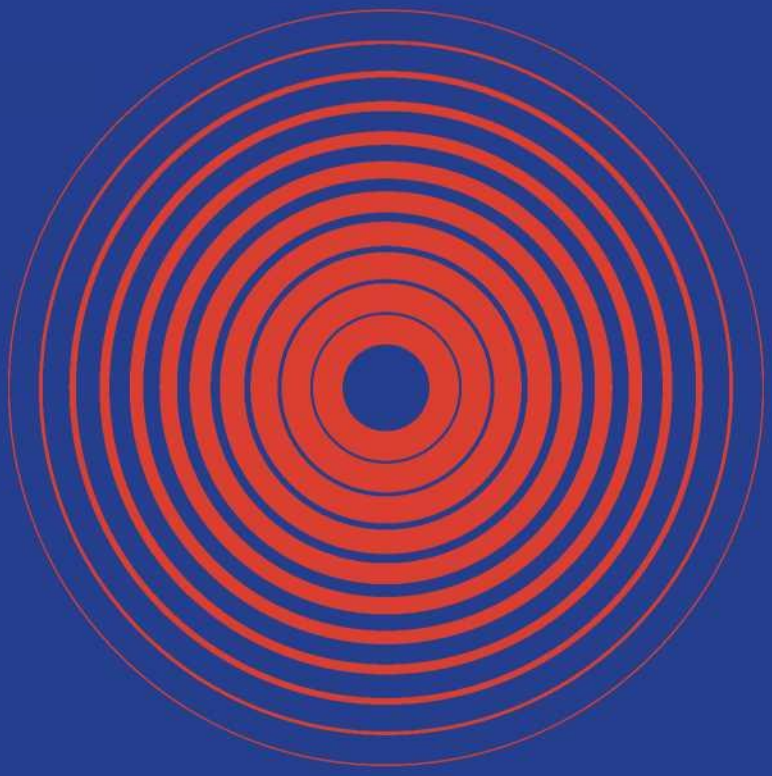
Working party
on the reform of French arbitration law

Under the co-chairmanship
of François Ancel and Thomas Clay

Report and proposed reforms

March 2025



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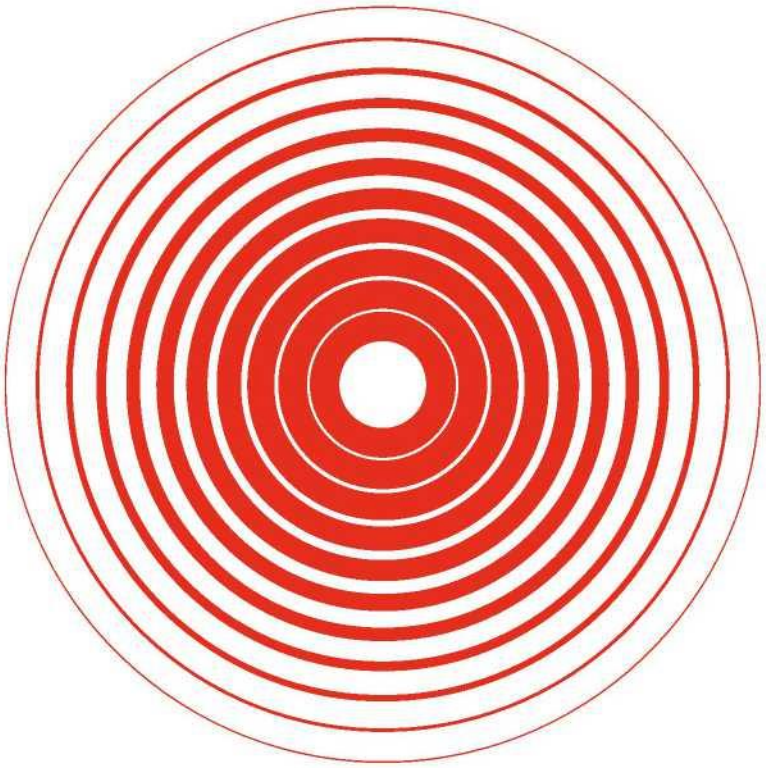

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COMPOSITION OF THE WORKING PARTY

ON THE REFORM OF FRENCH ARBITRATION LAW

Group leads:

- François Ancel, adviser to the First Civil Chamber of the *Cour de cassation*
- Thomas Clay, Professor at the University of Paris 1 Panthéon-Sorbonne

Representative institutions:

- Chairwoman of "*Paris, place d'arbitrage*": Carine Dupeyron
- Chairman of the *Association Française d'Arbitrage*: Marc Henry
- Chairman of the *Comité Français de l'Arbitrage*: Philippe Pinsolle
- *Centre de Médiation et d'Arbitrage de Paris*: Daniel Mainguy
- International Chamber of Commerce: Emmanuel Jolivet

