, 21 November 2002, *Gromelle*). In the same manner, a party that starts an arbitration without objecting to jurisdiction is estopped from later raising a claim that no arbitration agreement exists (Cour de cassation, 6 July 2005, *Golshani*). By contrast, the signing of terms of reference indicating that a party objects to jurisdiction does not constitute any such waiver (Cour de cassation, 6 January 1987, *SPP*). In the same vein, the failure of a party to timely object that the tribunal was irregularly constituted amounts to a waiver of that party's right to later complain that it was so constituted (Cour d'appel Paris, 11 July 2002, *Beugnet Acquitaine*). Likewise, the failure to timely object that an arbitrator lacked independence also amounts to a waiver (see art. 1456, and Cour d'appel Paris, 22 February 2007, *Worms*, and Cour de cassation, 25 June 2014, *Tecnimont*). Similarly, a party that participates in the arbitration without objecting that the time limit for rendering the award has expired waives its right to later complain on that basis (Cour de cassation, 6 July 2005, *Al Amiouny*). Having said this, a party may only waive its rights under art. 1520 by failing to object, if that party had knowledge of the fact justifying its complaint (Cour d'appel Paris, 6 May 2004, *Malecki*) and if the rules applicable to the arbitration procedure would have afforded an opportunity to remedy the alleged irregularity. Where the rules would not have afforded any such opportunity, a party's failure to object does not constitute a waiver for the purposes of art. 1520 (Cour d'appel Paris,

21 January 1997, *Nu Swift*). With respect to actions based upon art. 1520(5) on the grounds that enforcement of an international award would be contrary to French international public policy, waiver by non-objection is only possible in part. The right to act against an international award rendered in France, or appeal an enforcement order, based on alleged violations of procedural French international public policy may be waived for lack of timely objection during the arbitration (see art. 1466). However, the right to act against an international award rendered in France, or appeal an enforcement order, based on allegations that enforcement of the award would violate substantive French international public policy cannot be waived, and a party is under no obligation to have raised its substantive international public policy concerns with the arbitral tribunal in order to be able to appeal the enforcement order, or request the setting aside of an international award rendered in France, on such ground before the Court of Appeal (Cour d'appel Paris, 14 June 2001, *Tradigrain*, Cour d'appel Paris, 18 November 2004, *Thalès*, Cour d'appel Paris, 22 October 2009, *Linde*).

6. The Court of Appeal will not review an award's reasoning. Appeal of international awards is not available under French international arbitration law. Hence, French courts regularly dismiss applications filed under art. 1520, where the complaining party relies on alleged deficiencies in the arbitral tribunal's reasoning in the award. Such arguments are simply inadmissible before the Courts of Appeal (Cour d'appel Paris, 18 January 2007, *France Animation*). Unless the rules applicable to the arbitration procedure provide that the award shall be reasoned, the failure to reason an international award is not, in and of itself, a ground to refuse enforcement of a foreign award in France (see art. 1482 note 1, and Cour de cassation, 22 November 1966, *Gerstlé*). Unless the parties agree the award does need to be reasoned, the French courts will merely verify that the award is reasoned, without regard to what the quality of the reasoning may be. Indeed, erroneous or internally inconsistent reasoning does not render an award unenforceable or invalid in France (Cour de cassation, 14 June 2000, *IAIGC*).

7. Extent of the Court of Appeal's review. In deciding upon the setting aside of an award, or upon the appeal of an enforcement order under art. 1520, the Court of Appeal has the power to examine any evidence and factual or legal submissions that it considers relevant to determine whether the action should succeed on any of the grounds specified in art. 1520. Moreover, the Court of Appeal has the power to review de novo any issue that may provide a basis for action under art. 1520 regarding jurisdiction (Cour de cassation, 6 January 1987, *SPP*), the regular constitution of the tribunal, as well as alleged violations of procedural international public policy (Cour d'appel Paris, 23 March 2006, *SNF*) or substantial international public policy (Cour d'appel Paris, 4 March 2014, *Gulf Leaders*). Having said this, the Court of Appeal tends to give deference to findings of arbitral tribunals, particularly

with respect to questions of fact (Cour de cassation, 12 February 2014, *M. Schneider*).

