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France

INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in France.

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FRANCE
INTERNATIONAL ARBITRATION

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1. What legislation applies to arbitration in your country? Are there any mandatory laws?

French arbitration law is codified under Articles 1442 to 1527 of the French Code of Civil Procedure ("*CCP*").

The CCP distinguishes between international and domestic arbitration. According to Article 1504 of the CCP, arbitration is considered international if the underlying economic transaction that gave rise to the dispute involves "*international trade interests*". An arbitration is therefore deemed international if the dispute involves a cross-border flow of goods, services or currency, irrespective of the nationality of the parties, the applicable substantive or procedural law, or the seat of arbitration (Cour de cassation, First Civil Chamber, 20 November 2013, n°12-25.266; Cour de cassation, First Civil Chamber, 30 June 2016, n°15-13.755).

A different set of provisions is applicable to international and domestic arbitrations:

- Domestic arbitration is governed by Articles 1442 to 1503 of the CCP, as well as Articles 2059 to 2061 of the French Civil Code;
- International arbitration is governed by Articles 1504 to 1527 of the CCP; and
- Several articles of the CCP, such as Articles 1446, 1447, 1448 (1 and 2), 1449, 1452 to 1458, 1460, 1462, 1463 (2), 1464 (3), 1465 to 1470, 1472, 1479, 1481, 1482, 1484 (1 and 2), 1485 (1 and 2), 1486, 1502 (1 and 2) and 1503, which are applicable to domestic arbitration, are equally applicable to international arbitration by virtue of the reference made in Article 1506 of the CCP. These Articles cover crucial matters such as the validity of the arbitration agreement, the constitution of the arbitral tribunal, the arbitral award and its setting aside.

French courts' decisions, specifically those by the French *Cour de cassation* as well as the Paris Court of appeal, play a crucial role in interpreting and clarifying French legislation applicable to arbitration.

One of the cornerstone mandatory laws applicable to arbitration includes Article 1510 of the CCP, which provides that parties should be treated equally, and that the principle of due process ("*contradictoire*") shall always be upheld. In case the award violates such mandatory rules, it will face set aside proceedings before French courts as per Article 1520(4) of the CCP. Similarly, an arbitral award would be subject to set aside proceedings as per Article 1520(5) of the CCP if it violates any other mandatory rule that is part of the international public policy.

According to a long-standing definition established by case law and which applies, inter alia, for purposes of set aside proceedings before French courts, international public policy refers to the French values and principles that cannot be ignored, even in an international context (Paris Court of appeal, 27 October 1994, *LTDC v Reynolds*; ICCP-CA, 21 June 2022, n°21/00473, *Aersud*). This includes, without limitation, the prohibition of corruption (ICCP-CA, 5 April 2022, n°20/03242, *Groupement Santullo*; See Question 53), the prohibition of money laundering (Cour de cassation, First Civil Chamber 23 March 2022, n°17-17.981, *Belokon*), the fight against human rights violations (ICCP-CA, 5 October 2021, n°19/16601, *DNO v Yemen*), and the rule of State sovereignty over its natural resources (Paris Court of appeal, 16 January 2018, n°15/21703, *MK Group*).

2. Is your country a signatory to the New York Convention? Are there any

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reservations to the general obligations of the Convention?

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "*New York Convention*") was signed by France on 25 November 1958 and ratified on 26 June 1959, and it entered into force on 24 September 1959.

French law provides, however, for a more favorable regime of enforcement than the provisions of Article V of the New York Convention, and thus prevails over the Convention by virtue of Article VII(1). For example:

- Article 1507 of the CCP provides that in international arbitration, "*the arbitration agreement is not subject to any requirement as to its form*", which is a less stringent requirement than under Article II(1) of the New York Convention which expressly requires the arbitration agreement to be in writing. It follows that, under French law, the arbitration agreement may result from a written reference to a document containing it, *g.* general terms and conditions or a standard contract, when the party to whom the clause is opposed was aware of the content of this document at the time of the conclusion of the contract, and has, even by its silence, accepted the incorporation of the document into the contract (Cour de Cassation, First Civil Chamber, 9 November 1993, n°91-15.194).
- French arbitration law has recognized the principle of autonomy of arbitral awards for several decades (Cour de cassation, First Civil Chamber, 8 July 2015, n°13-25.846, *Société Ryanair Ltd et Société Airport Marketing Services Ltd v Syndicat Mixte des Aéroports de Charente)*, and as a result permits the recognition and enforcement in France of a foreign award, even if it has been set aside in its country of origin, *e.* at the place of arbitration (Cour de cassation, First Civil Chamber, 23 March 1994, n°92-15.137, *OTV v Hilmarton*; Cour de cassation, First Civil Chamber, 29 June 2007, n°06-13.293, *PT Putrabali Adyamulia v Rena Holding and Moguntia Est Epices*).

France entered only one reservation upon ratifying the New York Convention, in relation to the principle of reciprocity: "*France declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State*".

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

France signed several arbitration-related treaties and conventions, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 18 March 1965 (which created the International Centre for the Settlement of Investment Disputes "*ICSID*"), the European Convention on International Commercial Arbitration signed on 21 April 1961 and the Energy Charter Treaty ("*ECT*") on 17 December 1991. However, on 21 October 2022, following similar announcements by Spain, the Netherlands and Poland, French President Emmanuel Macron announced France's intention to withdraw from the ECT.

As a member of the European Union ("*EU*"), France is currently party to 56 multilateral arbitration-related treaties concluded by the EU. The most recent ones are the EU-Vietnam Investment Protection Agreement (2019), EU-Singapore Investment Protection Agreement (2018), EU-Japan Economic Partnership Agreement (2018), Armenia-EU Comprehensive and Enhanced Partnership Agreement (2017), and Canada-EU Comprehensive Economic and Trade Agreement (2016). In addition, France is also party to EU-UK Trade and Cooperation Agreement, which entered into force on 1 January 2021.

Moreover, according to UNCTAD, France is a party to 115 bilateral investment treaties (BITs) among which 84 are currently in force, 7 are not in force and 24 were terminated further to the conclusion of the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the EU signed on 5 May 2020 by 23 EU Member States and entered into force on 29 August 2020.

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

French Arbitration law is not based on the UNCITRAL Model Law on International Commercial Arbitration (the "*UNCITRAL Model Law*") and indeed differs from it in a number of ways:

- Unlike the UNCITRAL Model Law, French law distinguishes between domestic and international arbitration.
- Another significant difference relates to the determination of what constitutes an international arbitration. Article 1(3) of the

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UNCITRAL Model Law has both a seat-focused approach and an approach based on the parties' will. By contrast, French law has an economic approach centered on the cross-border flow of capital, services or assets (Cour de cassation, First Civil Chamber, 20 November 2013, n°12-25.266; Cour de cassation, First Civil Chamber, 30 June 2016, n°15-13.755; Article 1504 of the CCP; see Question 1).

- Another difference is that if the parties fail to choose the substantive law applicable to their dispute, French law no longer imposes the application of conflict of laws rules (Article 1511 of the CCP), while Article 28 of the UNCITRAL Model Law still does.
- As explained above, the principle of autonomy of arbitral awards is long-established under French arbitration law (Cour de cassation, First Civil Chamber, 8 July 2015, n°13-25.846, *Société Ryanair Ltd et Société Airport Marketing Services Ltd v Syndicat Mixte des Aéroports de Charente)*, and awards that have been set aside by State courts of the seat of arbitration may therefore still be recognized and enforced in France (Cour de cassation, First Civil Chamber, 23 March 1994, n°92-15.137, *OTV v Hilmarton*; Cour de cassation, First Civil Chamber, 29 June 2007, n°06-13.293, *PT* Putrabali Adyamulia *v Rena Holding and Moguntia Est Epices*).

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

No reform of the French arbitration law is currently being discussed.

In the past decade, French arbitration law has been reformed on two main occasions:

- Decree No. 2011-48 of 13 January 2011 has introduced the last amendments to the CCP provisions on arbitration law in France and came into force on 1 May 2011. The innovations provided by this decree gave parties a greater freedom in conducting the arbitration proceedings, while well-established case law and principles were codified under the CCP. This reform codified the rule that a party who knowingly fails to raise a procedural objection is deemed to have waived it (Article 1466 of the CCP). It redefined the role of States courts acting in support of arbitration proceedings ("*juge d'appui*"), which can now intervene even when the arbitration is seated outside of France and is not subject to French procedural law, if it is necessary to avoid a denial of justice (Article 1505(4) of the CCP). Another important novelty is the abolishment of the suspending effect formerly triggered by the challenge to an award (Article 1526 of the CCP). Moreover, this reform enables the parties to waive, by a specific agreement, the right to set aside an award.
- Later on, Law No. 2016-1547 of 18 November 2016 amended Article 2061 of the Civil Code which adds to the regime of the arbitration agreement. While the previous version of this provision provided that "*the arbitration clause is valid in contracts concluded for a professional activity*," new Article 2061 provides that an arbitration agreement cannot be enforced *vis-à-vis* a party that has entered into it outside of its professional activity. Under this new regime, the non-professional party can choose to submit its case either to State courts or to an arbitral tribunal. New Article 2061 can be seen as the logical extension of Article R. 212-2(10) of the French Code of Consumption, according to which an arbitration agreement in a consumer contract is presumed to be unfair and should then be deemed unenforceable *vis-à-vis* the protected party (*e.* the consumer).

Moreover, in February 2018, in an effort to modernize its court system and in the hopes of attracting more international litigants, France launched the creation *ex nihilo* of the International Commercial Chamber of the Paris Court of appeal ("*ICCP-CA*"), by means of a protocol entered into between the Paris Bar and the Paris Court of appeal. The ICCP-CA has jurisdiction to adjudicate disputes with an international dimension, either governed by French law or foreign laws. The Court is also competent to rule on set aside proceedings and appeals against enforcement orders relating to international arbitral awards. The main features of the ICCP-CA are the ability to use English or any other foreign language during the procedure (with witnesses, experts, parties, and foreign lawyers able to intervene orally in the chosen language) and the possibility of carrying out Anglo-Saxon styled cross-examinations. The ICCP-CA judges have knowledge of the main applicable foreign laws and will be able to conduct proceedings in English. The final judgment is rendered in French with an English translation.

6. What arbitral institutions (if any) exist in

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your country? When were their rules last amended? Are any amendments being considered?

The International Chamber of Commerce ("*ICC*") is the main arbitration institution in France and one of the leading one in the world. The new ICC Rules of Arbitration entered into force on 1 January 2021 (the "*ICC Arbitration Rules*"). These Rules provide for several innovations regarding:

- an extended scope for the consolidation (Article 10(b and c)) and joinder (Article 7(1 and 5)) of claims;
- the increase of the applicable opt-out threshold for expedited arbitrations (Article 30 Appendix VI);
- a closer supervision of party representation (Article 17(1 and 2));
- a reinforced equal treatment of the parties in the constitution of arbitral tribunals (Article 12(8) and (9));
- disclosure requirements regarding third party funding (Article 11(7)); and
- virtual hearings and electronic document submission (Article 26).