Judiciary:

Daniel Barlow, President of the International Commercial Chamber of the Court of Appeal of Paris,

Academics:

- Sandrine Clavel, Professor at Paris-Saclay University
- Claire Debourg, Professor at Paris-Nanterre University
- Jérémy Jourdan-Marques, Professor at Lumière Lyon 2 University
- Eric Loquin, Professor Emeritus of Bourgogne Europe University
- Denis Mouralis, Professor at Aix-Marseille University

Lawyers

- A representative of the National Bar Council: Valence Borgia
- A representative of the *Conseil de l'Ordre du Barreau de Paris*: Jean-Yves Garaud
- A representative of the *Ordre des avocats aux Conseil d'État et à la Cour de cassation*: Jérôme Ortscheidt
- Daniel Schimmel, Lawyer at the New York Bar, partner - Foley Hoag

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SUMMARY

The draft arbitration code consists of one hundred and forty-six articles and **forty** proposals[1].

Nine proposals are described as "*structural*" in that they have consequences for the way in which the arbitration law is understood and how it is handled by the courts.

These proposals do not wipe the slate clean in terms of French arbitration law. On the contrary, they are its natural extension. They rely on the past to build the future by having in common the fact that they are driven by a desire to enshrine the **autonomy** of arbitration law in order to better recognise its specificity.

A proposal is therefore being made for the creation of an arbitration code (proposal 1), the clarification of current legislative sources (articles 2059 to 2061 of the Civil Code - proposal 2), the establishment of common rules for international and domestic arbitration by absorption of the latter by the former, with certain exceptions (proposals 3 and 4), the ratification of guiding principles (proposal 5) and a greater concentration of the handling of arbitration litigation by the ordinary courts (proposals 6, 7, 8 and 9).

Thirty other proposals, relating to substantial amendments to French arbitration law, can be grouped into three categories:

1- A first category of rules aims to **promote a more flexible arbitration law**. This is a question of proposing an arbitration law that is as close as possible to the needs of economic stakeholders and practitioners.

The first evidence of this flexibility lies in the choice already mentioned to lay down common rules for arbitration, most of the rules of which are inspired by the more liberal rules of international arbitration.

Beyond that, this is also a question, based on the needs of practice, of offering law freed from any formalism unsuitable for the development of this method of dispute resolution; precisely because it has been chosen by the parties, who undertake by resorting to this system to enforce the award voluntarily (as recalled usefully in Article 18 of the draft code).

This is why a proposal is being made, for example, to remove any mandatory formality for the arbitration clause (proposal 11), to facilitate the conditions for the signature of the award (proposal 13), to recognise the electronic award (proposals 12 and 14) and the communication of the award to the parties (proposal 15).

2- A second set of proposals aims to **promote a more protective arbitration law**. If the extension of the field of arbitrability goes in the direction of history, it cannot be done without increased guarantees and without certain vigilance towards the so-called "weak" parties and/or in certain matters.

[1] The complete list of the forty proposals features at the end of the report, after the arbitration code.

The **guarantees** that the project intends to highlight include the solemn affirmation that arbitration is based on the independence and impartiality of the arbitrator (preliminary art and art. 6), who is appointed by each party but is contractually bound vis-à-vis all parties (art. 16, para. 2). The guarantee of property justice is also supported by the maintenance of the principle of imparity in the composition of the arbitral tribunal and that of the necessary recourse to a natural person arbitrator (thus excluding arbitration led by a legal entity and/or resolved by the exclusive use of algorithms - proposal 17).

Among the **protective rules**, we can also mention the introduction of a system aimed at compensating for the genuine lack of funds of a party (proposal 19, art. 33); the removal of the option to waive any recourse in advance (proposal 20) or the special rules (proposal 21) for arbitrations in the areas of consumer affairs, labour (unenforceability of the clause against the employee or consumer) and family matters (reinforced requirements in terms of form, mandatory representation, training of arbitrators, etc.).

The same applies to proposals aimed at protecting the rights of third parties by admitting their incidental appearance before the court of appeal (proposal 22, art. 117) and the possibility of filing a third party objection to the court decision having ruled on the award (proposal 23, art. 129).

3- A third set of substantive rules is driven by the desire to **strengthen the effectiveness of arbitration**.

Some of these rules relate to the conduct of the arbitration itself and others relate to appeals to the national courts.

