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# French Arbitration Law and Practice

*A Dynamic Civil Law Approach  
to International Arbitration*

**SECOND EDITION**

BY JEAN-LOUIS DELVOLVÉ, GERALD H. POINTON AND JEAN ROUCHE



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## **French Arbitration Law and Practice**

## Table of Abbreviations

|                              |                                                                                   |
|------------------------------|-----------------------------------------------------------------------------------|
| AFA                          | Association Française d'Arbitrage                                                 |
| ASA                          | Association Suisse d'Arbitrage                                                    |
| ATF                          | Judgments of the Swiss Federal Tribunal                                           |
| Bull. civ.                   | Bulletin de la Cour de cassation (civil chambers)                                 |
| C.civ.                       | Code Civil                                                                        |
| C.const.                     | Conseil constitutionnel                                                           |
| CA Paris or Paris*           | Cour d'appel de Paris                                                             |
| Cass.civ. or Civ. I, II, III | Cour de cassation, chambre civile (1st, 2nd; 3rd)                                 |
| Cass.com. or Com.            | Cour de cassation, chambre commerciale                                            |
| Cass.soc. or Soc.            | Cour de cassation, chambre sociale                                                |
| C.E.                         | Conseil d'Etat                                                                    |
| CFA                          | Comité Français de l'Arbitrage                                                    |
| CPC                          | Code de procédure civile (previously the Nouveau code de procédure civile (NCPC)) |
| D.                           | Recueil Dalloz                                                                    |
| D.S.                         | Dalloz-Sirey                                                                      |
| ECHR                         | European Court Of Human Rights                                                    |
| EHHR                         | European Human Rights Reports                                                     |
| ECJ                          | European Court of Justice                                                         |
| G.P. or Gaz. Pal.            | Gazette du Palais                                                                 |
| ICC                          | International Chamber of Commerce                                                 |
| J.Cl.                        | Jurisclasseur                                                                     |
| JCP                          | Jurisclasseur périodique (semaine juridique)                                      |
| JDI                          | Journal de droit international (Clunet)                                           |

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\* Judgments of other cours d'appel are referred to simply by the name of their place: Versailles, Rouen, Lyon, etc.

|               |                                                                      |
|---------------|----------------------------------------------------------------------|
| LCIA          | The London Court of International Arbitration                        |
| NCPC          | Nouveau code de procédure civile (now Code de Procédure Civile, CPC) |
| Ord.          | Order of a national local court or cour d'appel                      |
| Rec. or Lebon | Recueil des arrêts du Conseil d'Etat                                 |
| Rev. Arb.     | Revue de l'Arbitrage                                                 |
| Rev. Crit.    | Revue critique de droit international privé                          |
| RTD Civ.      | Revue trimestrielle de droit civil                                   |
| RTD Com.      | Revue trimestrielle de droit commercial                              |
| S.            | Sirey                                                                |
| Sem. Jur.     | Semaine Juridique (Jurisclasseur périodique)                         |
| TGI           | Tribunal de grande instance                                          |
| T com         | Tribunal de commerce                                                 |
| UNCITRAL      | United Nations Commission on International Trade Law                 |
| UNIDROIT      | International Institute for the Unification of Private Law           |
| YEARBOOK      | Yearbook Commercial Arbitration                                      |

## Introduction

1. *French Arbitration Law and Practice* was published five years ago and attempted to provide the anglophone reader with a clear understanding of how the French arbitration system had developed into a dynamic structure for the fair resolution of disputes outside the national courts, but relying on, and benefiting from their assistance whenever that was necessary. Although the code governing arbitration (which changed its name in 2008 to the *Code de Procédure Civile* [CPC]) for historical reasons deals separately with domestic and international arbitration, the principles underlying each division are closely allied, and their objectives so similar, that they may properly and usefully be considered as one discipline; further, such a method has the merit of throwing into relief such differences as they are.

In fact, during the last five years, the two branches have continued to exert a certain influence on each other, with rules and practices developed in international arbitration being imported into domestic arbitration and vice versa. Moreover, on a formal level, whereas matters relating to validity or enforcement of arbitral awards used to be handled by different chambers of the Cour de cassation (the French supreme court), that is, the Second Chamber for domestic arbitration and the First Chamber for international arbitration, the First Chamber now deals with both.