8. Extent of the Court of Appeal's powers. In deciding upon the setting aside of an award or upon the appeal of an enforcement order under art. 1520, the court may not add to the award or otherwise alter its content in any way (Cour de cassation, 11 September 2013, *CEPA*). The Court of Appeal may not order payment of interest (see art. 1514, note 8; and Cour d'appel Paris, 15 May 2003, *Central Timber Business*). If the claim for interest is based on contractual provisions, it will be for the tribunal to decide the issue. If post-award interest is claimed after the award was rendered, on the basis of French legal provisions applicable to post-judgment interest, it will be for the First Instance Court with jurisdiction, sitting with a single judge to decide (Cour d'appel Paris, 18 January 2001, *BAII*). Finally, pending the Court of Appeal's decision, the First President of the Court of Appeal or as soon as in charge, the judge in charge of the procedure (juge de la mise en état) before the Court of Appeal may make orders affecting the execution of the award within certain limits and under strict conditions (see art. 1526).

9. Sanctions for abuse of rights. In recent years, the Paris Court of Appeal increasingly sanctions parties who frivolously seek to block enforcement or recognition of international awards under art. 1520 (21 January 1997, *Nu Swift*, and 6 May 2004, *Babel Production*), or file claims under this provision that are found to be clearly inadmissible and filed for the sake of generating adverse publicity (Cour d'appel Paris, 18 February 1986, *Ojeh*).

[Article 1520(1)]

10. Scope of art. 1520(1). Art. 1520(1) provides that a party may obtain the setting aside of an award, or the annulment of the enforcement order, where the arbitral tribunal has wrongly retained or denied jurisdiction. This may be the case where the Court of Appeal finds that the arbitration agreement is null and void, does not exist, or where the arbitration agreement excludes the dispute settled in the award from the arbitral tribunal's jurisdiction. Alternatively, it may be the case where the tribunal wrongfully declined jurisdiction.

11. Separability and form of the arbitration agreement. Under French international arbitration law, an arbitration agreement does not need to be in writing, does not need to be signed by the parties to the arbitration (see also art. 1507), and is separable from the main contract that contains, or refers to it (see art. 1447).

12. No law applicable to the existence and efficiency of an arbitration agreement. When evaluating an appeal or a request for setting aside based on art. 1520(1), the Court of Appeal will not refer to any national law other than the mandatory rules of French law and French international public policy (Cour de cassation, 30 March 2004, *Uni-Kod*). The Court of Appeal will only

examine whether there was a ‘common intent of the parties’ to arbitrate the dispute settled in the award, and whether any mandatory rules of French law or French international public policy may affect the existence, validity or scope of the arbitration agreement (Cour de cassation, 8 July 2009, *Soerni*). In particular, the French domestic arbitration rules found in the French Civil Code, which prohibit individuals from entering into arbitration agreements in non-business related disputes, are not applicable in the context of an international arbitration (Cour de cassation, 28 January 2003, *Vivendi*). In addition, according to the Cour de cassation, French domestic arbitration rules also found in the French Civil Code, which prohibit French public entities from entering into arbitration agreements, do not to apply where the contractual relationship at stake involves international commerce (Cour de cassation, 2 May 1966, *Galakis*).