- Those relating to **the conduct of arbitral proceedings** are intended to strengthen the principle of jurisdiction and competence (proposal 24, art. 23) and also to allow the arbitral tribunal to group disputes together to deal with them one a single procedure (proposal 25, art. 25), to liquidate the penalties for non-performance imposed thereby (proposal 26, art. 59), to compel the parties to present all grounds and claims to the tribunal under penalty of subsequent inadmissibility (proposal 28, art. 13) and finally, to exclude the appeal in domestic matters (proposal 31).

  Strengthening the efficiency of the arbitration process also means allowing arbitrators to benefit from **the support of the national courts** so that they can carry out their mission. With this in mind, several proposals expand the powers of the supporting courts (proposal 29). In particular, they are entrusted with the task of preventing any denial of justice (art. 16), ensuring respect for the equality and will of the parties (art. 15) or examining the difficulty if a party is impecunious (art. 33). They are also empowered to rule on the issuance of a deed or a document (art. 42) and also to confer the enforcement of a protective or interim measure handed down by the arbitral tribunal (art. 41) and finally, in the event of difficulties, for reconstituting a new arbitral tribunal (arts. 66, 82 and 128).

- Finally, enhancing the effectiveness of arbitration requires facilitating the **recognition and enforcement** of arbitral awards. It also involves looking **at remedies**. The importance of these issues led to the creation of a dedicated Book in the draft code.

  Among the rules relating to the **recognition and enforcement of awards**, mention may be made in particular of the desire to better enshrine the simple recognition of an award (proposal 32) which may be requested but also challenged by the introduction of an action for the unenforceability of awards handed down abroad (art. 72). Mention may also be made of the abolition of the suspensive effect of actions for annulment in domestic matters (proposal 33), the clarification of the enforcement regime by the first presiding judge and the pre-trial judge (proposal 34), the triggering of remedies against orders refusing recognition or enforcement as from the decision (proposal 35) or the provision intended to govern the consequences of the annulment of an award for subsequent awards to avoid unnecessary recourse to the courts (proposal 36, art. 86). Similarly, the introduction of a mechanism allowing the appeal court judge to stay proceedings to ask the arbitral tribunal to amend its award in order to allow its recognition or enforcement is also proposed (proposal 38, art. 82).

  With regard to the remedies and the procedure before the Court of Appeal, a proposal is made to establish a procedure specific to the treatment of the arbitration dispute before this court (proposal 30), which favours in particular dialogue with the parties by the establishment of procedural schedules, makes it possible for the arbitrators to be heard by the court whenever deemed useful (arts. 35 and 109) and eliminates certain formalities sanctioned on pain of inadmissibility of the submissions of the parties by establishing instead a civil fine mechanism.

Finally, in addition to the fact that various proposals are necessary adjustments to ensure a better interaction between the texts of the Code of Arbitration and the other Codes, proposals, on the basis of established law, are made to **ensure better promotion**, better **appreciation of the law of arbitration** and improved **training** for its main actors (proposal 40).

INTRODUCTION

Fourteen years after the adoption of Decree 2011-48 of 13 January 2011 on the reform of arbitration, which was an important step for French arbitration law, France's Ministry of Justice considered it necessary to take stock and consider the prospects for reform and modernisation.

The international context lends itself to this. Several countries have embarked on the reform of their arbitration law, whether in Europe (United Kingdom[2], Germany[3], Luxembourg[4], Belgium[5][6], Italy[7], Greece, Switzerland[8]) or elsewhere in the world (China[9], Morocco[10]), thus demonstrating their desire to modernise their arbitration law to become more attractive in the context of increased competition between different arbitration laws. France cannot ignore this general trend; especially not if it wishes to retain its pre-eminence by maintaining an arbitration law that meets the needs of economic stakeholders while guaranteeing a high degree of legal certainty. While Paris' place as leader is undisputed and Paris is certainly the world capital of international arbitration, this position is envied. It was therefore time to reaffirm the primacy of French arbitration law.

In the spring of 2023, as part of the "Strategy of Influence through Law" mission, led jointly by the Ministry of Europe and Foreign Affairs and the Ministry of Justice, Professor Thomas Clay was asked to put forward proposals for reform which were submitted to the Department of Civil Affairs and the Justice Department in July 2023.

The avenues opened for exploration and assessed by the Directorate of Civil Affairs and the

[2] Proposed amendments to the Arbitration Act 1996 include a rule determining the law applicable to the arbitration agreement, the insertion of a statutory obligation of independence and disclosure of conflicts of interest, the strengthening of the immunity of arbitrators, the introduction of a provision empowering an arbitral tribunal to issue an award on a summary basis, a more restrictive approach to the review of arbitral awards based on jurisdiction, the power of the arbitral tribunal to issue orders against third parties and the extension of these instruments to emergency arbitrations. The Arbitration Act 2025 received Royal Assent on 24 February 2025, following its approval by the House of Lords in November 2024 and, most recently, by the House of Commons. The new law will come into force on a date to be determined by the Secretary of State. See J. Grierson, P. Rosher and G. Stephens-Chu, "*La réforme du droit anglaise de l'arbitrage*" [The reform of English arbitration law], *Rev. arb.* 2024, p. 801.

