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SPECIAL FEATURE

French Domestic Arbitration Law

CHRISTOPHER R. SEPPALA*

I. Introduction

France has recently promulgated two decrees on arbitration which, taken together, constitute the first comprehensive statutory reform of French private arbitration law¹ since the (old) Code of Civil Procedure was promulgated by Napoleon I in 1806.

The first decree to be issued was Decree No. 80-354 of May 14, 1980 (the 1980 Decree)² regulating private arbitration law generally without expressly

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¹The standard general work on arbitration in France is J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* (4th ed. 1967), a new edition of which is in preparation. Other important or useful works include 2 H. MOTULSKY, *ECRITS—ETUDES ET NOTES SUR L'ARBITRAGE* (1974), 8 *Juris-Classeur de Procédure Civile* [hereinafter cited as 8 J.-Cl. de Pr. Civ.] Fasc. I-IX and J. ROBERT & B. MOREAU, *DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE* (1971).

For arbitration in French private international law, see Goldman, *Arbitrage (Droit International Privé)* DALLOZ, *ENCYCLOPEDIE JURIDIQUE*, 1 *Repertoire de Droit International* (1968); 8 J.-Cl. de Pr. Civ. Fasc. I-IX; and P. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1965).

General materials on French arbitration law in the English language include P. HERZOG, *CIVIL PROCEDURE IN FRANCE* (1967) sections 11.05-11.11; and Robert, *France*, in *UNION INTERNATIONALE DES AVOCATS, INTERNATIONAL COMMERCIAL ARBITRATION* 241. For international arbitration, see G. DELAUME, *II TRANSNATIONAL CONTRACTS*, ch. XIII (1980); Carbonneau, *The Recognition and Enforcement of International Arbitral Awards in French Law*, 11 *INT'L LAW*, 603 (1977); and Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 *TUL. L. REV.* 1 (1980).

As indicated, most of the above works and materials were published prior to promulgation of the 1980 and 1981 Decrees.

A useful quarterly periodical is *Revue de l'Arbitrage* [hereinafter cited as *REV. ARB.*] published by the Comité Français de l'Arbitrage, 5, Rue de Stockholm, 75008 Paris.

²Decree No. 80-354 of May 14, 1980 relating to arbitration and destined to be incorporated into the New Code of Civil Procedure, *J.O.*, May 18, 1980, at 1238. The principal published commentaries on the 1980 Decree to date are: ROBERT, *LA LÉGISLATION NOUVELLE SUR L'ARBITRAGE*, (1980) *D.S., Chronique*, Cahier 25, at 189 [hereinafter cited as Robert, *Decree Commentary*]; Viatte, *Une Nouvelle Réglementation de l'Arbitrage*, (1980) *Le Journal des Notaires*, No. 17, at 1169; Level, *De la Réforme de l'Arbitrage Interne à la Réforme de l'Arbitrage International*, (1981) *J.C.P.C.I.* No. 11 9540 at 91 [hereinafter cited as Level, *Decree Commentary*]; the reports delivered at a symposium on "La Réforme du Droit de l'Arbitrage" held in Paris on September 25, 1980 under the auspices of the Comité Français de l'Arbitrage and the Confédération Syndicale des Avocats and collected in 1981 *REV. ARB.* 583 *et seq.*; J.

referring to arbitration in private international law. The 1980 Decree repealed the articles of the (old) Code of Civil Procedure regulating arbitration and replaced them by a new and more elaborate set of provisions which gives effect to legal principles and practices developed over the years by the French courts and arbitral tribunals and in doctrinal writings (*doctrine*).

This new set of provisions includes a number of original rules as regards the duration and constitution of the arbitral tribunal, the procedural rules to be applied by the arbitrators, methods of review of the arbitral award and other matters. Not the least of the merits of the 1980 Decree is that it replaces outdated enactments, legal principles and case law by a succinct, but intelligible, set of rules for the arbitration of domestic disputes. As we shall see, these rules may also apply in certain cases to the arbitration of international commercial disputes.

The 1980 Decree was followed almost exactly one year later by Decree No. 81-500 of May 12, 1981 (the 1981 Decree).³ The 1981 Decree formally introduced the provisions of the 1980 Decree into the New Code of Civil Procedure⁴ and, at the same time, added new provisions thereto regulating international arbitration (*arbitrage international*), as defined, and the recognition, enforcement and judicial review of awards rendered in international arbitration, whether in France or abroad, or otherwise rendered abroad.

Under the 1981 Decree, an international arbitration is defined as an arbitration "which implicates (*met en cause*) interests of international commerce."⁵ Thus, an arbitration, whether taking place in France or abroad,

Vincent & S. Guinchard, *PROCEDURE CIVILE*, 1143-1182 (20th ed. 1981); Derains, *France*, (1981) Y.B. ON COMMERCIAL ARBITRATION I (International Council for Commercial Arbitration); and Riotte, *La Réforme de l'Arbitrage: Analyse commentée du Décret du 14 mai 1980*, (1980) Les Petites Affiches, No. 78, [hereinafter cited as Riotte, *Decree Commentary*].

³Decree No. 81-500 of May 12, 1981 establishing the provisions of Books III and IV of the New Code of Civil Procedure [hereinafter cited as *Nouv. C. PR. CIV.*] and modifying certain provisions of such Code. The principal published commentaries on the 1981 Decree to date are: Robert, *L'Arbitrage en Matière Internationale*, (1981) D.S., *Chronique*, Cahier 28, at 209; Level, *La Réforme de l'Arbitrage International*, (1981) J.C.P.C.I. No. 28 9899 at 243; and DeLvolvé, *France as a Forum for International Arbitration—The Decree of May 12, 1981 (articles 1492 to 1507 of the French Code of Civil Procedure)*, 2 INT'L CONTRACT 421 (1981).

⁴With some minor modifications.

⁵This definition is derived from a long line of cases prior to the 1981 Decree holding that an arbitration is "international" if its subject matter is international, that is, if it "calls into play the interests of international commerce" ("*met en jeu les intérêts du commerce international*"), *Mardelé v. Muller & Cie.*, Judgment of February 19, 1930, Cass. civ., 26 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [R.C.D.I.P.] 514 (1931) (arbitration of a dispute under a contract entered into in France between two French merchants concerning the sale of a quantity of wheat to be shipped to France from Chile held to be international); see also *Dambricourt v. Rossart*, Judgment of January 27, 1931, Cass. civ., 59 JOURNAL DE DROIT INTERNATIONAL PRIVE 93 (1932); *Société Impex v. Soc. P.A.Z. et autres*, Judgment of May 18, 1971, Cass. civ. I, (1972) D.S. Jur. 37 (arbitration of a dispute under a series of contracts between a French company and certain Italian companies providing for the sale and shipment of quantities of barley from France to Italy held to be international); Fouchard, *Quand un Arbitrage Est-il International?*, 1970 REV. ARB. 59. For the limits on the notion of international arbitration, see e.g. *Tardieu v. Société Anonyme Bourdon*, Judgment of October 7, 1980, Cass. civ. I, (1981) J.C.P. C.I. No. 8 13462.

that relates to a business transaction involving the transfer of money, goods or services across national frontiers may ordinarily be expected to be an international arbitration in the sense intended by the 1981 Decree.⁶

The 1981 Decree has reduced the importance of French domestic arbitration law in international arbitration, as so defined. Under the regime applicable to international arbitration, the parties and, failing them, the arbitrators, are recognized as having very wide freedom to establish their own arbitral procedures without reference to French domestic arbitration law or other French procedural law. However, the provisions of French domestic arbitration law, other than those with respect to the recognition, enforcement and judicial review of arbitral awards, would apply to any international arbitration, whether taking place in France or abroad, which is governed by French procedural law, absent an agreement of the parties to the contrary and subject to certain general rules established in the 1981 Decree.⁷ In addition, as the provisions on international arbitration in the 1981 Decree expressly incorporate certain provisions of French domestic arbitration law by reference, even in the case of an international arbitration not governed by French procedural law, French domestic arbitration law may be pertinent.⁸ Finally, as the provisions of the 1981 Decree relating to international arbitration are few in number, brief in length and phrased in general terms, they may not, as a practical matter, be fully intelligible without reference to the corresponding provisions of domestic arbitration law and to French civil procedure generally.

The purpose of this article is to present a brief summary of the rules of French domestic arbitration law. As such, it will be principally concerned with the provisions of the 1980 Decree, which now constitute Articles 1442

A contract is said to be "international" (*contrat international*) according to the same or similar criteria as those applying to an arbitration. Goldman, *Les Problèmes Spécifiques de l'Arbitrage International*, 1980 REV. ARB. 323, 324-325. See also Delaume, *What Is an International Contract? An American and a Gallic Dilemma*, 28 INT'L & COMP. L.Q. Pt. 2. 258 (1979).

Prior to the 1981 Decree, it was recognized that, if a commercial arbitration was international (as defined above), it was subject to a particular set of court-made rules designed to moderate or render inapplicable domestic and, in certain cases, even foreign, legal requirements and policies in the interests of promoting the viability and efficacy of international arbitration. The vitality of these rules appears to be unaffected by the 1981 Decree and they are, for the most part, referred to in the text or the notes, e.g., (1) the rule as to the validity of a future disputes clause subscribed to by a French state entity in an international contract (see "A. Arbitration Agreement—(1) Capacity to Submit to Arbitration" *infra*) and (2) the rule as to the validity of a future disputes clause in an international contract even when such contract is governed by French law and when under French law such clause would be invalid in the type of contract concerned (see "A. Arbitration Agreement—(4) Limited Validity of the Future Disputes Clause" *infra*).

⁶See Robert, *L'Arbitrage en Matière Internationale*, (1981) D.S., Chronique, Cahier 28, 209, 210.

⁷Nouv. C. PR. CIV., art. 1495. This article provides generally that, when an international arbitration is governed by French procedural law, the provisions of French domestic arbitration law (Titles I, II and III of Book IV of the Nouv. C. PR. CIV.) only apply absent an agreement of the parties to the contrary and subject to arts. 1493 and 1494 of the Nouv. C. PR. CIV. which set forth certain general rules applicable to international arbitration.

⁸See Nouv. C. PR. CIV. arts. 1493, second paragraph, 1500 and 1507.

to 1491 of the New Code of Civil Procedure. Nevertheless, where there appears to be an important difference between the rule applicable under French law to a domestic arbitration and that applicable under French law to an international arbitration or to an award rendered in an international arbitration, whether in France or abroad, or otherwise rendered abroad, this has generally been indicated in the text or by footnote.

A translation of Articles 1442 to 1491 of the New Code of Civil Procedure is annexed.

* * *

The terms *international arbitration* (*arbitrage international*) and *international contract* (*contrat international*) are hereinafter used in their French legal sense as referring to any arbitration and contract, respectively, whose subject matter involves international commerce (see above and note 5 *supra*); conversely, the terms *domestic arbitration* and *domestic contract* are hereinafter used as referring to any arbitration and contract, respectively, which is not international, as defined above, and consequently whose subject matter involves an internal French commercial matter.

The term *domestic arbitration law* is hereinafter used as referring to French law governing arbitration generally, excluding French law and cases specifically applicable to international arbitration or to the recognition, enforcement or judicial review of awards rendered in international arbitration, whether in France or abroad, or otherwise rendered abroad.

Unless otherwise indicated, the statements below reflect the law applicable to a domestic arbitration, as defined above.

II. Domestic Arbitration Law

Arbitration is regulated in France mainly by the following statutory provisions:

- (a) Articles 2059 to 2061 of the Civil Code, which set forth certain broad principles;
- (b) Decree No. 80-354 of May 14, 1980 relating to domestic arbitration (the 1980 Decree), whose provisions have been codified as Articles 1442 to 1491 of the New Code of Civil Procedure;⁹ the 1980 Decree repealed, effective October 1, 1980, but with some qualifications,¹⁰ all

⁹As the articles of the 1980 Decree (other than certain transitory provisions) were repealed when introduced into the Nouv. C. Pr. Civ. by the 1981 Decree, references herein to articles of the 1980 Decree will generally be to the corresponding articles in the Nouv. C. Pr. Civ.

¹⁰The provisions of the 1980 Decree generally came into effect on October 1, 1980 except that certain provisions (Nouv. C. Pr. Civ., arts. 1443, 1451 and 1453) apply only to arbitration agreements entered into on and after that date and certain other provisions (Nouv. C. Pr. Civ., arts. 1454 and 1455) do not apply to arbitrations in progress on that date. Furthermore, certain other provisions (Nouv. C. Pr. Civ., arts. 1483, 1484 and 1486 to 1489) apply only if the arbitral award has been rendered after that date. If an award has been rendered before October 1, 1980, the applicable appeal procedure is that provided for by the laws in force before that date. 1980 Decree, arts. 52-55.

of the articles on arbitration in the (old) Code of Civil Procedure, namely Articles 1005 to 1028 thereof;¹¹

- (c) Decree No. 81-500 of May 12, 1981 (the 1981 Decree), which introduced the provisions of the 1980 Decree into the New Code of Civil Procedure and supplemented them by new provisions, Articles 1492 to 1507 of the New Code of Civil Procedure, relating to international arbitration and the recognition, enforcement and judicial review of awards rendered in international arbitration, whether in France or abroad, or otherwise rendered abroad;¹² and
- (d) Article 631 of the Commercial Code.

A. Arbitration Agreement

As indicated above, the 1980 Decree repealed, effective October 1, 1980, Articles 1005 to 1028 of the (old) Code of Civil Procedure which had gone without substantial change since the (old) Code was promulgated in 1806. Between 1806 and October 1, 1980, domestic arbitration in France had been governed essentially by these Articles.

Articles 1005 to 1028 of the (old) Code of Civil Procedure provided for, and regulated, only one kind of arbitration agreement, namely, the agreement to submit an existing dispute to arbitration or *compromis* (hereinafter called the submission agreement). To be valid, the submission agreement had to: (1) define the subject matter of the dispute; and (2) name the arbitrators (Article 1006).

These Articles contained no provision whatsoever with respect to the agreement to submit future disputes to arbitration or *clause compromissoire* (hereinafter called the future disputes clause) and, after the (old) Code was adopted in 1806 until about the mid-nineteenth century, the legal status of the future disputes clause was unclear. Arguably, such a clause was valid as it had been valid under the pre-(old) Code law (*ancien droit*) and had not been specifically proscribed by the (old) Code when it was adopted.¹³

However, in a series of decisions beginning with a decision in 1843, the *Cour de Cassation*¹⁴ held the future disputes clause to be invalid on the ground that such clause, by its nature, failed to satisfy the conditions for validity of the submission agreement, in particular, the condition to define

¹¹The 1980 Decree also repealed arts. 1027-1048 of the local Code of Civil Procedure in force in the *départements* (departments) of the Lower Rhine, Upper Rhine and Moselle in Alsace and Lorraine. Due to their occupation by Germany until the Treaty of Versailles in 1919, these *départements* have had, at least until recently, their own local procedural legislation, which is based on German legislation.

¹²The provisions of the 1981 Decree regarding international arbitration (title V, arts. 1492-1497) only apply to arbitration agreements entered into as from May 14, 1981 (date of the 1981 Decree's publication); those regarding the recognition, enforcement and judicial review of awards rendered in international arbitration, whether in France or abroad, or otherwise rendered abroad (title VI, arts. 1498-1507), only apply to awards rendered after May 14, 1981 (after the date of the 1981 Decree's publication), 1981 Decree, arts. 55 and 56.