13. The ‘common intent of the parties’ to arbitrate. French courts are liberal in finding a ‘common intent of the parties’ to arbitrate. Common intent may be found where a party, against which an arbitration clause is invoked, was aware at the time of entering into a contract and accepted by silence the incorporation in the contract, of general conditions or a standard contract that contained an arbitral clause. Such a written reference may, for instance, be found in a confirmation telex or an invoice (Cour de cassation, 9 November 1993, *Bomar Oil*, and Cour d’appel Paris, 13 September 2007, *Comptoir Commercial Blidéen*). Similarly, entities that are directly involved in the performance of a contract which contains or refers to an arbitration clause, as well as in the dispute that may result from that contract, are bound by that arbitration clause (Cour de cassation, 27 March 2007, *ABS*, Cour d’appel Paris, 5 May 2011, *Kosa*). In the same vein, a sub-contractor involved in the performance of the main contract containing an arbitration clause is also bound by that clause where the sub-contractor had knowledge of the clause (Cour de cassation, 26 October 2011, *Construction Mécanique de Normandie*). However, an arbitration agreement contained in a contract that is confidential may not be imposed upon third parties to the contract (Cour d’appel Paris, 23 October 2012, *Cubana de Aviacion*). The consistent and repeated practice of the parties to provide for arbitration in their successive contracts may also constitute evidence of a ‘common intent to arbitrate’ disputes that later arise out of contracts between them that contain no dispute resolution clause (Cour d’appel Paris, 18 March 1983, *Van Dijk*). Similarly, where a chain of contracts operates successive transfer of merchandise property, the arbitration agreement contained in one of these contracts is transmitted together with the contractual rights at issue, unless evidence is provided that there was reasonable ignorance of the arbitration clause on the part of the party against whom that clause is invoked (Cour de cassation, 27 March 2007, *ABS*). Of note, insurers of cargo have been found to be bound by an arbitration clause contained in the underlying transportation contract to which they were not parties, and were even barred from alleging that they had no knowledge of the existence of

that arbitration clause (Cour de cassation, 22 November 2005, *Axa Corporate Solutions*). As to the parties' common intent with respect to the scope of their agreement to arbitrate, the language of the clause will be critical. A broadly worded clause will generally be found to cover both contract and tort claims arising out of or in connection with the contract at issue (Cour d'appel Paris, 19 May 2005, *Sucres et Denrées*). However, a tribunal that issues an award on matters falling outside the terms of a restrictive arbitration clause runs the risk that the award will not be enforced in light of art. 1520(1) (Cour d'appel Paris, 22 May 2003, *Caviartrade*). Similarly, an award may be found unenforceable under art. 1520(1) where an arbitral tribunal settles in a single arbitration a dispute concerning two separate contracts that respectively contain different arbitration clauses providing for arbitration at different seats (Cour d'appel Paris, 16 November 2006, *Empresa de Telecomunicaciones de Cuba*).

14. Setting aside of a partial award on jurisdiction. If a Court of Appeal sets aside a partial award on jurisdiction for lack of jurisdiction, the decision of the court deprives the arbitral tribunal of jurisdiction as soon as the decision is final. As a consequence, any other award that the arbitral tribunal may have rendered in the meantime is also considered as set aside by the Court of Appeal's as a consequence of the decision setting aside the partial award on jurisdiction (Cour d'appel Paris, 18 November 2004, *Caviartrade II*).

[Article 1520(2)]

15. Irregular constitution of the tribunal. Art. 1520(2) allows for appeal against orders enforcing foreign awards, or the setting aside of an award rendered in France, in cases where the arbitral tribunal was irregularly constituted. An arbitral tribunal may be irregularly constituted in a variety of ways. The tribunal is said to be irregularly constituted if: it was not constituted in accordance with the parties' agreement (Cour de cassation, 4 December 1990, *Gas del Estado*), e.g. the parties may have specified a particular procedure to be followed in the constitution of the tribunal, or particular criteria an arbitrator must satisfy to be eligible to sit on the tribunal; where parties with diverging interests did not have the opportunity to participate in an equal manner in the constitution of the tribunal (Cour de cassation, 7 January 1992, *Dutco*; and Cour d'appel Paris, 3 December 2013, *SGO*); if an arbitrator on the tribunal was not or did not remain independent (Cour d'appel Paris, 21 February 2012, *Garoube*, and Cour d'appel Paris, 6 April 1990, *Icco*), or failed to disclose facts or circumstances that raise reasonable concerns with respect to that arbitrator's independence or impartiality (see art. 1456); where an arbitral institution wrongfully rejected a challenge against an arbitrator on the tribunal (Cour d'appel Paris, 3 July 2007, *Clal MSX*). A Court of Appeal setting aside an award or annulling an enforcement order on the basis that the tribunal was irregularly constituted for an arbitrators' breach of the duty to disclose, must explain how the information which was not disclosed would

have created a reasonable doubt as to the independence or impartiality of the arbitrator in the mind of the parties (Cour de cassation, 10 October 2012, *Tecso*).

