

ARBITRATION: PRACTICAL GUIDE  
(Pursuant to the Decree of 13 January 2011)

Decree No. 2011-48 of 13 January 2011 reforming the law on arbitration came into force on 1 May 2011, subject to certain reserves, and has been codified in Articles 1442 to 1527 of the French Civil Procedure Code.

*N. B. The Decree is described as modernising French arbitration law as it applies to both domestic and international arbitration. It provides for greater flexibility in the rules governing agreements to submit to arbitration, the notification and enforcement of arbitral awards. It asserts the authority of arbitral tribunals, empowering them to make interim and protective orders (mesures provisoires et conservatoires) binding the parties to the arbitration, with the exception of attachment orders (saisies conservatoires) or charges on property (sûretés judiciaires). It defines the role played by national courts as "judge supporting the arbitration". It clarifies and improves the rules governing appeals against arbitral awards and applications to set them aside.*

**I- Arbitration: Submission to Arbitration, Forming an Arbitral Tribunal and Arbitral Proceedings**

**A) Definition of Arbitration**

Arbitration is a method, alternative to court proceedings, of settling disputes, without involving State institutions, in which an arbitrator, at the request of the parties to the dispute, resolves the dispute by making a ruling, an arbitral award.

Arbitration is either domestic or international:

- arbitration is international where the dispute involves international trade;
- arbitration is domestic where the dispute involves national commercial interests.

**B) Formation of the Arbitral Tribunal**

The parties are each entitled to appoint an arbitrator. The selected arbitrators will appoint a third. These three individuals will form a collegiate body called the arbitral tribunal. An arbitrator is a judge whose decision is binding on the parties.

Therefore, arbitration is a method of settling a dispute by seeking the judgment of arbitrators selected by the parties involved. In the majority of cases, the arbitrators have specific knowledge and skills in the parties' area of business. Arbitrators acquire their powers by consent of the parties and by virtue of the effects the law recognises in the parties' desire to resolve their differences through this means without reference to the courts.

### **C) Submission to an Arbitral Tribunal**

An arbitrator's mandate is to resolve a dispute according to an agreement made binding by Article 1134 of the Civil Code. This agreement may predate the dispute (arbitration agreement) or be entered into after the dispute has arisen (submission agreement):

- an arbitration agreement is defined as an "*agreement whereby the parties to a contract agree to submit to arbitration any disputes that may arise in connection with that contract*" (Article 1442 CPC). An arbitration agreement must be evidenced in writing, if not it will be invalid. It must appoint an arbitrator or arbitrators or, if not, set out the procedure for their appointment. The arbitration clause is legally independent from the contract containing it. Therefore, if the main contract is held to be invalid, this will not affect the validity of the arbitration clause;
- a submission agreement is defined as an "*agreement whereby the parties to an existing dispute agree to submit it to arbitration*" (Article 1442 CPC): having first agreed their preference for arbitration, the parties delegate the task of resolving their disagreement to their chosen arbitrator.

### **D) Arbitral Awards**

The decision of the arbitral tribunal, the arbitral award, bears a close similarity to a "classic" court ruling. It must be based on proper legal grounds and has the same legal force as a judgment (becoming *res judicata*) as regards the adjudicated claims. An arbitral award may only be enforced in France pursuant to an enforcement order (*exequatur*) issued by the District Court of the place in which the award was made.

## **II- The Arbitration Process according to the Decree of 13 January 2011 (codified in Articles 1442 to 1527 of the Civil Procedure Code)**

The Decree of 13 January 2011 amends existing arbitration rules to give them greater flexibility and render the process more attractive. It also gives force of law to many of the rules set down in precedent by previous court rulings.

### **A) Domestic Arbitration**

#### ***1- Jurisdiction of the Arbitrator and Arbitral Tribunal***

A dispute is referred to an arbitral tribunal either jointly or by one of the parties exercising its right to do so. The parties may also opt to submit to arbitration even if court proceedings are already in progress. Conversely, a dispute covered by an arbitration agreement may be referred to a national court until such time as the arbitral court has been duly formed. Ultimately, the parties still retain their freedom of choice even if they have signed an arbitration or submission agreement.

Arbitral tribunals now have the power to order parties to disclose evidence or documents on terms that it will define and subject, at its discretion, to penalties for non-compliance. They may also hear testimony without witnesses being under oath.

The arbitral tribunal may also make, review and amend interim and protective orders.

An arbitral tribunal may, at the request of the parties, interpret an award, correct clerical errors and omissions or make a further award where it failed to rule on a claim.