¹³8 J.-Cl. de Pr. Civ., Fasc. VI (1st Cahier), para. 32.

¹⁴The *Cour de Cassation* is France's highest court of ordinary jurisdiction.

the subject matter of the dispute submitted to arbitration.¹⁵ This remained the position in French domestic law¹⁶ until 1925.

In that year, legislation modified judicial doctrine by providing that the future disputes clause was henceforth valid as to certain disputes which the commercial courts are competent to hear, namely those specified in Article 631 of the Commercial Code.¹⁷ As a result of this change in the law, use of the future disputes clause became valid for many kinds of, though not all,¹⁸ business disputes.

This is still the law of France today as to domestic (as opposed to international) arbitration. The submission agreement is valid whereas the future disputes clause is invalid (*nulle*) except as otherwise provided by law.¹⁹ Article 631 of the Commercial Code contains such an exception for the commercial disputes described therein.

While the 1980 Decree has given statutory recognition to the future disputes clause,²⁰ it has not fundamentally altered this dual legal regime. As a constitutional matter, it could not have done so as this would have necessitated a law (*loi*) voted by Parliament rather than a decree of the prime minister.²¹

¹⁵The first decision was *L'Alliance v. Prunier*, Judgment of July 10, 1843, Cass., (1843) D.I.343. In this case, the *Cour de Cassation* held the future disputes clause to be invalid for failure to name the arbitrators and, accordingly, it did not consider it necessary to examine whether the subject matter of the dispute had been sufficiently defined. However, under the reasoning of this decision, such a clause would be invalid for failure to define the subject matter of the dispute and this (rather than failure to name the arbitrators) proved, in later cases, the main impediment to recognition of the future disputes clause. See cases cited at 8 J.-Cl. de Pr. Civ., Fasc. VI (1st Cahier), para. 33.

This line of decisions has been properly criticized on the ground that the *Cour de Cassation* was not obligated to decide the validity of the future disputes clause by reference to the conditions for validity of the submission agreement. Moreover, although the same statutory provisions existed in Belgian law, the Belgian courts held the future disputes clause to be valid. 8 J.-Cl. de Pr. Civ., Fasc. VI (1st Cahier), para. 42.

¹⁶Since 1904 the French courts had been prepared to give effect to a future disputes clause in an international contract (see note 5 *supra*) governed by a foreign law under which the validity of such clause was recognized. See the cases cited at 8 J.-Cl. de Pr. Civ., Fasc. VI (1st Cahier), para. 34.

¹⁷For the disputes specified in art. 631 of the Commercial Code, see note 68 *infra*.

¹⁸See "A. Arbitration Agreement—(4) Limited Validity of the Future Disputes Clause" *infra*.

¹⁹C. Civ., art. 2061. The invalidity of the future disputes clause is described as a *nullité relative* (relative nullity). J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 126 (4th ed. 1967). A court cannot invoke such invalidity on its own motion and a party's right to invoke it may be lost by participation in arbitral proceedings. Fouchard, *La Clause Compromissaire Insérée dans un Acte Mixte*, 1971 REV. ARB. 3, 7.

²⁰As mentioned in the text above, until promulgation of the 1980 Decree, only the submission agreement was specifically regulated by statute. (Old) C. PR. CIV., arts. 1005-1028. The future disputes clause, where it was valid, was regulated by inference from the rules applicable to the submission agreement.

²¹Robert, *Decree Commentary*, at 189. Robert states that the reason this reform was effected by decree rather than by law was as follows (translation): "It had been thought preferable that this legislation be introduced by regulation (rather than by law requiring the approval of Parliament) probably to avoid a situation whereby a procedural text, which requires for its quality a precise adjustment of its provisions among one another to ensure their best homogeneity, is not subject to the hazards of parliamentary debate (*les aléas d'une discussion parlementaire*)."

A dual regime for arbitration agreements is, of course, not unknown in the United States. Twelve states in the United States are reported to enforce only agreements to arbitrate existing controversies.²²

1. CAPACITY TO SUBMIT TO ARBITRATION

The general test for the capacity of a party to arbitrate²³ is similar to his capacity to contract under French law. Thus, minors or persons who have reached majority but suffer from some form of legal incapacity (*e.g.*, incompetents, bankrupts and persons convicted of certain crimes) cannot submit to arbitration.²⁴

A general power of attorney is insufficient to authorize an agent to submit his principal to arbitration: a special power of attorney is necessary.²⁵ On the other hand, the president (*président directeur général*) or vice president (*directeur général*) of a corporation (*société anonyme*) and a general manager (*gérant*) of a limited liability company (*société à responsabilité limitée*) would ordinarily have the power to submit disputes of the corporate body they represent to arbitration.²⁶

The French State, public collectivities and public establishments, cannot submit to arbitration²⁷ except that "public establishments having an industrial and commercial character" (*établissements publics à caractère industriel et commercial*) may be authorized to do so by decree.²⁸

However, the *Cour de Cassation* has held that this general prohibition against arbitration by French state bodies will not invalidate a future disputes clause subscribed to by a French state body in an international contract.²⁹

²²Holtzmann, *United States*, (1977) Y.B. ON COMMERCIAL ARBITRATION 119 (International Council for Commercial Arbitration).

²³The applicable statutory provision is C. Civ., art. 2059, which provides (translation): "All persons may make arbitration agreements as to rights of which they have the free disposition."

²⁴J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 27 (4th ed. 1967); J. ROBERT & B. MOREAU, *DRIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE*, at C1-C7 (1971).

²⁵C. Civ., art. 1989 provides (translation): "An agent can do nothing beyond what is provided in his agency; the power to settle a dispute does not include the power to make an arbitration agreement."

²⁶Arts. 49, 113 and 117, Law No. 66-537 of July 24, 1966 on Commercial Companies, C. COM. 1980-81 at 985, 999-1000.

²⁷C. Civ., art. 2060.

²⁸*Id. see* Mestre, *Les Etablissements Publics Industriels et Commerciaux et le Recours à l'Arbitrage*, 1976 REV. ARB. 3. A "public establishment" has been defined as (translation): "An autonomous administrative body responsible for the management of a public service or a group of related public services," *e.g.*, a hospital or a public school (*lycée*), J. DE SOTO, *GRANDS SERVICES PUBLICS ET ENTREPRISES NATIONALES* 78 (1971). Examples of a "public establishment having an industrial and commercial character" are the state bodies controlling the supply of electricity, gas and coal: *Electricité de France* (EDF), *Gaz de France* (GDF) and *Charbonnages de France*. The internal management structure of a "public establishment having an industrial and commercial character" generally resembles that of a French commercial company.

²⁹*Trésor Public v. Galakis*, Judgment of May 2, 1966, Cass. civ. I^{re}, 56 R.C.D.I.P. 553 (1967), note B. Goldman (1967). As to the meaning in French law of international contract, see note 5 *supra*.

2. ARBITRABILITY OF THE SUBJECT MATTER

By statute,³⁰ arbitration is prohibited as to questions concerning the status and capacity of persons, and concerning divorce and separation. Arbitration is also prohibited as to all matters concerning public policy (*qui intéressent l'ordre public*).³¹

The most important prohibition is as to matters concerning public policy.³² As no comprehensive definition of public policy (*ordre public*) is laid down by statute or regulatory provision,³³ the scope of this prohibition is also the most difficult to delineate.

Robert, an eminent authority on French arbitration law, groups laws concerning public policy in four categories.³⁴ First, laws relating to social organization such as the constitution of the family, the status and capacity of persons, the status of aliens, and rights to liberty and property. Second, laws relating to political organization such as constitutional, political and administrative laws and laws relating to taxes and judicial organization. Third, laws relating to economic organization such as those relating to the legal regime applicable to property, the legal form of certain types of contracts and the liberty of commerce and industry (these are discussed more fully below). Fourth, laws relating to morality.

As France is a member of the European Economic Community (E.E.C.), the laws and regulations of the Community form part of French law. Accordingly, matters of public policy under E.E.C. law are also matters of public policy under French law.³⁵

³⁰C. Civ., art. 2060.

³¹*Id.*

³²See also C. Civ., arts. 6 and 1131. In the case of international arbitration (see note 5 *supra* and related text), arbitration is proscribed as to matters concerning French public policy in the international sense, a less strict standard. *Société Impex v. Société Malteria Adriatica*, Judgment of June 20, 1969, *Cour d'appel*, Paris, 58 R.C.D.I.P. 738 (1969) and the affirming *Cour de Cassation* decision, Judgment of May 18, 1971, Cass. civ. I^{re}, (1972) D.S. Jur. 37. See also *NOUV. C. PR. CIV.*, art. 1498.

³³The determination of what matters constitute public policy is generally made by the courts on a case-by-case basis. In addition, individual statutes may provide that certain of their provisions are public policy, *e.g.*, by stating that certain matters mandated by their provisions may not be derogated from by private contract.

³⁴J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 46-47 (4th ed. 1967).

³⁵When exempting a commercial agreement from article 85 (1) of the Treaty of Rome regulating free competition, the E.E.C. Commission has had the practice of requiring the applicant for exemption to agree to notify it of any arbitral award which may later be rendered pursuant to any future disputes clause contained in such agreement. See Focsaneanu, 1980 REV. ARB. 365. The E.E.C. Commission's draft Regulation (dated March 3, 1979) providing for a group exemption for certain categories of patent license agreements from article 85 (1) of the Treaty of Rome would require that any arbitral award rendered in respect of an exempted agreement and concerned with the interpretation or application of specified articles of the Regulation be communicated without delay by the parties to the Commission together with the relevant agreement. By these measures, the Commission clearly intends to be kept informed of how arbitrators are applying E.E.C. competition law; if it believes they have failed to respect the law, it could require that, among other things, the parties not enforce that portion of the award which it believes offends the law.

In the business field, certain matters may not be the subject of arbitration on the ground that they concern public policy. Thus, a dispute as to the validity of, or title to, a patent, or a demand for the compulsory licensing of a patent, is not arbitrable.³⁶ Similarly, a dispute as to the validity of, or title to, a trademark would not appear to be subject to arbitration.³⁷ On the other hand, disputes relating to the use or exploitation of patents or trademarks (*e.g.*, agreements for the sale or license of such rights, royalties payable, conditions of manufacture, secrecy, etc.) would not seem prevented from being arbitrated on the basis of public policy underlying patent or trademark laws.³⁸

While certain provisions of French company law are matters of public policy and hence are not arbitrable, it is common practice for a company's articles of incorporation to contain a future disputes clause to govern disputes among its shareholders or between the company and its shareholders.³⁹ Certain issues concerning the sale of a business (*fonds de commerce*),⁴⁰ a transaction subject in French law to strict statutory regulation,⁴¹ are not arbitrable. Only a French court is empowered to declare a company in legal reorganization (*règlement judiciaire*) or bankrupt (*liquidation des biens*).⁴²

A future disputes clause is invalid in an individual employment agreement.⁴³ But after an employment agreement has expired, the employee and employer may validly enter into a submission agreement with respect to a dispute which may have arisen thereunder.⁴⁴ A future disputes clause would appear to be valid in a collective bargaining agreement (*convention collective*).⁴⁵

³⁶Oppetit, *L'Arbitrage en Matière de Brevets d'Invention après la loi du 13 juillet 1978*, 1979 REV. ARB. 83; arts. 50bis, 52 and 68 of Law No. 68-1 of January 2, 1968 relating to patents, C. COM., 1980-81, at 870, 884-885, 887.

³⁷Art. 24 of Law No. 64-1360 of December 31, 1964 relating to trademarks, commercial marks and service marks, C. COM., 1980-81, at 959.

³⁸B. MERCADAL & P. JANIN, *LES CONTRATS DE COOPERATION INTER-ENTREPRISES* 261, 272 (1st ed. 1974).

The discussion in the text is concerned with French patents and trademarks. The arbitration of disputes concerning non-French (including non-E.E.C.) patents or trademarks should not be restricted on grounds of French public policy although it may be so restricted by the public policy of the country under whose laws such rights have been issued.

³⁹Memento Pratique Francis Lefebvre, *Sociétés Commerciales* (1980-1981), para. 419.

⁴⁰J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 56-57 (4th ed. 1967).

⁴¹Law of March 17, 1909 relating to the sale or pledge of a business (*fonds de commerce*), C. COM., 1980-81, at 463; Law of June 29, 1935 relating to the sale price of a business, C. COM., 1980-81, at 497.

⁴²J. ROBERT & B. MOREAU, *DRIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE*, at D8 (1971).

⁴³C. TRAV., arts. L 121-3 and L 511-1.

⁴⁴C. TRAV. art. L 511-1. Other public policy issues which may not validly be the subject of a future disputes clause may be validly submitted to arbitration by an arbitration agreement entered into after a dispute raising such issue has arisen, *i.e.*, a submission agreement, *Société Civile Immobilière Le Parc de Lésigny v. Epoux Mettout*, Judgment of October 27, 1975, *Cass. civ. 3e*, (1975) Bull. Civ. III, No. 310, at 234; and 1977 REV. ARB. 191, 193, note Mezger.

⁴⁵C. TRAV., art. L 525-1.

A future disputes clause may also be invalid in certain types of leases and in insurance contracts. Of particular importance to foreign companies doing business with France, arbitration would be excluded generally with respect to questions concerning French exchange controls and French foreign direct investment regulations.

Arbitration of a dispute is not prohibited simply because it raises or touches upon some question of public policy. While some courts formerly adopted this position,⁴⁶ thereby rendering arbitral proceedings more vulnerable to dilatory tactics, this no longer appears to be the case. The proper rule, as stated by one authority, and as reflected in more recent cases, is that arbitration is proscribed only as to a dispute for the resolution of which (translation): "... the application of a rule of public policy remains indispensable."⁴⁷

3. DISTINCTION BETWEEN THE FUTURE DISPUTES CLAUSE AND THE SUBMISSION AGREEMENT

As discussed above,⁴⁸ largely for historical reasons the submission agreement is valid while the future disputes clause is generally invalid except as to specified commercial disputes. Nevertheless, in belated recognition of its much wider use in business practice than the submission agreement,⁴⁹ the 1980 Decree gives primacy to the future disputes clause.

⁴⁶In one case, for example, it was held that, as the price of barley was publicly regulated (and therefore a matter of public policy), parties to a contract for the sale and delivery of barley could not validly submit to arbitration disputes relating to contract performance, specifically, transportation and delivery. *Société Anonyme Agricole v. Torris*, Judgment of February 9, 1954, *Cour d'appel*, Paris, (1954) D. Jur. 192. See also *Tissot v. Neff*, Judgment of November 29, 1950, Cass. civ. com., (1951) D. Jur. 170.

