

# European Branch of the Chartered Institute of Arbitrators

## New Decree on French Arbitration Law

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## History and Insight

Work began in 2001: ten years of study!

2001 – 2004: five Working Groups under the aegis of the French Committee on arbitration

- Arbitration Agreement (Prof. E. Loquin; Me. L. Degos)
- Arbitral Tribunal (Me. Y. Derains; Me. Laurent Jaeger)
- Arbitral proceedings and Award (Me. M. de Boissésou; Prof Th. Clay; Me. C. Malinvaud)
- Recourses (Me. J. Pellerin; Me. Ph. Pinsolle)
- International Arbitration (Prof. P. Mayer; Me. J.-G. Betto)

Five Working Groups reporting to a Study Commission chaired by Me. J.L. Delvolvé, with permanent participation of Prof. Ph. Fouchard († 2004), Prof. E. Gaillard, Prof. Ch. Jarrosson and Me. B. Moreau.

## History and Insight

End 2004: four different and competitive approaches

1. Dualistic version (result of the Working Groups' work: distinction between Domestic and International Arbitration)
2. Monistic version (elaborated by J. L. Delvolvé: no distinction, unique regime)
3. "Unified" version (elaborated by Prof. Ch. Jarrosson and J.G. Betto: dualistic version with a common core of rules for domestic and international arbitration)
4. "A minima" version (elaborated by Prof. E. Gaillard: dualistic version with a minimum of rules for international arbitration)

## History and Insight

2005: the political choice of a dualistic version (two “mini codes” of arbitration) taking into account the redaction of the other versions as a continuous improvement of the text.

What about International Arbitration ?

Main issues under discussion: criteria of application

- for French arbitration law
- for the jurisdiction of the French judge acting in support of the arbitration

Territoriality vs. Universalism

Mandatory rules vs. suppletive rules

Proposed reform presented to Ministry of Justice and published *in Revue de l'arbitrage* in 2006.

## History and Insight

2007 / 2008: pause in the process (European regulation and administrative arbitration)

Autumn 2009: Negotiation with French Government restarted

March 2010: reform proposal made by the Ministry of Justice

Extensive survey / direct discussions with the “Chancellery”:

- French Arbitration Committee
- National Counsel of the Bars: the legal profession
- State Counsel

→ Decree dated January 13, 2011;  
applicable from May 1, 2011

## Decree of January 13, 2011

Dualistic Law: Title II – International Arbitration

Criteria of “internationality” unchanged :

### **Article 1504**

An arbitration is international when international trade interests are at stake

What are the criteria of application relating to

- the judge acting in support of the arbitration (Juge d’appui) → Art. 1505
- French procedural / arbitration law → Art. 1506

## No particular criteria for the application of French procedural / arbitration law

### Article 1506

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

- (1) 1446, 1447, 1448 (paragraphs one and two) and 1449, regarding the arbitration agreement;
- (2) 1452 through 1458 and 1460 regarding the constitution of the arbitral tribunal and the procedure governing application to the judge acting in support of the arbitration;
- (3) 1462, 1463 (paragraph two), 1464 (paragraph three), 1465 through 1470 and 1472 regarding arbitral proceedings;
- (4) 1479, 1481, 1482, 1484 (paragraphs one and two), 1485 (paragraphs one and two) and 1486 regarding arbitral awards;
- (5) 1502 (paragraphs one and two) and 1503 regarding means of recourse other than appeals or actions to set aside.

**... and a rather sophisticated system**

## Conditions and jurisdiction of « *juge d'appui* »

### Article 1505

In international arbitration, unless otherwise stipulated, the judge acting in support of the arbitration shall be the President of the *Tribunal de grande instance* of Paris when:

- (1) the arbitration takes place in France; or
- (2) the parties have agreed that French procedural law shall apply to the arbitration; or
- (3) the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or
- (4) one of the parties is exposed to a risk of a denial of justice.

## Before arbitration starts...

### Article 1449

The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to taking evidence or provisional or conservatory measures.

Subject to provisions governing conservatory attachments and judicial security, application shall be made to the President of the *Tribunal de grande instance* or of the *Tribunal de commerce* who shall rule on the measures relating to taking evidence in accordance with the provisions of Article 145 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement.