France has other arbitral institutions such as the French Arbitration Association (*Association Française d'Arbitrage*) created in 1957, the European Arbitration and Mediation Centre (*Centre Européen d'Arbitrage et de Médiation*) created in 1959, the Regional Chamber of Arbitration (*Chambre Régionale d'Arbitrage)* created in 1988, the International Arbitration Chamber of Paris (*Chambre Arbitrale Internationale de Paris*) created in 1926, the Paris Centre of Mediation and Arbitration (*Centre de Médiation et d'Arbitrage de Paris*) known as the CMAP and created in 1995, and the European Court of Arbitration created in 1992 in Strasbourg.

Specialized arbitral institutions also exist in France, in fields such as reinsurance and insurance (*French Arbitration and Mediation Centre for Reinsurance and Insurance*), construction (*Arbitration Court for Construction*) as well as the maritime field (*Arbitral Maritime Chamber of Paris*).

7. Is there a specialist arbitration court in your country?

Article 1504(4) of the CCP establishes a "*juge d'appui*" which is a judge acting in support of the arbitration process to ensure an efficient dispute resolution and avoid a denial of justice. Article 1505 of the CCP provides that the "*juge d'appui*" is, unless otherwise stipulated, the president of the *Tribunal judiciaire* of Paris.

In February 2018, France created the ICCP-CA to modernize its courts system and attract more international litigants. The ICCP-CA has jurisdiction to adjudicate set aside proceedings and appeals against enforcement orders relating to international arbitral awards (See Question 5).

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

Under French law, the requirements for the validity of an arbitration agreement differ depending on whether the arbitration is domestic or international.

In international arbitration, arbitration agreements do not necessarily need to be in writing or in a particular form to be valid (Article 1507 of the CCP). As a result, the *Cour de cassation* held that the arbitration agreement may result from a written reference to a document containing it, *e.g.* general terms and conditions or a standard contract, when the party to whom the clause is opposed was aware of the content of this document at the time of the conclusion of the contract, and has, even by its silence, accepted the incorporation of the document into the contract (Cour de Cassation, First Civil Chamber, 9 November 1993, n°91-15.194). Although arbitration agreements do not necessarily need to be in writing, it must however be noted that, to be able to recognize and enforce international awards, French law requires evidence of the arbitration agreement (Articles 1515 and 1516 of the CCP).

By contrast, in domestic arbitration, arbitration agreements must be in writing. Yet, as in international arbitration, they may result from an exchange of documents or a reference to another document containing an applicable arbitration agreement, as codified under Article 1443 of the CCP. In addition, it is required in domestic arbitration that the parties to an arbitration agreement have the capacity and power to contract and give their valid consent. The arbitrability of the dispute, covered by Articles 2059 to 2061 of the French Civil Code, is also a required condition for the validity of the arbitration agreement. Arbitrability appears at first blush to be very restrictive, but case law has progressively extended its scope (see Question 13).

9. Are arbitration clauses considered separable from the main contract?

Pursuant to Article 1447 of the CCP, which is applicable

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to both domestic and international arbitration by virtue of Article 1506 of the CCP, an arbitration agreement is separable from the contract which includes it. Accordingly, the arbitration agreement shall not be affected if such contract is void. Conversely, if an arbitration agreement is void, its invalidity does not affect the validity of the underlying contract.

Article 1447 of the CCP was introduced by the Decree No. 2011-48 of 13 January 2011 reforming French arbitration law, yet such principle of separability was first upheld by the *Cour de cassation* as early as in the *Gosset* case in 1963 (Cour de cassation, First Civil Chamber, 7 May 1963, *Gosset*) and confirmed by numerous subsequent decisions (Cour de cassation, First Civil Chamber, 2 April 2014, n°11-14.692; Paris Court of appeal, 9 June 2017, n°16/17575).

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

In addition to being separable from the main contract (See Question 9), the arbitration agreement is equally independent and autonomous from any national law.

This has first been established in the famous *Dalico* case as a substantive rule of international arbitration ("*règles matérielles de l'arbitrage international*") (Cour de cassation, First Civil Chamber, 20 December 1993, n°91-16.828, *Dalico*), and has been confirmed on several occasions since then (Cour de cassation, First Civil Chamber, 5 January 1999, n°96-21.430, *Zanzi*; Cour de cassation, First Civil Chamber, 30 March 2004, n°01-14.311, *Uni-kod*; Paris Court of appeal, 17 December 2013, n°12/07231, *Jnah Development*; Paris Court of appeal, 24 June 2014, *Shackleton*; Paris Court of appeal, 20 December 2018, n°16/25484, *Garoubé*; Paris Court of appeal, 17 November 2020, n°18/02568, *Sorelec*; ICCP-CA, 15 June 2021, n°20/07999, *Pharaon*; ICCP-CA, 7 September 2021, n°19/17531, *Global Voice*; ICCP-CA, 19 October 2021, n°18/01254, *Monster Energy*).

It is worth bearing in mind that, while other countries (such as Switzerland) have a rule according to which an arbitration agreement is valid as long as it can be considered as such under one of the potential applicable laws to the dispute, France does not have such a rule.

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

In case of a multi-party dispute, the principle of equality between the parties, which is a matter of public policy that cannot be waived before the dispute arises, requires that each party must have an equal opportunity in appointing the arbitral tribunal (Cour de cassation, First Civil Chamber 7 January 1992, n°89-18.708 and 89-18.726, *Siemens and BKMI v Dutco*). If the parties fail to agree on the terms and conditions for their appointment, the institution administrating the case or, if there is no such institution, the "*juge d'appui*", will appoint all members of the arbitral tribunal (Article 1453 of the CCP).

As to multi-contract arbitrations, Article 1442 of the CCP, which is only applicable to domestic arbitration, provides that "*an arbitration clause is an agreement by which the parties to one or more contracts undertake to submit to arbitration disputes which may arise in relation to such contract or contracts*". French courts have admitted the extension of the arbitration agreement to contracts that are inseparable from the initial contract containing the arbitration agreement (*Cour de cassation*, 14 May 1996, n°93-15.138, *Sigma corp. v Tecni-Ciné-Phot*; Paris Court of appeal, 23 November 1999, *Glencore Grain Rotterdam v Africa*; Cour de cassation, 29 January 2014, n°12-26.597, *République du Congo v Commissions Import Export*).

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

According to the principle of privity, a contract is only binding between the parties (Article 1199 of the Civil Code) and arbitration agreements therefore cannot apply to third parties or non-signatories without their prior consent (Article 2061 of the Civil Code).

French case law has however established several exceptions allowing for the extension of an arbitration clause to third parties in the following circumstances.

First, French case law established a general principle whereby arbitration agreements may be extended to third parties that were directly involved in the negotiation, conclusion, performance or termination of the contract (Cour de cassation, 27 March 2007, n°04-20.842, *ABS and AGF Iart v. Amcor Technology et al*).

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This principle has been confirmed on several occasions by recent case law:

- In the 2021 *Pharaon* case, the arbitration agreement was extended to a third company which did not sign the contract containing it, but only some of its annexes, whose shares were the subject of the said contract, and which was directly involved in its execution and the disputes related to it (ICCP-CA, 15 June 2021, n°20/07999, *Pharaon*).
- In the 2022 *Legrand* case, the third party to which the arbitration agreement was extended was the parent company of one of the parties to the contract obtaining it and had been involved in the follow-up and performance of the said contract as well as the dispute related to it (ICCP-CA, 1 March 2022, n°20/13575, *Legrand*).
- See also the 2022 *Kout Food* case at Question 14.

Second, French courts have also admitted that an arbitration agreement may be transferred to a third party by way of assignment or other contractual transfer mechanisms, regardless of the parties' initial intention (Cour de cassation, First Civil Chamber, 8 February 2000, n°95-14.330, *Taurus Film*).

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

Arbitrability refers to the question of whether a particular dispute may or may not be settled through arbitration, either because of the subject-matter of the dispute ('objective arbitrability') or because of the status or the function of the contracting party ('subjective arbitrability').

On the first hand, objective arbitrability is defined in Articles 2059 to 2061 of the French Civil Code, which appears at first blush to be very restrictive. While Article 2059 of the French Civil Code states positively that any person may submit to arbitration her or his rights, Article 2060 further provides that disputes related to specific subject matters (status and capacity of individuals, family law, and public order related matters) cannot be settled through arbitration. This list is not exhaustive and also includes disputes related to criminal law, bankruptcy or insolvency issues. According to Article 2061(2) of the CCP, the effects of an arbitration agreement may also be limited in labor disputes and consumer claims to protect non-professional parties.

However, for both international and domestic arbitration, French courts have progressively narrowed the scope of these statutory prohibitions, by considering that a dispute involving public policy rules does not in itself preclude arbitration, and that arbitral tribunals can apply public policy rules and/or decide on whether they were violated (for international arbitration: Paris Court of Appeal, 19 May 1993, n°92/21091; for the extension to domestic arbitration: Cour de cassation, 9 April 2002, n°98-16829, *Toulousy v Philam*).

In the 2022 *Haco* case, the ICCP-CA reaffirmed this long-standing solution and ruled that a dispute does not become inarbitrable merely because a public policy rule apply. The Court further held that by virtue of the principle of compétence-compétence, the question of arbitrability should be decided by the arbitral tribunal in accordance with public policy rules (ICCP-CA, 28 June 2022, n°21/06317, *Haco*).

In international arbitration, objective inarbitrability is even more limited as confined to cases involving a matter of international public policy which would "*absolutely exclude*" the jurisdiction of an arbitral tribunal (Paris Court of Appeal, 29 mars 1991, *Sté Ganz et autres c. Sté nationale des Chemins de fer tunisiens*).

On the other hand, the question of subjective arbitrability relates to the capacity of States and public entities to resort to arbitration. In this regard, French law allows public entities of industrial and commercial character to arbitrate, provided there are specific statutory authorizations (Article 2060(2) of the Civil Code).

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

As expected, the recent decisions of the Paris Court of appeal and the *Cour de Cassation* in the *Kout Food* case have confirmed the well-established substantive rule of international arbitration ("*règles matérielles de l'arbitrage international*") according to which the validity and effectiveness of an arbitration agreement is independent from any national laws (Cour de cassation, First Civil Chamber, 20 December 1993, n°91-16.828, *Dalico*; See Question 10).

In this case, a dispute arose under a franchise development agreement concluded between Kabab-Ji and AHFC, respectively Lebanese and Kuwaiti companies. It provided that English law was the

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governing law of the contract, and that any dispute should be referred to an ICC arbitration with a seat in Paris. The parties had not specified the law applicable to the arbitration agreement. Following corporate restructuring in 2005, AHFC became a subsidiary of the Kuwaiti Kout Food Group, which was thereafter heavily involved in the performance of the franchise development agreement, as well as in discussions to terminate it, despite not being a signatory.

In response, Kabab-Ji initiated an ICC arbitration against Kout Food to obtain damages. Kabab-Ji's co-contractor, AHFC, was not a party to the arbitration. On 11 September 2017, the ICC tribunal rendered an award by which, *inter alia*, it upheld its jurisdiction and extended the arbitration agreement to Kout Food, on the grounds that French law governed the arbitration agreement as the law of the seat of the arbitration, and that under French law, Kout Food had become party to the arbitration agreement because of its involvement in the performance of the agreement.

Kout Food challenged the award before the Paris Court of appeal, arguing that the arbitral tribunal wrongly upheld its jurisdiction and should not have extended the arbitration clause to a third party, as English law was applicable to this matter. On 23 June 2020, the Paris Court of appeal dismissed Kout Food's application to set aside the award, finding that, in the absence of an express choice of law applicable to the arbitration agreement, the French substantive rules on international arbitration should apply ("*règles matérielles de l'arbitrage international*"). As a result, the arbitral tribunal was right in extending the arbitration agreement to Kout Food because of its heavy involvement in the performance of the agreement (Paris Court of appeal, 23 June 2020, 17/22943).