⁴⁷J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 51 (4th ed. 1967). Thus, even though the terms of farm leases (*baux à ferme*) were publicly regulated (and therefore matters of public policy), it was held that parties to such a lease could submit to arbitration disputes concerning the amount of indemnity to which the lessee was entitled for waiving certain rights (right of preemption and right to annul sale of underlying property) under the lease so as to permit sale of the underlying property to a third party. *Veuve André*, Judgment of June 27, 1957, *Cour d'appel*, Paris, (1958) J.C.P. IV. 96. Similarly, an arbitral award which fixed the amount of damages to be allowed to a buyer, upon the default of the seller, under a contract for the sale of potato plants, was upheld even though (i) the price of such plants was subject to government regulation (and therefore a matter of public policy) and (ii) the amount of damages awarded provided the buyer with a rate of profit in excess of that obtainable by the regulated price. *Société des Etablissements Bailly v. Société Comptoir Régional du Bourbonnais et Société Gillet Frenes*, Judgment of February 12, 1963 (1st case), *Cour d'appel*, Paris, (1963) J.C.P. II. 13281.

⁴⁸See "A. Arbitration Agreement" *supra*.

⁴⁹E. BERTRAND, *ÉTUDE EXPLORATOIRE DE L'ARBITRAGE DANS LES PRINCIPALES MATIÈRES DE DROIT PRIVÉ* (Collection Ministère de la Justice) 43, (1979).

i. Future Disputes Clause (*Clause Compromissoire*)

In contracts entered into on or after the effective date of the 1980 Decree (October 1, 1980), a future disputes clause⁵⁰ must:

- (a) be stipulated in writing in the relevant main contract or in a document to which such contract refers; and
- (b) designate the arbitrator or arbitrators or prescribe the method of their appointment (*e.g.*, by reference to the rules of an arbitral institution which provide a procedure for such appointment).

If it does not satisfy these two conditions as to form, it is void under domestic arbitration law.⁵¹

However, a future disputes clause which is void in domestic law, whether for these reasons or otherwise, will not ordinarily have the effect of invalidating the main contract in which it is contained or to which it relates. This is because of an express provision in the 1980 Decree to the effect that an invalid future disputes clause is "deemed not to have been written," *i.e.*, not to be contained in the contract.⁵² Accordingly, it should not ordinarily prejudice other rights thereunder.⁵³

If difficulty should be encountered in constituting an arbitral tribunal or in implementing the procedure for designating the arbitrator or arbitrators, the arbitrator or arbitrators may, at the demand of one of the parties, be appointed by the presiding judge of the local *tribunal de grande instance* (ordinary court of original jurisdiction)⁵⁴ in a *référé* proceeding⁵⁵ which is an expedited court procedure.⁵⁶

⁵⁰The future disputes clause (*clause compromissoire*) is formally defined as (translation): "an agreement by which the parties to a contract undertake to submit to arbitration the disputes which could arise relative to such contract." NOUV. C. PR. CIV., art. 1442.

⁵¹NOUV. C. PR. CIV., art. 1443. By establishing these conditions for the validity of a future disputes clause, the 1980 Decree is more restrictive than prior law. Under prior law, the omission of a future disputes clause to designate the arbitrators or to indicate the manner for their appointment was a matter which could be cured by the courts. This option is no longer open under domestic arbitration law. Level, *Decree Commentary*, at 94. Thus, a future disputes clause providing simply that "All disputes hereunder shall be finally settled by arbitration in Paris" is now likely to be void under domestic arbitration law. See remarks of Messrs. Reymond and Mezger in symposium *La Réforme du Droit Français de l'Arbitrage*, 1980 REV. ARB. 625-627. However, such a clause may be valid in the case of an international arbitration, even one governed by French procedural law, see NOUV. C. PR. CIV., art. 1495 and art. 1493, first paragraph.

⁵²NOUV. C. PR. CIV., art. 1446.

⁵³Robert, *Decree Commentary*, at 190. Nevertheless, if it can be established that the future disputes clause was a material condition to a contract (*i.e.*, that the parties would not have contracted without it) then invalidation of such clause should invalidate the contract.

⁵⁴However, if the arbitration agreement so provides, such appointment may be made by the president of the local *tribunal de commerce* (commercial court). NOUV. C. PR. CIV., art. 1444.

⁵⁵NOUV. C. PR. CIV., art. 1457.

⁵⁶The *référé* procedure is a simplified procedure, whereby a party may in certain circumstances, by application to a single judge sitting in *référé* obtain rapid provisional relief. NOUV. C. PR. CIV., arts. 484-492. In the case of an international arbitration (see note 5 *supra* and related text), even one governed by French procedural law, it would appear that parties could validly agree to exclude resort to such *référé* procedure, see NOUV. C. PR. CIV., art. 1493, second paragraph, and art. 1495.

The decisions of the presiding judge of the *tribunal de grande instance* are not subject to appeal except if he has determined that the future disputes clause is either "manifestly void" (*manifestement nulle*)⁵⁷ or "insufficient" (*insuffisante*) to permit the constitution of the arbitral tribunal and that, consequently, there are no grounds for the appointment of arbitrators.⁵⁸

It is no longer necessary (as formerly) that parties to an agreement containing a future disputes clause, once a dispute arises, enter into a submission agreement as a condition to the commencement of arbitration.⁵⁹ The 1980 Decree expressly negates this requirement by providing that a dispute subject to a future disputes clause may be submitted to an arbitral tribunal either by the parties jointly or simply by one party alone.⁶⁰

ii. The Submission Agreement (*Compromis*)

The submission agreement⁶¹ must:

- (a) define the subject of the dispute; and
- (b) designate the arbitrator or arbitrators or prescribe the method of their appointment.⁶²

If it does not satisfy these two conditions as to form, it is void under domestic arbitration law.⁶³

However, if one of the arbitrators should not, after having been designated, accept his appointment, this would not render the submission agreement void under domestic law; however, it would be without effect (*caduc*) unless and until there is agreement on his replacement.⁶⁴

The submission agreement must be in writing. It may be established in

⁵⁷These words are not defined in the Nouv. C. Pr. Civ. For one interpretation thereof, see "A. Arbitration Agreement—(5) Effect of Arbitration Agreement" *infra*.

⁵⁸In such case, the appeal is made, heard and adjudged in an interlocutory appeal procedure (*contredit de compétence*). See Nouv. C. Pr. Civ., arts. 80-91 and art. 1457.

⁵⁹Prior to the 1980 Decree, a future disputes clause was defined as being a promise to enter into a submission agreement (*compromis*) at the time a dispute subject to such clause arose. Giverdon, *Compromis—Clause Compromissoire* in DALLOZ, *ENCYCLOPEDIE JURIDIQUE*, 2 REPERTOIRE DE DROIT CIVIL (1980) para. 180. Entry into a submission agreement was a necessary condition precedent to arbitration. However, under the criteria established by more recent court decisions (prior to the 1980 Decree), the condition could be so easily satisfied as to have become virtually meaningless. See *Société Oromar v. Société Commerciale Matignon (SIMCOMA)*, Judgment of January 20, 1972, Cour d'appel, Paris, 1974 REV. ARB. 105, note Fouchard. The condition of a submission agreement in French law may have been the source of the requirement for "Terms of Reference" in article 13 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

⁶⁰Nouv. C. Pr. Civ., art. 1445.

⁶¹The submission agreement is formally defined as (translation): "an agreement by which the parties to a dispute which has arisen submit it to the arbitration of one or several persons." Nouv. C. Pr. Civ., art. 1447.

⁶²Nouv. C. Pr. Civ., art. 1448.

⁶³However, such an agreement may be valid in the case of an international arbitration (see note 5 *supra* and related text), even one governed by French procedural law, see Nouv. C. Pr. Civ., art. 1495 and art. 1493, first paragraph.

⁶⁴Nouv. C. Pr. Civ., art. 1448.

minutes (*procès-verbal*) signed by the arbitrator and the parties.⁶⁵ It may be entered into even while the parties are engaged in judicial proceedings.⁶⁶

4. LIMITED VALIDITY OF THE FUTURE DISPUTES CLAUSE

As stated above,⁶⁷ the future disputes clause continues to be valid as to domestic disputes only in limited cases, namely, those commercial matters enumerated in Article 631 of the Commercial Code as falling within the competence of the commercial courts.⁶⁸ While this enumeration encompasses many business disputes, it falls substantially short of permitting use of the future disputes clause in business disputes generally. In particular, the future disputes clause is invalid in those domestic contracts which, under French law, are considered to constitute *actes mixtes* (literally, mixed acts), *i.e.*, civil for one party but commercial for the other.⁶⁹

However, when a future disputes clause is contained in an international contract, a French court will not deny effect to the future disputes clause even when the contract is governed by French law and when under French law such clause would be invalid in the type of contract concerned.⁷⁰

5. EFFECT OF ARBITRATION AGREEMENT

If a dispute, which is pending before an arbitral tribunal pursuant to an arbitration agreement (future disputes clause or submission agreement), is brought before a court then, the 1980 Decree provides, such court must, at the demand of a party to the arbitration agreement, declare itself incompetent. Even if a dispute which is subject to an arbitration agreement has not yet been referred to an arbitral tribunal, a court to which it is submitted

⁶⁵NOUV. C. PR. CIV., art. 1449. The NOUV. C. PR. CIV. does not, as in the case of a future disputes clause, expressly state that a submission agreement which is not in writing is void under domestic arbitration law.

⁶⁶NOUV. C. PR. CIV., art. 1450.

⁶⁷See "A. Arbitration Agreement" *supra*.

⁶⁸C. COM., art. 631 provides that commercial courts are competent to hear: (1) disputes relating to agreements and transactions between businessmen, merchants and bankers; (2) disputes between shareholders (*associés*) of a commercial company (*société de commerce*) concerning its affairs; and (3) disputes concerning commercial acts (*actes de commerce*) between any persons. C. COM., art. 632 defines commercial acts.

⁶⁹Example of *actes mixtes* are: the sale of crops by a farmer to a wholesaler ("civil" as to the farmer and "commercial" as to the wholesaler), the sale of goods by a retailer to a consumer ("commercial" as to the retailer but "civil" as to the consumer), a transportation contract concluded between a person not in the transportation business and a person engaged in such business ("civil" as to the former but "commercial" as to the latter), the leasing of a seat in a theater ("commercial" as to the theater owner but "civil" as to the spectator) (F. Gore, *Droit des Affaires*, para. 185, (1977); and a maritime insurance contract concluded between an insurance company and its nonmerchant client ("commercial" as to the former but "civil" as to the latter) (Martin v. Cie. d'Assurances L'Equité, Judgment of December 2, 1964, Cass. com., (1965) J.C.P. II.14041, note P.L. The Martin decision stands for the proposition that a future disputes clause in a domestic contract is invalid in cases where such contract is an *acte mixte*.

⁷⁰Hecht v. Société N.V.R. Buisman's, Judgment of July 4, 1972, Cass. civ. 1re, (1972) Bull. Civ. I, No. 175, at 154. See also Menitucci v. Mahieux, Judgment of December 13, 1975, *Cour d'appel*, Paris, 65 R.C.D.I.P. 507 (1976), note Oppetit.

For the definition of international contract in French law, see note 5 *supra*.

must, at the demand of a party to the arbitration agreement, declare itself incompetent unless the arbitration agreement is manifestly void (*manifestement nulle*).⁷¹

The expression *manifestly void* is not defined in the 1980 Decree. It is interpreted by one authority to mean "... the literal contravention of one of the legal conditions imposed for the validity of arbitration agreements, and not requiring any interpretation to be established."⁷² Thus, if a future disputes clause fails to designate the arbitrator or arbitrators or prescribe the method of their appointment (e.g., by reference to arbitration rules providing for the same), it would, under this interpretation, be manifestly void.

As the right to arbitrate derives from contract, the parties are always free to waive or forego this right in favor of direct judicial relief.⁷³ For this reason, when faced with a dispute governed by an arbitration agreement which is not manifestly void, a court may not, on its own motion, declare itself incompetent but may only do so at the demand of a party thereto.⁷⁴ Upon such demand being made, the court must declare itself incompetent to hear the dispute.

While a court may be incompetent to adjudicate a dispute covered by an arbitration agreement it may, even after arbitration proceedings have commenced, be properly called on to grant provisional relief or conservatory measures in a *référé* proceeding.⁷⁵ The granting of provisional relief or conservatory measures in such a court proceeding is not considered to contravene the arbitration agreement.

B. The Arbitrators

1. CAPACITY

Any natural person, including a non-French national or resident, who has the full enjoyment of his *droits civils* (civil rights),⁷⁶ may be an arbitra-

⁷¹Nouv. C. Pr. Civ., art. 1458.

⁷²Robert, *Decree Commentary*, at 192.

⁷³When a party to a contract containing a future disputes clause brings a court action in respect of a substantive matter within the scope of such clause against the other party thereto, the first party is held to have waived its rights under such clause not only in respect of the claim which is the subject of that action and other claims within the scope of such clause but also in respect of counterclaims within the scope of such clause, brought by the second party. *Société British Leyland International Services v. Société d'exploitation des Etablissements Richard*, Judgment of June 6, 1978, Cass. civ. 1re, 1979 REV. ARB. 230, note Level. While this case concerned an international contract, the decision is considered as establishing also a principle of domestic law, note Level at 239.

⁷⁴Nouv. C. Pr. Civ., art. 1458.

⁷⁵*Société d'exploitation du Cinéma Rev. v. Société Rex and S.C.I. La Lagune et autre v. S.A.R.L. SERCIP* (two cases), Judgments of June 7 and July 9, 1979, Cass. civ. 3e, 1980 REV. ARB. 78, note Courteault. While these cases were decided prior to the 1980 Decree, they would still appear to represent good law. See also "A. Arbitration Agreement—(3) Distinction between the Future Disputes Clause and the Submission Agreement—(i) Future Disputes Clause (*Clause Compromissoire*)" *supra* and Nouv. C. Pr. Civ., arts. 1444, 1454, 1456, 1475 and 1463.

⁷⁶For the meaning of *droits civils*, see C. PEN., arts. 34, 42.

tor. However, under arbitration agreements entered into on or after October 1, 1980, a legal entity (*personne morale*) may not be an arbitrator⁷⁷ and any provision to the contrary would be invalid under domestic arbitration law.⁷⁸

2. APPOINTMENT OF ARBITRATORS

Under domestic arbitration law, an arbitral tribunal must consist either of a sole arbitrator or of several arbitrators of an uneven number.⁷⁹ This requirement, which is new in French law, only applies with respect to arbitration agreements entered into on or after October 1, 1980.

Where a natural person or legal entity is responsible for organizing an arbitration (*e.g.*, the Paris Arbitral Chamber or, in the case of international business disputes, the International Chamber of Commerce, whose headquarters are in Paris), then, the 1980 Decree provides, the arbitration must be conducted by one or more arbitrators accepted by each of the parties. If the parties cannot agree on the arbitrator or arbitrators, the person or legal entity organizing the arbitration must invite each party to appoint an arbitrator and then must itself, if necessary, appoint the third arbitrator required to complete the tribunal. If either party should fail to appoint an arbitrator, then the natural person or legal entity responsible for organizing the arbitration must make such appointment.⁸⁰

The natural person or legal entity responsible for organizing an arbitration may, according to the 1980 Decree, provide for a procedure whereby the arbitral tribunal renders only a draft award and that, if such draft award is challenged by one of the parties, the dispute must be submitted for final decision to a second arbitral tribunal. In such case, the members of

⁷⁷NOUV. C. PR. CIV., art. 1451. If, nevertheless, an arbitration agreement provides for a legal entity (*personne morale*) to be an arbitrator then, according to the 1980 Decree, such entity is deemed to have only the power to organize the arbitration. NOUV. C. PR. CIV., art. 1451. Consequently, an arbitration agreement should not be void under domestic arbitration law merely on this account.