[3] A ministerial bill on the modernisation of arbitration procedure was tabled on 1st February 2024. The objective of this draft is to adapt German arbitration law in various was to meet current needs, 25 years after the last recasting of the instruments to increase the effectiveness of this law and strengthen the attractiveness of Germany as a place of arbitration. According to the draft, "*a high-quality and internationally competitive arbitration law is decisive for Germany's attractiveness as a place for dispute resolution*".

[4] The Luxembourg law of 19 April 2023 on arbitration, see V. Bolard, "*L'esprit libéral de la loi luxembourgeoise du 19 avril 2023 sur l'arbitrage*" [The liberal spirit of the Luxembourg law of 19 April 2023 on arbitration], *Rev. arb.* 2024, p. 83.

[5] Law of 28 March 2024 following on from a previous major reform of Belgian arbitration law adopted by the Law of 24 June 2013, see O. Caprasse and A. Muniken, "*Droit belge de l'arbitrage: de la réforme de 2024*" [Belgian arbitration law: the 2024 reform], *Rev. arb.* 2024, p. 1133.

[6] W. Brillat-Capello, "*La réforme du droit italien de l 'arbitrage: Tutto deve cambiare perché tutto cambi*?" [The reform of Italian arbitration law: Everything must change for everything to change], *Rev. arb.* 2023, p. 959.

[7] A. Fouchard Papaefstratiou, M. Papadatou, and M. Paralika, "*Présentation de la nouvelle loi hellénique sur l'arbitrage international*" [Presentation of Greece's new law on international arbitration], *Rev. arb.* 2023, p. 991.

[8] Law of 17 March 2023 (for domestic arbitration).

[9] A draft reform of arbitration law was circulated in November 2024 (the Draft Amendment to the Arbitration Law), the previous major reform having been adopted in 1995.

[10] Law no. 95-17 of 13 June 2022, fourteen years after the entry into force of the previous reform by Law no. 08-05 of 6 December 2007. See I. Segame, "*La nouvelle réforme de l'arbitrage au Maroc: analyse critique*" [The new reform of arbitration in Morocco: a critical analysis], *Rev. arb.* 2024, p. 837

Ministry of Justice made it possible to engage in a fruitful discussion, in which Professor Jérémy Jourdan-Marques took part, lasting more than one year, before the new Minister of Justice Didier Migaud decided on 12 November 2024 to establish a working party bringing together recognised practitioners of arbitration law (judges, university professors, lawyers, representatives of centres for arbitration). This working party was entrusted with the task of assessing the effectiveness of the existing provisions, reporting on current difficulties or shortcomings and making recommendations and drafting proposals to address the issues identified. The working party was put together taking care to represent the different categories of stakeholders in the law and practice of arbitration, whether judges, academics, lawyers or experts from centres for arbitration (ICC and CMAP). Naturally, the three expert associations dedicated to arbitration, the *Comité français de l'arbitrage* [French Arbitration Committee], the *Association française d'arbitrage* [French Arbitration Association] and "*Paris, place d'arbitrage*" [Paris, seat of arbitration] were represented by their respective chairs, and the professional bodies representing lawyers, the *Conseil National des Barreaux* [National Council of Bar Associations], the *Ordre du Barreau de Paris* [the Paris Bar] and the *Ordre des Avocats aux Conseils* [Council for Supreme Court Lawyers] were also represented[11].

The working party, co-chaired by François Ancel, adviser to the *Cour de cassation* , and Professor Thomas Clay also had the effective support of the Directorate of Civil Affairs and the Justice Department. The group met at the Chancery seven times between 12 November 2024 (inaugural session) and 20 February 2025 (concluding session). The deadline for submission of the work of the working party was set as March 2025, which will be respected since the report was officially submitted on 20 March 2025.

This tight schedule was both a constraint and an opportunity. A constraint because it was not possible to carry out a wider consultation. An opportunity because this avoided the loss of focus frequent in this type of matter that sometimes leads to prolonged procrastination. We recall that the 2011 reform took eleven years to reach fruition.

To move forward effectively, the working party had to define its specific operating methods. They chose to organise four thematic plenary meetings[12] covering respectively the arbitral body, procedures before the national courts, the oversight of awards and, finally, the structures of French arbitration law. Each of these plenary sessions was preceded by subgroup work to establish findings and proposals for reform that were then submitted for discussion during the plenary session[13]. Although time was short, several hearings were organised, specific expertise was requested and spontaneous contributions were received and all were taken into account[14].