[Article 1520(3)]

16. Failure to comply with the tribunal's mission. Art. 1520(3) allows for appeal against an order enforcing a foreign award, or the setting aside of an award rendered in France, where the arbitral tribunal has rendered an award without complying with the mission conferred upon it by the parties. An arbitral tribunal may fail to comply with its mission in a variety of ways. The arbitral tribunal may fail to follow the rules agreed by the parties to govern the arbitration procedure. For example, if the rules agreed upon by the parties require that the award be reasoned, an arbitral tribunal that fails to produce a reasoned award fails to fulfil its mission (Cour d'appel Paris, 14 January 1997, *Chromalloy*). Similarly, an arbitral tribunal vested with powers of amiable compositeur that does not use those powers, fails to fulfil its mission (Cour de cassation, 18 October 2001, *Eurovia*, and Cour d'appel Paris, 17 December 2009, *Gothaer*). A tribunal not vested with powers of amiable compositeur that orders payment of an interest rate that was not claimed by the parties, and is neither the legal nor the contractual rate, necessarily acts as amiable compositeur and therefore fails to comply with its mission (Cour de cassation, 12 October 2011, *Groupe Antoine Tabet II*). A tribunal that fails to render its award within the applicable deadline, if any, also fails to comply with its mission (see art. 1463). Where the parties have agreed that certain rules of law shall apply to the merits of their dispute, art. 1520(3) may come into play where the arbitral tribunal entirely disregards those rules of law when making its award. In this regard, it is not necessary for the arbitral tribunal to make reference to the particular legal provisions upon which it relies in reaching its decisions (Cour d'appel Paris, 11 December 1997, *Consavio International*). In practice, it is usually sufficient for the arbitral tribunal merely to make reference to the applicable rules of law in its award. In no event will the Court of Appeal examine whether the applicable rules of law were correctly applied by the arbitral tribunal (Cour de cassation, 22 October 1991, *Cementos Portland*).

17. Infra petita and ultra petita. An arbitral tribunal may also fail to fulfil its mission because it fails to decide all of the claims before it (*infra petita*), or decides matters beyond those submitted by the parties (*ultra petita*). Awards that are *infra petita* do not run foul of art. 1520(3), because in such a situation, the claim may be again submitted to the tribunal (see art. 1485 and 1486). Moreover, the tribunal's failure to decide upon each and every legal or factual argument raised by the parties in the course of an arbitration is not sufficient to trigger the application of art. 1520(3). Awards that are *ultra petita* do provide a basis under art. 1520(3) for appeal of an order of enforcement of a foreign award or the setting aside of an international award rendered

in France, but only with respect to that part of the award that is *ultra petita* (Cour d'appel Paris, 28 May 1993, *SGI*). The arbitral tribunal's substantive mission is defined by the subject matter of the parties' dispute, which is itself determined by the parties' submissions during the course of the arbitration (Cour d'appel Paris, 29 September 2011, *Techman Head*). As a consequence, claims that are not expressly set out in terms of reference do not necessarily fall outside the arbitrators' mission (Cour de cassation, 20 June 2012, *Chaudronnerie Mécanique Algéroise*, and Cour de cassation, 6 March 1996, *Farhat Trading*).

18. Breach of the duty of collegiality. A principle of collegiality, not expressly mentioned in the CPC, generally requires that all arbitrators composing the arbitral tribunal be afforded the opportunity to participate in any and all of the tribunal's deliberations (Cour d'appel Paris, 1 July 1997, *Comilog*, Cour d'appel Paris, 16 January 2003, *Intelcam*). A violation of this principle may serve as a basis under art. 1520(3) and (5) to appeal the enforcement order of a foreign award (Cour d'appel Paris, 6 May 2004, *Malecki*) or set aside an international award rendered in France. The party relying on a breach of the duty of collegiality must show evidence of such breach (Cour de cassation, 29 June 2011, *Papillon*).