⁷⁸NOUV. C. PR. CIV., art. 1459. In the case of an international arbitration (*see note 5 supra* and related text), even one otherwise governed by French procedural law, there would seem no prohibition to the appointment of a legal entity as arbitrator if the parties had agreed to such an arrangement. NOUV. C. PR. CIV., art. 1495.

⁷⁹NOUV. C. PR. CIV., art. 1453. However, where the parties have designated an even number of arbitrators, the arbitration agreement is not void under domestic arbitration law. Instead, it is stated that in such circumstances the tribunal must be completed by an arbitrator chosen either in accordance with the provisions of the parties' agreement or, in the absence of such provisions, by the appointed arbitrators, or, if the appointed arbitrators are unable to agree, by the presiding judge of the local *tribunal de grande instance* in a *référé* proceeding by a decision not subject to appeal or other review. NOUV. C. PR. CIV., arts. 1454-1457. For a description of the *référé* procedure *see note 56 supra*.

⁸⁰NOUV. C. PR. CIV., art. 1455. One effect of this article would appear to be that a party cannot be compelled against its will to accept a tribunal composed of a single arbitrator appointed by the natural person or legal entity responsible for organizing the arbitration. Thus, in the case of any "institutional arbitration" a persistent party may always be able to compel the appointment of at least three arbitrators regardless of the nature of the dispute or the sum involved.

the second tribunal must be appointed by the person or entity responsible for organizing the arbitration. However, each party has the right to object to, and have replaced, one of the arbitrators so appointed.⁸¹

Any agreement which is contrary to the rules described above (*i.e.*, in "Appointment of Arbitrators") is invalid under domestic arbitration law.⁸²

3. ACCEPTANCE OF APPOINTMENT

Unlike a French judge, who may be subject to penal sanction for refusing to decide a case,⁸³ a private individual is, of course, under no obligation to act as an arbitrator. However, once a private individual chooses to accept such an appointment, then, under French domestic arbitration law, he is deemed to have assumed certain obligations not dissimilar from those to which a judge is subject.

If there should exist grounds for challenge (*cause de récusation*) to his appointment as arbitrator, he must, before accepting the same, inform the parties thereof.⁸⁴ Having informed them thereof, he cannot thereafter accept his appointment except with their express agreement.⁸⁵

An arbitral tribunal is not deemed to have been properly formed until the arbitrator or arbitrators have accepted their appointments.⁸⁶

Once an arbitrator has accepted his appointment, he is obligated to complete his mission.⁸⁷ He is not entitled to resign, except for grounds for challenge which are disclosed or which arise after his appointment.⁸⁸ Any default by an arbitrator in this respect may subject him to civil liability.

On the other hand, once he has accepted his appointment, his independence is protected. He cannot be disqualified except for grounds for chal-

⁸¹ *Id.*

⁸² NOUV. C. PR. CIV., art. 1459. However, in the case of an international arbitration (*see* note 5 *supra* and related text), it appears that the rules described in "(2) Appointment of Arbitrators" could only apply if it was governed by French procedural law and if the parties had not agreed to the exclusion of such rules. NOUV. C. PR. CIV., art. 1495.

⁸³ C. CIV., art. 4.

⁸⁴ NOUV. C. PR. CIV., art. 1452. Grounds for challenge are not defined in the 1980 Decree. Prior to the 1980 Decree, arbitrators were subject to disqualification upon the same grounds as judges, Moreau, *La Récusation des Arbitres dans la Jurisprudence Récente*, 1975 REV. ARB. 223, at 224. The grounds for disqualification of a judge are stated in NOUV. C. PR. CIV., art. 341 which provides that (translation): "... subject to provisions particular to certain jurisdictions, a judge may be challenged: (1) If he or his spouse has a personal interest in the dispute; (2) If he or his spouse is a creditor, debtor, heir presumptive or donee of one of the parties; (3) If he or his spouse is related to the fourth degree inclusive either by blood or by marriage to one of the parties or his spouse; (4) If there has been or is a law suit between him or his spouse and one of the parties or his spouse; (5) If he has previously heard the matter either as a judge or as an arbitrator or if he has counselled one of the parties; (6) If the judge or his spouse is responsible for administering the property of one of the parties; (7) If there is a relationship of subordination (*lien de subordination*) between the judge or his spouse and one of the parties or his spouse; (8) If there is a well-known friendship or enmity between the judge and one of the parties."

⁸⁵ NOUV. C. PR. CIV., art. 1452.

⁸⁶ *Id.*

⁸⁷ NOUV. C. PR. CIV., art. 1462.

⁸⁸ NOUV. C. PR. CIV., art. 1463. For a definition of grounds for challenge *see* note 84 *supra*.

lenge which are first disclosed or which arise after his appointment.⁸⁹ Otherwise, his appointment can be revoked only by unanimous agreement of the parties.⁹⁰

Any agreement which is contrary to the rules described above (*i.e.*, in "Acceptance of Appointment") is invalid under domestic arbitration law.⁹¹

Because of the legal significance attached to the acceptance of an appointment as arbitrator,⁹² such acceptance should, as a practical matter, always be confirmed in writing.⁹³

4. DURATION OF APPOINTMENT

If the arbitration agreement contains no time limit by which an award must be rendered, then the appointment of the arbitrators is deemed to last six months from the day the last of them had accepted his appointment.⁹⁴

A contractual time limit or such legal time limit may be extended either by agreement of the parties, or, upon the demand of one of them or of the arbitral tribunal itself, by the presiding judge of the *tribunal de grande instance*.⁹⁵ The contractual or legal time period may also be suspended in certain cases.⁹⁶

Any agreement which is contrary to the rules described above (*i.e.*, in "Duration of Appointment") is invalid under domestic arbitration law.⁹⁷

⁸⁹NOUV. C. PR. CIV., art. 1463. Disputes to which this provision may give rise must be referred to the presiding judge of the competent local court. *Id.*

⁹⁰NOUV. C. PR. CIV., art. 1462.

⁹¹NOUV. C. PR. CIV., art. 1459. However, in the case of an international arbitration (*see note 5 supra* and related text), it appears that the rules described in "(3) Acceptance of Appointment" could only apply if it was governed by French procedural law and if the parties had not agreed to the exclusion of such rules. *See* NOUV. C. PR. CIV., art. 1495.

⁹²The time limit for the proceedings also runs from the date the last arbitrator has accepted to act. *See* "B. The Arbitrators—(4) Duration of Appointment" *infra*.

⁹³Robert, *Decree Commentary*, at 194.

⁹⁴NOUV. C. PR. CIV., art. 1456. Prior to the 1980 Decree, the time limit was three months from the date of the submission agreement. *See* (old) C. PR. CIV., art. 1007.

⁹⁵NOUV. C. PR. CIV., art. 1456. If the arbitration agreement provides for the appointment of arbitrators by the presiding judge of the *tribunal de commerce*, then he may extend the time limit.

⁹⁶The contractual or legal time period may, for example, be suspended in the case of a challenge to certain specified documentary evidence (*inscription de faux*) (*see* "C. The Arbitral Proceeding—(3) Disputes Relating to Documentary Evidence" *infra*) or in the case of interruption of proceedings (*see* "C. The Arbitral Proceeding—(6) Interruption of Proceedings" *infra*). Interlocutory proceedings do not generally suspend the time period. J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 262-263 (4th ed. 1967).

⁹⁷NOUV. C. PR. CIV., art. 1459. Several commentators believe that, by providing that the time limit may, absent agreement of the parties, be extended by a court and that any provision to the contrary is invalid, the 1980 Decree casts doubt on the validity of the rule often found in rules of arbitral institutions (and upheld in cases prior to the 1980 Decree) to the effect that the institution may on its own initiative extend the time limit, *see, e.g.*, article 18(2) of the Rules of Conciliation and Arbitration of the ICC. Mezger, *A Propos de l'Article 16 du Décret du 14 mai 1980*, 1980 REV. ARB. 710, 715-716; and Level, *Decree Commentary*, at 95. A counter-argument to this is that by entering into an agreement providing for arbitration under the rules of a particular arbitral institution which has such a rule, the parties have also agreed, in effect, that the institution act as their agent to extend the time limit. As the parties may validly agree to extend the time limit themselves (NOUV. C. PR. CIV., art. 1456), they should be able validly to

5. FEES

In general, an arbitrator is entitled to fees for his services and the parties are liable, jointly and severally, for the payment of an arbitrator's fees.⁹⁸

6. CIVIL LIABILITY

An arbitrator is civilly liable on the same grounds as a French judge. A French judge may be civilly liable for, among other things, fraud (*dol, fraude*), serious professional fault (*faute lourde professionnelle*) and for commission of a denial of justice (*déni de justice*).⁹⁹

C. The Arbitral Proceeding

1. PROCEDURE

Unless the parties have agreed otherwise, the arbitrators are free to determine the arbitral procedure and are not bound to observe the procedural rules applicable to courts.¹⁰⁰

However, under domestic arbitration law, the arbitrators (and the parties) are bound to observe certain fundamental principles of procedural

agree that an agent may do so on their behalf. Absent an express provision in the 1980 Decree (or elsewhere) to the contrary, such an agreement should be valid.

Prior to the 1980 and 1981 Decrees, the *Cour de Cassation* (see note 14 *supra*) held that the requirement that arbitrators render an award within a specific time period, whether contractually determined by the parties or as stipulated by law, applies only to an arbitration whose procedure is governed by French law. In the case of an international arbitration (see note 5 *supra* and related text) where the arbitration procedure is governed by a foreign law, the arbitration agreement may empower the arbitrators themselves to fix the duration of their appointment or possibly even provide that their appointment is of undetermined duration, if permitted by the applicable foreign law; a French judge would not on this ground refuse enforcement to the resulting arbitral award. *Société Bruynzeel Deurenfabrik N.V. v. Ministre d'Etat aux Affaires Etrangères de la République Malgache*, Judgment of June 30, 1976, Cass. civ. I^{re}, 1977 *Gazette Du Palais*, Nos. 33, 34, 70, note Viatte. By virtue of NOUV. C. PR. CIV., art. 1495, introduced into law by the 1981 Decree, it appears that, in an international arbitration, the domestic law rules as to time limits could only apply if the arbitration were governed by French procedural law and if the parties had not agreed to the exclusion of such rules.

⁹⁸J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 331-332 (4th ed. 1967); 8 J.-Cl. de Pr. Civ., arts. 1003-1028, Fasc. V, (2nd Cahier) para. 136.

⁹⁹(Old) C. PR. CIV., art. 505. Although this article was technically repealed on July 5, 1972, it is still in force since it has not been replaced and since, according to the terms of the repealing legislation, it shall remain in force until replaced. M. BLANC & J. VIATTE, *NOUVEAU CODE DE PROCEDURE CIVILE* 394 (1980). With respect to an arbitrator's civil liability, see J. ROBERT & B. MOREAU, *DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE*, at H11 (1971). While the civil liability of an arbitrator is based on the same grounds as that of a judge, it is not based on the same legal theory. An aggrieved party suing a judge may invoke such article 505 as the basis of his claim whereas one suing an arbitrator must, even though invoking one or more of the grounds enumerated in such article 505, base his action on either a contractual or a tort theory. *Soc. Veuve J. Houdet et Fils v. Chambre Arbitrale de l'Union Syndicate de Grains et Farine de Bordeaux*, Judgment of January 29, 1960, Cass. civ. 2^e, (1960) D.S. Jur. 262; 8 J.-Cl de Pr. Civ., arts. 1003-1028, Fasc. V (2nd Cahier) para. 105-106.

¹⁰⁰NOUV. C. PR. CIV., art. 1460. The 1980 Decree reversed the presumption in prior law, namely, that, as to procedural matters, the parties and arbitrators are bound to observe the time limits and forms established for the courts unless the parties agreed otherwise. (Old) C. PR. CIV., art. 1009.

fairness or due process laid down in the New Code of Civil Procedure as applicable to judicial proceedings.¹⁰¹ These principles are contained in the following Articles of the New Code: 4 and 5 relating to the subject matter of a dispute; 6-8 relating to the facts; 9, 10 and 11 (first paragraph) relating to the production of evidence; 13 relating to law; 14-17 relating to the right of each party to receive an adequate opportunity to be heard and present its case (*la contradiction*); 18-20 relating to defense rights; 21 relating to conciliation.¹⁰² Subject to compliance with these principles, which are considered to be matters of public policy (*ordre public*),¹⁰³ the arbitrators and the parties are at liberty under domestic law to determine the procedural rules they wish to apply.

In general, these principles do not seem inconsistent with the objectives of civil procedural rules in common law countries. Only the principles relating to the production of evidence call for special comment here.

2. PRODUCTION OF EVIDENCE

The Articles of the New Code of Civil Procedure referred to above which establish certain fundamental principles relating to the production of evidence may be translated as follows:

Art. 9. It is incumbent upon each party to prove in conformity with law the facts necessary to the success of his claim.

Art. 10. The judge (*i.e.*, arbitrator) has the power to order on his own motion all legally admissible measures of investigation.

Art. 11 (first paragraph). The parties are bound to give their support to investigatory measures, it being left to the judge (*i.e.*, arbitrator) to draw any conclusions in the event of an abstention or refusal.

These Articles have special significance in the context of French procedural law. Although, as indicated above, arbitrators are not bound to observe the procedural rules applicable to courts, it is instructive briefly to consider these Articles against their French law background as French law on the production of evidence differs very substantially from the corresponding U.S. law. Furthermore, the procedures applied by the local courts necessarily exert a strong influence on arbitral procedure and practice generally.

With respect to the obligation under Article 9 for each party to prove the facts to support its claim, it should be noted that, in practice, whether in civil or commercial cases, primary weight is given to evidence in written form.¹⁰⁴ Oral evidence is given much less weight than under United States

¹⁰¹NOUV. C. PR. CIV., art. 1460. In the case of an international arbitration (*see note 5 supra* and related text), it appears that these principles could only apply if the arbitration was governed by French procedural law. NOUV. C. PR. CIV., art. 1495. However, the arbitrators would be bound to respect such principles as constitute French international public policy (*ordre public international*). NOUV. C. PR. CIV., arts. 1498 and 1502.

¹⁰²*Id.*

¹⁰³Riotte, *Decree Commentary*, at 12.

¹⁰⁴In "civil" cases, one reason for this is C. Civ., art. 1341, which may be translated as follows:

law¹⁰⁵ and is in fact used only exceptionally. In civil cases, party or witness oral testimony is submitted only when requested by a judge either on his own motion or at a party's request.

Article 10 indicates the central role of the judge (and therefore, in arbitral proceedings governed by domestic arbitration law, of the arbitrator) in the discovery and production of evidence in French law.¹⁰⁶ By providing that the arbitrator is empowered to order "all legally admissible measures of investigation," tacit reference is made to those types of fact-finding procedures which are specifically defined and regulated by the New Code of Civil Procedure. These procedures, which are ordered and conducted by, or under the supervision of a judge include, but are not limited to, the following: the *enquête* (literally, inquest),¹⁰⁷ to which witnesses may be convoked by the judge, and heard and interrogated by him but not, however, interrogated by the parties;¹⁰⁸ the *expertise*, by which a judge may appoint an expert to investigate and report upon a particular factual matter believed to necessitate specialized knowledge for its appreciation;¹⁰⁹ *vérifications personnelles du juge* (view of the premises) by which a judge may, at a time and place of his choosing, verify certain facts at first hand;¹¹⁰ and *comparution personnelle des parties* (direct examination of the parties), by which a

An instrument must be executed before notaries or under private signatures for all things exceeding a sum or value fixed by decree, even voluntary bailments, and no evidence by witnesses contrary to or outside of the contents of instruments is admissible, nor as to what is alleged to have been said before, at the time of, or after the execution of the instruments, even when it is a question of a lesser sum or value.