The present book, therefore, follows the plan adopted in the previous edition and considers the arbitral process as one entire system of dispute resolution, which consists of various stages from the formation of the arbitration agreement to enforcement of the award, without dividing the subject into the formally distinct parts of domestic and international arbitration set forth in the CPC. At each such stage the similarities between domestic and international arbitration are shown, and any differences highlighted.

The book is thus divided into four parts:

Part I: The concept and scope of arbitration

Part II: The arbitral process

Part III: The arbitral award

Part IV: Satisfaction of awards by processes of execution

2. The objective of the book is to present a modern and efficient arbitration system, not only to readers who are encountering it for the first time, but also to those who, although well-versed in it, might benefit from a text in English; a treatise on French arbitration law in the English language inevitably involves an underlying comparative law approach, and invites reference in specific matters to the relevant situations in certain common law systems, particularly in the field of international arbitration and the enforcement of foreign awards.

The reader will find that French arbitration law is continually developing in decisions of the national courts and the writings of academic commentators (*'la doctrine'*). In addition, the Comité Français de l'Arbitrage (which is an unofficial think tank of arbitration law experts) published in 2006, in the *Revue de l'Arbitrage*, a Draft Reform of the arbitration provisions of the CPC (*'the CFA Draft Reform'*)<sup>1</sup> for consideration and review by the Ministry of Justice; its purpose is both to write into the CPC some of the matters which have been the subject of national court decisions, and to suggest certain new rules which are intended to improve the process in domestic and international arbitration. Rather than setting out the CFA Draft Reform as a whole and separately, its provisions are introduced into the book with comments at the relevant points.

Another remarkable proposed reform is one which has been initiated by the Ministry of Justice itself, and is still under consideration.<sup>2</sup> It proposes to reverse the rule in Article 2060 of the *Code Civil* whereby arbitration is prohibited for the settlement of disputes involving the state and public entities and/or concerning matters subject to administrative law. This development is considered in Part II, Chapter 1, of this book.

3. The reader from a common law country may find it difficult to be convinced by recent French case law to the effect that an international arbitral award is not attached to the legal system of the country where it was made, since it emanates from an autonomous jurisdiction which is subject only to the mandatory provisions of procedural law of that country, so that the transnational non-enforceability of the award cannot be dictated by its courts. That is, however, the conclusion drawn by French law from the fact that it considers that arbitration has become the normal and usual method for the resolution of disputes arising from international economic relations (see, in particular, n°412 et seq. of this book). The national courts of certain countries have long since adjudicated disputes which have no connection with the country in question other than that the parties have agreed to the jurisdiction of its courts; however, there can be little doubt that international arbitration has indeed become, if not *'the normal'*, then *'a very usual'* method for resolution of

1. Rev. Arb. 2006.499 and presentation by J.L. Delvolvé, *ibid.*, 491.

2. Rev. Arb. 2007.651. See also: J.L. Delvolvé, *'Une véritable révolution... inaboutie (Remarques sur le projet de réforme de l'arbitrage en matière administrative)'*, *ibid.*, 373; S. Lemaire, *'La libération de l'arbitrage international de droit administratif: approche critique du projet de réforme du 13 mars 2007'*, *ibid.*, 407.

such disputes. French law and courts encourage and favour this, seeking to guarantee parties the right to adjudication of their disputes by arbitral justice in a manner similar to that of access to justice in the national courts; thus, private and state jurisdictions are both considered necessary for the protection of parties' fundamental rights. Hence, just as there is a '*droit au juge*' (a right of access to national courts), French law provides a '*droit à l'arbitre*' (a right of access to arbitration)<sup>3</sup> with few, but notable exceptions, as two facets of the same gem.

To assist the reader, we have prepared a table, which appears on the next few pages and which attempts to summarize how the various articles of the CPC today in force apply to different categories of domestic and international arbitration.

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3. J.L. Delvolvé, '*Le droit à l'arbitre*', AFA Conference, 28 Sep. 1994, and G.P. 1995. I. Doct. 473.