## What's new about Arbitration Agreement ?

No difference between arbitration clause or submission agreement

### Article 1507

An arbitration agreement shall not be subject to any requirements as to its form.

- ↳ No *ad validitatem* condition
- ↳ What about “oral” arbitration agreement → Art. 1515
- ↳ All may be confirmed afterwards.

## **What's new about Arbitration Agreement ?**

Autonomy of the Arbitration Agreement clearly stated

### Article 1447

An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.

If an arbitration clause is void, it shall be deemed not written.

## Effects of the Arbitration Agreement: Kompetenz – Kompetenz Principle reaffirmed

↳ Negative effect

### Article 1448

When a dispute subject to an arbitration agreement is brought before a court, the court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute **and** if the arbitration agreement is manifestly void or manifestly not applicable.

A court may not decline jurisdiction on its own motion.

↳ Positive effect

### Article 1465

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

## No more Blank or Pathological Clause

### Article 1452

If the parties have not agreed on the procedure for appointing the arbitrator(s):

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

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

### Article 1453

If there are more than two parties to the dispute and they fail to agree on the procedure for constituting the arbitral tribunal, the person responsible for administering the arbitration or, where there is no such person, **the judge acting in support of the arbitration**, shall appoint the arbitrator(s).

### Article 1454

Any other dispute relating to the constitution of an arbitral tribunal shall be resolved, if the parties cannot agree, by the person responsible for administering the arbitration or, where there is no such person, **by the judge acting in support of the arbitration**.

## The “juge d’appui”: two other roles / powers

### ↳ Independence and impartiality

#### **Article 1456**

The constitution of an arbitral tribunal shall be complete upon the arbitrators’ acceptance of their mandate. As of that date, the tribunal is seized of the dispute.

Before accepting a mandate, an arbitrator shall disclose any circumstances that may affect his or her independence or impartiality. He or she shall also disclose promptly any such circumstances that arise after accepting the mandate.

If the parties cannot agree on the removal of an arbitrator, the issue shall be resolved by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration to whom application must be made within one month following the disclosure or the discovery of the fact at issue.

## The “juge d’appui”: two other roles / powers

↳ Termination of the arbitrator’s mission

### **Article 1457**

Arbitrators shall carry out their mandate until it is completed, unless they are legally incapacitated or there is a legitimate reason for them to refuse to act or to resign.

If there is disagreement as to the materiality of the reason invoked, the matter shall be resolved by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration to whom application must be made within one month following such incapacity, refusal to act or resignation.

### **Article 1458**

An arbitrator may only be removed with the unanimous consent of the parties. Where there is no unanimous consent, the provisions in the final paragraph of Article 1456 shall apply.

## The applicable principles in international arbitration proceedings

**Article 1510** → Main international principle replacing the “fundamental principles governing court proceedings”

Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.

**Article 1464** → (D&I) Good faith / loyalty principle

Both parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings.

**Article 1466** → (D&I) estoppel principle

A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.

## New Powers of the arbitral tribunal

### Article 1467 → Production of an item of evidence / injunction with penalties

The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters, unless the parties authorize it to delegate such tasks to one of its members.

The arbitral tribunal may call upon any person to provide testimony. Witnesses shall not be sworn in.

If a party is in possession of an item of evidence, the arbitral tribunal may require that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction.

### Article 1468 → Conservatory or provisional measures / order with penalties

The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such **an** order. However, only courts may order conservatory attachments and judicial security. The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted.

### Article 1469 → Evidence held by a third party / assistance of the French judicial authority

If one of the parties to arbitral proceedings intends to rely on an official (*acte authentique*) or private (*acte sous seing privé*) deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the *Tribunal de grande instance* for the purpose of obtaining a copy thereof (*expédition*) or the production of the deed or item of evidence.

(...)

## What about timing?

### Article 1463 (§ 2)

The statutory or contractual time limit may be extended by agreement between the parties or, where there is no such agreement, by the judge acting in support of the arbitration.

### Article 1472

Where necessary, the arbitral tribunal may stay the proceedings. The proceedings shall be stayed for the period of time set forth in the stay order or until such time as the event prescribed in the order has occurred.

The arbitral tribunal may, as the circumstances require, lift or shorten the stay.

## New provisions regarding the arbitral award

↳ Casting vote for the chairperson of the arbitral tribunal

### Article 1513

Unless the arbitration agreement provides otherwise, the award shall be made by majority decision. It shall be signed by all arbitrators.