All of this is without prejudice to what is prescribed by the laws relative to commerce.

Decree No. 80-533 of July 15, 1980, J.O. of July 16, 1980, at 1788, fixed the sum or value at 5,000 French francs (approximately U.S. \$1,000).

¹⁰⁵ As a general rule, testimony of witnesses is subject to free judicial evaluation and even uncontracted testimony may be disbelieved. P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 307 n.347, (1967). In "commercial" litigation in France (*i.e.*, "commercial" by virtue of its subject matter or the fact that at least one of the parties is a merchant), the case may be proved by presumptions as well as by oral evidence even if the oral evidence is contrary or outside of the contents of the writing in question. *Mascre v. Veuve Ohorne*, Cass. req., Judgment of July 21, 1908, (1909) D.P.I.64; *Veuve Pinck v. Lohez*, Cass, req., Judgment of November 25, 1903, (1904) D.P.I. 183. Contrary to C. Civ., art. 1341, in "commercial" litigation one may present oral evidence to prove the existence of an obligation even if the amount of the claim exceeds the sum or value fixed by the Civil Code (or by decree) and even if there is no writing whatsoever. *Ayache v. Société algérienne de navigation pour l'Afrique du Nord*, Cass. civ., 2e, Judgment of July 2, 1941, (1941) D.A. 291.

¹⁰⁶ Under U.S. law and practice, where findings of fact are made by juries as well as by judges in civil cases, this role falls primarily on the parties and their counsel. The difference between U.S. and French law in the gathering of evidence is discussed in Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW 35 (1979).

The Rules of Conciliation and Arbitration of the International Chamber of Commerce also appear to give the central role in the discovery and production of evidence to the arbitrator, *see* art. 14 of such rules.

¹⁰⁷ NOUV. C. PR. CIV., arts. 204-231.

¹⁰⁸ After interrogation of a witness, the judge may, if he considers it necessary, put questions to the witness which have been submitted to him by a party. NOUV. C. PR. CIV., art. 214.

¹⁰⁹ NOUV. C. PR. CIV., arts. 263-284.

¹¹⁰ *Id.*, arts. 179-183.

judge (or the full court) may order the parties to appear at a specified time and place and interrogate them (after interrogating a party, the judge may, if he considers it necessary, put questions to a party which have been submitted to him by the other party).¹¹¹

Thus, apart from the submission of written evidence, the main role in the fact-finding process is played by the judge, and the parties and their counsel are confined to the role of interested, but generally passive, bystanders. In particular, a party's counsel has no right, as in common law countries, to examine or to cross-examine witnesses.¹¹²

Article 11 of the New Code of Civil Procedure also refers to discovery in the limited sense that it may be said to exist in French law.¹¹³ Only the first paragraph of this Article, which is quoted above, is deemed to apply to arbitration proceedings. The second paragraph, which provides that if a party withholds evidence the judge can, at the request of the other party, order the first party to produce it under compulsion of a daily fine (*astreinte*), does not apply. An arbitrator is therefore denied the power to impose such penalty on a defaulting party. While the arbitrator may order a party who holds evidence to produce it,¹¹⁴ if the party fails to do so, the arbitrator can impose no formal sanction. An arbitrator is at liberty, of course, to draw an adverse inference from its failure to comply and the threat of this may induce substantial compliance with an arbitrator's orders.

No provision of law authorizes an arbitrator to subpoena or compel a person not a party to the arbitral proceeding to produce evidence.¹¹⁵

Under domestic arbitration law, the taking of evidence and minutes (*actes de l'instruction et les procès-verbaux*) must be done by all of the arbitrators, jointly, unless the arbitration agreement authorizes them to delegate this to one of them.¹¹⁶ This rule is to protect the parties against the possible bias of a party-appointed arbitrator while permitting the arbitrators to act independently where the parties have expressly agreed this to be appropriate (*e.g.*, when an arbitrator has expertise in a specialized field relevant to the dispute).

¹¹¹*Id.*, arts. 184-198.

¹¹²For a comparison of the procedures for the production of evidence in common law and civil law countries, see the report, in French, of a conference on this subject held in London on February 15, 1974 REV. ARB. 121-260. See also note 106 *supra*.

¹¹³The very limited role of discovery in French civil procedure is counter-balanced, in part, by the greater importance of legal presumptions and inferences in French substantive law. F. GRIVART DE KERSTRAT & W. CRAWFORD, NEW CODE OF CIVIL PROCEDURE IN FRANCE, BOOK 1, AT XXXIII (1978).

¹¹⁴NOUV. C. PR. CIV., art. 1460. A party is not ordinarily heard under oath even in judicial proceedings. NOUV. C. PR. CIV., arts. 184-198. However, special procedures do exist in French law for party oaths. NOUV. C. PR. CIV., arts. 317-322.

¹¹⁵Witnesses (other than parties, see note 114) are not required in an arbitral proceeding to be heard under oath, although an oath is ordinarily required of a witness in a judicial *enquête* proceeding. NOUV. C. PR. CIV., art. 1461 and NOUV. C. PR. CIV., art. 211.

¹¹⁶NOUV. C. PR. CIV., art. 1461. This rule does not appear to be mandatory in the case of an international arbitration (see note 5 *supra* and related text). See, in this connection, NOUV. C. PR. CIV., art. 1495.

3. DISPUTES RELATING TO DOCUMENTARY EVIDENCE

Unless the parties have agreed otherwise, an arbitrator is empowered to decide disputes as to the genuineness of documents or other writings submitted in evidence, other than authentic instruments (*actes authentiques*, which are defined below), in conformity with the procedures for the settlement of such disputes laid down for the courts.¹¹⁷

An arbitrator is not empowered to decide disputes as to the genuineness of authentic instruments (*actes authentiques*), that is, legal instruments drawn up in accordance with specified formalities by French notaries (*notaires*) and certain other French public officials (for example, a marriage contract or mortgage must, by law, be drawn up in the form of an authentic instrument by a notary). Authentic instruments form conclusive proof of—that is, must be accepted by a court as establishing—the facts recorded as having been witnessed by the notary or other public official.¹¹⁸ They may not be challenged except by special court proceeding (*inscription de faux*)¹¹⁹ during the course of which arbitral proceedings must be stayed. The legal or contractual time period applicable to the arbitration proceeding¹²⁰ is suspended until the day such special proceeding has been decided.¹²¹

4. SUBSTANTIVE LAW

An arbitrator must decide a dispute in conformity with the rules of substantive law unless he has been empowered to act as an *amiable compositeur*, i.e., essentially, in equity.¹²² If he has been empowered to decide as an *amiable compositeur* then, while he is not bound to the strict observance of rules of substantive (or procedural) law, he is nevertheless bound to conform to rules of public policy (*ordre public*).¹²³

¹¹⁷NOUV. C. PR. CIV., art. 1467; NOUV. C. PR. CIV., arts. 287-294 and 299.

¹¹⁸P. HERZOG, CIVIL PROCEDURE IN FRANCE 327 (1967).

¹¹⁹NOUV. C. PR. CIV., arts. 303-316. Notice of commencement of such proceedings must be given to the *ministère public* (public prosecutor). NOUV. C. PR. CIV., art. 303.

¹²⁰See "B. The Arbitrators—(4) Duration of Appointment" *supra*.

¹²¹NOUV. C. PR. CIV., art. 1467.

¹²²NOUV. C. PR. CIV., art. 1474. If an arbitrator has been authorized to act as *amiable compositeur*, this does not mean that he should necessarily disregard the application of law. Rather, if he is authorized to act in this capacity, he is considered as having, in addition to the power to decide an issue in law, the power to decide it in accordance with equitable considerations if to do so is essential to enable him to arrive at a result consistent with the intention of the parties. He is not obligated to exercise the power of *amiable compositeur* and, in fact, it has been said, should do so only in the exceptional case where the result obtained through the application of law would not also be the just result. J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 202 (4th ed. 1967) and statement of Robert, in *Arbitrage et Transfert de Techniques*, 1979 REV. ARB. 26. For *amiable composition* in general see E. LOQUIN, *L'AMIALE COMPOSITION EN DROIT COMPARÉ ET INTERNATIONAL* (1980).

¹²³J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 202 (4th ed. 1967); for French public policy (*ordre public*), see "A. Arbitration Agreement—(2) Arbitrability of the Subject Matter" *supra*.

5. CHALLENGES TO ARBITRATORS' JURISDICTION

Under French law, an arbitrator has been held, since at least the nineteenth century, to have the power to interpret an arbitration agreement, whose validity is not contested, in order to decide the scope or limits of his jurisdiction thereunder.¹²⁴ He is regarded as having the inherent power to determine which issues he is authorized to decide under the applicable arbitration agreement and which issues he is not and to proceed accordingly.¹²⁵

However, prior to the 1980 Decree, it had been doubtful, at least in the case of a domestic arbitration, whether an arbitrator had the inherent power to decide on challenges to his jurisdiction based, not on the scope of an admittedly valid arbitration agreement, but upon its alleged nonexistence or invalidity or—a situation which arises much more frequently in practice—the alleged invalidity of the contract in which a future disputes clause is contained.¹²⁶ Overruling its own case law,¹²⁷ the *Cour de Cassation* decided in 1953 that where a future disputes clause is contained in a contract whose validity is challenged by one of the parties, then the courts, not the arbitrators, are alone competent to decide the issue of such validity.¹²⁸ The apparent rationale for this decision was that a challenge to the validity of the main contract is necessarily a challenge to the validity of the future disputes clause contained therein and that arbitrators should not be permitted to decide on the existence or validity of the very source of their power. The *Cour de Cassation's* decision was severely criticized by doctrinal writers¹²⁹ and a majority of the *cours d'appel* (regional courts of appeal)

¹²⁴H. MOTULSKY, ETUDES ET NOTES SUR L'ARBITRAGE 193-194 (1974).

¹²⁵*Société Anonyme Compagnie Eurafrique des Bois et Matériaux v. Rousset*, Judgment of May 6, 1971, Cass. civ. 2e, (1971) Bull. Civ. II, No. 171, at 121. In that case, *Compagnie Eurafrique des Bois et Matériaux* sought to oppose enforcement of an arbitral award on the ground that the arbitrator, by declaring himself incompetent to decide part of the dispute, had effectively decided an issue he had not been requested to decide, i.e., his own competence. In discussing *Eurafrique's* claim, the *Cour de Cassation* stated (translation):

Whereas every tribunal even one of the special jurisdiction (*même (jurisdiction) d'exception*) is the judge of its own competence, the arbitrator had the power and the duty, before any consideration of the demands of the parties, to verify if, under the arbitration agreement they had subscribed, he was competent to hear the dispute which had been submitted to him.

¹²⁶An arbitrator could decide on such challenges to his jurisdiction, even in the case of domestic arbitration, if such power had expressly been conferred upon him by the terms of the future disputes clause. Goldman, *Arbitrage (Droit International Privé)* in DALLOZ, ENCYCLOPEDIE JURIDIQUE, I REPERTOIRE DE DROIT INTERNATIONAL (1968), para. 136.

Caulliez-Tiberghien v. Caulliez-Hannart, Judgment of February 22, 1949, Cass. com., (1949) J.C.P. II. 4899, note Motulsky.

¹²⁸*Courtieu et Tronel v. Blanchard*, Judgment of October 6, 1953, Cass. com., (1954) J.C.P. II. 8293. In this case, the *Cour de Cassation* confirmed the decision of a lower court holding that a court, not an arbitrator, had exclusive jurisdiction to declare a particular corporation to be void or nonexistent as this claim had necessarily called into question the validity of the future disputes clause contained in the corporation's articles of incorporation (*statuts*).

¹²⁹*E.g.*, H. MOTULSKY, ETUDES ET NOTES SUR L'ARBITRAGE 189 (1974). The *Cour de Cassation's* decision severely jeopardized the efficacy of arbitration. A party had merely to find some basis for challenging the main contract or future disputes clause as invalid and he could

refused, in fact, to follow it.¹³⁰

The first sign of change in the *Cour de Cassation's* position came in the celebrated *Gosset* decision in 1963, where the court held that in the case of international arbitration,¹³¹ a future disputes clause is, "except in exceptional circumstances" not found to have been alleged in that case, legally separable from the main contract and cannot be affected by its alleged invalidity.¹³² The *Gosset* decision involved a challenge to the arbitrators' jurisdiction based on the alleged invalidity of the contract in which a future disputes clause was contained. It thus left open the question of whether the same rule would obtain in the event such challenge was based on the alleged invalidity of the future disputes clause itself.¹³³

The 1980 Decree now appears to settle these open questions as regards both domestic (and, *a fortiori*, international) arbitration. It indicates that, after a dispute has been referred to arbitration (and assuming it had not previously been referred to a court),¹³⁴ the arbitrators have exclusive competence to decide challenges to their jurisdiction whether based on the alleged invalidity of the submission agreement or the future disputes clause

cause arbitration to be stayed pending resolution of this issue by the courts, which could take years.

¹³⁰Giverdon, *Compromis—Clause Compromissoire* in DALLOZ, *ENCYCLOPEDIE JURIDIQUE*, 2 *REPERTOIRE DE DROIT CIVIL* (1980).

¹³¹*Gosset v. Société Carapelli*, Judgment of May 7, 1963, Cass. civ. I, (1963) D. Jur. 545, note Robert. For the definition of international arbitration in French law, see note 5 *supra* and related text.

In devising a special forum rule applicable to international arbitration, the *Gosset* case foreshadowed the decision of the U.S. Supreme Court in *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974) some eleven years later.

¹³²*Id.* In this case, a French company, Gosset, had ordered a quantity of seed-corn from Société Carapelli, an Italian company, it being provided that payment would only be due once the produce cleared French customs. At the time of the sales agreement, Gosset, but not Carapelli, was aware of the fact that a special authorization would be necessary for French customs clearance. The authorization was not granted. Carapelli commenced arbitration before the Italian arbitral tribunal established pursuant to the sales agreement, claiming damages due to the impossibility of transferring the produce ordered through French customs and to the refusal of Gosset to pay the purchase price. The Italian arbitral tribunal found in favor of Carapelli and the arbitral award was granted an enforcement (*exequatur*) order in France. Gosset sought, unsuccessfully, to attack the enforcement order on the ground that the validity of the future disputes clause contained in the sales agreement was dependent on the validity of the sales agreement itself and, as the sales agreement was void absent the necessary authorization, argued Gosset, so was the future disputes clause and the proceedings that had been based thereon.

¹³³In subsequent cases, where an international contract (see note 5 *supra* and related text) was involved, the courts upheld the future disputes clause even where it was invalid under the law governing the main contract in which it was contained. *Hecht v. Société Buisman's* Judgment of July 4, 1972, Cass. civ. I, (1972) Bull. Civ. I, No. 175, at 154; and *Menicucci v. Mahieux*, Judgment of December 13, 1975, *Cour d'appel*, Paris, 65 R.C.D.I.P. 507 (1976), note Oppetit.