**APPLICABILITY OF ARTICLES OF NCPC TO VARIOUS CATEGORIES OF ARBITRATION**

|                                                                             | <b>French Domestic arbitration</b> | <b>International Arbitration held in France subject to French procedural law</b>                             | <b>International Arbitration held in France NOT subject to French procedural law</b> | <b>Arbitration held abroad subject to French procedural law, and whether 'international' in the French sense or 'domestic' at the place of arbitration</b> | <b>Arbitration held abroad NOT subject to French procedural law, and whether 'international' in the French sense or 'domestic' at the place of arbitration</b> |
|-----------------------------------------------------------------------------|------------------------------------|--------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Art. 1442 to 1446 (arbitration clauses)                                     | Yes                                | Yes unless excluded or varied by agreement of the parties as provided by art. 1495                           | No                                                                                   | Yes, unless excluded or varied by agreement of the parties as provided by Art. 1495                                                                        | No                                                                                                                                                             |
| Art. 1447 to 1450 (the Submission Agreement)                                | Yes                                | Yes, unless excluded or varied by agreement of the parties (Art. 1495)                                       | No                                                                                   | Yes, unless excluded or varied by agreement of the parties (Art. 1495)                                                                                     | No                                                                                                                                                             |
| Art. 1451 to 1459 (general provisions applicable to arbitration agreements) | Yes                                | Yes, unless excluded by agreement of the parties as provided by 1495, except for 1457 made mandatory by 1495 | No                                                                                   | Yes, unless excluded by agreement of the parties as provided by 1495, except for 1457 made mandatory by 1495                                               | No                                                                                                                                                             |

|                                                                         |     |                                                                                               |                                                                                                         |                                                                                               |    |
|-------------------------------------------------------------------------|-----|-----------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|----|
| Art. 1460 to 1468<br>(arbitral proceedings)                             | Yes | Yes, unless excluded or varied by agreement of the parties as provided by arts. 1494 and 1495 | No. Subject however to any rules of public policy which may arise under arts. 4 to 11 and 13 to 21 NCPC | Yes, unless excluded or varied by agreement of the parties as provided by arts. 1494 and 1495 | No |
| Art. 1469 to 1475<br>(the award: how it is made; its immediate effects) | Yes | Yes, unless excluded or varied by agreement of the parties as provided by 1494 and 1495       |                                                                                                         |                                                                                               |    |
| Art. 1476 (the award: its binding effects)                              | Yes | Yes, made specifically applicable by Art. 1500                                                |                                                                                                         |                                                                                               |    |
| Art. 1477 and 1478 ( <i>exequatur</i> necessary for enforcement)        | Yes | Yes, made specifically applicable by Art. 1500                                                |                                                                                                         |                                                                                               |    |
| Art. 1479<br>(provisional enforcement)                                  | Yes |                                                                                               |                                                                                                         |                                                                                               |    |
| Art. 1480 (certain formal grounds for nullity)                          | Yes | No, because not provided for by Art. 1504                                                     |                                                                                                         | No, because not provided for by Art. 1502                                                     |    |

|                                                                                                | French Domestic arbitration | International Arbitration held in France subject to French procedural law | International Arbitration held in France NOT subject to French procedural law | Arbitration held abroad subject to French procedural law, and whether 'international' in the French sense or 'domestic' at the place of arbitration | Arbitration held abroad NOT subject to French procedural law, and whether 'international' in the French sense or 'domestic' at the place of arbitration |
|------------------------------------------------------------------------------------------------|-----------------------------|---------------------------------------------------------------------------|-------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| Art. 1481 ( <i>pour-voi en cassation, tierce opposition, tierce opposition</i> ) not available | Yes                         | No, because excluded by Art. 1507                                         |                                                                               |                                                                                                                                                     |                                                                                                                                                         |
| Art. 1482 and 1483 (appeal against award)                                                      | Yes                         | No, because excluded by Art. 1507                                         |                                                                               |                                                                                                                                                     |                                                                                                                                                         |
| Art. 1484 and 1485 (application to have award declared null and void i.e. set aside)           | Yes                         | No, dealt with by Art. 1504                                               | No, excluded by Art. 1507 and since application for annulment not available   |                                                                                                                                                     |                                                                                                                                                         |