On 28 September 2022, the *Cour de cassation* upheld the Paris Court of appeal's judgment. It based its decision on the fundamental principle that the arbitration agreement is independent of the main contract containing or referring to it : "*According to a substantive rule of international arbitration law, the arbitration clause is legally independent of the main contract which contains it directly or by reference and its existence and effectiveness are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the common will of the parties, without the need to refer to a State law, unless the parties have expressly submitted the validity and effects of the arbitration agreement itself to such a law*". It further held that, unless English law was expressly designated as the law applicable to the arbitration agreement, the validity of the latter, as well as its effectiveness, transfer and extension, are to be determined by French substantive rules of international arbitration ("*règles matérielles de l'arbitrage international*"): "*the choice of English law as the law governing the contracts* [...] *is not sufficient to establish the common will of the parties to submit the effectiveness of the arbitration agreement to English law, in derogation of the substantive rules of the seat of arbitration expressly designated by the contracts*" (Cour de cassation, First Civil Chamber, 28 September 2022, n°20-20.260).

It should be noted that the position adopted by the *Cour de cassation* directly contradicts that of the UK Supreme Court. Kabab-Ji had indeed, in parallel to French set aside proceedings, submitted an application to have the award recognized and enforced in the UK. Yet, on 27 October 2021, the UK Supreme Court rendered a decision where it applied conflict of laws rules and found that English law, as the law chosen by the parties to govern the contract, also governed the arbitration agreement. As a result, the UK Supreme Court denied the recognition and enforcement of the award since English law does not provide for the extension of the arbitration agreement to a non-signatory party (UKSC, 27 October 2021, *Kabab-Ji SAL v Kout Food Group*, [2021] UKSC 48). The UK Supreme Court's approach in this case is in line with the long-standing position of English law.

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

In international arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties, provided that the application of such rules does not give rise to a violation of the international public policy.

Absent such choice of law by the parties, Article 1511 of the CCP provides that arbitrators shall determine the applicable "*rules of law*" themselves: in doing so, they shall not be bound to apply any conflict of law rules – as in other legal systems – but rather can select what they will consider the "*appropriate*" substantive law of the dispute. However, arbitrators still have the freedom to use conflict of law rules if they consider it appropriate in the circumstances of the case. The tribunal shall also take into account trade usages (see Question 16). The only limitation to the arbitrators' freedom in applying any law they deem "*appropriate*" is the international public policy.

As to domestic arbitration, the arbitral tribunal shall also decide the dispute in accordance with the law chosen by

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the parties. However, this choice should not make it possible to avoid the provisions of French law that cannot be derogated from by an agreement (in other words, the mandatory rules of French law). Absent such choice by the parties in the scope of a domestic arbitration, arbitrators shall decide the merits of the case by applying French law. Parties may also ask the arbitral tribunal to rule as *amiables compositeurs*.

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

Parties have the freedom to choose the substantive law applicable to their dispute, and absent such choice, the arbitral tribunal shall determine the appropriate applicable "rule of law" pursuant to Articles 1478 (applicable to domestic arbitration) and 1511 (applicable to international arbitration) of the CCP (See Question 15).

French courts have ruled on several occasions that such appropriate applicable law may consist of, for instance:

- UNIDROIT principles, which represent a consensus of generally accepted norms in the international community (Paris Court of appeal, 25 February 2020, n°17/18001; Paris Court of appeal, 23 June 2020, n°17/22943); and
- International trade practices or *lex mercatoria* (First Civil Chamber, 22 October 1991, n°89-21.528, *Compania Valenciana*; Cour de cassation, First Civil Chamber, 15 June 1994, n°92-17.075; Cour de cassation).

The use of the term "*rules of law*", as opposed to "*law*" or "*statute*", in Articles 1511 and 1478 of the CCP confirms this case law and that, in the absence of a choice of law by the parties, arbitrators should not limit themselves to State laws, but could also apply non-State sources of law.

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

Pursuant to Article 1508 of the CCP, parties to an arbitration agreement are free to appoint arbitrators, directly or by reference to a set of arbitration rules.

French law does not provide for any specific requirements as to the diplomas, qualification, and experience of arbitrators. Article 1450 of the CCP only requires that the arbitrator must be a natural person having full civil capacity.

Yet, the exercise of certain professional activities may prevent a person from being an arbitrator, such as public employees (in a dispute where the State is party), members of Parliament, State judges and judicial officers ("*huissiers de justice*"). Any arbitrator who is found in breach of such prohibition will be subject to disciplinary actions, but this will not affect the validity of the award.

In case of a multi-party dispute, the principle of equality of the parties implies that each party must have an equal opportunity in appointing the arbitrators (Cour de cassation, First Civil Chamber, 7 January 1992, n°89-18.708, *Dutco*), and if the parties fail to agree on the terms and conditions for their appointment, the institution administrating the case or the "*juge d'appui*" will appoint all members of the arbitral tribunal (Article 1453 of the CCP) (See Question 11).

Once appointed, the arbitrators must meet the conditions of independence and impartiality throughout the entire duration of the arbitration proceedings (Articles 1456 and 1506 CCP).

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

Pursuant to Article 1508 of the CCP, parties to an arbitration agreement are free to appoint arbitrators, directly or by reference to a set of arbitration rules (See Question 17).

As for the number of arbitrators, the rules differ depending on whether the arbitration is domestic or international:

- In domestic arbitration, the tribunal should be composed of a sole arbitrator or an uneven number of arbitrators (Article 1451(1) of the CCP). If the arbitration agreement provides for an even number of arbitrators, an additional arbitrator must be added by the parties when the tribunal is constituted (Article 1451(2) of the CCP) and in case of disagreement, by the arbitrators already appointed within one month following the acceptance of their mission. If the arbitrators fail to do so, the additional arbitration will be appointed by the "*juge d'appui*".
- In international arbitration, such requirement does not apply and a tribunal composed of an even number of arbitrators is not considered

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irregularly constituted. Yet, this is very rare in practice.

As for the appointment of the arbitral tribunal's members, case law requires that it should be carried out in accordance with the common will of the parties as reflected in the arbitration agreement (Cour de cassation, Second Civil Chamber, 13 April 1972, n°70-12.774). Under Articles 1444 (for domestic arbitration) and 1508 (for international arbitration) of the CCP, parties may in the arbitration agreement: :

- designate directly the arbitrator(s); or
- agree upon a means by which the selection could be made on their behalf, *e.*, by reference to arbitration or procedural rules; or
- provide for the terms and conditions of the appointment.

If the arbitration agreement is silent, Article 1452 of the CCP (applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code) provides that:

- In case of an arbitration by a sole arbitrator, if the parties cannot agree on the choice of the arbitrator, the latter will be appointed by the institution in charge of the administration of the arbitration, and should the institution fail to do so, by the "*juge d'appui*".
- In case of an arbitration by a tribunal of three arbitrators, each party must appoint one arbitrator, and the chair will be appointed by the two party-appointed arbitrators. If a party fails to make its appointment within one month following the receipt of the other party's request to that effect, or if the two party-appointed arbitrators fail to agree on the choice of the third one within the same time-limit following the acceptance of their mission, the institution in charge of the administration of the or the "*juge d'appui*" if the institution fails to do so, will proceed with the appointment.

In order to ensure the equality of all parties in a multi-party arbitration, Article 1453 of the CCP provides that all members of the arbitral tribunal will be appointed by the institution in charge of the administration of the arbitration, and failing that, by the "*juge d'appui*" if the parties fail to do so (See Question 11).

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

In both domestic and international arbitration, the "*juge d'appui*" can resolve disputes related to the constitution of the arbitral tribunal (Articles 1452 to 1454 of the CCP, applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code; see Question 18), their challenge (Article 1456 of the CCP), as well as their abstention, resignation or impediment (Article 1457 of the CCP, applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code), in one of the following situations (Article 1505 of the CCP):

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

Unless otherwise agreed by the parties, the "*juge d'appui*" is the President of the Paris *Tribunal judiciaire* (Article 1505 of the CCP).

Pursuant to Article 1460 of the CCP (applicable to both domestic and international arbitrations by virtue of Article 1506(2) of the same Code), a dispute related to the constitution of the arbitral tribunal can be referred to the "*juge d'appui*" either by a party or by the arbitral tribunal or one of its members through expedited proceedings ("*référé*"). The judge will decide by way of an order which cannot be appealed, except for decisions on the nullity or manifest inapplicability of the arbitration agreement (Article 1460 of the CCP).

Given the favorable approach of French law towards arbitration, the "*juge d'appui*" has only a subsidiary role to resolve disputes relating to the constitution of the arbitral tribunal since the common will of the parties as reflected in the arbitration agreement and the intervention of the institution in charge of the administration of the arbitration will always prevail.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

French law provides for a limited number of grounds to challenge arbitrators.

First, Article 1456(2) of the CCP (applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code) requires arbitrators to disclose any fact or circumstance that may affect their

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judgment and create, in the mind of the parties, a reasonable doubt as to their independence or impartiality, even if such circumstance arises after the acceptance by the arbitrator of her/his mission (Cour de cassation, First Civil Chamber, 3 October 2019, n°18-15.756; ICCP-CA, 25 February 2020, n°19/15818, *Dommo*).

A failure to make such disclosure and/or the disclosure of facts that in the opinion of a party reveal a lack of independence and/or impartiality, allows a party to challenge the arbitrator. To do so, the parties shall refer the matter to the institution in charge of the administration of the arbitration, or in the absence of such an institution, to the "*juge d'appui*" within one month following the disclosure or the discovery of the fact in question (Article 1456(3) of the CCP, applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code). The decision of the "*juge d'appui*" in this respect will be final and binding and cannot be revisited at the stage of set aside proceedings, unless new facts have occurred in the meantime (Cour de cassation, First Civil Chamber,13 March 2013, n°12-20.573; Versailles Court of appeal, 4 June 2019, n°17/06632). The time limit of one month is not applicable where the institutional rules applicable to the arbitration proceedings provide for another deadline (see Question 22 for more recent case law).

Second, according to Article of the 1458 of the CCP (applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code), parties may agree to dismiss an arbitrator. In the absence of an agreement, the matter should be referred to the institution in charge of the administration of the arbitration, or the "*juge d'appui*". Article 1458 of the CCP deals with situations other than the lack of independence and impartiality of the arbitrator, *e.g.*, an arbitrator's negligence causing significant delays to the proceedings in contravention to Article 1464(3) of the CCP that requires both parties and arbitrators to conduct the arbitration proceedings in a manner that is efficient and in good faith.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

Recent developments in French law concerning the duty of independence and impartiality of arbitrators mainly stem from decisions of the ICCP-CA in the context of set aside proceedings or appeal proceedings against an exequatur order.

In this context, the arbitrator's lack of independence and impartiality is usually raised on the grounds of the improper constitution of the arbitral tribunal (Article 1520(2) of the CCP for international arbitration; Article 1492(2) for domestic arbitration).