¹³⁴As indicated under "A. Arbitration Agreement—(5) Effect of Arbitration Agreement" *supra*, if a dispute subject to an arbitration agreement has been brought before a court before it has been referred to arbitration, the court must, upon the demand of a party, declare itself incompetent unless the arbitration agreement is "manifestly void" (*manifestement nulle*).

or the contract in which it is contained.¹³⁵ This, at least, is the opinion of certain doctrinal writers¹³⁶ which it will remain for the courts to confirm or qualify.

Decisions of arbitrators as to their jurisdiction in domestic arbitrations remain, like certain other questions, subject to judicial review after the arbitral proceedings have terminated through appeal (if this has not been waived) or *recours en annulation*.¹³⁷

6. INTERRUPTION OF PROCEEDINGS

Under domestic arbitration law, arbitral proceedings are subject to interruption (*interruption*) on the same grounds and in the same circumstances as French judicial proceedings.¹³⁸ French judicial proceedings are subject to interruption in each of six events¹³⁹ but only if such event occurs prior to the opening of the hearing (*ouverture des débats*). Any judgment or other action that takes place in a proceeding after the occurrence of an event of interruption is deemed to be without legal effect. If, after an event of interruption, the proceeding is not ultimately resumed by the parties voluntarily, one party may by court action compel such resumption.¹⁴⁰

7. TERMINATION OF PROCEEDINGS

Unless the parties have agreed otherwise (or an award has been rendered), arbitral proceedings terminate in the following circumstances:

- (i) By the revocation, death or inability to act of an arbitrator or by an arbitrator's loss of the full enjoyment of his civil rights;

¹³⁵NOUV. C. PR. CIV., art. 1466 and art. 1458, first para. In art. 1466, the reference to the arbitrator's investiture (*investiture*) appears to be a reference to the (alleged) arbitration agreement and to the powers the arbitrator draws therefrom. See 2 H. MOTULSKY, ECRITS—ETUDES ET NOTES SUR L'ARBITRAGE (1974) 216.

¹³⁶Robert, *Decree Commentary*, at 194; Riotte, *Decree Commentary*, at 8-9. Assuming the future disputes clause is broad enough to include such a claim, even an allegation of fraudulent inducement of the future disputes clause itself, provided it is not criminal in nature, may be within the arbitrators' exclusive competence. In this respect, French law may now afford arbitrators wider powers than U.S. law. Compare *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

¹³⁷See E. Methods of Review *infra*. As stated therein, a *recours en annulation* is available if an arbitrator has decided "in the absence of an arbitration agreement." This could afford a party a basis for attacking an arbitrator's decision upholding his jurisdiction.

¹³⁸NOUV. C. PR. CIV., art. 1465; NOUV. C. PR. CIV., arts. 369-376.

¹³⁹NOUV. C. PR. CIV., arts. 369-370. Art. 369 provides that proceedings are interrupted by: (1) attainment of majority by a party; (2) discontinuance of representation by an attorney (*avocat or avoué*) when such representation is compulsory; and (3) the effect of a judgment ordering judicial reorganization (*règlement judiciaire*) or bankruptcy (*liquidation des biens*) in cases when such order results in taking control or in dispossession of the debtor. Article 370 provides that, as from the date notification thereof is given to the other party, proceedings are interrupted by: (1) death of a party in cases where the action is transmissible; (2) discontinuance of the functions of the legal representative of a person under a legal disability; and (3) recovery or loss by a party of its right to sue and be sued.

¹⁴⁰NOUV. C. PR. CIV., art. 373.

- (ii) By the abstention (*abstention*) or disqualification (*récusation*) of an arbitrator, *i.e.*, in either case, because grounds for challenge to his appointment have arisen or been disclosed since he commenced his duties; or
- (iii) By the expiration of the time limit for arbitration.¹⁴¹

In view of the difficulties and delay resulting from premature termination of arbitral proceedings (*i.e.*, in cases (i) and (ii) above), in cases governed by this domestic rule the parties should provide expressly in their arbitration agreement that proceedings shall not end when an arbitrator ceases to act and stipulate a procedure for the replacement of an arbitrator.¹⁴²

D. *The Arbitral Award*

1. ARBITRATORS' DELIBERATIONS

Under domestic arbitration law, the arbitrators are required to fix a date as of which the matters in dispute must be submitted to the arbitrators' formal deliberations (*mise en délibéré*). This date marks the end of the proceedings as regards the submission of pleadings and proof. After this date no further claim (*demande*) or ground for a claim (*moyen*) may be presented. No further observations or documentary evidence may be submitted by the parties except at the arbitrators' request.¹⁴³

Under domestic arbitration law, the discussions or deliberations (*délibérations*) of the arbitrators in the process of arriving at an award must be kept secret.¹⁴⁴

2. FORMAL REQUIREMENTS

When an arbitral award is rendered by a tribunal consisting of more than one arbitrator, under domestic arbitration law it must be rendered by a majority vote of the arbitrators.¹⁴⁵ The award must be in writing and contain the following:

- (i) A succinct statement of the respective claims of the parties and the grounds therefor;

¹⁴¹Nouv. C. Pr. Civ., art. 1464, and see "B. The Arbitrators—(4) Duration of Appointment" *supra*.

¹⁴²Robert, *Decree Commentary*, at 194. A procedure for replacing arbitrators is provided for in the Rules of Conciliation and Arbitration of the I.C.C. See art. 2(8) thereof.

¹⁴³Nouv. C. Pr. Civ., art. 1468. These provisions allow the arbitrators greater flexibility than under prior law. Under prior law, each party had to present its case and evidence by no later than fifteen days prior to the expiration of the time limit allowed for the arbitration and the arbitrators were bound to decide upon the state of the evidence at that time, (old) C. Pr. Civ., art. 1016. These provisions would not seem to be mandatory in the case of an international arbitration (see note 5 *supra* and related text). Nouv. C. Pr. Civ., art. 1495.

¹⁴⁴Nouv. C. Pr. Civ., art. 1469. This provision means, in effect, that they must not take place in the presence of either the parties or of third parties, 3 E. Blanc, *Nouveau Code de Procedure Civile Commenté Dans L'Ordre des Articles* (1980), 626-631. This provision would not seem to be mandatory in the case of an international arbitration (see note 5 *supra* and related text). Nouv. C. Pr. Civ., art. 1495.

¹⁴⁵Nouv. C. Pr. Civ., art. 1470.

- (ii) A statement of the reasons for the decision reached;
- (iii) The names of the arbitrators;
- (iv) The date of the award;
- (v) The place where the award was rendered;
- (vi) The names (including first names of individuals) of the parties and the addresses of their residences or, in the case of legal entities, of their head offices; and
- (vii) If applicable, the names of their lawyers or of any person who has represented or assisted the parties.¹⁴⁶

The arbitral award must be signed by all of the arbitrators. However, if a minority of them refuses to sign it, then, if the others make mention of this in the award, the award is deemed to have the same effect as if it had been signed by all of the arbitrators.¹⁴⁷ While the fact of the existence of disagreement within the tribunal may therefore be revealed in an award, it is not the practice for French arbitrators to issue dissenting opinions just as it is not the practice for French court judges to do so.

If an award fails to satisfy certain of the requirements of form listed above, it is void. Thus, an award is void if it does not contain the reasons for the decision reached (even if the arbitrators had been empowered to act as *amiables compositeurs*), the names of the arbitrators, the date of the award or is not signed in the manner indicated in the immediately preceding paragraph.¹⁴⁸

The above-mentioned requirements of form (*i.e.*, in "Formal Requirements") would not appear applicable in the case of an international arbitration unless it were governed by French procedural law and the parties had not agreed to exclude application of such requirements.¹⁴⁹

3. EFFECT OF AWARD

Under domestic arbitration law, upon rendering an award with respect to a dispute, the arbitrator is relieved of his duties with respect to it.¹⁵⁰

Nevertheless, the arbitrator retains the power to interpret, and to correct, obvious errors or omissions (*erreurs et omissions matérielles*) which may affect the award as well as the power to complete it if he should have omitted to decide an issue (*chef de demande*). In this respect an arbitrator now

¹⁴⁶Nouv. C. Pr. Civ., arts. 1471 and 1472.

¹⁴⁷Nouv. C. Pr. Civ., art. 1473.

¹⁴⁸Nouv. C. Pr. Civ., art. 1480.

¹⁴⁹Nouv. C. Pr. Civ., art. 1495.

¹⁵⁰Nouv. C. Pr. Civ., art. 1475. This principle would appear necessarily to apply only to an award on the merits (not to an interlocutory decision). See J. ROBERT & B. MOREAU, *DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE*, at M4 (1971) and *Sté Rhum Saint James v. Sté Pierre Rivière et Cie*, Judgment of March 30, 1962, *Cour d'appel*, Paris, (1962) J.C.P. II 12843, note Level. This principle would not seem to be mandatory in the case of an international arbitration (see note 5 *supra* and related text). Nouv. C. Pr. Civ., art. 1495.

enjoys the same powers as a judge.¹⁵¹ If the arbitral tribunal cannot be reunited, such powers of interpretation, correction and completion are deemed to devolve on the court which would have been competent if the dispute had not been submitted to arbitration.¹⁵²

Once an arbitral award has been rendered it has *res judicata* effect in France (*autorité de la chose jugée*) with respect to the dispute decided by it.¹⁵³ But an award is, nevertheless, not capable of enforcement in France until it has received an *exequatur* (enforcement) order as described below.

4. ENFORCEMENT OF AWARD

For an arbitral award to be enforceable in France, it must have received an *exequatur* order (see below) from the *tribunal de grande instance* (ordinary court of original jurisdiction) competent for the area in which the award has been rendered. An *exequatur* order would also seem necessary to enforce an interlocutory decision of the arbitrators.¹⁵⁴

The granting of an *exequatur* order on an award makes the award enforceable in France much like a court judgment.

To obtain an *exequatur* order, the record (*la minute*) of the award, together with a copy of the arbitration agreement, must be submitted by either an arbitrator or a party to the secretariat of the applicable court.¹⁵⁵ The *exequatur* order is usually¹⁵⁶ issued in an *ex parte* proceeding before a single judge (*juge de l'exécution*) and it can generally be obtained within a few days of application therefor.¹⁵⁷

In an *ex parte exequatur* proceeding, the judge does not reexamine the merits of the dispute but merely ascertains that the award appears to be

¹⁵¹NOUV. C. PR. CIV., art. 1475 expressly provides that NOUV. C. PR. CIV., arts. 461-464, which authorize judges to interpret, correct and complete their decisions, in certain circumstances, apply equally to arbitrators.

¹⁵²NOUV. C. PR. CIV., art. 1475.

¹⁵³NOUV. C. PR. CIV., art. 1476. The effect of this provision is that an arbitral award, even before an order of *exequatur* has been obtained thereon, benefits from a legal presumption that the matter concerned has been decided, pursuant to C. CIV., art. 1350. Robert, *Decree Commentary*, at 193.

¹⁵⁴The enforcement of interlocutory decisions, which was dealt with specifically in art. 1021 of the (old) C. PR. CIV., is not referred to expressly in the 1980 Decree. It would seem, and has been assumed, that former law (see J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 282-83 (4th ed. 1967)) continues to apply.

¹⁵⁵NOUV. C. PR. CIV., art. 1477. As an *exequatur* order is generally considered to be an *ordonnance sur requête* (order granted on petition), an application for an *exequatur* order should also comply with the procedure for *ordonnance sur requête*, NOUV. C. PR. CIV., arts. 493-498 (see 1979 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 100-101). This provides, among other things, for the submission to the court of a petition, in duplicate, containing the reasons for the order being requested. NOUV. C. PR. CIV., art. 494.

Application to a court for an *exequatur* order may be made at any time within thirty years of the rendering of an award. Statement of Robert in *La Réforme du Droit Français de l'Arbitrage*, 1980 REV. ARB. 694.

¹⁵⁶The judge has the power to call for the presence of the other party. Goldman, *Arbitrage (Droit International Privé)* in DALLOZ, *ENCYCLOPEDIE JURIDIQUE*, 1 REPERTOIRE DE DROIT INTERNATIONAL (1968), para. 276.

¹⁵⁷1977 REV. ARB. 353.

authentic, has been rendered by the arbitrators referred to in the arbitration agreement and that there appears to be nothing manifestly incompatible with French public policy in enforcing the award.¹⁵⁸ While the subject of debate, it has also been held that he may make a preliminary examination to determine that the arbitrators have not exceeded their competence or powers under the arbitration agreement.¹⁵⁹

The *exequatur* order is noted on the original record (*la minute*) of the award. An order (*ordonnance*) denying *exequatur* to an award must give the reasons for such denial¹⁶⁰ and is subject to appeal.¹⁶¹

Once an *exequatur* order has been granted, the award cannot be enforced until one month after the award, bearing notice of *exequatur*, has been served upon the party against whom it is sought to be enforced. As discussed below,¹⁶² full review of the award may only occur if a party elects to challenge the award by way, for example, of appeal (if this has not been waived) or *recours en annulation*. If a party has elected to challenge the award by way of appeal or *recours en annulation*, an award which has received an *exequatur* order cannot be enforced until such legal proceeding has terminated.¹⁶³

5. PROVISIONAL ENFORCEMENT

Provisional enforcement (*exécution provisoire*) of an arbitral award, that is, immediate enforcement notwithstanding appeal or the exercise of another procedure for judicial review of an award, may be available in certain circumstances.¹⁶⁴

6. REGISTRATION TAX

An arbitral award must be registered with the tax authorities within one month after the date an *exequatur* order, if any, on the award has been rendered.¹⁶⁵ An award which has received an *exequatur* order is subject to the registration tax (*droits d'enregistrement*) applicable to court judg-

¹⁵⁸Goldman, *Arbitrage (Droit International Privé)* in DALLOZ, ENCYCLOPEDIE JURIDIQUE, I REPERTOIRE DE DROIT INTERNATIONAL (1968), para. 275; J. ROBERT & B. MOREAU, DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE, at N2-N3 (1971).

¹⁵⁹Guthmann v. Soc. Sofidal, Judgment of July 30, 1952, Cass. civ. com., (1952) D. Jur. 724; J. ROBERT, ARBITRAGE CIVIL ET COMMERCIAL (4th ed. 1967) 286; Goldman, *Arbitrage (Droit International Privé)* in DALLOZ, ENCYCLOPEDIE JURIDIQUE, I REPERTOIRE DE DROIT INTERNATIONAL (1968), para. 275; J. ROBERT & B. MOREAU, DROIT INTERNE ET DROIT INTERNATIONAL DE L'ARBITRAGE, at N2-N3 (1971).

¹⁶⁰NOUV. C. PR. CIV., art. 1478.

¹⁶¹See "E. Methods of Review—(2) Effect upon *Exequatur*" *infra*.

¹⁶²See "E. Methods of Review" *infra*.

¹⁶³NOUV. C. PR. CIV., art. 1486. However, the award may in the meantime be subject to provisional enforcement. See "D. The Arbitral Award—(5) Provisional Enforcement" *infra*.

¹⁶⁴As the rules on this subject are complex, they are not summarized in the text. See NOUV. C. PR. CIV., art. 1479 and arts. 514-526.

