



# THE FRENCH LAW OF ARBITRATION

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# Foreword and Acknowledgements

The purpose of this book is not only to illustrate the utility of the study of foreign law in the area of international commerce, but also to attest to the truly remarkable creative character of the French regulatory provisions on arbitration. Prior to May 1980, the French law on arbitration had not been revised to any significant extent since the enactment of the Code of Civil Procedure in 1806. The task of tailoring antiquated provisions to meet the exigencies of evolving commercial reality had been left to the courts, and they had responded admirably well to the demands of the task. The legislation enacted in 1980 and 1981 codifies and refines many of the achievements of the decisional law in domestic and international arbitration. It represents perhaps the most considered and advanced modern-day regulatory pronouncement on arbitration, fostering its development as a viable alternate dispute-resolution mechanism and instilling a necessary measure of judicial collaboration with a largely autonomous arbitral process. Specifically, in the international area, arbitration is considered a possible purveyor of new normative standards, spearheading the elaboration of an emerging international law merchant restrained only by the fundamental dictates of a properly international public policy.

The content of this book has been adapted from J. Robert, *L'Arbitrage Droit Interne Droit International Privé* (5th ed. 1983). The present work focuses principally upon the development of the French law of arbitration in the international area. This treatment is preceded by a less extensive discussion of the principles and methodology applicable in the area of French domestic arbitration. Any supplementary reference should be made to the French version. The technical format of the book is primarily European in inspiration; for example, footnotes are kept to a minimum and are used to document only essential substantive sources. The references to the

statutory materials are available in the French *Journal Officiel*; codal references are contained in the 1983 edition of the relevant *Code* published by Dalloz. The appendices contain the full text of the 1958 New York Convention and the 1961 European Convention. Further references are available in the bibliographic sources listed in the appendices section.

The authors are indebted to the Parker School of Foreign and Comparative Law at Columbia University School of Law, under the auspices of which this book is published. They also wish to express their sincere gratitude to Ms. Kären Holstrom and Patricia Head, third-year law students at Tulane, for their invaluable assistance in the preparation of the manuscript and to the word processing staff at the Tulane School of Law, Ms. Sherry Bachus, Stephanie Jones, and Helen Carbonneau, whose expeditious and meticulous skills facilitated considerably the progress of this work. Finally, the authors extend a special note of personal and professional gratitude to Ms. Lisa R. Shelton and Professor Gabriel M. Wilner who read the book in manuscript form. Their criticisms and suggestions were indispensable to enhancing the quality of the work.

Paris and New Orleans, July 26, 1983

J.R.  
T.E.C.

# Preface

This impressive book in English on the French law of arbitration, and especially international arbitration, demonstrates in telling fashion the great benefits to be derived from the comparative study of law. This book also highlights that these benefits are greatly enhanced when the description of the foreign law is the product of the collaborative efforts of an expert in the foreign law and a lawyer who is able to present the exposition in a form that takes due account of the legal concepts, terminology, and techniques familiar to the expected readers of the book.

The two authors of this book are ideally suited for the task they set themselves. Jean Robert is a leading lawyer at the Paris Bar and a universally recognized authority on the law of arbitration. Professor Carbonneau, a distinguished graduate of the Jervej Fellows Program of the Parker School of Foreign and Comparative Law and a young comparatist of unusual accomplishments and promise, has done a truly magnificent job of presenting the French law in lucid, intelligible, and idiomatic prose.

This book is an absolute must for any American lawyer who wishes to study the French law on arbitration, and especially the French law on international arbitration, to which the major part of the book is devoted. The French law on international arbitration naturally attracts the attention of anyone interested in international commerce. The Court of Arbitration of the International Chamber of Commerce has its offices in Paris, France, and is by far the leading institution engaged in international commercial arbitration. Furthermore, the French legislature has recently amended the statutory provisions relating to arbitration and has provided one of the most modern forms of statutory regulations of the subject.

However, this book goes far beyond offering a detailed and thoughtful analysis of French arbitration law. It provides in-

sights and analyses that will greatly enhance comprehension and solution of problems relating to arbitration arising in other legal systems. Indeed, its greatest merits may well be in its contributions in this regard. For this book provides most helpful treatments and analysis of a great many problems that continue to arise wherever arbitration is conducted and awards are sought to be enforced. Mention of only a few of these may indicate the extent to which the book will be of interest to both the theoretical comparatist and the practitioner.