As to the definition of independence and impartiality, the ICCP-CA has held on several occasions that the independence of an arbitrator is "*assessed objectively in the light of precise and verifiable factors external to the arbitrator*", while "*impartiality presupposes the absence of prejudice or bias likely to affect the arbitrator's judgment*" and implies the absence of bias or predisposition towards a party that may affect the arbitrator's judgment, due to multiple factors such as the arbitrator's nationality, social, cultural or legal environment (ICCP-CA, 8 June 2021, n°19/02245, *Aurier*; ICCP-CA, 16 February 2021, n°18/16695 *Greenwich*; ICCP-CA, 2 March 2021, n°18/16891, *Rotana*).

In conducting its review, the judge in charge of the set aside proceedings will examine whether the requesting party has evidenced "*the existence of material or intellectual links*" which are likely to introduce a legitimate doubt on the arbitrator's independence and/or impartiality (Paris Court of appeal, 13 March 2008, n°06/12878, *Centre technique des industries mécaniques v Société SDT International*).

The ICCP-CA also allows for such argument to be invoked on the grounds of a violation of international public policy (Article 1520(5) of the CCP for international arbitration; Article 1492(5) for domestic arbitration) or on the basis that it constitutes a breach of the principle of equal treatment between the parties and the rights of defense (ICCP-CA, 12 July 2021, n°19/11413, *Fiorilla* concerning the lack of impartiality; ICCP-CA, 15 June 2021, n°20/07999, *Pharaon* concerning the lack of independence).

The arbitrators' duty of disclosure has been extensively addressed by recent case law (See Question 22).

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

Under French law, the arbitrators' duty of disclosure has a statutory basis. Article 1456(2) of the CCP (applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code) indeed requires arbitrators to disclose any fact or circumstance that may affect their judgment and create, in the mind of the parties, a reasonable doubt as to the arbitrators'

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independence or impartiality, even if such circumstance arises after the acceptance by the arbitrator of her/his mission (Cour de cassation, First Civil Chamber, 3 October 2019, n°18-15.756; ICCP-CA, 25 February 2020, n°19/15818, *Dommo*) (see Question 20).

The scope of the duty of disclosure is not set out in the CCP but has been defined by case law. The threshold for challenging an arbitrator's failure to disclose is indeed subject to two conditions:

- Pursuant to Article 1466 of the CCP (applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code), the party, which knowingly and without legitimate reason, failed to raise before the arbitral tribunal the objection based on an arbitrator's lack of independence and impartiality in a timely manner is deemed to have waived its right. Such an objection is therefore inadmissible before the set aside judge (Cour de cassation, First Civil Chamber,19 December 2018, n°16-18.349, *Tecnimont*; Paris Court of appeal, 15 December 2020, n°18/14864, *Soletanche*; ICCP-CA, 26 January 2021, n°19/10666, *Vidatel*; ICCP-CA, 11 January 2022, n°19/19201, *Rio Tinto*; ICCP-CA, 17 May 2022, n°20/18020, *Billionaire*).
- Arbitrators are exempt from disclosing "notorious" facts that the parties are considered to have known. A notorious fact is defined by the ICCP-CA as "*easily accessible public information, which the parties could not have failed to check before the start of the arbitration*" (ICCP-CA, 25 February 2020, n°19/15818, *Dommo*; ICCP-CA, 25 May 2021, n°18/20625, *Delta Dragon Import*) leading the judges, in this decision, to proceed to a very detailed and factual analysis of the case to determine whether the fact in question was notorious or not (in the *Delta Dragon* case, the Court analyzed notably the number of clicks required to achieve the research about the so-called notorious fact and the terms used in the search engine). The ICCP-CA also ruled that the information published on a well-known website for arbitration practitioners such as the Global Arbitration Review is considered notorious (ICCP-CA, 26 January 2021, n°19/10666, *Vidatel*) even though payment of a fee is required to have access to the information (ICCP-CA, 22 February 2022, n°20/08929, *CNC*).

As to the definition of what constitutes a reasonable doubt, the ICCP-CA considered that it should be "a *doubt that could arise in a person in the same situation and having access to the same reasonably accessible information*" (ICCP-CA, 22 February 2022, n°20/08929, *CNC*), and may result from "*a potential conflict of interest*" which can be "*direct*" as it involves a link between the arbitrator and a party or its counsel or "*indirect*" as it involves a link between the arbitrator or her/his firm and a third party with an interest in the arbitration (ICCP-CA, 23 February 2021, n°18/03068, *LERCO*). In the latter case, the assessment of reasonable doubt depends, in particular, on "*the intensity and the proximity*" of such link (ICCP-CA, 14 September 2021, n°19/16071, *NHA*; ICCP-CA, 16 February 2021, n°18/16695, *Greenwich*; ICCP-CA, 26 January 2021, n°19/10666, *Vidatel*).

The latest decisions of the ICCP-CA favor a more objective approach to the duty of disclosure by referring frequently to recommendations/guidelines from arbitration rules including:

- the FINRA (Financial Industry Regulatory Authority) Dispute Resolution Arbitrator's Guide (ICCP-CA, 12 July 2021, n°19/11413, *Fiorilla*);
- the ICC's Guidance Note for the disclosure of conflicts by arbitrators of 12 February 2016 (ICCP-CA, 26 January 2021, n°19/10666, *Vidatel*; ICCP-CA, 14 September 2021, n°19/16071, *NHA*; ICCP-CA, 11 January 2022, n°19/19201, *Rio Tinto*; ICCP-CA, 22 February 2022, n°20/08929, *CNC*; ICCP-CA, 17 May 2022, n°20/15162, *Pizzarotti*);
- the IBA Guidelines on Conflicts of Interest in International Arbitration of 23 October 2014 (ICCP-CA, 23 February 2021, n°18/03068, *LERCO*); and
- the ICC's Note to Parties and Arbitral tribunals on the Conduct of the Arbitration of 1 January 2019 (ICCP-CA, 17 May 2022, n°20/18020, *Billionaire*).

However, those recommendations do not exempt the arbitrator from evaluating the situation on a case-by-case basis to consider the particularity of each situation (ICCP-CA, 23 February 2021, n°18/03068, *LERCO*).

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

In domestic arbitration, Article 1473 of the CCP provides that the arbitral proceedings shall be suspended in the event of death, loss of legal capacity, refusal to act,

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resignation, challenge or removal of an arbitrator, unless otherwise agreed by the parties. The suspension is maintained until a substitute arbitrator, appointed in accordance with the procedure agreed upon by the parties or, failing that, with the procedure followed for the appointment of the original arbitrator, accepts the mandate.

Article 1473 of the CCP however does not apply to international arbitration. In the circumstances mentioned above, the parties must apply any instructions provided in the arbitration agreement. Where the arbitration agreement is silent, the arbitrator's absence, resignation or impediment shall be settled by the institution in charge of the administration of the arbitration. If there is no such institution, then the "*juge d'appui*" will rule on the matter by a request filed within one month following the fact in question (Article 1457(2) of the CCP, applicable to both domestic and international arbitration by virtue of Article 1506(2) of the same Code).

In the *Malecki* case, an exequatur order was overturned because the arbitral tribunal composed of two arbitrators had decided alone, without consulting the parties, to continue the arbitration in the absence of the third arbitrator who resigned (Paris Court of appeal, 21 April 2005, *Malecki*).

24. Are arbitrators immune from liability?

French case law consistently provides that arbitrators can only be held liable in case of a "personal fault". Such concept of "personal fault" has been limited to fraud, gross negligence or denial of justice, such misconduct being incompatible with the judicial function of an arbitrator (Paris Court of appeal, 1 March 2011, n°09/22701).

Arbitrators therefore cannot be held liable for their decision, even in case of a legal or factual error (Paris Court of appeal, 22 May 1991, *Bompard;* Cour de cassation, First Civil Chamber, 15 January 2014, n°11-17.196). This immunity covers all complaints of the parties relating to the merits of the dispute. Failure of arbitrators to comply with their obligation of impartiality and good faith does not amount to a "personal fault" if there is no evidence of facts characterizing a personal fault, as defined above (Cour de cassation, First Civil Chamber, 15 January 2014, n°11-17.196).

However, arbitrators can be held liable if they render an award after the allocated time (Cour de cassation, First Civil Chamber, 6 December 2005, n°03-13.116). Yet, more recent case law has held that arbitrators cannot be blamed for the multiple delays in the arbitration proceedings in the absence of a specific time-limit stipulation. The Court considered that the arbitrators are only bound by an "*obligation de moyen*" whereby an arbitrator only has to act as a diligent professional (Cour de cassation, First Civil Chamber, 17 November 2010, n°09-12.352).

The arbitrator's liability is of a contractual nature, *i.e.* he or she would be liable for a breach of obligations that arises from the contract between the arbitrator and the parties. Any action for an arbitrator's liability should therefore be brought before the courts designated by the rules of private international law. For example, Brussels I bis Regulation, which applies if the defendant is domiciled in a EU member State, designates the court of the place where the arbitrator has effectively performed his intellectual duties in a preponderant manner (*Tribunal judiciaire de Paris*, 31 March 2021, n°19/00795; ICCP-CA, 22 June 2021, n°21/07623).

25. Is the principle of competence-competence recognized in your country?

French law recognizes the principle of compétence-compétence by virtue of Articles 1448 and 1465 of the CCP (applicable to both domestic and international arbitration by virtue of Article 1506 of the same Code).

A distinguishing characteristic of French arbitration law, as compared to other foreign arbitration laws, is that it recognizes both the positive and negative effects of the compétence-compétence principle:

- The positive effect is codified in Article 1465 of the CCP which states that the arbitral tribunal has exclusive jurisdiction to decide on its jurisdiction.
- The negative effect obliges a State court seized by a party that is bound by an arbitration agreement to decline its jurisdiction if one of the defendants raises objections and unless the arbitration agreement is manifestly void or unenforceable (Article 1448(1) of the CCP, applicable to both domestic and international arbitration by virtue of Article 1506 of the CCP).

French courts are however entitled to carry out a full review of the arbitral tribunal's jurisdiction in the context of set aside proceedings (Article 1520(2) of the CCP for international awards and Article 1492(1) of the CCP for domestic awards), as well as in the framework of an appeal against an exequatur order (Article 1525 (4) of the CCP).

Moreover, according to a very recent decision by the

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Cour de cassation, the impecuniosity of one of the parties does not make the arbitration agreement manifestly unenforceable within the meaning of Article 1448(1) of the CCP and thus does not prevent State courts from applying the negative effect of the principle of compétence-compétence . In this case, despite the existence of an arbitration agreement in the contract, one of the parties still brought the claim before the French courts on the basis that it was impecunious and by invoking its right to a fair trial under Article 6(1) of the European Convention on Human Rights. This argument was rejected by both the Paris Court of appeal and then the *Cour de cassation* (Cour de cassation, First Civil Chamber, 28 September 2022, n°21-21.738).

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

Pursuant to the negative effect of the principle of compétence-compétence, a State court seized by a party that is bound by an arbitration agreement shall decline jurisdiction if one of the defendants raises objection and unless the arbitration agreement is manifestly void or unenforceable (Article 1448(1) of the CCP, applicable to both domestic and international arbitration by virtue of Article 1506 of the CCP; see Question 25).

French case law has consistently adopted a strict application of the negative effect of the principle of compétence-compétence. Recently, the ICCP-CA even ruled that an arbitration agreement inserted in the contract for fraudulent reasons does not lead to a manifest invalidity or unenforceability of the arbitration agreement within the meaning of Article 1448 and hence, does not bar the arbitral tribunal's jurisdiction (ICCP-CA, 12 July 2022, n°22/06400).