¹⁶⁵C. GEN. IMP., art. 841; J. VINCENT & S. GUINCHARD, PROCEDURE CIVILE 1174 (20th ed. 1981).

ments.¹⁶⁶ This is nominal in amount.¹⁶⁷ Registration of the *exequatur* order itself is not subject to registration tax.¹⁶⁸

E. *Methods of Review*

1. APPEAL AND *RECOURS EN ANNULATION*

In France, arbitral awards, like judgments,¹⁶⁹ can be challenged only by means of the procedural devices specifically made available by law, generally by statute. The two main procedural devices for attacking an award rendered in France in a domestic arbitration¹⁷⁰ are: (i) appeal (*appel*); and (ii) *recours en annulation*.

As we shall see below, the scope of judicial review of such an award will vary to an important extent depending upon whether the procedure of appeal is available in respect of such an award or not. Where the procedure of appeal is available, no other procedural device for attacking such an award may be exercised.¹⁷¹

i. Appeal

An arbitral award is subject to appeal (*appel*) unless the right of appeal has been waived in the arbitration agreement.¹⁷²

Appeal is made to the *cour d'appel* (regional court of appeal) competent for the area in which the award has been rendered.¹⁷³ Under French law, appeal is not limited to a review of assigned errors of law but generally leads to a *de novo* review of the entire case.¹⁷⁴ The *cour d'appel* may not limit its review to questions of law and remand for a new adjudication of factual issues: it must itself decide the entire case, both facts and law, on the merits.¹⁷⁵ While parties may not ordinarily present new claims on appeal, they may present new arguments (*moyens nouveaux*) and new evidence.¹⁷⁶

As the full judicial review which appeal implies is basically inconsistent with the idea of arbitration,¹⁷⁷ it is the practice in France for parties to

¹⁶⁶*Id.*

¹⁶⁷C. GEN. IMP., arts. 835-841.

¹⁶⁸C. GEN. IMP., art. 841.

¹⁶⁹P. HERZOG, *CIVIL PROCEDURE IN FRANCE* (1967) 467.

¹⁷⁰Different procedural devices are available for attacking an award rendered in an international arbitration (see note 5 *supra* and related text), whether in France or abroad, or otherwise rendered abroad. See NOUV. C. PR. CIV., arts. 1501-1507.

¹⁷¹NOUV. C. PR. CIV., art. 1483.

¹⁷²NOUV. C. PR. CIV., art. 1482.

¹⁷³NOUV. C. PR. CIV., art. 1486.

¹⁷⁴P. HERZOG, *CIVIL PROCEDURE IN FRANCE* (1967) 397.

¹⁷⁵*Id.*

¹⁷⁶NOUV. C. PR. CIV., art. 563.

¹⁷⁷This expression is taken from P. HERZOG, *CIVIL PROCEDURE IN FRANCE* (1967) 530.

waive the right of appeal in their arbitration agreement.¹⁷⁸

An award is also stated not to be subject to appeal if the arbitrators had been authorized to decide as *amiables compositeurs* unless the parties had expressly reserved the right of appeal in their arbitration agreement.¹⁷⁹ It is presumed, absent a provision by the parties to the contrary, that having conferred such authority upon the arbitrators, the parties would not want the award to be reviewed by a court in an appeal proceeding.

Upon appeal, the *cour d'appel* may be requested either to modify, or to annul, the award. If the award being appealed from was decided by arbitrators who had the power to act as *amiables compositeurs*, then the judge on appeal must also act as *amiable compositeur*.¹⁸⁰

(ii) *Recours en Annulation*

If the parties have expressly waived the right of appeal or have authorized the arbitrators to decide as *amiables compositeurs* and have not expressly reserved the right of appeal, the award remains subject to possible annulment by a *recours en annulation*. As a matter of public policy (*ordre public*), the benefit of this review procedure cannot be waived.¹⁸¹

A *recours en annulation* is available in six cases, as follows:

- (a) If the arbitrator has decided in the absence of an arbitration agreement or on the basis of a void or expired arbitration agreement;
- (b) If the arbitral tribunal has been irregularly constituted or the sole arbitrator irregularly appointed;
- (c) If the arbitrator has decided without complying with the mission conferred upon him;
- (d) When the right of each party to present its case (*principe de la contradiction*) has not been respected;
- (e) In any case where the arbitral award is void for failure to comply with specified requirements of form;¹⁸² and
- (f) If the arbitrator has violated a rule of public policy (*ordre public*).¹⁸³

A *recours en annulation*, unlike an appeal (which, as we have seen, results in a *de novo* review by the *cour d'appel*), could give rise to a second arbitra-

¹⁷⁸In this connection, art. 24(2) of the Rules of Conciliation and Arbitration of the ICC provides that, by submitting to arbitration by the ICC, the parties shall be deemed "... to have waived their right to any form of appeal insofar as such waiver can be validly made."

¹⁷⁹Nouv. C. PR. CIV., art. 1482. For a definition of *amiable compositeur*, see note 122 *supra*.

¹⁸⁰Nouv. C. PR. CIV., art. 1483. Under Nouv. C. PR. CIV., article 12, court judges are empowered to act as *amiables compositeurs* in certain cases, including cases where, after a dispute has arisen, the parties have conferred this power on them. This article would therefore enable a *cour d'appel* to act as *amiable compositeur* where an award appealed from has been decided by arbitrators having that power. Inasmuch as the *Cour de Cassation* may only decide in law, the decision of the *cour d'appel*, at least as to questions of substance, could not be subject to further review. Robert, *Decree Commentary*, at 197.

¹⁸¹Nouv. C. PR. CIV., art. 1484.

¹⁸²See "D. The Arbitral Award—(2) Formal Requirements" *supra*.

¹⁸³Nouv. C. PR. CIV., art. 1484. See also "A. Arbitration Agreement—(2) Arbitrability of the Subject Matter" *supra*.

tion proceeding if the award is annulled in whole or in part and a future disputes clause applicable to the dispute remains still in effect.¹⁸⁴ With a view apparently to dissuading parties from using this review procedure as a delaying tactic,¹⁸⁵ the 1980 Decree provides that, when a court annuls an award in such a proceeding, it must also decide the merits of the dispute, within the limits of the arbitrator's terms of reference, unless all of the parties elect that it should not do so.¹⁸⁶ Thus, unless the parties unanimously agree otherwise, the court called upon to annul the award, will, if it does annul the award, render a final judgment on the merits of the dispute originally submitted to arbitration.

A *recours en annulation*, like an appeal, is made to the *cour d'appel* competent for the area in which the award has been rendered.¹⁸⁷ Like an appeal, it is made, heard and judged according to the applicable procedural rules for proceedings before that court.¹⁸⁸

* * *

An appeal or *recours en annulation* to challenge an arbitral award rendered in France in a domestic arbitration may be made as soon as the award has been pronounced; the time period allowed for exercising each such review procedure expires one month after the award, bearing notice of *exequatur*, has been served upon the party against whom it is sought to be enforced.¹⁸⁹

As indicated above,¹⁹⁰ once an *exequatur* order has been granted on an award, the award cannot be enforced earlier than one month after the award, bearing notice of *exequatur*, has been served upon the party against whom it is sought to be enforced. Thus, an award cannot be enforced earlier than the date when the time period allowed for the making of an appeal or *recours en annulation* has expired. If one of these review procedures is exercised within the time period allowed therefor, this will have the effect of staying enforcement of the award until the review proceeding has terminated.¹⁹¹

The only exception to the above rule as to when an award, which has received an *exequatur* order, may be enforced would be in a case where provisional enforcement of the award has been ordered by a court.¹⁹²

¹⁸⁴J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL* 295 n. 1 (4th ed. 1967).

¹⁸⁵Robert, *Decree Commentary*, at 197.

¹⁸⁶NOUV. C. PR. CIV., art. 1485.

¹⁸⁷NOUV. C. PR. CIV., art. 1486.

¹⁸⁸NOUV. C. PR. CIV., art. 1487.

¹⁸⁹NOUV. C. PR. CIV., art. 1486.

¹⁹⁰See "D. The Arbitral Award—(4) Enforcement of Award and (5) Provisional Enforcement" *supra*.

¹⁹¹NOUV. C. PR. CIV., art. 1486.

¹⁹²See "D. The Arbitral Award—(5) Provisional Enforcement" *supra*.

2. EFFECT UPON *EXEQUATUR*

While an award rendered in France in a domestic arbitration is subject to the above-mentioned two review procedures, an order granting *exequatur* in respect of such an award is not subject to judicial review. However, when a party challenges such an award by appeal or *recours en annulation*, such procedure is deemed by operation of law to include, within the limits of the action before the court, recourse against any *exequatur* order that may have been granted in respect of such an award. If an *exequatur* order had not yet been granted in respect of such an award, the appeal or *recours en annulation* against such award is deemed by operation of law to have the effect of depriving the court, which would otherwise be competent to grant the *exequatur* order, of jurisdiction to do so.¹⁹³

An order denying *exequatur* (which, as indicated above, must contain the reasons therefor) may be appealed from within a period of one month from the date it has been served upon the party against whom it was proposed to enforce the award. In such case, the *cour d'appel* will, at the parties' demand, hear the arguments which they could have raised against the arbitral award either by appeal or *recours en annulation*.¹⁹⁴

The dismissal of an appeal or *recours en annulation* against an arbitration award rendered in France in a domestic arbitration has the effect of conferring an *exequatur* order upon the award or upon those of its provisions which have not been annulled by the court.¹⁹⁵ Thus, upon such dismissal being made, the award or such provisions thereof may be immediately enforceable like a judgment.

3. OTHER METHODS OF REVIEW

In addition to an appeal and a *recours en annulation*, a third procedural device is available to a party seeking to challenge an arbitration award rendered in France in a domestic arbitration: the *recours en révision*. The circumstances in which this proceeding may be instituted are very limited (e.g., if it is revealed, after such an award has been rendered, that it has been obtained by fraud of the party in whose favor it had been rendered)¹⁹⁶ and it is not believed it will be much used.¹⁹⁷ The right to resort to this proceeding can probably be validly waived.¹⁹⁸ The *recours en révision* is brought before the *cour d'appel* which would be competent to hear other judicial challenges to an award.¹⁹⁹

An award rendered in France in a domestic arbitration may be subject to attack by a third party (e.g., a creditor of a party), who considers it may be

¹⁹³Nouv. C. Pr. Civ., art. 1488.

¹⁹⁴Nouv. C. Pr. Civ., art. 1489.

¹⁹⁵Nouv. C. Pr. Civ., art. 1490.

¹⁹⁶Nouv. C. Pr. Civ., arts. 593-603.

¹⁹⁷Robert, *Decree Commentary*, at 197.

¹⁹⁸*Id.*

¹⁹⁹Nouv. C. Pr. Civ., art. 1491.

damaged thereby, in a *tierce opposition* proceeding.²⁰⁰ Such a proceeding is brought before the court which would have been competent to decide the dispute if it had not been submitted to arbitration.²⁰¹

An award is not subject to direct review by the *Cour de Cassation*, France's highest court of ordinary jurisdiction.²⁰² However, the judgment of a *cour d'appel* in a proceeding to review an award may be the subject of a *pourvoi*²⁰³ to the *Cour de Cassation*.

III. Conclusion

The 1980 Decree has effected a long overdue reform in French domestic arbitration law. Its most notable achievements have been summarized as being:²⁰⁴ (1) statutory recognition of the future disputes clause as an arbitration agreement separate from and independent of the submission agreement (the parties to a contract containing a future disputes clause no longer being technically required to enter into a submission agreement as a condition to commencing arbitration); (2) the grant of broad powers to the arbitrators to decide challenges to their jurisdiction whether based on the alleged invalidity of a submission agreement or a future disputes clause or the contract in which such clause is contained; (3) reinforcement of the powers of the *référé* judge to deal with problems which may arise in the constitution of the arbitral tribunal and in the course of arbitral proceedings; and (4) the unification of methods of review of arbitral awards rendered in France in a domestic arbitration, the simplification of their procedures and the adoption of measures designed to reduce the time required for their exercise.

One may argue that the reform of domestic arbitration law should have gone further. It is, for example, regrettable that in domestic law the future disputes clause remains valid only in specified commercial disputes and continues to be invalid for other commercial and for mixed (civil and commercial) disputes. These definitions are today, more than ever, artificial. By maintaining them, use of the future disputes clause is likely to continue to be discouraged in a number of domestic business transactions.

The 1980 Decree may also appear, at least to a lawyer with a common law background, to be, in certain respects, excessively formalistic. As indicated above,²⁰⁵ by imposing formal conditions for the future disputes clause and providing that a failure to meet those conditions will invalidate the clause, the law is now stricter than it was before the 1980 Decree when the future disputes clause was unregulated by statute. Similarly, the formal

²⁰⁰Nouv. C. Pr. Civ., art. 1481 and Nouv. C. Pr. Civ., arts. 582-592.

²⁰¹Nouv. C. Pr. Civ., art. 1481.

²⁰²*Id.*

²⁰³*Pourvoi en cassation* is the procedure for seeking review of a lower court judgment by the *Cour de Cassation*.

²⁰⁴Robert, *Decree Commentary*, at 189.

²⁰⁵See note 51 *supra*.

conditions for the validity of an arbitral award seem very severe. As indicated above,²⁰⁶ the mere omission of the date of the award will void the award (although this omission could subsequently be corrected by the arbitrator). Furthermore, the requirement that an arbitral tribunal must consist of an uneven number of arbitrators, otherwise it is invalid, seems unduly rigid.

Nevertheless, these possible shortcomings are minor in relation to the importance of the reform of domestic arbitration law that the 1980 Decree has achieved. Moreover, these criticisms should not greatly trouble lawyers outside France as the above-mentioned provisions would appear to be without possible application to an international arbitration unless it were governed by French procedural law and the parties had not agreed to exclude the application of such provisions.

Now that the 1981 Decree has added to the reform of domestic law the provisions on international arbitration, the reform of French arbitration law may be regarded as complete. The changes that have been effected have generally been warmly welcomed by French legal practitioners and should promote greater confidence in, and wider use of, arbitration for the resolution of private domestic and international disputes in France.

²⁰⁶ See "D. The Arbitral Award—(2) Formal Requirements" *supra*.

Appendix

**Translation of Articles 1442 to 1491
of Book IV of the New Code of Civil Procedure
(*Nouveau Code de Procédure Civile*)***

**Book IV
Arbitrations**

**Title I
Arbitration Agreements**

**Chapter I
Future Disputes Clause**

Article 1442

A future disputes clause (*clause compromissoire*) is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which could arise relative to such contract.

Article 1443

A future disputes clause must be stipulated in writing to the main contract or in a document to which it refers, otherwise it is void.

Subject to the same sanction, a future disputes clause must either designate the arbitrator or arbitrators or prescribe the method of their appointment.

Article 1444

If, the dispute having arisen, a difficulty is encountered in the constitution of an arbitral tribunal due to an act of one of the parties or in the implementation of the method of appointment, the presiding judge (*président*) or the *tribunal de grande instance*¹ shall appoint the arbitrator or arbitrators.

However, such appointment shall be made by the presiding judge of the *tribunal de commerce*² if the agreement has expressly so provided.

If a future disputes clause is either manifestly void, or insufficient to permit the constitution of an arbitral tribunal, the presiding judge shall so decide and shall declare that there are no grounds for appointment.

