The Legal 500 Country Comparative Guides

France: International Arbitration

This country-specific Q&A provides an overview to international arbitration laws and regulations that may occur in France.

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1. **Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?**

   Yes, France is a signatory to the New York Convention. It entered into force in France on 24 September 1959. In practice, the New York Convention is rarely applied, as French arbitration rules on recognition and enforcement are generally more favourable than the New York Convention (Article VII (1) of the New York Convention).

   France made a reciprocity reservation in the New York Convention, but it does not concern the provisions applicable to the recognition and enforcement of foreign awards. These provisions are applicable to all awards rendered in foreign countries, regardless of whether they are signatories of the New York Convention or not.

2. **What other arbitration-related treaties and conventions is your country a party to?**

   France has ratified several multilateral treaties such as the European Convention on International Commercial Arbitration of 1961 and the Washington Convention of 1965 creating the International Centre for Settlement of Investment Disputes (ICSID).

   In addition, as of 1 October 2019, 94 BITs are in force between France and foreign States. France is also a member of the European Union, which as of 1 October 2019 is a party to 56 multilateral treaties in force, including the European Energy Charter.

3. **Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?**

   French international arbitration law is not based on the UNCITRAL Model Law. There are, however, not many significant differences between French international arbitration law and the UNCITRAL Model Law. French law generally appears as more favourable to arbitration than the UNCITRAL Model Law in some respects.

   For example, contrary to Article 36(1)(a)(v) of the UNCITRAL Model Law, French law provides that the setting-aside of an award by a court at the seat of the arbitration is not a ground to deny enforcement of the arbitral award in France (*Omnium de Traitement et de Valorisation – OTV v. Hilmarton*, French Court of Cassation, First Civil Chamber, 10 June 1997; *Putrabali Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices,* French Court of Cassation, First Civil Chamber, 29 June 2007).

4. **Are there any impending plans to reform the arbitration laws in your country?**

   There are currently no impending arbitration reforms in France.

   The latest reforms of the arbitration legislation in France date back to Decree No. 2011-48

dated 13 January 2011, which codified some well-established jurisprudence and developed new principles, and Law No. 2016-1547 dated 18 November 2016 “for the modernization of XXIst century justice.”

Article 2061 of the French Civil Code was amended by article 11-3°of Law No. 2016-1547. It now provides that arbitration clauses are only enforceable against the parties who concluded these clauses in their professional capacity.

Additionally, this new law promotes alternative dispute resolution in its article 4, which provides that:

“*Under penalty of inadmissibility, which the judge may raise ex officio, referral to the court of first instance by declaration to the registry must be preceded by an attempted conciliation conducted by a conciliator of justice, except:*

1° If at least one of the parties requests the approval of an agreement;

2° If the parties justify further steps taken to reach an amicable resolution of their dispute;

3° If the absence of recourse to conciliation is justified by a legitimate reason.” (free translation)

However, there has been no Decree implementing this provision into the FCCP yet. This means that it is not yet in force as French arbitration law.

This year, Law No. 2019-222 dated 23 March 2019 “on programming 2018-2022 and reform for justice” introduced two new articles 4-1 and 4-2 to article 4 of Law No. 2016-1547. These provisions will subject online alternative dispute resolution services (conciliation, mediation and arbitration) to obligations relating to personal data protection. In addition, article 4-2 provides for the possibility of rendering arbitral awards in electronic form under certain conditions. Law No. 2019-222 has also not yet been implemented by Decree so as to incorporate these provisions into the FCCP.

Finally, on 7 February 2018 two protocols were concluded between the Ministry of Justice, the Paris Bar Council and the Paris Court of Appeal on the one hand, and the Ministry of Justice, the Paris Bar Council, and the Paris Commercial Court on the other hand. These protocols created two international Chambers, one at the Paris Court of Appeal, and one at the Paris Commercial Court, to deal with disputes arising out of international trade contracts (regardless as to where the substantive applicable law is French law or a foreign law). The protocols are applicable to proceedings initiated on or after 1 March 2018. These international chambers offer a tailor-made procedure for international disputes, under the supervision of the judge: English can be used in the debates and proceedings; witnesses and

experts can be heard and cross-examined in English; exhibits can also be communicated in English.

5. **What are the validity requirements for an arbitration agreement under the laws of your country?**

   In domestic arbitrations, an arbitration agreement must be in writing. It can be included in a written communication or in a document to which reference is made in the main agreement (FCCP Article 1443).

   In international arbitrations, arbitration agreements are not subject to any form requirement (FCCP Article 1507). In practice, the existence of an arbitration agreement is evidently easier to prove if it has been recorded in some form.