However, if a minority refuses to sign, the others shall so state in the award.

If there is no majority, the chairman of the arbitral tribunal shall rule alone. Should the other arbitrators refuse to sign, the chairman shall so state in the award, which only he or she shall sign.

An award made under the circumstances described in either of the two preceding paragraphs shall have the same effect as if it had been signed by all the arbitrators or made by majority decision.

## New provisions regarding the arbitral award

International award shall now state specific elements  
→ Articles 1481 and 1482

and

### Article 1484

As soon as it is made, an arbitral award shall be *res judicata* with regard to the claims adjudicated in that award. The award may be declared provisionally enforceable.

## **New provisions regarding the arbitral award**

### **Power of rectification, interpretation and correction / time limit**

#### **Article 1485 (§§ 1 and 2)**

Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award.

However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard.

#### **Article 1486**

Applications under Article 1485, paragraph two, shall be filed within three months of notification of the award.

Unless otherwise agreed, the decision amending the award or the additional award shall be made within three months of application to the arbitral tribunal. This time limit may be extended in accordance with Article 1463, paragraph two. The decision amending the award or the additional award shall be notified in the same manner as the initial award.

## Recognition and enforcement of arbitral awards made abroad or in international arbitration

↳ Always the same criteria, Article 1514 “Not manifestly contrary to international public policy”.

↳ New provisions regarding translation provided “by a translator whose name appears on a list of court experts or a translator accredited by the administrative or judicial authorities of another Member State of the European Union, a contracting party to the European Economic Area Agreement or the Swiss Confederation”.

## Recourse – awards made in France

### Article 1518

The only means of recourse against an award made in France in an international arbitration is an action to set aside.

However, some domestic provisions are applicable and state:

### Article 1502 (§§ one and two) (only non mandatory recourse)

Application for revision of an arbitral award may be made in the circumstances provided in Article 595 for court judgments, three and under the conditions set forth in Articles 594, 596, 597 and 601 through 603. Application shall be made to the arbitral tribunal.

### Article 1503

No *opposition* may be filed against an arbitral award, nor may the *Cour de Cassation* be petitioned to quash the award.

## Recourse – awards made in France

### Article 1519

An action to set aside shall be brought before the Court of Appeal of the place where the award was made.

Such recourse can be had as soon as the award is rendered. If no application is made within one month following notification of the award, recourse shall no longer be admissible.

The award shall be notified by service (*signification*), **unless otherwise agreed by the parties.**

## Recourse – awards made in France

Reminder: same causes of annulment but slightly altered wording

### Article 1520

An award may only be set aside where:

- (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
- (2) the arbitral tribunal was not properly constituted; or
- (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
- (4) due process was violated; or
- (5) recognition or enforcement of the award is contrary to international public policy.

## Recourse – awards made in France

### NEW – WAIVER OF RECOURSE

#### Article 1522

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

Where such right has been waived, the parties nonetheless retain their right to appeal an enforcement order on one of the grounds set forth in Article 1520.

Such appeal shall be brought within one month following notification of the award bearing the enforcement order. The award bearing the enforcement order shall be notified by service (*signification*), **unless otherwise agreed by the parties.**

## Recourse – award made abroad

Just one Article...

### Article 1525

An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed.

The appeal shall be brought within one month following service (*signification*) of the order.

However, the parties may agree on other means of notification when an appeal is brought against an award bearing an enforcement order.

The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520.

## Recourse – award made in France and abroad

NEW – No Suspension of Enforcement

### Article 1526

**Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award.**

However, the first president ruling in expedited proceedings (*référé*) or, once the matter is referred to him or her, the judge assigned to the matter (*conseiller de la mise en état*), may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.

## In conclusion...

- ↪ No interference of the French judicial judge upon the arbitrator's power to rule (on its jurisdiction and on the merits): only help of the judicial authority and of the "Juge d'appui"
- ↪ No "revision" recourse which may allow the judicial court to review the award
- ↪ No recourse suspending enforcement of an award
- ↪ No recourse to set aside can be agreed (i.e. no recourse on the award validity): ever existing award!
- ↪ No French/national impact location: French international award can be treated as award made abroad!
- ↪ ... A 100 % arbitration-confident (and friendly) location.

**THANK YOU !**