It was not the task of the working party to make a clean slate of the 2011 reform, the latter having proved its worth. However, the current context is different from that of previous reforms.

In the 1980s, the objective of the reform was, as far as domestic arbitration is concerned, to strengthen the effectiveness of this alternative mode of dispute resolution, without sacrificing the guarantees of good justice. For international arbitration, it was necessary to "*make it simple and short*"[15] by proposing a model attached to respect for the will of the parties. The context was favourable since arbitration law was governed by the Code of Civil Procedure of 1806 (Articles 1003 to 1028).

To this arsenal established by the texts of 1980 and 1981, which laid the foundations of

[11] A full list of members of the working party can be found above.
[12] In addition to the inaugural (methodology) session and the concluding session.
[13] A list of the composition of the subgroups is attached as an appendix to the report.
[14] A full list of hearings, expert testimony and spontaneous contributions can be found in an appendix to the report.
[15] Ph. Fouchard, "*Le nouveau droit français de l'arbitrage*" [New French arbitration law], *Revue de droit international et de droit comparé* 1982, p. 29.

French arbitration law and which Maître Jean-Louis Delvolvé, who chaired the working party, considered at the time had allowed this law "*to achieve in a quarter of a century a coherent status as a normal and legitimate alternative method of dispute resolution*"[16], the 2011 decree brought new life, taking into account three decades of flourishing practice in France - both case law precedent and legal commentary[17] - and which had made Paris a go-to seat of arbitration. It was therefore necessary to propose reforms capable of maintaining and even updating this pre-eminence, while overcoming the obstacles posed by Articles 2059 to 2061 of the Civil Code which are obsolete but still present in the code.

The Report to the Prime Minister published in France's Official Journal with the decree of 13 January 2011 stated that "*after thirty years of practice, it appeared necessary to reform this instrument, on the one hand, to consolidate some of the achievements of the case law that has developed on this basis, on the other hand, to supplement this instrument in order to improve its effectiveness and finally, to incorporate provisions from foreign laws whose practice has proven useful*". Among the objectives is that of efficiency already put forward in 1980. To this is added the consolidation of one "*some of the achievements*" of case law and the taking into account of experience from abroad.

The ambition in 2011 was substantial and the discussions aimed at achieving this objective were long. Eleven years of work, three legislatures, four Prime Ministers, six Justice Ministers were required before the adoption of the decree of 13 January 2011, including five articles reforming Articles 1442 to 1527 of the Code of Civil Procedure. Hailed by the entire academic community and by practice, the 2011 decree was unquestionably successful. It was perceived as such abroad. French arbitration law had recovered its place.

[16] J.-L. Delvolvé, "*Présentation du texte proposé par le comité français de l'arbitrage pour une réforme du droit de l'arbitrage*" [Presentation of the text proposed by the French Arbitration Committee for a reform of arbitration law], *Rev. arb.* 2006, p. 491.

[17] D. Hascher, "*L'influence de la doctrine sur la jurisprudence française en matière d'arbitrage*" [The influence of legal commentary on French arbitration case law], *Rev. arb.* 2005, p. 391, recalling French arbitration law's debt to Bruno Oppetit, Berthold Goldman, Henry Motulsky and Philippe Fouchard and, from among the judiciary, Pierre Bellet, Pierre Drai, Jean-Pierre Ancel or Gérard Pluyette. See also Emmanuel Gaillard (*JDI* 2019, var. 7).

From this point of view, even if there has been a non-negligible body of case since 2011[18], the reformer now has fewer "case law materials" than in 2011[19].

However, the working party, under the impetus of its two co-chairs, considered that it was not necessary to confine its reflections to a simple consolidation of the case law achievements that had emerged between 2011 and 2025 and believed that its work should also be placed in perspective. This should lead the working party to reflect more broadly on what was likely not only to consolidate but also to strengthen French arbitration law for the coming years. It is therefore not simply a question of looking at the past, but also of considering the future or at least looking for a path that can lead serenely to this future.

So, among the group's proposals, several participate in an adjustment so as to ensure better consistency and readability of this law and correct the few remaining issues, while others make more substantial changes to strengthen the effectiveness of this law and take into account the difficulties caused by practice without modifying its structure.