   French law provides no other substantive requirement to the validity of an arbitration agreement except for the arbitrability of the dispute (French Civil Code Article 2059).

6. **Are arbitration clauses considered separable from the main contract?**

   French law recognizes the principle of separability of arbitration agreements from the main contract (FCCP Articles 1447 and 1506).

   The nullity of the main contract does not affect the validity of the arbitration agreement and an arbitral tribunal has jurisdiction to rule on claims as to the nullity of the main contract if that contract contains an arbitration clause that is not manifestly void. The jurisdiction of the arbitral tribunal is based on the principle of competence-competence (see at 19 below).

   French courts have in fact established a "substantive" rule of international arbitration ("*règle matérielle*") regarding the legal "autonomy" of the arbitration clause (*Municipality of Khoms El Mergeb v. Dalico*, Court of Cassation, First Civil Chamber, 20 December 1993, No. 91-16.828). Under this principle, an arbitration clause is presumed valid unless otherwise proven (*Zanzi v. J.de Coninck and others*, Court of Cassation, First Civil Chamber, 5 January 1999, No. 96-21.430).

7. **Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?**

   - Multi-contract arbitration:

   French law does not preclude the parties from bringing claims arising out of more than one contract in one arbitral proceeding.

   FCCP Article 1442 defines an arbitration clause as "*an agreement by which the parties to one*

or more contracts undertake to submit to arbitration any disputes that may arise in relation to that or those contracts." This provision clearly permits multi-contract arbitration on the condition that the parties have so agreed. However, this provision only applies to domestic arbitration.

- Multi-party arbitration:

Multi-party proceedings have received particular attention under French law following the famous Dutco case (Dutco v BKMI and Siemens, French Court of Cassation, First Civil Chamber, 7 January 1992, No. 89-18.708). In that case, the French Supreme Court held that the principle of equality of the parties in the designation of arbitrators is a matter of public policy, which may not be waived before the emergence of a dispute. Therefore, two or more defendants cannot be required to appoint an arbitrator jointly if the claimant has had the opportunity, alone, to designate an arbitrator. As a result of this decision, FCCP Article 1453 following the 2011 Decree provides that 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 (the *juge d'appui)* shall appoint the arbitrator(s). This article specifically applies to international arbitration but not to domestic arbitrations.

8. **How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?**

In international arbitration, the tribunal must decide the dispute in accordance with the rules of law chosen by the parties. Absent such choice, the tribunal may choose the rules of law it considers appropriate. The tribunal need not use specific conflict-of-law rules in doing so. However, it must, in all cases, consider trade usages (FCCP Article 1511). Parties may agree to exclude the application of mandatory French laws that are not part of international French public policy. In international arbitration, the parties may also empower the arbitral tribunal to rule as *amiable compositeur*, *i.e.* to have it decide the dispute ex aequo et bono (FCCP Article 1512).

In domestic arbitration, FCCP Article 1478 provides that the arbitral tribunal decides the dispute according to the rules of law, unless the parties have empowered the tribunal to rule as an *amiable compositeur*. The rules of law chosen by the parties cannot however breach French mandatory rules or rules of public policy. Where no rules of law have been chosen by the parties, general conflicts of law rules apply.

9. **Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?**

Parties may have recourse to arbitration with respect to any right that they freely enjoy (French Civil Code, Article 2059). Article 2060 of the French Civil Code provides that the only disputes that cannot be resolved by arbitration are those relating to civil status and

capacity of natural persons, divorce and judicial separation of spouses, or disputes involving public authorities and entities and more generally any matter of public policy.

In the case of an international employment contract containing an arbitration clause, the French courts once considered that the arbitration clause was not valid and that the employee was free to initiate a claim before the French Employment Courts (French Court of Cassation, Social Chamber, 16 February 1999, No. 96-40.643). Now, according to Article 2061 of French Civil Code, an arbitration clause involving a consumer is legal. Nevertheless, following the 2016 reform, the second paragraph of this article provides that the clause cannot be relied on against a party which did not contract in a professional capacity.

10. **In your country, are there any restrictions in the appointment of arbitrators?**

As a matter of principle, the parties are free to determine the number of arbitrators and the manner in which they are appointed, directly or by reference to arbitration rules (FCCP Articles 1444 and 1508). Arbitrators must be and remain independent and impartial (FCCP Articles 1456 and Article 1506).

In international arbitration the parties may, directly or by reference to institutional arbitration rules, appoint one or several arbitrators, or provide the conditions for their appointment in their arbitration agreement (FCCP Article 1508). The parties are free to determine the number of arbitrators.