For example, Part One, relating to national arbitration, deals with the court's proceeding to adjudicate the merits of a dispute after it finds an arbitral award null and void; it discusses the recourse to special judicial proceedings when provisional relief is needed in arbitration; and it details how proof is taken in arbitration proceedings when witnesses are unwilling to cooperate.

Part Two, relating to international arbitration, contains similarly enlightening treatments. The subject of the "a-national" or "floating" award is discussed in appropriate detail. The concept of international, as distinguished from national, public policy is elucidated. Applicable law, both substantive and procedural, is discussed extensively. The developing *lex mercatoria* is given careful consideration. The requirement of a reasoned award, and the instances in which it need not be met, is treated in detail, as is the dissenting opinion.

These examples give only a slight indication of the riches offered by this book. The Parker School of Foreign and Comparative Law is most pleased to have been able to make its contribution to the publication of this important book.

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# Table of Contents

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Foreword and Acknowledgements .....	iii
Preface .....	v
General Table of Contents .....	vii

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## Part One

### A SURVEY OF THE DOMESTIC PROVISIONS ON ARBITRATION

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## Chapter One

### PRELIMINARY CONSIDERATIONS

§ 1.01 Arbitration Defined .....	I:1-1
[1] Arbitration Distinguished from the Process of Third-Party Mediation Implied in Article 1592 of the Civil Code.....	I:1-2
[2] Arbitration Compared to Settlement .....	I:1-4
[3] Arbitration Compared to the Documentation Provided By and the Testimony of a Techni- cal Expert .....	I:1-5
§ 1.02 The Right to Enter Into Arbitration Agreements	I:1-7
[1] The Capacity to Enter Into Arbitration Agree- ments.....	I:1-7
[a] Minors.....	I:1-7
[b] Married Women.....	I:1-8
[c] Bankruptcy Proceedings.....	I:1-9

## TABLE OF CONTENTS

[2] Authority to Enter Into Arbitration Agreements—Agents .....	I:1-10
§ 1.03 The Arbitrability of the Subject Matter of the Dispute .....	I:1-13
[1] Public Entities .....	I:1-16
[2] Trademarks .....	I:1-17
[3] Patents .....	I:1-18
[4] Labor Disputes .....	I:1-20

---

## Chapter Two

### ARBITRATION AGREEMENTS

§ 2.01 The Agreement to Arbitrate Future Disputes.....	I:2-2
[1] Article 631 of the Commercial Code.....	I:2-3
[2] Technical Requirements Pertaining to the Arbitration Clause .....	I:2-7
§ 2.02 The “Compromis” or Submission .....	I:2-11
§ 2.03 General Rules Relating to Arbitration Agreements .....	I:2-13
[1] The Arbitrators .....	I:2-13
[2] The Effect of Arbitration Agreements .....	I:2-14
§ 2.04 The Arbitral Tribunal .....	I:2-16
[1] Composition .....	I:2-16
[2] Disqualification .....	I:2-19
[3] Abstention .....	I:2-21
[4] Revocation .....	I:2-22
[5] Duration of the Terms of Reference .....	I:2-22
[6] Liability of Arbitrators .....	I:2-24
§ 2.05 The Courts’ Capacity to Rule on Urgent Matters	I:2-25

### Chapter Three

#### THE ARBITRAL PROCEEDINGS

§ 3.01	Jurisdictional Challenges .....	I:3-2
§ 3.02	Verification of the Authenticity of Documents and Allegations of Forgery .....	I:3-8
§ 3.03	Incidental Criminal Matters .....	I:3-10
§ 3.04	The Usual Stages of the Arbitral Proceeding.....	I:3-11
	[1] The Appearance and Representation of the Parties .....	I:3-11
	[2] Evidence Gathering.....	I:3-12
	[3] The Ruling on the Merits.....	I:3-14
	[4] The Deliberations.....	I:3-19

---

### Chapter Four

#### THE ARBITRAL AWARD

§ 4.01	Requirements Pertaining to the Award .....	I:4-1
	[1] Formal Requirements .....	I:4-1
	[2] Substantive Requirements .....	I:4-2
§ 4.02	<i>Res Judicata</i> Effect and Authentic Character of the Award.....	I:4-6
§ 4.03	The Effect of the Award Upon the Status of the Arbitrators .....	I:4-7
§ 4.04	The Enforcement of the Award.....	I:4-11

---

### Chapter Five

#### THE MEANS OF RECOURSE

§ 5.01	Third-Party Opposition.....	I:5-1
--------	-----------------------------	-------