However, the working party considered that it should not refrain from exploring more ambitious reform proposals - structural proposals - which are part of a desire to strengthen its autonomy[20] and which, while being in line with the spirit which animated the previous reforms, also extend and amplify these, sometimes even achieving solutions that had not been adopted in 2011, probably for lack of sufficient maturity, but which, as time passes, prove necessary to allow French

[18] Referring to the decisions cited in the book entitled "*Les grandes décisions du droit de l'arbitrage commercial*" [Key decisions in commercial arbitration law] (I. Fadlallah, D. Hascher, Dalloz ed., 2019), two are highlighted above all: the *Azran* decision of 15 January 2014 (appeal no. 11.17-196) by which the *Cour de cassation* ruled on the liability of the arbitrator in the exercise of his jurisdictional mission which involves personal misconduct equivalent to fraud. The *Tecnimont* decision of 25 June 2014 (no. 11.26-529) by which the *Cour de cassation* subordinated the criticism of the arbitrator's independence to a request for recusal before the arbitration institution within the time limits provided for by its arbitration rules. We could add the *Schneider* decision of 12 February 2014 (no. 10.17 -076 "the annulment judge is the judge of the award to admit or refuse its inclusion in the French legal order and not the judge of the case for which the parties have signed an arbitration agreement"; the *PWC* decision of 30 September 2020 (*Cass. 1re civ.* [Court of Cassation, 1st Civil chamber], no. 18-19.241, by which the *Cour de cassation* rules out the application of the competence-competence principle to rule on an international consumer affairs contract); the *Schooner* decision (*Cass. 1re civ*., 2 December 2020, no. 19-15.396 at the end of which "when jurisdiction has been debated before the arbitrators, the parties are not deprived of the right to invoke on this issue, before the annulment judge, new pleas in law and arguments and to adduce, for this purpose, new evidence"; the *Central Bank of Libya* decision of 26 May 2021 (*Cass. 1re civ*., no. 19-23.996 opening the third party objection to a judgment handed down by the Court of Appeal granting enforcement); the *Belokon* (*Cass. 1re civ*., 23 March 2022, appeal no. 17-17.981) and *Sorelec* (*Cass. 1re civ.*, 7 September 2022, appeal no. 2022.118) decisions on the monitoring of compliance with international public policy; or the *FG Hemisphere* decision (*Cass. 1re civ*., 28 February 2024, appeal no. 22-16.151) on the contested withdrawal.

[19] Between 1980 and 2011, several fundamental decisions of French arbitration law were set out in case law, including the principle of competence-competence (*Cass. 1re civ.*, 5 January 1999, no. 96-21.430, *Zanzi* decision), the effectiveness or validity of the international arbitration clause (*Cass. 1re civ.*, 20 December 1993, no. 91-16.828, *Dalico* decision), the validity of the arbitration clause by reference (*Cass. 1re civ*., 9 November 1993, no. 91-15.194, *Bomar* decision), or the estoppel that contributes to the effectiveness of the award (*Cass. 1re civ*., 6 July 2005, No. 01-15.912, *Golshani* decision); the transmission of the arbitration clause with the contractual action (Cass. 1re civ., 6 February 2001, No. 98-20.776, *Peavey* decision), the risk of denial of justice as grounds for jurisdiction of the French supporting judge (*Cass. 1re civ*. 1 February 2005, No. 01-13.742, *NIOC* decision) or the universal nature of the award as opposed to the annulment or the enforcement which remain local (*Cass. 1re civ.*, 29 June 2007, No. 05-18.053 and 06-13.293, *Putrabali* decisions), as an extension of the *Hilmarton* decisions which did not make the annulment of the award in the place of the seat of the arbitral tribunal sufficient grounds for a refusal to enforce in France *Cass. 1re civ*., 23 March 1994, no. 92-15.137).

[20] Let us remember the words of Bruno Oppetit according to whom "international arbitration always oscillates between autonomy and integration" (B. Oppetit, *Théorie de l'arbitrage* [Arbitration theory]. PUF, coll. Law, Ethics, Society, 1998, in partic. p. 86).

arbitration law to retain its role as a model in the rank of arbitration law regimes worldwide.

Finally, the working party, aware that the attractiveness and strength of an arbitration law result not only from the relevance and clarity of the rules that form the corpus but also from its interpretation and application by practitioners, in the first place judges and lawyers, also recommends measures (on the basis of established law) for a better understanding of this law by its main stakeholders.

Throughout its work, the group's ambition has been guided by the desire to offer a fair and effective alternative to the ordinary courts. This approach is based on the conviction, shared by each member of this group, that arbitration can effectively provide useful services to litigants and that it is therefore necessary to propose a legislative and regulatory framework allowing its development, while guaranteeing their rights. The structure of this report reflects this effort to project into the future.