[Article 1520(4)]

19. Failure of the tribunal to comply with due process. Art. 1520(4) allows appeal against enforcement orders on awards and the setting aside of international awards rendered in France where due process was not complied with during the arbitration procedure (see art. 1510). Because due process forms part of French international public policy, an alleged denial of due process may also provide grounds for appeal of an enforcement order, or the setting aside of an international award rendered in France for violation of international procedural public policy under art. 1520(5) (see notes 20 and 21). A tribunal that grants a claim for grounds other than those put forward by the parties in the arbitration, without inviting the parties to comment upon these grounds, breaches due process and violates its mission (Cour d'appel Paris, 3 September 2013, *Albata*).

[Article 1520(5)]

20. French international public policy: general. Pursuant to art. 1520(5), a party may appeal an enforcement order on a foreign award, or request the setting aside of an international award rendered in France, where recognition or enforcement of the award would be contrary to French international public policy (see art. 1514, notes 4 and 5). This article thus addresses both violations of French substantive international public policy and French procedural international public policy. The laws of the seat of the arbitration and the rules of law applicable to the merits of the dispute are irrelevant to the Court

of Appeal when examining whether recognition or enforcement of an award would be contrary to substantive French international public policy.

21. Procedural international public policy. Appeals of enforcement orders and actions to set aside awards based on allegations that enforcement or recognition of the award would be contrary to French procedural public policy may be brought pursuant to art. 1520(5). In order to succeed on this ground, the moving party must show that the breach at issue actually caused it harm (Cour d'appel Paris, 21 January 1997, *Nu Swift*). Enforcement of an award may be contrary to French procedural public policy in a variety of circumstances, including where an arbitrator lacked impartiality or independence (see art. 1456), or the arbitrator breached its duty of loyalty (see art. 1464, note 2), or where a party was denied due process (see art. 1510). These violations of French procedural international public policy would also normally provide a basis for appeal or for the setting aside of the award under art. 1520(2) and (4), respectively (see notes 15 and 19). An arbitrator's breach of a duty of loyalty creating an imbalance among the parties violates 'rights of defence' and therefore violates procedural international public policy (Cour de cassation, 24 March 1998, *Excelsior Films*). In a case involving alleged bribery, a tribunal found in its award that certain documents constituted evidence that the purpose of the contract at issue was not for bribery. Once the award was rendered, a party asserted that it had just discovered that these documents were in fact false and that as a consequence, the award gave effect to a contract for bribery which was against French substantive international public policy. The Court of Appeal found the award unenforceable on the grounds that the submission of false documents in the course of an arbitral procedure constituted a fraud that was, in and of itself, a breach of French procedural international public policy (Cour d'appel Paris, 30 September 1993, and Cour de cassation, 19 December 1995, *Westman*, see also Cour d'appel Paris, 1 July 2010, *Thalès II*).

22. Substantive French international public policy. Art. 1520(5) also provides a ground for appeal of an order of enforcement of a foreign award where enforcement or recognition of the award would be contrary to French substantive international public policy at the time the Court of Appeal exercises its powers (Cour d'appel Paris, 23 March 2006, *SNF*). It is the solution reached in the award and not the award's reasoning that the Court of Appeal will examine in light of French substantive international public policy (Cour de cassation, 15 March 1988, *Grands Moulins de Strasbourg*). The arbitral tribunal's disregard or misapplication of a French rule of international public policy does not in and of itself constitute the violation envisaged under art. 1520(5) (Cour de cassation, 23 February 1994, *Multitrade*). Rather, the Court of Appeal will focus on whether recognition or enforcement of the award in France violates French international public policy. To sustain an appeal or a setting aside action on this ground, the violation of French substantive international public policy must generally be blatant, actual and concrete