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

Under French law, arbitral proceedings are usually commenced by the claimant submitting a request for arbitration, which is not subject to any particular form requirement. As French law is mainly silent on the issue, the parties ought to pay particular attention to the arbitration agreement and any arbitration rules that are applicable.

As to limitation periods or time bars to submit such request, French law does not contain any specific provision. However, Article 2224 of the French Civil Code provides for a general limitation period of 5 years for contract and tort claims.

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

French case law has traditionally acknowledged that foreign States benefit from immunity of jurisdiction, which enables them to evade the jurisdiction of French courts. The source of this immunity can be found in the rules of public international law governing relations between States (Cour de cassation, First Civil Chamber, 20 October 1987, n°85-18.608), in the principles of international law governing the immunities of foreign States (Cour de cassation, First Civil Chamber,6 July 2000, n°98-19.068), or in international customary law (Cour de cassation, Criminal Chamber, 13 March 2001, n°00-87.215).

Foreign States may however enjoy such immunity only in limited circumstances where the act that gives rise to the dispute participates, by its very nature or purpose, in the exercise of the sovereignty of these States and is therefore not an act of management ("*acte de gestion*") (Cour de cassation, 20 June 2003, n°00-45.629, *Dame Soliman*). It follows that any commercial activities by a State or acts that are not strictly an emanation of a State's sovereignty are not covered by immunity of jurisdiction.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

Under French law, a respondent's failure to participate in the arbitration does not prevent the proceedings from continuing. The only requirement is for the parties not participating to be informed of the arbitration and its evolution.

In the case *Dovert et Tabourdeau v Confex*, the Paris Court of appeal enforced an award where the respondent had failed to participate in the proceedings. The Court noted that the defaulting party was duly notified of the commencement of the arbitral proceedings and since the respondent decided not to appear before the arbitral tribunal, the Court enforced the award (Paris Court of appeal, 7 February 1991, *Dovert et Tabourdeau v Confex*, Rev Arb, 1992, pp 625–684).

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This principle is also enshrined in Article 6(8) of the ICC Arbitration Rules according to which if any of the parties refuses or fails to participate in the arbitration, the arbitration shall still proceed.

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

As mentioned above, arbitration agreements do not bind third parties or non-signatories as per the principle of privity of contract, except in some specific circumstances that have been set under case law (See Question 12).

As with most national legislations on arbitration, French law does not establish a specific mechanism for the voluntary joinder of third parties in arbitration proceedings.

It is worth noting that under the ICC Arbitration Rules, third parties may voluntarily join arbitration proceedings pursuant to the conditions set forth in Article 7, which mentions, *inter alia,* the consent of the third party.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

There is no provision in French law allowing courts to order third parties to participate in arbitration proceedings.

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

French law specifically authorizes arbitral tribunals to order interim measures. Under Article 1468 of the CCP, an arbitral tribunal may "*take any protective or provisional measure it deems appropriate under the conditions it shall determine*", therefore conferring a wide margin of discretion on arbitrators. Even though parties usually comply with the interim measures ordered by the tribunal on a voluntary basis, tribunals may order that the non-compliance with an interim measure triggers the obligation to pay an *astreinte*, *i.e.* a fine. This ability also extends to emergency arbitrators before the constitution of the tribunal (See Question 49).

Due to their lack of *imperium*, arbitral tribunals may not, however, (i) order interim measures against third parties, (ii) order conservatory attachment of property or the registration of a judicial security (such as judicial mortgage) or (iii) enforce the interim measures it ordered. Hence, in case of non-compliance, the requesting party wishing to enforce the measure must seek the assistance of French courts.

There has been a debate as to whether an order for interim measures rendered by an arbitral tribunal does qualify as an award. In the *Sardisud* case, the *Cour de Cassation* famously held that a tribunal's decision may only qualify as an award if it "*definitively rules upon, in whole or in part, the dispute submitted* […]*, whether on the merits, on jurisdiction or on a procedural ground which leads them to terminate the proceedings*" (Paris Court of appeal, 25 March 1994, *Société Sardisud et autre v Société Technip et autre*, Rev. arb. 1994, 39). In 2004, the Paris Court of appeal further clarified the issue and held that a tribunal's decision that "*definitely ruled on the requests for conservatory measures*" does qualify as an award and is therefore readily enforceable and subject to the French law regime of awards' enforcement and setting aside (Paris Court of appeal, 7 October 2004, n°2004/13909, *Otor v Carlyle*). This approach holds true even when the arbitral tribunal did not label its decision as an "*award*" (Paris Court of appeal, 1 July 1999, *Brasoil v GMRA*, 1999 Rev. arb., 834). Case law has consistently followed this line of reasoning. For instance, in the 2011 *Tabet* case, the *Cour de Cassation* refused to characterize an order rendered by the arbitrators as an award since it did not "*definitively settl*[ed] […] *the dispute*" (Cour de cassation, First Civil Chamber, 12 October 2011, n°09-72439, *SA Groupe Antoine Tabet (GAT) v République du Congo*).

Furthermore, a party may also apply to the French courts for interim measures as long as the arbitral tribunal has not yet been constituted (Article 1449 of the CCP; Cour de cassation, Commercial Chamber, 29 June 1999, n°98-17.215), Interim measures that are available before French courts include :

- Investigative measures that are necessary to preserve or establish evidence, which include pre-arbitration disclosure of documents, under Article 145 of the CCP;
- Provisional measures that are necessary to avoid a damage, or the aggravation thereof, or to put an end to a manifestly unlawful disorder under Article 809(1), 834 and 835 of the CCP;
- Provisional measures that are not disputed or are justified by the existence of a dispute under Article 808 of the CCP; and

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- Interim relief which would allow the creditor of a non-disputed obligation to obtain an advance under Article 835(2) and 873(2) of the CCP.

The possibility for a party to bring an request for interim measures before French courts may be excluded by the parties (Paris Court of appeal, 2 April 2003, n°2002/19947, *Pourdieu v Merril Lynch Pierce*).

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Anti-suit injunctions are decisions issued by State courts prohibiting a party from bringing a claim either before another court or before an arbitral tribunal. In *Turner*, the European Court of Justice ruled that anti-suit injunctions are incompatible with EU law (ECJ, 27 April 2004, Case C-159/02, *Turner*). In *West Tankers*, the Court extended this ruling to anti-suit injunctions related to arbitration agreements (ECJ, 10 February 2009, C-185/07, *West Tankers*).

As to whether an anti-suit injunction granted by a foreign court could produce effects in France, the *Cour de cassation* did acknowledge that anti-suit injunctions ordered in the United States were not contrary to French international public policy and thus refused to set aside an arbitral award on such grounds (Cour de cassation, First Civil Chamber, 14 October 2009, n°08-16.369).

As to anti-suit injunctions made by arbitral tribunals, they are considered valid under EU law provided they meet specific requirements. In the *Gazprom* case, the ECJ ruled that arbitral tribunals may issue anti-suit injunctions provided that they are only aimed at ensuring that parties do not resort to State courts in violation of the arbitration agreement (ECJ, 13 May 2015, C-536/13, *Gazprom*).

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Parties are free to determine the rules that will govern evidentiary matters during the arbitration. However, in the absence of an agreement, Article 1467 of the CCP provides that the arbitral tribunal may order any appropriate evidentiary measures including by ordering disclosure of documents or other evidence. In this regard, arbitral tribunals enjoy, under French law, the power to issue injunctions providing for a fine (*astreinte*), which applies if a party refuses to produce the requested evidence (Paris Court of appeal, 7 October 2004, n°2004/13909, *Otor v Carlyle*). If the evidence is not produced, the arbitral tribunal can draw adverse inferences.

Finally, the IBA Rules on the Taking of Evidence in International Arbitration may be freely applied by arbitral tribunals provided that the parties did not exclude them (Cour de cassation, First Civil Chamber, 6 November 2019, n°17-20.573).

Moreover, French courts can also play a role in the obtaining of evidence. Under Article 1469 of the CCP, a party may summon a third party (*e.g.* a witness) before the courts, at the invitation of the arbitral tribunal, to obtain the production of evidence.

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

There is no specific ethical code of conduct that applies to counsels and arbitrators in the framework of arbitration proceedings in France.

However, Article 1456 of the CCP mandates that arbitrators be independent and impartial.

Naturally, arbitrators and counsel who are members of the French Bar are subject to the regulations on ethics enacted by the *Conseil National des Barreaux* and other European regulations. They are, since 2008, expressly allowed to perform witness preparation for cross-examinations (Résolution du CNB, Bulletin du Barreau 2008 No. 9, p. 46).

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Under Article 1464 of the CCP, domestic arbitration proceedings are confidential unless the parties agree otherwise.

On the contrary, there is no provision mandating confidentiality under French law for international arbitration proceedings. International arbitrations are therefore not deemed confidential, unless the parties agree, or the arbitral tribunal orders otherwise. While the ICC Arbitration Rules, do not impose a duty of confidentiality on the parties, they do provide a duty of

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confidentiality on the International Court of Arbitration, its members, and the arbitrators (Article 6 of Appendix I and Article 1 of Appendix II). Article 22(3) of the ICC Rules also authorizes the arbitral tribunal to make orders concerning the confidentiality of the proceedings upon the request of any party, which does happen regularly in practice.

Moreover, under Article 1506 of the CCP, the deliberations of the arbitral tribunal remain confidential even in international arbitration.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

We are not aware of any recent decision in France regarding the use of evidence acquired illegally in arbitration proceedings.

However, the Paris Court of appeal expressed a view in the *Chantiers de l'Atlantique* case. In this case, a party deliberately concealed documents directly related to the matter in dispute and produced misleading testimony before the arbitral tribunal. During the enforcement proceedings before the Paris Court of appeal, the Court held that these breaches were not enough to impact the enforcement of the award, as the concealed documents were not a determining factor for the award (Paris Court of appeal, 1 April 2010, n°09/7068).

The threshold for French courts to refuse the enforcement of an award due to the use of evidence acquired illegally is quite high. It "*implies that false documents were produced, that false testimony was taken or that documents relevant to the resolution of the dispute were fraudulently concealed from the arbitrators*" and that this evidence in turn directly impacted the decision of the arbitral tribunal (Paris Court of appeal, 1 July 2010, n°09/10069, *Thalès*).

38. How are the costs of arbitration proceedings estimated and allocated?

French law does not provide any rules for the estimation and allocation of costs. Hence, absent any agreement of the parties or reference to institutional rules, cost allocation is left to the discretion of the arbitrators.

In practice, cost allocation usually depends on the circumstances of the case, including the outcome of the case, the reasonableness of the parties' legal fees and the parties' attitude throughout the proceedings.

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

Arbitral tribunals have jurisdiction to award interests for principal claims and costs. They may also determine the rate and the starting date of such interests.

If the arbitral tribunal does not fix an interest rate, the legal interest rate fixed by decree will apply. It is worth noting that this does not prevent parties from agreeing on a contractually applicable interest rate.

Moreover, pursuant to Article 1231(7) of the French Civil Code, even if the arbitrator does not award any interest, the legal interest rate shall apply for awards enforced in France.

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

The recognition and enforcement of an arbitral award in France involves two steps.