This work is also part of a historical continuity as it appeared that arbitration had arrived at a point in its evolution where it could both further empower itself, both in substance and form, expand to other areas, and be strengthened by the reminder of fundamental principles that produce a model of arbitration intended to grow. Arbitration for all, but not just any old arbitration. Arbitration that is both freer and, in some ways, more secure. The reform proposed here completes the French conception of arbitration gradually developed since 1963 and the famous *Gosset* decision handed down by the *Cour de cassation*[21].

Finally, even if they are ambitious in scope, the proposals made by the working party are not intended to pursue the impossible goal of solving everything. Nothing is worse than a reformer who claims to foresee everything. On the contrary, the reform that follows hopes that case law can continue to make its contribution to arbitration law, as it has always done, more than elsewhere, in particular through a succession of major judgments that have shaped the subject for sixty years[22]. The proposed instruments have thus been designed in such a way as to be interpreted, extended and updated by the courts. It is with this in mind that the working party has adopted the proposals presented in this report.

The draft arbitration code is the collective work of the members of the working party, under the guidance of the two co-chairs themselves responsible for the drafting, with the active support of Professor Jérémy Jourdan-Marques, and with a careful and fruitful final review by lawyers Luca de Maria and Jacques Pellerin.

[21] Cass. 1re civ., 7 May 1963, *Gosset, Bull. civ.* I, no. 246; *D.* 1963, p. 545, note J. Robert; *Rev. crit. DIP* 1963, p. 615, note H. Motulsky; *JDI* 1964, p. 83, note J.-D. Bredin; *JCP* 1963, II, 13405, note B. Goldman; *Rev. arb.* 1963, p. 60, note Ph. Francescakis; *RTD civ.* 1963, p. 785, obs. P. Hébraud.

[22] I. Fadlallah and D. Hascher, *Les grandes décisions du droit de l'arbitrage commercial* [Key decisions in commercial arbitration law], Dalloz ed., coll. *Grands arrêts*, 2019; Th. Clay and Ph. Pinsolle, *The French International Arbitration Law Reports 19632007*, JurisNet, New York, 2014.

Four strategies for reform have thus been designed to guide French arbitration law "towards" new horizons, while not denying its original characteristics.

Structure of the report:

I- Structural proposals: towards an autonomous French arbitration law

II- Proposed substantial amendments: towards a French arbitration law that is more flexible, more protective and more effective

III- Adjustment proposals: towards improved coherence and articulation of the instruments

IV- Proposals without changes to the law: towards improved promotion and knowledge of the law of arbitration

I. Structural proposals: towards an autonomous French arbitration law

We need to take a closer look at this notion of "structural proposals". This is obviously not to argue that arbitration law as it has been in force since 2011 is flawed by a lack of structure. It is more simply a question of ensuring that the structural choices that were made in 2011 remain relevant or if, as the years have passed, whether it is not time to complete a movement aimed at empowering French arbitration law that began with decrees nos. 80-354 of 14 May 1980 and 81-500 of 12 May 1981.

This "empowerment" of arbitration law involves grouping the sources of this law into one single code (A), clarifying the legislative sources of arbitration law (B), reorganising the articles of this code in order to strive for a unification of the rules of domestic and international arbitration (C), enshrining the guiding principles of French arbitration law (D) and unifying the treatment by the courts of this dispute and rendering this specialist (E).

A- The creation of an arbitration code

a. Observation

As it currently stands, French arbitration law is scattered across nearly twenty different codes and several laws. If the Code of Civil Procedure has, since the double decree of 14 May 1980 and 12 May 1981, been the heart of French arbitration law, there are many codes or instruments that refer to arbitration and include a provision on arbitrability, the arbitration agreement or even procedure[23].

The best known are the Civil Code, the Commercial Code and the Consumer Code. There are, however, many others, including the Code of Rural Affairs and Maritime Fisheries, the Research Code, the Heritage Code, etc.[24].

The global understanding of arbitration law therefore requires reference to a multitude of sources, which is detrimental to its readability and accessibility. From a practical point of view, knowledge of certain prohibitions or authorisations on resorting to arbitration or the identification of the special rules of validity of the arbitration agreement can be complex.

Finally, Articles 1442 to 1527 of the Code of Civil Procedure alone are not sufficient to assess the dimension of the rules applicable to arbitration. There are multiple references to other provisions. For example, Article 1464 of the Code of Civil Procedure refers to the many guiding principles of the Code of Civil Procedure, and Articles 1495 and 1527 refer to Articles 900 to 930-1 of the Code of Civil Procedure. This therefore needed to be rationalised.

b. Proposal

The working party is well aware that the presence of French arbitration law in the Code of Civil Procedure was consolidated nearly half a century ago and that this longevity is a virtue.