(Cour de cassation, 21 March 2000, *Verhoeft*, Cour d'appel Paris, 23 March 2006, *SNF*, Cour de cassation, 4 June 2008, *SNF*, see also Cour d'appel Paris, 18 November 2004, *Thalès*, Cour d'appel Paris, 22 October 2009, *Linde*). As discussed in note 7, the Court of Appeal has the power to review de novo any issue that may provide a basis for appeal of an enforcement order, or the setting aside of an international award rendered in France, on grounds of a breach of French substantive international public policy (Cour d'appel Paris, 23 March 2006, *SNF*). Having said this, as a matter of practice, the Court of Appeal often tends to give a certain deference to the findings of the arbitral tribunal, particularly with respect to questions of fact. Cases where the Court of Appeal has denied enforcement on the grounds of a violation of French substantive international public policy are rare. Corruption and bribery are contrary to French substantive international public policy (Cour de cassation, 19 December 1995, *Westman*). European competition law is part of the European Union member states' international public policy (UECJ, 1 June 1999, *Eco Swiss*). As France is a member state of the European Union, European competition law is part of France's substantive international public policy. Certain European regulatory provisions on the protection of consumers are also part of French substantive international public policy and may affect the validity of the arbitration agreement itself (UECJ, 26 October 2006, *Mostaza Claro*). Certain French rules on bankruptcy proceedings are also part of French international public policy (Cour de cassation, 5 February 1991, *Almira Films*). Specifically, if a French party files for bankruptcy during the course of an arbitration, the arbitral tribunal should suspend the proceedings for the time it takes to join the receiver into the arbitration. In addition, the arbitral tribunal may be prevented from ordering that party to pay debts that were owed prior to its filing for bankruptcy (Cour de cassation, 2 June 2004, *Alstom Power*, two cases). The arbitral tribunal may still decide how much the bankrupt party owes; it is simply prevented from ordering that party to pay that amount (Cour de cassation, 6 May 2009, *Liquidator of Jean Lion*, Cour d'appel Paris, 12 May 2011, *Intertraff*). Of note, awards ordering payment of an interest rate that is considered usury under French law, does not violate French international public policy (Cour d'appel Paris, 27 October 2011, *Advens*).

[Procedure before the Court of Appeal; Rejection of appeal or action to set aside confers exequatur]

Article 1527

The appeal of the order deciding on enforcement and the action to set aside the award shall be filed, heard and decided in accordance with the rules governing adversarial proceedings set forth in articles 900 to 930-1.

Denial of the appeal or of the action to set aside grants enforcement to the award, or to the provisions of the award which have not been affected by the court's decision.

1. General. Art. 1527 does not provide any additional grounds for recourse in connection with international awards, nor does art. 1527 affect the grounds set forth in art. 1520. According to the first paragraph of art. 1527, the procedural rules generally applicable before the French Courts of Appeal are to be followed in cases of appeal of enforcement orders and actions to set aside international awards rendered in France (see arts. 1518, 1519, 1524 and 1525). For instance, according to the rules generally applicable before the Court of Appeal, decisions of the Court of Appeal rendered in matters concerning international arbitration may be subject to recourse before the Supreme Court (Cour de cassation). The second paragraph of art. 1527 provides that if an appeal against an enforcement order is rejected in whole or in part by the Court of Appeal, the rejection of the appeal constitutes an order of enforcement in France for the corresponding part of the award. Similarly, with respect to international awards rendered in France, art. 1527 provides that if the Court of Appeal rejects an action for setting aside an award in whole or in part, the rejection of the setting aside action constitutes an enforcement order for the corresponding part of the award in France.

[Revision]

Article 1502

The action for revision is available against the award in cases provided for judgments at Article 595 and under the conditions set forth in Articles 594, 596, 597 and 601 to 603.

The action shall be filed before the arbitral tribunal.

[However, if the tribunal cannot be reconvened, the action shall be filed before the court of appeal which would have had jurisdiction to hear other forms of recourse against the award.]

1. General. Art. 1502 is a French domestic arbitration law provision made in part applicable to international arbitration by art. 1506. It is a mandatory provision of French arbitration law. Parties may not agree to the contrary.