The first step is for the party seeking the recognition and enforcement of an award to submit an *ex parte* application to the President of the *Tribunal judiciaire*. At this stage, the applicant must prove only (i) the existence of the award, by producing the original award and the arbitration agreement or duly certified copies thereof (together with a translation of these documents if they were not drafted in French), and (ii) that there will be no manifest violation of French international public policy as a result of the recognition or enforcement of this award (Articles 1514 and 1515 of the CCP). During these *ex parte* proceedings, French courts only carry out a *prima facie* review to confirm the existence of the award and its compliance with international public policy.

The second step relates to the potential appeal proceedings that might be brought against the decision of first instance ordering or dismissing the recognition and enforcement of the award. This second step involves a much more detailed review of the award, applying the same criteria as those set forth in Article 1520 of the CCP for the set aside proceedings against awards issued in France (Article 1525 of the CCP).

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It is worth noting that arbitral awards should set forth the respective claims and arguments of the parties and must be reasoned (Article 1482 of the CCP, which is applicable to both domestic and international arbitration by virtue of Article 1506 of the CCP). Under domestic arbitration only, the award is null and void in the absence of motivation (Article 1483 of the CCP which is not applicable to international arbitration). As to whether the absence of motivation may be a ground for setting aside the award, one should distinguish between domestic and international arbitration:

- As to domestic arbitration, the tribunal's failure to motivate the award is indeed in itself a ground for setting aside the award, in virtue of Article 1492(6) of the CCP. The Court's review is however only limited to the existence of a reasoning, and it cannot therefore review its content.
- In international arbitration, Article 1492(6) CCP does not apply, so that the tribunal's failure to motivate the award is not in itself a ground for setting it aside. However, the judge may examine the existence of a reasoning on the basis of the award's compliance with the arbitrator's terms of reference (Article 1520(3) CCP) or its compliance with the adversarial process (Article 1520(4) CCP). Again, the Court cannot review the content of the reasoning adopted by the arbitrators.

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Under French law, the request for recognition and enforcement of an arbitral award shall be brought before the *Tribunal judiciaire* of the place where the award is rendered, or before the Paris *Tribunal judiciaire* when the award is rendered abroad.

The procedure takes a few weeks.

Such request for recognition and enforcement of an arbitral award is submitted on an *ex parte* basis (Article 1516(2) of the CCP for international awards and Article 1487(1) of the CCP for domestic awards). The exequatur order can be appealed in adversarial proceedings (Articles 1522, 1523, 1525 of the CCP).

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

At the first – *ex parte* – stage, the standard of review is similar in both domestic and international arbitration. However, in international arbitration (including awards rendered in France and abroad), French courts will review the award's compliance with the standard of "*manifest violation of international public policy*" (Article 1514 of the CCP), while, in domestic arbitration, the standard for is the "*manifest violation of public policy*" (Article 1488 of the CCP).

At the stage of appeal against the *ex parte* exequatur order, the standard of review is equally similar in both cases (Article 1492 of the CCP for domestic awards, and Article 1520 for international award), except that Article 1492(6) provides for one additional ground, *i.e.* where the award failed to provide for the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having rendered the award, or where the award was not made by majority decision (See Question 40).

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

There is no statutory limit under French law as to the type of remedies which can be awarded by an arbitral tribunal. Unless otherwise restricted by the parties in the arbitration agreement, a wide range of remedies is therefore available to the arbitrators: award of damages, injunction or even specific performance.

Punitive damages are not *per se* contrary to French international public policy but will however be considered so where the amount awarded is disproportionate with the damage actually suffered by the victim (Cour de cassation, First Civil Chamber,1 December 2010, n°09-13.303, *Fountaine Pajot*; Paris Court of appeal, 25 February 2020, n°17/18001, *Uzuc*; ICCP-CA, 6 July 2021, n°19/21216).

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

In international arbitration, an arbitral award may not, in principle, be appealed, and the parties cannot provide in their arbitration agreement for such right (Cour de cassation, First Civil Chamber,13 March 2007,

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n°04-10.970).

The only recourse available against international awards rendered in France is a set aside action before State courts (Article 1518 of the CCP). Such request must be lodged with the Court of appeal in which jurisdiction the award was rendered, within one month of the notification of the award (Article 1519(2) of the CCP) and an additional two months if the applying party is located abroad. Article 1520 of the CCP sets forth a limited and exhaustive list of grounds for setting aside an international arbitral award rendered in France which include the following:

- The arbitral tribunal wrongly upheld or declined its jurisdiction; or
- The arbitral tribunal was not properly constituted; or
- The arbitral tribunal ruled without complying with the mandate given to it; or
- Due process was violated; or
- Recognition and enforcement of the arbitral award is contrary to international public policy.

In addition, parties may appeal court orders declining recognition or enforcement of an international arbitral award issued in France (Article 1523 of the CCP) or ruling on the recognition or enforcement of a foreign arbitral award (Article 1525 of the CCP). The grounds for filing an appeal are the same as provided for by Article 1520 (Article 1525(4) of the CCP). Those appeals should be brought within one month from the service ("*signification*") of the decision and an additional two months if the appealing party is located abroad.

One should note that set aside actions as well as appeals against the exequatur order do not suspend the enforcement of the arbitral award. However, a suspension of the enforcement of the award could be ordered by the First President of the Court of appeal having jurisdiction over the action in question if there is an alleged risk that such enforcement will cause a severe damage to one of the parties' rights (Article 1526 of the CCP).

In domestic arbitration, the award may not be appealed unless the parties have expressly provided for a right to appeal on the merits of an award in their arbitration agreement (Article 1482 of the CCP). Third-party appeal against an award ("*tierce-opposition*") is also possible in domestic arbitration (See Question 47).

Besides, and unless the parties have agreed to a right to appeal the award, the award may always be set aside and any stipulation to the contrary shall be deemed unwritten (Article 1491 of the CCP).

The grounds for setting aside a domestic award are the same as in international arbitration (Article 1492 of the CCP), except that Article 1492(6) provides for one additional ground, *i.e.* where the award failed to provide for the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having rendered the award, or where the award was not made by majority decision (see Questions 40 and 42).

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

Both in domestic and international arbitration, an award shall not, in principle, be appealed (see Question 44).

As to set-aside proceedings, a distinction is to be drawn between domestic and international arbitration:

- In domestic arbitration, any waiver of the right to set aside an award is prohibited (Article 1491(2) of the CCP); and
- In international arbitration, the parties may on the contrary expressly waive their right to set aside an award, at any time – in the arbitration agreement, during the arbitral proceedings or after the award has been rendered – by way of a specific agreement (Article 1522 of the CCP).

It should be noted that even if a waiver of set aside proceedings has been concluded, the parties still have the possibility to appeal against the order granting recognition and enforcement of the award in France in international arbitration (Article 1522(2) of the CCP).

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

As a common principle of public international law, sovereign immunities from jurisdiction and from execution are recognized under French law (For immunity of jurisdiction, see Question 28).

As for immunity from execution, its legal regime has now been clarified by the Law No. 2016-1691 of 9 December 2016, known as "*Sapin II Law*". The Sapin II Law, which came into force on 1 June 2017, has added three new provisions to the Civil Enforcement Procedure Code.

Article L. 111-1-1 of the Civil Enforcement Procedure

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Code requires a prior court authorization, on an *ex parte* basis, to enforce or obtain interim measures against properties of foreign States.

Article L. 111-1-2 of the same Code states that the judge can only grant such authorization in one of the following cases:

- The foreign State has expressly consented to such enforcement measures; or
- The foreign State has dedicated or assigned an asset to the satisfaction of the claim, subject of the proceedings; or
- Where a judgment or an arbitral award has been rendered against the foreign State and the property in question is specifically used or intended to be used by that State for a purpose other than a non-commercial public service and has a connection with the entity against which the proceedings have been brought.

The same article then provides for a non-exhaustive list of assets that are deemed used or intended to be used for non-commercial public purposes.

Article L. 111-1-3 of the same Code further provides that provisional measures or enforcement measures may not be granted in respect of property used or intended to be used for diplomatic missions of foreign States or of international organizations, unless the States concerned have expressly and specifically waived their right to do so.

In a decision of 10 January 2018, the *Cour de cassation* has emphasized the importance of the new provisions under the Sapin II Law, by considering that former case law on immunity from execution was no longer valid (Cour de cassation, First Civil Chamber,10 January 2018, n°16-22.494, *Commisimpex*; restated by Paris Court of appeal, 5 September 2019, n°18/17592, where the judge also ruled that the seized accounts and securities are seizable since they belong to Libyan emanations and are therefore necessarily related to Libya, and it is demonstrated that they are not specifically used or intended to be used for non-commercial public service purposes).

In the *Oschadbank* case before the ICCP-CA, the Russian Federation, while awaiting the outcome of the set aside proceedings, brought a motion to suspend the enforcement of an arbitral award. It alleged there was a risk that its immunity from execution would not be recognized in certain countries, in particular Ukraine, where the protection of State's immunity from execution is not as high as under the French Sapin II Law. Russia's motion was rejected by the ICCP-CA since no risk of severe damage to the Russian Federation's rights related to the enforcement of the award had been demonstrated pursuant to Article 1526 of the CCP (ICCP-CA, Order, 22 October 2019, n°19/04161, *Oschadbank*).

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

While an arbitral award is *res judicata* only in respect of the dispute and the parties it involves, it is nonetheless enforceable against third parties which are likely to be affected by the award (Cour de cassation, Commercial Chamber, 23 January 2007, n°05-19.523).

As a consequence, third-party appeals against an award, known as *tierce-opposition*, is possible in domestic arbitration (Article 1501 of the CCP), before the State court that would normally have jurisdiction over the merits of the case in the absence of the arbitration agreement. For instance, a guarantor ("*caution solidaire*"), who is not a party to the arbitration, is entitled to file a *tierce-opposition* against the award that determines the amount of the debt for which it is a guarantor, on the basis of Article 6(1) of the European Convention on Human Rights (Cour de cassation, Commercial Chamber, 5 May 2015, n°14-16.644).

Although *tierce-opposition* is not allowed against international arbitration awards, a third party may lodge such action against the decision granting enforcement of an international award (Cour de cassation, First Civil Chamber, 26 May 2021, n°19-23.996).

Finally, it is worth noting that the *Cour de cassation* held in 1997 that an arbitrator cannot file a *tierce-opposition* against the decision of the Paris Court of appeal which had set aside the arbitral award for lack of independence towards one of the parties and ordered him to pay damages to the other party (Cour de cassation, First Civil Chamber,16 December 1997, n°95-15.921).

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

French law does not specifically regulate third party funding. Accordingly, classic contract law principles apply to third party funding agreements in France.

Apart from the now-famous case *Foris AG v Veolia* (Versailles Court of appeal, 1 June 2006, n°05/01038)

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where the court admitted in principle the validity of third-party funding agreements, it seems that there have been no further recent court decisions.

However, the Paris Bar Council considered in its Resolution dated 21 February 2017, that the use of third-party funding in international arbitration is favorable to the interests of litigants and lawyers. The Paris Bar emphasized the following points for lawyers admitted in France:

- Lawyers are bound by their ethical obligations towards their client, and not towards the funder. This means, *inter alia*, that communications between lawyers and their clients are privileged and may not be disclosed to funders;
- Lawyers may not both represent the funded party and the funder; and
- Lawyers are strongly encouraged, although not mandated, to disclose the existence of the third-party funding agreement to the tribunal.