In domestic arbitration, the tribunal must be composed of an uneven number of arbitrators; otherwise the arbitral tribunal is completed by the addition of one arbitrator (FCCP Article 1451). Only physical persons may act as arbitrators. If the arbitration agreement designates a legal person, the same will only be allowed to administer the arbitration (FCCP Article 1450). In practice, parties more often refer to a physical person rather than to a legal person to act as arbitrator in their arbitration agreement.

11. **Are there any default requirements as to the selection of a tribunal?**

The default provisions on the selection of a tribunal are set out at FCCP Articles 1452 and 1453. Article 1452 FCCP provides:

- Where the dispute is to be resolved by a sole arbitrator and the parties fail to agree on an arbitrator, the same will be appointed by the *juge d'appui* or by the administering institution.
- Where the dispute shall be resolved by three arbitrators, each party appoints an arbitrator, and the co-arbitrators shall designate a third arbitrator, who will act as the president of the tribunal. If either party fails to appoint an arbitrator within one month from the receipt of a request to that effect from the other party, or, if the co-arbitrators fail to designate a third arbitrator within one month from the date on which they accepted their appointment, the appointment falls upon the arbitration institution or the

juge d'appui.

As mentioned above at 9., in multi-party arbitration, the administering institution, or, alternatively, the *juge d'appui* may appoint the arbitrator where the multiple parties cannot agree (FCCP Article 1453).

12. **Can the local courts intervene in the selection of arbitrators? If so, how?**

At the parties' request, the *juge d'appui* can appoint one or more arbitrators when the proceeding is not administered.

In international arbitration, unless the arbitration agreement provides otherwise, the *juge d'appui* shall be the President of the *Tribunal de Grande Instance* of Paris if one of the following conditions is met (FCCP Article 1505):

- The seat of arbitration is in France; or
- The parties have agreed that French procedural law applies to the arbitration; or
- The parties have expressly granted jurisdiction to the French courts over disputes relating to the arbitral procedure; or
- One of the parties is at risk of a denial of justice.

In domestic arbitration, the *juge d'appui* is the President of the *Tribunal de Grande Instance* or the President of the *Tribunal de commerce* (French Commercial court) if so provided by the arbitration agreement. In the absence of a specific agreement of the parties, the *Tribunal de Grande Instance* which has territorial jurisdiction is the Tribunal of the seat of arbitration. In the absence of such choice, the judge that has territorial jurisdiction shall be that of the defendant's domicile, or the claimant's if the defendant does not reside in France (FCCP Article 1459).

13. **Are arbitrators immune from liability?**

Under French law, arbitrators cannot be held liable for what they have decided, even if they make a legal or factual error (*Bompard v. Consorts C. and others*, Paris Court of Appeal, 22 May 1991). However, in the exercise of their function, arbitrators are liable if they breach obligations arising from their relationship with the parties such as rendering an award once the deadline for doing so has passed (*Louis Juliet and Benoît Juliet v. Paul Castagnet, Pierre Couilleaux and Adolphe Biotteau,* French Court of Cassation, First Civil Chamber, 6 December 2005, No. 03-13.116). Arbitrators must also provide each party a reasonable opportunity to present its factual and legal arguments, and a reasonable opportunity to respond to the arguments made by the other parties before the arbitral tribunal decides on any issue in the case. In the *Blow Pack* Case (21 May 2019, No. 17/12238), the Paris Court of Appeal upheld the judgment of the *Tribunal de Grande Instance*, holding that a breach of due process by the arbitral tribunal (which, in that case, led to the partial annulment of the underlying arbitral award), relates to the tribunal's jurisdictional power, and does not trigger

the arbitrator's personal (civil) liability.

Under French criminal law, arbitrators may also be found liable for corruption (French Penal Code, Articles 434-9 and 435-7).

14. **What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?**

As mentioned at 19., pursuant to FCCP Article 1448, a French court must decline jurisdiction when a dispute is brought before it despite the existence of an arbitration agreement unless the matter has not yet been referred to the arbitral tribunal and the arbitration agreement is manifestly void or manifestly unenforceable.

Therefore, if the dispute is subject to an arbitration agreement, the court will declare itself incompetent unless the arbitration proceedings have not commenced and the agreement is manifestly null and void or inapplicable (French Court of Cassation, First Civil Chamber, 28 November 2006, No. 04-10384).

15. **How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?**

French law does not impose specific procedural steps. Parties can follow the proceedings chosen in their arbitration agreement. Usually, the proceedings commence by an unequivocal service of a notice of arbitration on the other party.