## ***2- Jurisdiction of the Supporting Judge***

The Decree of 13 January 2011 confirms and consolidates the role of the national judge as judge supporting the arbitration ("Supporting Judge"). This reform brings the jurisdictional competition between the President of the District Court and President of the Commercial Court to an end. It attributes jurisdiction to the District Court, unless expressly stipulated otherwise by agreement.

The Decree empowers the Supporting Judge:

- to rule on applications made where difficulties are encountered in forming the arbitral tribunal, in challenging an arbitrator, where an arbitrator refuses to sit or there is an impediment preventing an arbitrator from accepting his mandate, and to extend the time allowed for the arbitration process (an arbitral tribunal has six months to rule from the date when all the requisite arbitrators have accepted their mandate);
- to rule on investigative measures and provisions governing interim attachment orders or charges on property;
- to order third parties to disclose documents at the invitation of the arbitral tribunal.

## ***3- Exequatur***

The Decree excludes all right of appeal against an *exequatur* authorising the enforcement of an arbitral award. It is still, however, possible to appeal against a refusal by a national court to issue such an enforcement order.

*Exequatur* applications will not be adversarial.

#### **4- Recourse**

##### *a. Appeal*

There is no appeal against an arbitral award unless the parties have expressly agreed otherwise and provided for the possibility in their arbitration agreement. Any appeal allowed will be to alter or quash the arbitral award. The appeal will be heard by the Court of Appeal of the place in which the arbitral award was made within one month of its notification. An appeal will suspend the enforcement of the arbitral award.

##### *b. Application to Set Aside*

An application to set an arbitral award aside is available unless the parties have reserved the right to appeal.

An application to set aside may only be made where:

- an arbitral tribunal has wrongly assumed or declined jurisdiction;
- an arbitral tribunal has not been properly formed;
- the arbitral tribunal has ruled without complying with its terms of reference;
- the rules of due process have been violated;
- the award is contrary to public policy
- the award fails to state the reasons for the ruling, its date, the names of the arbitrators, has not been signed or has not been made by majority decision.

An application to set aside, like an appeal where allowed, will be heard by the Court of Appeal of the place in which the arbitral award was made within one month of its notification. The application will suspend the enforcement of the arbitral award.

Where the court sets aside an arbitral award, it will rule on the merits within the confines of the arbitrators' terms of reference.

##### *c. Appeal against the court order deciding an *exequatur* application*

There is no right of appeal against an enforcement order.

An order denying *exequatur* is subject to appeal within one month of service.

##### *d. Third Party Opposition*

Where parties have not been joined or represented in proceedings despite having an interest in defending their rights in such proceedings, they may petition for those sections of the award detrimental to them to be revisited and reviewed by the court by filing a "third party opposition".

For practical reasons, third party opposition proceedings are not heard by the arbitral tribunal because it only exists for the duration of the arbitration, but by the court that would have had jurisdiction had the parties not referred their dispute to arbitration.

*e. Application for Revision*

An application for revision is a petition for the reopening of a dispute and a ruling *de novo* in the light of new facts.

An application for revision is only allowed for one of the following reasons:

- if it comes to light, after the issue of the arbitral award, that the ruling was obtained fraudulently by the party in whose favour it was made;
- if, after the issue of the arbitral award, decisive evidence withheld by another party is uncovered;
- if the ruling was made on the basis of documents that, since the arbitral award, have been proven, or held by a court, to be false;
- if the ruling was made on the basis of statements, testimony or affidavits that a court has, since the arbitral award, held to be false.

In all of these cases, an application for revision is only admissible where the applicant was unable, through no fault of its own, to assert the claim in question before the award became *res judicata*.

The application should be made to the arbitral tribunal. If the tribunal cannot be reconvened, the application will be made to the Court of Appeal that would have had jurisdiction to hear other applications, petitions or appeals against the arbitral award.

**N. B.** There is no right of appeal against an arbitral award to the Supreme Court.

## **B) International Arbitration**

The 2011 Decree restates the definition of international arbitration: arbitration is international where international trade interests are at stake.

### ***1- International Arbitration Agreement***

The arbitration agreement is not restricted by any requirements as to form.

The new Article 1506 of the Civil Procedure Code no longer makes general reference to the domestic arbitration legislation but only cites those sections that are relevant to international arbitration.

Accordingly, the following **do not apply** to international arbitration:

- the arbitration agreement validity requirements;
- the requirement for an arbitrator to be a natural person;
- the requirement for the number of arbitrators in an arbitral tribunal to be uneven;
- the rules governing arbitration deadlines, the stay or interruption of arbitration proceedings;
- the stipulation of confidentiality unless the parties wish it otherwise;
- the procedural reasons for invalidity;
- the requirement for arbitrators to decide by majority; if a majority is not reached, it is possible for the chairman to rule alone.