2. Conditions for admissibility of a request for revision. According to arts. 594 and 595 CPC, parties which through no fault of their own, were not in a position to raise one of the grounds foreseen in art. 1520 against the award or the award's enforcement order before the award was rendered, may file a request for revision against the award. According to arts. 595 and 597 CPC, the request for revision is only admissible if filed against all other parties to the arbitration, and: (i) it has come to light further to the award, that the award was obtained by a fraud committed by or on behalf of the party in whose favour the award was rendered; (ii) decisive documents withheld by another party to the arbitration were discovered since the award was rendered; (iii) the award was rendered on the basis of documents judicially declared, or admitted to be false since the award was rendered; or (iv) the

award was rendered on the basis of affidavits, testimonies or oaths which were judicially declared false since the award was rendered.

3. Time limit. Pursuant to art. 596, in order to be admissible, the request for revision must be filed within two months from the date upon which the requesting party became aware of the grounds for the revision request (Cour d'appel Paris, 5 March 2013, *CAT II*).

4. Jurisdiction for revision. The third paragraph of art. 1502 provides that if the tribunal cannot be reconvened, the action shall be filed before the Court of Appeal which would have had jurisdiction to hear other forms of recourse against the award. This provision is not applicable to international arbitration. Therefore, under French international arbitration law, a request for revision of an award based on the grounds referred to in art. 1502 may only be submitted to the arbitral tribunal that rendered the award, or to a new tribunal if the tribunal that rendered the award cannot be reconvened.

[Other means of recourse]

Article 1503

The arbitral award may neither be the subject of opposition proceedings or petition before the Supreme Court.

1. General. Art. 1503 is a French domestic arbitration law provision that is made applicable to international arbitration by art. 1506. It is a mandatory provision and parties cannot agree otherwise. This provision clarifies that actions against default judgments, and direct actions before the Supreme Court, both available in France against French First Instance courts judgments, are not admissible against awards. Moreover, third party challenges available against domestic awards are not admissible against international awards (Cour d'appel Paris, 12 November 2013, *Fitzpatrick*).

[Provisional execution of awards]

Article 1526

The action to set aside the award and the appeal against the decision granting the enforcement order (exequatur) shall not suspend enforcement.

However, the First President ruling in expedited proceedings or, as soon as in charge, the judge in charge of the procedure (conseiller de la mise en état) may suspend or set conditions for enforcement of the award if such enforcement may seriously harm one of the parties' rights.

1. General. The 2011 decree (see Introductory remarks, note 2) fundamentally modified the regime applicable to provisional enforcement of awards.

The new regime applies to international awards rendered after 1 May 2011. Under the former regime, that is still applicable to awards rendered before 1 May 2011, and described in the first edition of this book, the action to set aside an award and the appeal against the decision granting the enforcement order (*exequatur*) suspended enforcement.

2. Provisional execution in France of international awards. Orders for the provisional execution of an award may be made by the arbitral tribunal in its award (see art. 1514, notes 1-3). However, an express decision of the arbitrators to that effect in awards rendered after 1 May 2011 is no longer necessary, so far as execution of the award in France is concerned. That is because under art. 1526, the filing of an appeal against an international award's enforcement order, or the filing of a setting aside action against an international award rendered in France, does not suspend execution of awards. Before any such action is filed, the First President of the Court of Appeal with jurisdiction where execution is sought, or the judge in charge of the procedure (*jugé de la mise en état*) before the Court of Appeal, once appointed, may suspend provisional execution of the award or make execution of the award subject to conditions. For example, allow the deposit in an escrow account of the amounts payable under the award pending the appeal on the enforcement order (Cour d'appel Paris, 23 April 2013, *Spie Batignolles Nord*). This is only possible, pursuant to art. 1526, where the provisional execution of the award would 'seriously harm a parties' rights'. This is the case where a party is ordered to pay significant amounts abroad under a foreign award, and that party shows evidence that it may be extremely difficult to obtain reimbursement abroad if the award's enforcement order is successfully appealed in France (Cour d'appel Paris, 23 April 2013, *Spie Batignolles Nord*). This is not the case where a party only alleges it will have to file for bankruptcy if the award is actually executed (Cour d'appel Paris, 13 July 2012, *CIEC*).