The parties may agree upon contractual limitation periods or time bar applicable to arbitral proceedings. Absent any such agreement, limitation periods are governed by the law governing the merits of the dispute (Civil Code Article 2221). According to this provision, a general limitation period of 5 years applies to contractual and tortious matters from the date that the parties become aware (or should have been aware) of the event giving rise to the dispute. The submission of the dispute through the arbitration agreement interrupts the limitation period (Civil Code Article 2241; Court of Cassation, First Civil Chamber, 11 December 1985, No. 84- 14.209).

16. **In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?**

Sovereign States and emanations of the State as a matter of principle enjoy immunity from jurisdiction in France. According to this principle, sovereign States and emanations of the State may not be sued before French courts with regard to acts made in their sovereign capacity (*jure imperii*). On the other hand, States are not immune from jurisdiction when the dispute relates to their acts of a private or commercial nature (*jure gestionis*).

A waiver of immunity from jurisdiction may be provided expressly, in terms that must be certain, express and unequivocal. A waiver may also be implied if the State or State-emanation agreed to submit disputes to arbitration or failed to raise an immunity defence at the outset of the proceedings before French domestic courts (*UNESCO v. Boulois*, Paris Court of Appeal, 19 June 1998, Rev. Arb. 343 (1999)). A State can, however, challenge the jurisdiction of an arbitral tribunal by arguing the absence of consent to the arbitration agreement.

17. **What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?**

Prior to the constitution of the arbitral tribunal and unless otherwise agreed by the parties, French courts have the power to order provisional or conservatory measures as well as any measures relating to the taking of evidence (FCCP Article 1449).

Any such application for interim relief must be made to the President of the *Tribunal de Grande Instance* or of the Commercial Court. The application is decided through expedited proceedings based upon an ex parte request ("*sur requête*" or "*en référé*") FCCP Article 1449).

Once the arbitral tribunal is constituted, the power to order conservatory or interim measures shifts to the arbitral tribunal. The arbitral tribunal can order any type of provisional or preliminary measures that it deems appropriate. Whereas in the past, the parties were free to continue to seek urgent interim relief from French courts after the constitution of the arbitral tribunal, Article 1449 which results from the 2011 Decree provides that French courts may only grant interim relief "as long as the arbitral tribunal has not been constituted."

However, French courts retain exclusive jurisdiction to order conservatory attachments or judicial security, as well as to ensure satisfaction of a future award (FCCP Article 1468). In addition, recourse to a court may be necessary to enforce any measure ordered by the arbitral tribunal that is not voluntarily complied with.

18. **What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?**

France does not impose specific ethical codes or standards on arbitrators or counsel. However, any counsel or arbitrator admitted to the French bar, must respect, even when abroad, the Code of Ethics of the French Bar including the National Rules applicable to the Profession of Attorney ("*Règlement Intérieur National de la Profession d'Avocat*"), and the Code of Conduct for European Lawyers.

Under the resolution adopted on 26 February 2008 by the Paris Bar, lawyers admitted to the

Paris Bar are expressly allowed to prepare witnesses for cross-examination in arbitral proceedings.

19. **Can pre- and post-award interest be included on the principal claim and costs incurred?**

An arbitral tribunal can award interest. The arbitral tribunal must determine the relevant factors (including the relevant law) to determine the rate. Under French law, the legal interest rate, where applicable, is fixed by Decree each semester.

There are two types of late payment interest ("*intérêts moratoires*") in France:

- According to FCCP Article 1153, interest on damages ("*intérêts sur les dommages-intérêts*") must be claimed by the parties. It runs from the notice to pay or its equivalent, which in international arbitration would often be the request for arbitration.
- The arbitral tribunal has wide latitude to decide from when post-award interest ("*intérêts de condamnation*"), pursuant to FCCP Article 1553-1 should run (*Fontan Tessaur v. Société ISS Abilis France*, Paris Court of Appeal, 1st Chamber, 25 mars 2004, Arb., 2004.671). However, for interest related to enforcement (exequatur), the French Court of Cassation has stated that interest runs from the date of the enforcement decision (*RSCC v. Orion Satellite*, French Court of Cassation, First Civil Chamber, 6 March 2007, case No. 04-17.127).

20. **Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?**

The standard of review for recognition and enforcement of a foreign award or an award rendered in France in an international arbitration is similar to the enforcement regime of a domestic award. The only exception concerns the standard to determine whether the award is manifestly contrary to public policy which refers to French international policy in case of an international award, and French internal public policy in the case of a domestic award (FCCP Article 1488).