*Translated by Christopher R. Seppala, *Conseil Juridique*, Paris, from the official French text of Decree no. 81-500 of May 12, 1981 establishing the provisions of Books III and IV of the New Code of Civil Procedure and modifying certain provisions of such Code, published in the *Journal Officiel* of the French Republic, dated May 14, 1981.

¹Ordinary court of original jurisdiction.

²Commercial court.

Article 1445

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

Article 1446

When it is void, a future disputes clause is deemed not to have been written.

Chapter II

Submission Agreement

Article 1447

A submission agreement (*compromis*) is an agreement by which the parties to a dispute which has arisen submit it to the arbitration of one or several persons.

Article 1448

A submission agreement must determine the subject matter of the dispute, otherwise it is void.

Subject to the same sanction, it must either designate the arbitrator or arbitrators, or prescribe the method of their appointment.

A submission agreement is without effect (*caduc*) when an arbitrator which it designates does not accept the mission which is entrusted to him.

Article 1449

A submission agreement shall be established in writing. It may be so established in minutes (*procès-verbal*) signed by the arbitrator and the parties.

Article 1450

The parties have the right to submit to arbitration even during the course of a proceeding already undertaken before another jurisdiction (*juridiction*).

Chapter III

Common Rules

Article 1451

The mission of arbitrator can only be entrusted to a natural person; such person must have full enjoyment of his civil rights.

If an arbitration agreement designates a legal entity, such entity shall have only the power to organize an arbitration.

Article 1452

An arbitral tribunal shall be properly constituted only if the arbitrator or arbitrators shall accept the mission which is entrusted to them.

An arbitrator who believes that there exists a ground for challenge to his appointment must inform the parties of it. In such case, he can only accept his mission with the agreement of such parties.

Article 1453

An arbitral tribunal shall be constituted by a sole arbitrator or by several arbitrators of an uneven number.

Article 1454

When the parties shall have appointed an even number of arbitrators, the arbitral tribunal shall be completed by an arbitrator chosen either in conformity with the provisions (prévisions) of the parties, or, in the absence of such provisions, by the appointed arbitrators, or, in the absence of agreement between the latter, by the presiding judge of the *tribunal de grande instance*.

Article 1455

When a natural person or legal entity is responsible for organizing an arbitration, the mission of arbitration shall be entrusted to one or several arbitrators accepted by all of the parties.

Failing such acceptance, the person responsible for organizing the arbitration shall invite each party to appoint an arbitrator and shall proceed, if necessary, to the appointment of the arbitrator required to complete the arbitral tribunal. If the parties fail to appoint an arbitrator, he shall be appointed by the person responsible for organizing the arbitration.

An arbitral tribunal can also be constituted directly in accordance with the procedures provided for in the preceding paragraph.

The person responsible for organizing an arbitration can provide that the arbitral tribunal will render only a draft award and that, if such draft is challenged by one of the parties, the matter will be submitted to a second arbitral tribunal. In this case, the members of the second tribunal shall be appointed by the person responsible for organizing the arbitration, each party having the right to obtain the replacement of one of the arbitrators so appointed.

Article 1456

If an arbitration agreement does not fix a time limit, the mission of the arbitrators shall continue only for six months from the day on which the last one of them accepted it.

The legal or contractual time limit can be extended either by agreement of the parties, or, at the request of one of them or of the arbitral tribunal, by the presiding judge of the *tribunal de grande instance* or, in the case provided for in Article 1444, paragraph 2, by the presiding judge of the *tribunal de commerce*.

Article 1457

In the cases provided for in Articles 1444, 1454, 1456 and 1463, the presiding judge of the court, whose jurisdiction has been invoked by one of the parties or by the arbitral tribunal as in the case of a *référé* proceeding,³ shall decide by an order not subject to review.

However, such order can be appealed from (*frappée d'appel*)⁴ when the presiding

³A simplified judicial proceeding, whereby a party may in certain circumstances, by application to a single judge sitting in *référé*, obtain rapid provisional relief.

⁴*Appel* refers to an appeal from a decision of a court of first instance (or from an arbitrator's award) to an intermediate appellate court, which ordinarily results in a reexamination of the entire case *de novo*, both facts and law, by such appellate court.

judge declares that there are no grounds for such appointment for one of the reasons mentioned in Article 1444 (paragraph 3). The appeal is made, heard and adjudged in the same manner as a *contredit de compétence*.⁵

The competent presiding judge is the one of the court which has been designated in the arbitration agreement or, in the absence of such designation, the one in whose area (*ressort*) the agreement has situated the arbitral proceedings. If the agreement is silent on this matter, the competent presiding judge is the one of the court for the place where the defendant or one of the defendants as to this procedural issue resides or, if the defendant does not reside in France, the one of the court for the place where the claimant resides.

Article 1458

When a dispute, which has been referred to an arbitral tribunal by virtue of an arbitration agreement is brought before a jurisdiction of the State, such jurisdiction must declare itself incompetent.

If the dispute has not yet been referred to an arbitral tribunal, the jurisdiction must likewise declare itself incompetent, unless the arbitration agreement is manifestly void.

In both cases, the jurisdiction cannot on its own motion raise its incompetence.

Article 1459

Any provision or agreement contrary to the rules decreed in this Chapter shall be deemed not to have been written.

Title II

The Arbitral Proceeding

Article 1460

The arbitrators shall settle the arbitral procedure without being bound to observe the rules established for the courts, unless the parties shall have otherwise decided in the arbitration agreement.

However, the fundamental principles of judicial proceedings contained in Articles 4 to 10, 11 (paragraph 1) and 13 to 21⁶ are always applicable to an arbitral proceeding.

If a party is in possession of an item of evidence, the arbitrator can also order him to produce it.

Article 1461

The taking of evidence (*actes de l'instruction*) and minutes shall be made by all of the arbitrators if the submission agreement does not authorize them to entrust this to one of them.

Third parties shall be heard without having to take an oath.

⁵A procedure for judicial review of a decision of a court that it is incompetent to hear a matter, no decision having been rendered by such court on the merits of the dispute.

⁶The contents of these Articles of the New Code of Civil Procedure [hereinafter called *Nouv. C. Pr. Civ.*] are briefly described in the main text under the headings "C. The Arbitral Proceeding—(1) Procedure."

Article 1462

Every arbitrator must carry out his mission until its term.

An arbitrator can only be revoked with the unanimous consent of the parties.

Article 1463

An arbitrator cannot abstain nor be disqualified except for a ground for challenge which would have been revealed or would have arisen since his appointment.

Difficulties relating to the application of this Article shall be brought before the presiding judge of the competent court.

Article 1464

Subject to special agreement of the parties, an arbitral proceeding shall terminate:

1. On the revocation, death or inability to act of an arbitrator as well as on the loss of full enjoyment of his civil rights;
2. On the abstention (*abstention*) or disqualification of an arbitrator; or
3. On the expiration of the time period for arbitration.

Article 1465

Interruption of arbitral proceedings shall be governed by the provisions of Articles 369 to 376.⁷

Article 1466

If one of the parties contests, before the arbitrator, the principle or scope of the arbitrator's jurisdictional power, it shall be for him to decide on the validity or the limits of his investiture.

Article 1467

Absent an agreement to the contrary, an arbitrator has the power to decide the *incident de vérification d'écriture ou de faux*⁸ in conformity with the provisions of Articles 287 to 294 and Article 299.

In the case of *inscription de faux incidente*,⁹ Article 313 shall be applicable before the arbitrator. The time period for arbitration shall continue to run from the day such proceeding has been decided.

Article 1468

The arbitrator shall fix the date on which the matter shall be submitted to deliberation (*mise en délibéré*).

After that date, no claim can be made nor ground for a claim raised. No observation can be presented nor any document produced, unless it has been requested by the arbitrator.

⁷The contents of these Articles of the NOUV. C. PR. CIV. are briefly described in the main text under the headings "C. The Arbitral Proceeding—(6) Interruption of Proceedings."

⁸A judicial proceeding to obtain a declaration as to the genuineness of the writing or signature contained in a privately signed legal instrument (*acte sous seing privé*), as compared to an authentic instrument, see note 9 hereto.

⁹A judicial proceeding to contest the genuineness of an authentic instrument (*acte authentique*), that is, a legal instrument drawn up in accordance with specified formalities by a French notary or of other public official (*officier public*).

Title III

Arbitral Award

Article 1469

The deliberations of the arbitrators shall be secret.

Article 1470

The arbitral award shall be rendered by majority vote.

Article 1471

The arbitral award must set out succinctly the respective claims to the parties and their grounds.

The decision must contain the reasons therefor.

Article 1472

The arbitral award shall contain a statement:
of the names of the arbitrators who rendered it;
of its date;
of the place where it was rendered;
of the names, first names or corporate name (*dénomination*) of the parties, as well as their domicile or head office (*siège social*);
if applicable, of the names of the advocates (*avocats*) or of any person having represented or assisted the parties.

Article 1473

The arbitral award shall be signed by all of the arbitrators.

However, if a minority of them should refuse to sign it, the others shall make mention of this and the award shall have the same effect as if it had been signed by all of the arbitrators.

Article 1474

The arbitrator shall decide the dispute in conformity with the rules of law, unless, in the arbitration agreement, the parties shall have conferred upon him the mission to decide as *amiable compositeur*.¹⁰

Article 1475

The award shall relieve the arbitrator of his mission concerning the dispute which it decides.

The arbitrator shall nevertheless have the power to interpret the award, to correct obvious errors and omissions (*erreurs et omissions matérielles*) which affect it, and to complete it when he has omitted to decide an issue (*chef de demande*). Articles 461 to 463 shall be applicable.¹¹ If the arbitral tribunal cannot be reconvened, this power shall belong to the jurisdiction which would have been competent had the dispute not been submitted to arbitration.

¹⁰Essentially, in equity. See note 122 to main text.

¹¹These articles of the NÖUV. C. PR. CIV. set forth the powers of a judge to interpret, to correct and to complete his decision.

Article 1476

An arbitral award has, once it has been rendered, *res judicata* effect (*l'autorité de la chose jugée*) with respect to the dispute that it decides.

Article 1477

An arbitral award may be enforced only by an enforcement order (*décision d'exequatur*) from the *tribunal de grande instance* for the area in which the award has been rendered. Enforcement is ordered by the enforcement judge (*juge de l'exécution*) of the court.

For this purpose, the record of the award, together with a copy of the arbitration agreement, shall be filed by one of the arbitrators or by the most diligent party with the secretariat of the court.

Article 1478

The enforcement order shall be affixed to the record of the arbitral award. An order which denies enforcement must contain the reasons therefor.

Article 1479

The rules concerning the provisional enforcement (*exécution provisoire*)¹² of judgments shall be applicable to arbitral awards.

In the case of an appeal or *recours en annulation*,¹³ the first president or the judge responsible for the preparation of the case (*magistrat chargé de la mise en état*) from the moment the case is referred to him, can grant enforcement of the arbitral award together with provisional enforcement. He can also order provisional enforcement under the conditions provided for in Articles 525 and 526; his decision shall be equivalent to an enforcement order.

Article 1480

The provisions of Articles 1471 (paragraph 2), 1472, as regards the name of the arbitrators and the date of the award, and 1473 are mandatory under pain of nullity.

Title IV**Methods of Review***Article 1481*

An arbitral award is not subject to *opposition*¹⁴ nor *pourvoi en cassation*.¹⁵

Subject to the provisions of Article 588 (paragraph 1), it can be subject to *tierce opposition*¹⁶ before the jurisdiction which would have been competent had there been no arbitration.

¹²See in the main text under the headings "D. The Arbitral Award—(5) Provisional Enforcement."

¹³Literally, recourse in nullity. See art. 1484.

¹⁴A judicial proceeding brought by a party to reopen a case in which it has been subject to a default judgment.

¹⁵A procedure for review by the *Cour de Cassation*, France's highest court of ordinary jurisdiction.

¹⁶Literally, third opposition. A special procedure which allows a person who was not a party to an action to obtain judicial review of the court's decision on the ground that it causes him damage.

Article 1482

An arbitral award is subject to appeal (*appel*) unless the parties have waived appeal in the arbitration agreement. However, it is not subject to appeal when the arbitrator had the mission to decide as *amiable compositeur*, unless the parties expressly reserved this right in the arbitration agreement.

Article 1483

When, according to the distinctions made in Article 1482, the parties have not waived appeal, or when they have expressly reserved this right in the arbitration agreement, the appeal procedure alone is open, whether it is for the revision of the arbitral award or its annulment. The judge of the appeal shall decide as *amiable compositeur* when the arbitrator had this mission.

Article 1484

When according to the distinctions made in Article 1482, the parties have waived appeal or when they have not expressly reserved this right in the arbitration agreement, a *recours en annulation* against the instrument designated as an arbitral award may nevertheless be made, notwithstanding any stipulation to the contrary.

It is only available in the following cases:

1. If the arbitrator has decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;
2. If the arbitral tribunal has been irregularly composed or the sole arbitrator irregularly appointed;
3. If the arbitrator has decided without complying with the mission which had been conferred upon him;
4. When the right of each party to present its case (*principe de la contradiction*) has not been respected;
5. In all cases of nullity provided for in Article 1480;
6. If the arbitrator has violated a rule of public policy (*ordre public*).

Article 1485

When, in a *recours en annulation* proceeding, the court annuls an arbitral award, it shall render a decision on the merits within the limits of the arbitrator's mission, unless all of the parties object thereto.

Article 1486

The appeal and the *recours en annulation* shall be brought before the *cour d'appel*¹⁷ for the area in which the arbitral award has been rendered.

These review procedures (*recours*) shall be admissible once the arbitral award has been pronounced; they shall cease to be admissible if they have not been exercised within one month after the award bearing the enforcement order has been served.

Enforcement of the arbitral award shall be suspended during the period allowed for the exercise of these review procedures. A review procedure exercised within such period shall also suspend enforcement of the award.

¹⁷Regional court of appeal.

Article 1487

The appeal and the *recours en annulation* shall be made, heard and adjudged according to the procedural rules for adversary proceedings before the *cour d'appel*.

The designation given by the parties to a method of review (*voie de recours*) at the time the declaration is made can be modified or particularized until the matter is referred to the *cour d'appel*.

Article 1488

The order which grants enforcement shall not be subject to any review.

However, appeal or *recours en annulation* against an award shall comport by operation of law, within the limits of the action before the court, recourse against the enforcement order of the judge or withdrawal of the action from such judge.

Article 1489

An order which denies enforcement may be appealed until the expiration of a period of one month from its service. In this case, at the request of the parties, the *cour d'appel* shall hear the arguments which they could have made against the arbitral award, by means of appeal or *recours en annulation*, as the case may be.

Article 1490

Dismissal of an appeal or of a *recours en annulation* shall result in an enforcement order for the arbitral award or those of its provisions which shall not have been censured by the court.

Article 1491

A *recours en révision*¹⁸ shall be available against an arbitral award in those cases and under those conditions provided for judgments. It shall be brought before the *cour d'appel* which would have been competent to hear other proceedings for review of an award.

¹⁸A judicial proceeding to reopen a case on certain specified grounds (*e.g.*, the decision had been obtained by fraud of the party in whose favor it was rendered) and to obtain a *de novo* decision as to both facts and law.