## ***2- Jurisdiction of the Arbitral Tribunal and the Supporting Judge***

Where the arbitration agreement is silent, the arbitral tribunal will define the procedure as may be required, either directly or by reference to arbitration rules or procedural rules.

The arbitral tribunal will decide the dispute according to the rules of the legal system that the parties have chosen, or where no election has been made, according to the rules of law that it deems appropriate.

Unless the parties have agreed otherwise, the award will be made by majority decision. If there is no majority, the chairman of the arbitral tribunal will rule alone.

The arbitral tribunal will rule as *amiable compositeur* if the parties have empowered it to do so, i.e. the parties exempt the arbitrators of their obligation to decide according to the rules of a specific national legal system, allowing them to apply the equitable principles that they believe appropriate to reach a just outcome.

In international arbitration, the Supporting Judge is, unless stipulated otherwise, the President of the Paris District Court where:

- the arbitration is conducted in France; or
- the parties have agreed that French law of procedure will apply to the arbitration; or
- the parties have expressly attributed jurisdiction to French national courts to resolve disagreements over arbitration procedure; or
- one of the parties is at risk of being denied justice.

## ***3- Recognition and Enforcement of Arbitral Awards***

An arbitral award will be recognised or enforced in France if the party seeking to rely upon it can prove that it exists and that recognition or enforcement will not be blatantly contrary to public policy.

An arbitral award may only be enforced by way of an enforcement order (*exequatur*) granted by the District Court of the place in which it was made (domestic arbitration) or the Paris District Court if the award was issued abroad.

*a. Awards Issued in France*

➤ Recourse against the Arbitral Award

The only recourse against an international arbitration award is an application to set aside, available on five strictly limited grounds:

- an arbitral tribunal has wrongly assumed or declined jurisdiction;
- an arbitral tribunal has not been properly formed;
- the arbitral tribunal has ruled without complying with its terms of reference;
- the rules of due process have been violated;
- the recognition or enforcement of the award is contrary to international public policy.

The application can only be filed with the Court of Appeal of the place in which the arbitral award was made within one month of its notification.

➤ Appeal against an Enforcement Order

By special agreement, the parties may at any time expressly waive their right to file an application to set aside an arbitral award. If so, they may appeal against an enforcement order (*exequatur*) on any of the grounds for setting an award aside.

The appeal must be made within one month of notification of the award endorsed with an *exequatur*.

An appeal may be filed against the decision refusing to recognise or enforce an international arbitral award made in France. The appeal must be filed within one month of service of the decision.

There is no right of appeal against a court order granting *exequatur* unless there has been a waiver of the right to apply to set aside an award.

*b. Awards Issued Abroad*

The parties are entitled to appeal a decision granting or denying the recognition or enforcement of an arbitral award made abroad.

*c. Common Provisions*

No application to set aside or appeal will suspend the enforcement of an arbitral award. This is to ensure that international arbitral awards are executed expeditiously.

However, where the execution of an arbitral award may severely prejudice the rights of one of the parties, the Decree grants the First President of the Court of Appeal the power to stay or set conditions for the enforcement of the arbitral award.

Finally, a ruling denying an appeal or application to set aside will be the equivalent of granting *exequatur* to the arbitral award or to those of its provisions that have not been overturned by the court.

RECOURSE

AREA	DOMESTIC ARBITRATION			INTERNATIONAL ARBITRATION			
	AWARD	EXEQUATUR		AWARDS		EXEQUATUR	
		ENFORCEMENT ORDER	DENIAL OF ENFORCEMENT	AWARD MADE IN FRANCE	AWARD MADE ABROAD (*)	AWARDS MADE IN FRANCE AND ABROAD	
						ENFORCEMENT ORDER	DENIAL OF ENFORCEMENT
APPEAL	NO unless the parties wish it	NO	YES	NO	<del>X</del>	YES for award issued abroad YES for award issued in France if waiver of application to set aside the award	YES
APPLICATION TO SET ASIDE	YES if no appeal	NO	NO	YES in limited cases	<del>X</del>	NO	NO
THIRD PARTY OPPOSITION	YES	NO	NO	NO	<del>X</del>	NO	NO
APPLICATION FOR REVISION	YES in limited cases	NO	NO	NO	<del>X</del>	NO	NO
CHALLENGE	NO	NO	NO	NO	<del>X</del>	NO	NO
SUPREME COURT APPEAL	NO	NO	NO	NO	<del>X</del>	NO	NO

(\*) The rights of recourse against awards issued abroad are governed by the laws of the country in which the arbitral tribunal was formed.