21. **Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts?**

Arbitrators are free to order a wide range of remedies such as payment of damages or injunctions. Once ordered by an arbitral tribunal, these remedies can be enforced by domestic courts. There are no restrictions in French law on the types of remedies that can be awarded. However, the damages awarded by the arbitral tribunal must not be contrary to French (international or domestic) public policy. The Court of Cassation does not consider punitive damages as contrary to international public policy unless they are "disproportionate in light of the loss sustained and the contractual breach" (French Court of Cassation, First Civil Chamber, 1 December 2010, No. 09-13.303).

22. **To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?**

Pursuant to Article L 111-1-2 of the Code of Civil Enforcement Procedures, assets belonging to a sovereign State are, as a matter of principle, immune from enforcement in France, unless:

(i) the State has expressly consented to the taking of interim and/or enforcement measures;

(ii) the State has earmarked or allocated assets for the satisfaction of the relevant claim; or

(iii) a judgment or an arbitral award has been rendered against the relevant State and the asset concerned (a) is in use or intended for use for purposes other than non-commercial purposes; and (b) has a connection with the entity against which the proceeding was brought.

Under Article L 111-1-1 of the Code of Civil Enforcement Proceedings a party must apply for prior judicial authorisation to carry out any interim or enforcement measures against the assets of a foreign State. Such application is brought ex parte and heard by the President of the Paris First Instance Court.

Under Article L 111-1-2 (1) of the Code of Civil Enforcement Proceedings, a State may waive its immunity from enforcement. Such waiver must be express. With respect to assets used or intended for use in the operation of the State's diplomatic mission, an express and special waiver is required (Article L 111-1-3 of the French Code of Civil Enforcement Procedures).

23. **Is emergency arbitrator relief available in your country? Is this frequently used?**

French Law does not include provisions on emergency arbitration. However, parties can have access to an emergency arbitrator by agreeing to arbitral rules, such as the ICC Arbitration Rules or the AFA Rules, that provide for emergency arbitration procedures. Where arbitral rules provide for the possibility to appoint an emergency arbitrator, those provisions are upheld in France as a matter of contract (see with regard to the pre-arbitral referee Rules: *Société Nationale des Pétroles du Congo v. Republic of Congo, Total Fina Elf E & P Congo*, Paris Court of Appeal, 29 April 2003, 2003 Rev Arb 1296). The number of requests for emergency arbitration before the ICC has increased to 25 in 2018 (White & Case, ICC Task Force on Emergency Arbitrator Proceedings releases findings, 15 April 2019).

24. **Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?**

France does not expressly promote diversity in the choice of arbitrators and counsel.

However, several institutions have signed the Equal Representation in Arbitration Pledge,

calling for an increase in the number of women appointed as arbitrators with the goal of full parity. Some of the members are law firms with offices in France or arbitration institutions such as the LCIA, HKIAC, SIAC and ICC. The ICC has revealed a surge in the number of women appointed and confirmed by it, from 136 in 2015 to 273 in 2018 (statistics available on the ICC Website).

As far as the choice of counsel is concerned, this issue has not been dealt with and seems difficult to address from a regulatory perspective since the parties remain entirely free to choose their counsel.

25. **Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?**

Most recently, an Egyptian domestic award that was set aside in Egypt because it was considered contrary to public policy was held enforceable by the French Court of Appeal (*Egyptian General Petroleum Corporation* v. *National Gas Company (NATGAS),* Paris Court of Appeal, 21 May 2019, No. 17/19850). In this case, the Cairo arbitral tribunal on 12 September 2009 ordered EGPC to pay a sum of approximately 255,000,000 Egyptian pounds (about EUR 30 Million). This award was enforced by the president of the Paris Court of First Instance and then subject to several appeals before the Court of Appeal and Court of Cassation (*Egyptian General Petroleum Corporation* v. *National Gas Company (NATGAS),* Court of Cassation, First Chamber, 1rst June 2017 No. 16-130729).

The Paris Court of Appeal finally confirmed the exequatur order. In doing so the Court stated: *Articles 1498 et seq., now 1514 et seq., on the recognition and enforcement of arbitral awards are applicable to both international arbitral awards and to awards rendered abroad, regardless of their domestic or international character. The lawfulness of such awards is examined in the light of the rules applicable in the country where their recognition and enforcement are sought, the purpose of exequatur being to welcome foreign awards into the French legal system under the conditions it has imposed*." (free translation)

26. **Have there been any recent court decisions in your country considering the definition and application of "public policy" in the context of enforcing or setting aside an arbitral award?**

See at 7 above.