Under Article 11(7) of the 2021 ICC Arbitration Rules, parties are now required to disclose to the ICC Secretariat, the arbitral tribunal, and the other parties to the proceedings, the existence of third-party funding, so to "*assist prospective arbitrators and arbitrators in complying with their duties of impartiality and independence under Articles 11(2) and 11(3)*".

Finally, the European Parliament recently called for a stronger regulation on third party funding. The proposed regulation, should it be adopted, would include a cap on the funders' shares of recovery at 40%, the obligation to disclosure the funding agreements, and the obligation for the funder to pay adverse costs orders. The practical implications of this proposal, as well as their interactions with other domestic laws, remain however to be seen.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

French law does not specifically address the issue of emergency arbitrators, although it does not prohibit it.

Several institutional arbitration rules, such as Article 29 of the 2021 ICC Arbitration Rules, provide for emergency arbitrator relief. Article 29(6) states that the emergency arbitrator provisions do not apply when (i) the arbitration agreement under the Rules was concluded before 1 January 2012, (ii) the parties have agreed to opt out of the emergency arbitrator provisions, or (iii) the arbitration agreement upon which the application is based arises from a treaty.

The issue as to whether a decision rendered by an emergency arbitrator shall qualify as an "award" has been addressed by case law. In 2003, the Paris Court of appeal refused enforcement of an order rendered pursuant to the then applicable ICC Pre-Arbitral Referee mechanism (the precursor to the emergency arbitrator), declaring that the Referee was a third-party adjudicator as opposed to an arbitrator (Paris Court of appeal, 29 April 2003, *Société Nationale des Pétroles du Congo and Republic of Congo v TEP Congo*). The reasoning of the Court of appeal in relation to the non-jurisdictional nature of the Pre-Arbitral Referee was however highly criticized and would "*unlikely be relied upon today for* [emergency arbitrator] *proceedings where, contrary to the ICC Pre-Arbitral Referee Rules, the* [emergency arbitrator] *Provisions are incorporated in the ICC Rules*" (see the 2019 ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings).

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

There is no provision under French law allowing for simplified or expedited procedures. However, Article 30 and Appendix VI of the 2021 ICC Arbitration Rules provide for an expedited procedure which applies if:

- the amount in dispute does not exceed US$ 2 000 000, if the arbitration agreement was concluded on or after 1 March 2017 and before 1 January 2021;

OR

- the amount in dispute does not exceed US$ 3 000 000, if the arbitration agreement was concluded on or after 1 January 2021;

AND

- the parties have not opted out of the Expedited Procedure Rules in the arbitration agreement or at any time thereafter.

The ICC expedited procedure shall also apply, irrespective of the date of conclusion of the arbitration agreement or the amount in dispute, if the parties have agreed to opt in. Such opt in agreements can be concluded at any time.

The expedited procedure is a simplified one as follows:

- there are no Terms of Reference;

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- a case management conference is organized within 15 days of the date on which the file was transmitted to the arbitral tribunal;
- the arbitral tribunal may limit the number, length and scope of the parties' written submissions and written witness evidence; and
- the final award is rendered within six months from the case management conference.

To date, 261 cases have been conducted under the ICC expedited procedure. Out of the 115 final awards rendered, 77 (67%) were delivered on or around the six-month time limit.

It is also worth noting that the International Arbitration Chamber of Paris has established an expedited procedure ("*Procédure PAR*") for arbitrations whose principal amount in dispute is no more than EUR 100 000.

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

There is no specific provision under French law actively promoting diversity in the choice of arbitrators. As elsewhere, however, the French arbitration community is more and more committed to promoting diversity by appointing more women, young practitioners and persons of diverse ethnicity as arbitrators.

On both gender equality and cultural diversity, the ICC has been leading the way by publishing diversity-related statistics since 2015. These show a steady increase in the appointments of female arbitrators from 10% in 2015 to 23.4% in 2020, a record for the ICC, and a greater diversification of the profile with appointed arbitrators from 89 different jurisdictions in 2019. As to age diversity, the ICC YAAF brings together over 27 400 practitioners aged 40 and under, and hosts hundreds of educational and social events each year, providing young professionals with the opportunity to discover best practices, discuss topical issues and network with experienced practitioners.

In addition to the work carried out by the ICC, several other significant initiatives have been conducted.

These include, for example, the Equal Representation in Arbitration Pledge ("*ERA Pledge*") launched in 2016 and now garnering over 4 000 signatories from law firms, institutions and organizations over 113 countries, seeking to increase the number of women appointed as arbitrators with the ultimate goal of full parity.

The French Arbitration Committee has also created the 'under 40 group' (CFA-40) in 2011, which today counts more than 350 members and organizes numerous events. Finally, for the past two years, the keynote speech given at the Paris Arbitration Week has also intentionally focused on diversity so to ensure continued awareness-raising on this issue.

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

Article V of the New York Convention sets forth limited and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused by a competent authority in the Contracting State where recognition and enforcement are sought.

French law however provides for a more favorable regime of enforcement than the stringent requirements of Article V of the New York Convention, and thus prevails over the Convention by virtue of Article VII(1).

In a now famous recital, the *Cour de cassation* has indeed recognized the principle of autonomy of arbitral awards and thus considers that an "*international arbitral award, which is not anchored to any national legal order, is an international judicial decision*" (Cour de cassation, First Civil Chamber, 8 July 2015, n°13-25.846, *Société Ryanair Ltd et Société Airport Marketing Services Ltd v Syndicat Mixte des Aéroports de Charente;* Cour de cassation, First Civil Chamber, 29 June 2007, n°05-18.053, *Putrabali*). As a result, French courts, when enforcing an award, are not bound, and usually disregard, decisions of foreign courts on recognition and enforcement and/or setting aside of awards, including those of the arbitral seat of the award (See Question 2). Accordingly, an award that has been set aside at the seat of arbitration may be enforced before French courts (Cour de cassation, First Civil Chamber, 23 March 1994, n°92-15.137, *OTV v Hilmarton*; Cour de cassation, First Civil Chamber, 29 June 2007, n°05-18.053, *PT Putrabali Adyamulia v Rena Holding and Moguntia Est Epices*) (See Question 2).

On 13 January 2021, the *Cour de cassation* confirmed that this principle also applies to purely domestic arbitral awards issued abroad (Cour de cassation, First Civil Chamber, 13 January 2021, n°19-22.932, *Egyptian General Petroleum Corporation v National Gas Company*). In this case, the Court confirmed that the set

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aside of an award in Egypt was irrelevant for its enforcement in France, even though the arbitration was purely domestic.

On 12 July 2021, the Paris Court of appeal confirmed the *Putrabali* decision (Cour de cassation, First Civil Chamber, 29 June 2007, n°06.13-293) and went on to consider that "*only the recognition or enforcement of an award that is incompatible with a domestic or foreign court decision previously granted exequatur in France*" would violate French international public policy (Paris Court of appeal, 12 July 2021, n°19/11413). In other words, if the set aside decision at the seat is recognized in France, the award may not be enforced. A similar decision was recently rendered by the same Court (Paris Court of appeal, 11 January 2022, n°20/17923).

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

French courts consider corruption to be contrary to international public policy, leading to the refusal to enforce awards (Paris Court of appeal, 16 May 2017, n°15/17442, *République Démocratique du Congo*).

Numerous French court decisions have been rendered on the issue of corruption in the framework of court review of arbitral awards. In recent years, French courts' scope of review of arbitral awards in the context of set aside proceedings has expanded. Instead of simply relying on the arbitral tribunal's findings, French courts' review now includes a full examination, as matter of both fact and law, of the merits of a party's allegation that the arbitral award violates the international public policy (*e.g.* because it is based on a contract tainted by corruption).

In the *Belokon* case, the *Cour de cassation* indeed reversed its previous position (Cour de cassation, First Civil Chamber, 12 February 2014, n°10-17.076, *Schneider)*, according to which violations of international public policy had to be flagrant, effective, and concrete, (even when the award is challenged on allegations of corruption) and ruled that a wide scrutiny of the award must be applied to examine its compliance with the prohibition of corruption and money laundering. The *Cour de cassation* notably commended the Court of appeal for having fully investigated the allegation of corruption and relying on "*serious, precise, and concurring*" indicators that money laundering had in fact occurred in this case, thereby directly contradicting the arbitral tribunal's findings. The *Cour de cassation* finally declared that the enforcement of the award would violate French international public policy in a "*characterized manner*", departing from its "*flagrant, effective, and concrete*" test(Cour de cassation, First Civil Chamber, 23 March 2022, n°17-17.981).

On 5 April 2022, the International Commercial Chamber of the Paris Court of appeal applied the same test and set aside an award on the basis that its recognition would violate international public policy in a characterized manner (Paris Court of appeal, 5 April 2022, n°20/03242 *Gabonese Republic v Société Groupement Santullo Sericom Gabon*).

Furthermore, on 7 September 2022, the *Cour de cassation* ruled that allegations of corruption need not have been raised during the arbitration proceedings for them to be raised at the set aside stage. It considered that: "*The court of appeal, faced with a plea that the recognition or enforcement of the award would violate international public policy in that the transaction it approved had been obtained by bribery, rightly verified the reality of this allegation by examining all the documents produced in support of it, regardless of the fact that they had not previously been submitted to the arbitrators*" (Cour de cassation, First Civil Chamber, n°20-22.118, *Sorelec v Libya*).

54. Have there been any recent court decisions in your country considering the judgments of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16), Republic of Moldava v Komstroy LLC (Case C-741/19) and Republiken Polen v PL Holdings Sarl (Case C-109/20) with respect to intra-European investor-state arbitration? Are there any pending decisions?

Following the three landmark cases by the CJEU, *Achmea*, *Komstroy*, and *PL Holdings*, French courts recently ruled on the compatibility with EU law of intra-European investor-sate arbitration in three cases rendered by the Paris Court of appeal.

In both *Slot* (Paris Court of appeal, 19 April 2022, n°20/14581) and *Strabag* (Paris Court of appeal, 19 April 2022, n°20/13085), the Paris Court of appeal set aside awards involving an intra-EU dispute based on intra-EU BITs. In both cases the investors argued that EU law was inapplicable to the dispute. In particular, they argued that the applicable BITs were significantly different from the ones forming the basis of the CJEU's decisions as they did not refer to EU law, which was the main

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motivation for the CJEU's rulings in *Achmea*, *Komstroy*, and *PL Holdings*. The Court rejected this argument as it considered that even in the absence of reference to EU law in the treaty, it cannot be excluded that the arbitral tribunal will misapply EU law. French courts therefore hold the dispute to be inarbitrable based solely on the ***risk*** of applicability of EU law to the dispute when it is not formally excluded. Naturally, the intra-European nature of the BITs might have played a role in the Paris Court of appeal's reasoning.

Another case worth noting is the *Komstroy* case. The arbitral tribunal rendered an ECT-based award in favor of the Ukrainian investor and Moldovia brought set aside proceedings before the Paris Court of appeal. It argued that the transaction was not an investment within the meaning of the ECT and that the arbitral tribunal had therefore wrongly upheld its jurisdiction. On 12 April 2016, the Paris Court of appeal set aside the award, finding that the transaction at stake did not correspond to the "*ordinary meaning*" of an investment which requires a contribution by the investor (Paris Court of appeal, 12 April 2016, n°13/22531). On 28 March 2018, the *Cour de Cassation* quashed this decision on the ground that the Court of appeal could not add a condition which was not provided by the ECT to determine whether the arbitral tribunal had jurisdiction (Cour de Cassation, First Civil Chamber, 28 March 2018, n°16-16.568). The case was remanded to the Paris Court of appeal, which decided on 24 September 2019 to suspend proceedings in order to submit a preliminary reference on the interpretation of the ECT to the CJEU (Paris Court of appeal, 24 September 2019, n°18/14721).