§ 5.02 Appeal and the Action in Nullity .....	I:5-2
[1] The Appeal Procedure.....	I:5-4
[2] The Action in Nullity.....	I:5-5

---

## Part Two

### THE REGIME APPLYING TO INTERNATIONAL COMMERCIAL ARBITRATION

---

#### Chapter One

##### PRELIMINARY CONSIDERATIONS REGARDING INTERNATIONAL ARBITRATION

§ 1.01 Determining the Character of Awards .....	II:1-1
§ 1.02 The Prior Conflicts Approach .....	II:1-3
§ 1.03 The Influence of International Conventions .....	II:1-7
§ 1.04 An Evaluation of the Choice-of-Law Methodology .....	II:1-9
§ 1.05 The New Regime.....	II:1-11
§ 1.06 The Approach Under the New Legislation .....	II:1-14

---

#### Chapter Two

##### THE ARBITRATION AGREEMENT

§ 2.01 The Legal Status of the Arbitration Agreement .....	II:2-1
§ 2.02 Ordinary Rules Applying to the Arbitration Agreement.....	II:2-4
[1] Proof of the Arbitration Agreement and the Requirements as to Form.....	II:2-4

## TABLE OF CONTENTS

xiii

[2] The Problem of Consent .....	II:2-7
[3] Arbitrability.....	II:2-8
[4] Transferring the Agreement to Arbitrate.....	II:2-9
§ 2.03 The Rules of International Conventions Relating to the Arbitration Agreement .....	II:2-10
[1] An Overview.....	II:2-10
[2] The Development of an International Conventional Law.....	II:2-11
[3] The European Convention.....	II:2-14
[4] A Summary and Evaluation of the Conventional Rules .....	II:2-16
§ 2.04 Decisional Law Rules Applying to the Arbitration Agreement.....	II:2-18
[1] The Juridical Autonomy of the Arbitration Agreement .....	II:2-19
[2] Arbitration Involving the State and Public En- tities.....	II:2-27
[3] The Elimination of Domestic Public Policy Considerations .....	II:2-31
[4] Waiver of Article 14 of the Civil Code and Sovereign Immunity.....	II:2-33
[5] Waiver of the Arbitration Agreement .....	II:2-35
[6] Adaptation of Long-Term Contracts .....	II:2-35

---

## Chapter Three

### THE COMPOSITION OF THE ARBITRAL TRIBUNAL

§ 3.01 The Capacity of the Arbitrators.....	II:3-1
§ 3.02 The Appointment of the Arbitrators.....	II:3-4
§ 3.03 Investiture and the Jurisdictional Authority of the Arbitral Tribunal.....	II:3-7

**Chapter Four****THE APPLICABLE LAW**

§ 4.01 The Applicable Law of Procedure .....	II:4-1
[1] Decisional Law Principles .....	II:4-2
[2] The Rules of International Conventions .....	II:4-3
[3] The Regulations of Arbitral Institutions .....	II:4-4
[4] Article 1494 of the New Code of Civil Procedure .....	II:4-5
§ 4.02 The Law Governing the Merits .....	II:4-10
[1] The First Approach: The Choice-Of-Law Rule of the Arbitral Forum .....	II:4-11
[2] The Second Approach: The Autonomy of the Arbitral Tribunal .....	II:4-12
[3] The Third Approach: Localization .....	II:4-14
[4] The Approach of the 1961 European Convention .....	II:4-16
[5] The Approach under Article 1496 of the New Code of Civil Procedure .....	II:4-21

---

**Chapter Five****INCIDENTAL MATTERS**

§ 5.01 Procedure for Raising Incidental Matters .....	II:5-1
§ 5.02 The Types of Incidental Pleadings .....	II:5-3
§ 5.03 The Authority of the Arbitral Tribunal to Rule .....	II:5-5
§ 5.04 Matters of Treaty Interpretation .....	II:5-9

## Chapter Six

### THE ARBITRAL AWARD

§ 6.01 A Ruling in Accordance with the Rules of Law	II:6-1
§ 6.02 A Ruling Ex Aequo et Bono .....	II:6-3
§ 6.03 Procedural Provisions Applicable to the International Arbitral Award.....	II:6-5
§ 6.04 The International Award.....	II:6-7
§ 6.05 Res Judicata .....	II:6-9
§ 6.06 The Requirement of a Reasoned Decision in the Context of International Arbitration.....	II:6-10
§ 6.07 Dissenting Opinions in the Award .....	II:6-14