|                                                                                                                    |                                                         |                                                    |                             |     |     |
|--------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------|----------------------------------------------------|-----------------------------|-----|-----|
| Art. 1486 to 1488 (procedural provisions common to action in the French courts for either appeal or setting aside) | Yes                                                     | Art. 1507 says yes in respect of 1st para, of 1487 |                             |     |     |
| Art. 1489 (appeal against decision to refuse <i>exequatur</i> )                                                    | Yes                                                     | No, dealt with by Art. 1504                        | No, dealt with by Art. 1501 |     |     |
| Art. 1490 (effect of dismissal of appeal against an award, action for its annulment)                               | Yes                                                     | Yes, made specifically applicable by Art. 1507     |                             |     |     |
| Art. 1491 (application for retraction)                                                                             | Yes                                                     | No, but see n° 497 et seq. of text                 |                             |     |     |
| Art. 1492 (definition of 'international' <i>arbitration</i> )                                                      | Yes: to exclude international from domestic arbitration | Yes                                                | Yes                         | Yes | Yes |

|                                                                                                               | <b>French Domestic arbitration</b> | <b>International Arbitration held in France subject to French procedural law</b> | <b>International Arbitration held in France NOT subject to French procedural law</b> | <b>Arbitration held abroad subject to French procedural law, and whether ‘international’ in the French sense or ‘domestic’ at the place of arbitration</b> | <b>Arbitration held abroad NOT subject to French procedural law, and whether ‘international’ in the French sense or ‘domestic’ at the place of arbitration</b> |
|---------------------------------------------------------------------------------------------------------------|------------------------------------|----------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Art. 1493 (constitution of an international arbitral tribunal and possible support of French courts)          | Not relevant                       | Yes                                                                              | Yes                                                                                  | Yes                                                                                                                                                        | No                                                                                                                                                             |
| Art. 1494 (procedural rules for an international arbitration)                                                 | Not relevant                       | Yes                                                                              | Yes                                                                                  | Yes                                                                                                                                                        | Yes                                                                                                                                                            |
| Art. 1495 (applicability to international arbitration of Arts. 1442 to 1480 subject to French procedural law) | Not relevant                       | Yes                                                                              | No                                                                                   | Yes                                                                                                                                                        | No                                                                                                                                                             |

|                                                                                                                                               |              |     |     |     |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------|--------------|-----|-----|-----|-----|
| Art. 1496 and 1497 (rules of law applicable to resolution of dispute (merits of the case))                                                    | Not relevant | Yes | Yes | Yes | Yes |
| Art. 1498 and 1499 (formal and other requirements for awards made abroad and awards made in France in international arbitration)              | Not relevant | Yes | Yes | Yes | Yes |
| Art. 1500 (res judicata effect of a foreign award and its need of 'exequatur' – also of an award in international arbitration made in France) | Not relevant | Yes | Yes | Yes | Yes |

|                                                                                                                                                                  | French Domestic arbitration | International Arbitration held in France subject to French procedural law | International Arbitration held in France NOT subject to French procedural law | Arbitration held abroad subject to French procedural law, and whether ‘international’ in the French sense or ‘domestic’ at the place of arbitration | Arbitration held abroad NOT subject to French procedural law, and whether ‘international’ in the French sense or ‘domestic’ at the place of arbitration |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|---------------------------------------------------------------------------|-------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| Art. 1501 to 1503 (appeals against refusal or grant of “ <i>exequatur</i> ” of an award made abroad and of an award made in France in international arbitration) | Not relevant                | Yes                                                                       | Yes                                                                           | Yes                                                                                                                                                 | Yes                                                                                                                                                     |
| Art. 1504 and 1505 (application to set aside arbitral awards made in France in international arbitration)                                                        | Not relevant                | Yes                                                                       | Yes                                                                           | No                                                                                                                                                  | No                                                                                                                                                      |

|                                                                                                                                                   |                 |     |     |     |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|-----|-----|-----|-----|
| Art. 1506-time<br>limits for appeal<br>against decisions<br>refusing or grant-<br>ing “ <i>exequatur</i> ”<br>or for applications<br>to set aside | Not<br>relevant | Yes | Yes | Yes | Yes |
| Art. 1507 (exclu-<br>sion of Art. 1481<br>to 1491 with<br>certain<br>exceptions)                                                                  | Not<br>relevant | Yes | Yes | Yes | Yes |