On 2 September 2021, the CJEU rendered its much-awaited decision. While admitting that the dispute at hand was an extra-EU dispute where EU law was not directly applicable, the CJEU upheld its jurisdiction and took the opportunity to reaffirm its previous line of jurisprudence according to which ECT-based intra-EU arbitrations are contrary to EU law. It is only at the end of its decision that the CJEU focused on the issue at stake in the preliminary reference, namely the definition of an investment, and found that "*a mere supply contract is a commercial transaction which cannot, in itself, constitute an 'investment' within the meaning of Article 1(6) ECT, irrespective of whether an economic contribution is necessary in order for a given transaction to constitute an investment*"(CJEU, 2 September 2021, C-741/19).

Furthermore, it must be noted that following the *Achmea* decision, France signed the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the EU, along with 23 other Member States. The Agreement entered into force on 29 August 2020 and effectively terminated bilateral investment treaties between France and EU Member States that were signed before their accession to the EU (including, but not limited to, Bulgaria, Croatia, Poland, Slovakia, and Slovenia).

55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

To the best of our knowledge, there is no recent decision in France following the decision rendered in *Micula* and *Ors*.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

The ICC published a list of measures related to the COVID-19 pandemic on 9 April 2020, which is still applicable. Amongst the main points are:

- The ICC required correspondence, including new requests for arbitration, to be filed in electronic form; and
- The ICC provided guidance on the organization of virtual hearings.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

At the ICC, and under the 2021 ICC Arbitration Rules, all notifications and communications from either the Secretariat or the arbitral tribunal can be sent via email.

Under Article 26(1) of the ICC Arbitration Rules, the arbitral tribunal may decide, after having consulted with the parties, that the hearings will take place virtually. In the Note to Parties and Arbitral tribunals on the Conduct of the Arbitration dated 1 January 2021, the ICC strongly encourages virtual hearings for case management conferences and hearings related to the Expedited Procedure Provisions, and Emergency Arbitrator Provisions.

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The ICC Arbitration Rules also published on 1 January 2021 suggests clauses for cyber-protocols and procedural orders dealing with the organization of virtual hearings.

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

Articles L.622-21 (applicable to safeguard proceedings), L.631-14 (applicable to receivership proceedings), and L.641-3 (applicable to liquidation proceedings) of the French Commercial Code, provide that:

- Any pending proceedings against an insolvent party shall be stayed from the date of the decision by which the court opens the insolvency proceedings, the opening judgment ("*jugement d'ouverture*"), until the creditor who initiated them has filed a submission of claim ("*déclaration de créance*") and has called a court-appointed insolvency practitioner (administrator or liquidator) to participate in the pending proceedings.
- Creditors are prohibited from bringing any new judicial proceedings or enforcement proceedings seeking to obtain (i) an order against the insolvent debtor to pay a sum of money or (ii) the termination of a contract on the grounds of non-payment of a sum of money, from the date of the opening judgment, according to the principle of suspension of individual claims ("*principe de l'arrêt des poursuites individuelles*"), which is of public order.

The *Cour de cassation* expressly acknowledged such principles in the context of arbitration and ruled that arbitration proceedings may only resume after the opening judgment if the creditor is able to produce evidence to the arbitral tribunal that he or she (i) filed his or her claim to the insolvency practitioner and (ii) called the insolvency practitioner to participate in the proceedings (Cour de Cassation, First Civil Chamber, 6 May 2009, n°08-10.281).

Moreover, a creditor with a claim existing prior to the opening judgment shall submit its claim to the specific verification procedure before initiating arbitral proceedings. For instance, in the *Alstom* case, the disputed contract contained an arbitration agreement and one creditor (Alstom) initiated arbitration proceedings against insolvent companies. The *Cour de Cassation* ruled that this arbitration was admissible only if the specific verification procedures existing under French law had been previously followed by the creditor, including the filing of her or his claim to the insolvency practitioner (Cour de cassation, Commercial Chamber, 2 June 2004, n°02-13.940).

Similarly, the recognition and enforcement of an award during the insolvency proceedings is not *per se* contrary to French international public policy, but the execution of the award may not happen otherwise than in the framework of the insolvency proceedings (Paris Court of appeal, 14 May 2019, n°17/09133).

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

France ratified the ECT on 1 September 1999 and it entered into force on 27 December 1999. The International Energy Charter was signed on 20 May 2015 but has not yet been ratified.

France took part in the modernization of the Treaty and called for an EU withdrawal from the ECT alongside other EU Member States.

On 2 September 2022, German investors brought the first known action under the ECT against France.

On 21 October 2022, however, the French President Emmanuel Macron announced France's intention to withdraw from the ECT, following similar moves by Spain, the Netherlands and Poland. Commentators mentioned how the ECT would be incompatible with climate goals and commitments to be reached by 2030 as it enables private investors to launch arbitrations against Contracting States, preventing them from carrying out their climate change policies.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

As to disputes on climate, the Paris Administrative Court ("*Tribunal administratif de Paris*") rendered a landmark decision, which ruled that the French State failed to combat climate change and must therefore be enjoined to repair the consequences of such failure (Paris Administrative Court, 14 October 2021, n°1904967, 1904968, 1904972, 1904976/4-1). To this end, the Administrative Court of Paris has, for the first time,

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ordered that the overrun of the greenhouse gas emissions cap set by the first carbon budget (2015-2018) should be compensated by 31 December 2022, at the latest.

Under French law, French companies are required to implement a 'vigilance plan' and conduct due diligence to prevent, and remedy, human rights violations in the conduct of their business (Law No. 2017-399 dated 27 March 2017). Other initiatives might also arise, including at the EU level with the Proposal for a Directive on Corporate Sustainability Due Diligence dated February 2022. It is however not completely clear how those principles will be applied by arbitral tribunals.

As to human rights, the Paris Court of appeal faced a set aside action where the claimant claimed a violation of international public policy as the award provided for the payment of a sum of money to a party allegedly subject to sanctions and allegedly controlled by authorities violating human rights. On 5 October 2021, the Court recognized that international public policy encompasses the fight against violation of human rights and international sanctions, but dismissed the claim as (i) the claimant relied on future hypothesis, *i.e.* that the respondent would use the sums to engage in conduct that violates international public policy, and (ii) the claimant failed to bring "*serious, precise and concordant evidence that makes it possible to characterize a disregard of the sanctions imposed as a result of the enforcement of the arbitral award*" (ICCP-CA, 5 October 2021, n°19/16601, *DNO v Yemen*).

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

France has not expressed specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS. However, the EU submitted the following proposals:

- creation of a Multilateral Court of Investment, including an appellate tribunal, with full-time adjudicators subject to strict ethical requirements;
- increasing the transparency of the proceedings, considering the UNCITRAL Rules on transparency in Treaty-based Investor-State Arbitration to be a minimum standard;
- enhancing predictability and consistency, notably through a sense of "*continuous collegiality*" built up by permanent adjudicators; and
- eliminating double hatting, whereby arbitrators may also appear as counsel in other cases.

62. Has your country implemented a sanctions regime (either independently, or based on EU law) with regard to the ongoing crisis in Ukraine? Does it provide carve-outs under certain circumstances (i.e., providing legal services, sitting as an arbitrator, enforcement of an award)?

Since March 2014, the EU has gradually imposed restrictive measures on the Russian Federation in response to (i) the illegal annexation of Crimea in 2014, and (ii) the illegal military aggression against Ukraine in 2022.

France has, together with the EU, adopted unprecedented measures which have gradually increased from February 2022 until now as a result of the escalation of the Russia-Ukraine conflict, with an eighth package of sanctions having been adopted on 6 October 2022 (Regulation (EU) 2022/236 of 21 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine).

The sanctions include, *inter alia*:

- Asset freezing and travel restrictions for individuals and entities linked with the Russian regime, including Vladimir Poutine and members of the Russian Douma;
- Closure of EU airspace, ports, and other restriction of transport for Russian registered aircraft and vessels;
- Prohibition on imports of commodities from Russia to the EU;
- Prohibition of transactions between the EU and the Russian Central Bank;
- Restriction on media, including Sputnik, Russia today and other Russian State-owned media platforms;
- Sectorial embargos in energy, aeronautic, and finance sectors; and
- Export control regime for dual-use goods and goods intended for military end-users.

As mentioned, on 6 October 2022, the EU issued an eighth package of sanctions against Russia which includes additional sanctioned individuals and entities, an increased geographical scope of the sanctions to include the areas of Kherson and Zaporizhzhia, new

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import restrictions worth EUR 7 billion, and a prohibition to provide legal advice to Russia or any legal persons, entities or bodies established in Russia, including with regards to commercial transactions, with the exclusion of their representation in State courts, arbitration or mediation proceedings which is still permitted.

In the near future, many issues will certainly arise with regard to the enforcement of awards, especially with regard to the seizing of debtors' frozen assets and the payments to sanctioned creditors.

63. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

UN- and EU-enacted international economic sanctions are part of French international public policy (Paris Court of appeal, 3 June 2020, n°19/07261).

However, foreign economic sanctions, such as those established by the United States, are only part of French international public policy when they carry values that are by themselves considered to be part of French international public policy. In other words, when the foreign sanctions do not correspond to the values that France cannot accept to see breached, they are not part of the international public policy (ICCP-CA, 3 June 2020, n°19/07261).

On 5 October 2021, the Paris Court of appeal faced a set aside action where the claimant claimed a violation of international public policy as the award provided for the payment of a sum of money to a party allegedly subject to sanctions and allegedly controlled by authorities violating human rights. The Court recognized that international public policy encompasses the fight against violation of human rights and international sanctions, but dismissed the claim as (i) the claimant relied on future hypothesis, *i.e.* that the respondent would use the sums to engage in conduct that violates international public policy, and (ii) the claimant failed to bring "*serious, precise and concordant evidence that makes it possible to characterize a disregard of the sanctions imposed as a result of the enforcement of the arbitral award*" (ICCP-CA, 5 October 2021, n°19/16601, *DNO v Yemen*).

64. Have arbitral institutions in your country taken any specific measures to administer arbitration proceedings involving sanctioned individuals/entities? Do their rules address the issue of sanctions?

In October 2021, the ICC was granted a license by the US OFAC to receive payments in ICC arbitrations involving Iran, a sanctioned entity. The ICC did not, however, take any specific measure to administer arbitration proceedings in this context, and the ICC Rules do not specifically address the issue of sanctions.

Indeed, the ICC pledged to "*consistently endeavor to pave the way for access to justice for all parties to dispute resolution proceedings, irrespective of their country, nationality or residence*." (ICC welcomes EU Regulation amendment increasing legal certainty for the business community, 5 August 2022).

Moreover, in its Note to Parties and Arbitral Tribunals on ICC Compliance dated 29 September 2017, the ICC issued a general notice to set out its position as to sanctions, according to which "[p]*ayments made and requested by ICC may be affected by international sanctions and such payments may be made and requested only after being approved by the relevant* [French regulatory] *authorities*".

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