---

## Chapter Seven

### RECOGNITION AND ENFORCEMENT

§ 7.01 Requirements for the Recognition and Enforcement of Awards.....	II:7-2
§ 7.02 Prior Homologation .....	II:7-6
§ 7.03 Provisional Enforcement.....	II:7-9
§ 7.04 The Appeal of Judicial Denials of Recognition or Enforcement.....	II:7-11
§ 7.05 The Suspension of Enforcement and Divesting the Enforcement Judge of Jurisdiction .....	II:7-13
§ 7.06 Conservatory Measures.....	II:7-14
§ 7.07 Recognition and Enforcement Under International Conventions .....	II:7-15

## Chapter Eight

### THE MEANS OF RECOURSE

§ 8.01 The Previous Regime.....	II:8-1
§ 8.02 The New Means of Recourse .....	II:8-4
[1] Preliminary Remarks.....	II:8-4
[2] The Grounds for Recourse Under Article 1502 .....	II:8-5
§ 8.03 The Public Policy Exception.....	II:8-12
§ 8.04 The Action to Annul the Award.....	II:8-17
§ 8.05 General Rules.....	II:8-19
§ 8.06 Denial of Recognition and Enforcement Under International Conventions.....	II:8-20

---

## Chapter Nine

### PUBLIC POLICY AND INTERNATIONAL ARBITRATION

§ 9.01 Domestic Public Policy.....	II:9-1
§ 9.02 Economic Public Policy .....	II:9-4
§ 9.03 The Transition from Domestic to International Public Policy.....	II:9-6
§ 9.04 The Sources of International Public Policy.....	II:9-8
§ 9.05 A Truly International Public Policy.....	II:9-11
§ 9.06 International Public Policy and Substantive Rules in International Arbitration.....	II:9-13
§ 9.07 The Concept of International Arbitration .....	II:9-15
[1] The Requirement of a Reasoned Decision .....	II:9-15
[2] The Right of the State to Enter into Arbitra- tion Agreements .....	II:9-18
[3] Juridical Autonomy of the Arbitration Agree- ment .....	II:9-20

## TABLE OF CONTENTS

xvii

[4] The Source of the Substantive Rule.....	II:9-22
[5] The Implications of this Development .....	II:9-24
§ 9.08 The Public Policy Constraints on International Arbitration .....	II:9-27

---

## Appendices

Appendix A Sample Forms .....	App. A-1
Appendix B French Codal Provisions on Arbitration.....	App. B-1
Appendix C International Conventions on Arbitration...	App. C-1

---

Selected Bibliography .....	B-1
Index .....	I-1

## CHAPTER ONE

# Preliminary Considerations

### § 1.01 Arbitration Defined

Arbitration essentially consists of a private dispute-resolution process—the creation of a private form of adjudication—divesting the ordinary courts of jurisdiction to hear a particular dispute and attributing that authority to private individuals. The law regulates and, thereby, favors the process of arbitration: first, by allowing for arbitration on a voluntary basis—permitting parties, in effect, to have recourse to arbitration in a given area of activity; second, by mandating that disputes in other specified areas of activity be brought before an arbitral tribunal—in other words, mandatory arbitration. Since the latter form of arbitration is relatively insignificant in terms of contemporary dispute resolution, voluntary arbitration and its contractual character assume a position of preeminence in the regulatory framework.

When arbitration is entered into voluntarily, the parties' agreement to arbitrate essentially has the effect of a choice-of-forum clause; just as one would substitute the competence of one court for that of another court,<sup>1</sup> the agreement, in effect, determines which adjudicatory body has ju-

<sup>1</sup> For an assessment of the jurisdictional impact of an arbitration agreement, *see* Paris, Judgment of June 27, 1957, 4 JUR. CLASS. PERIOD. 96 (1958); Paris, Judgment of May 14, 1958, [1958] DALLOZ 457 (J. Robert, *Note*) and [1959] REV. ARB. 119; Amiens, Judgment of Oct. 20, 1959, [1959] REV. ARB. 122 (*Note, in* [1959] REV. TRIM. DR. CIV. 780); Paris, Judgment of Nov. 14, 1964, [1965] REV. ARB. 19.

For a historical account of arbitration, *see, e.g.*, Clère, *L'arbitrage révolutionnaire, apogée et déclin d'une institution (1790-1806)*, [1981] REV. ARB. 3.