[23] See Th. Clay, "*La codification de l'arbitrage hors le code de procédure civile*" [The codification of arbitration other than in the Civil Code], in *Écrits sans esprit de système. Mélanges en l'honneur du professeur Philippe Delebecque* [Writings without a system. Collection in honour of Professor Philippe Delebecque], Dalloz, 2024, p. 375.

[24] A full list of Codes can be found at the end of this report.

Similarly, since the presence of arbitration law in Articles 2059 to 2061 of the Civil Code is already more than fifty years old, practitioners are familiar with this breakdown and know that it is necessary to look at the various texts, primarily the Code of Civil Procedure and the Civil Code. The disorientation that some practitioners accustomed to the current numbering system may feel and their reluctance to relearn an instrument with a new ordering should not be overlooked.

However, evolution is also not without virtue and it can also be a source of regeneration of stifling practices and habits. If the Code of Civil Procedure and the Civil Code are identified as accommodating the main rules of arbitration law, it is more difficult, even for a practitioner, to be aware of the existence and content of all of the texts appearing in the other Codes. In addition, the location of many provisions is questionable. For example, within the Civil Code itself, Articles 2059 to 2061 appear in Book III of the Code on "The different ways in which property is acquired", which is far from being the main subject of arbitration. Finally, the existence of a dedicated Book within the Code of Civil Procedure should not make us forget that the arbitration law is enshrined in Articles 1442 and 1527 of the Code of Civil Procedure and that an ambitious reform will immediately encounter numbering difficulties due to the impossibility of moving the numbering forward or backward.

The working party therefore considered that it was time to move away from the old patterns and, in the context of a work such as this, to propose a concentration of all of the texts relating to arbitration in one single code, known as the "Code of Arbitration", thus continuing an initial attempt by editors and legal commentators[25]. The principle of a code was also adopted unanimously by the members of the working party.

The interest is first of all pedagogical. Such a presentation is likely to strengthen the consistency and readability of the law of arbitration, by centralising all the provisions within one single text. This approach makes this method of dispute resolution accessible to all and therefore popularises it. It should also be noted that arbitration has a strong identity. Where we can often criticise the potentially "artificial" character of codification, this is not the case for codification of the law of arbitration, which is a subject that is both very singular and highly homogeneous.

Codification is then a tool to promote French arbitration law. Where a large number of codes are aimed above all at an "internal readership", arbitration law seeks to make itself known throughout the world in order to convince economic operators to establish their headquarters in France or to adopt French law. In this competitive environment, the usefulness of grouping together all standards in one autonomous corpus is a decisive factor in the search to make French arbitration law competitive. The creation of a code will promote its dissemination, in particular by facilitating its translation and targeting the provisions to be made known.

Finally, the codification is likely to contribute to the empowerment of French arbitration law. The creation of guiding principles, also envisaged here, forms part of this strategy. However, where the insertion of competing guiding principles in the Code of Civil Procedure would be likely to create confusion, the separation of the instruments would fully justify the consecration of autonomous principles.

[25] Th. Clay, *Code de l'arbitrage commenté* [Annotated Code of Arbitration], preface by Loïc Cadiet, LexisNexis, coll. *Les codes bleus*, 1st ed., 2015, and 2nd ed. with M. de Fontmichel, 2021.

The codification of arbitration law has, according to the working party, several merits:

- improved clarity of French arbitration law;
- improved readability of French arbitration law;
- greater attractiveness of French arbitration law.

Better still, the presentation in the form of "code" even seems ideally suited to its purpose because it espouses the French autonomist conception of arbitration which wants this right to be sufficient in itself. Here, substance and form are allied, in an almost militant way, to best restore the infinite wealth of this branch of law. Arbitration is a body of rules on its own and can therefore form a specific code.

This proposal constitutes an additional step in the modernisation of French arbitration law, in line with its codifying tradition.

With regard to its layout, the working party considered that a plan such as that usually retained in the "new" codes, namely a legislative section setting out the principles and a regulatory section providing for the rules of application, would be inappropriate for arbitration law.

The division between the legislative field and the regulatory field in arbitration law is moreover not that of an articulation between the general rules and the rules of application. In reality, the rules of a legislative nature essentially concern the arbitrability of the dispute, whereas rules of a regulatory nature concern the implementation of the arbitration agreement, the arbitral body or the remedies. In addition, the outlines themselves do not even appear clear, if one thinks for example of the prohibition on invoking domestic law to escape a signed arbitration agreement. In other words, for arbitration, there is a need to revise what is currently law and what is regulation. Consequently, the adoption of a traditional plan, identical in format for the legislative and regulatory parts, appeared inappropriate. We should add that, in the most recent codification, the trend is precisely to no longer separate the legislative and regulatory provisions but instead to present them in a continuous manner[26]. Admittedly, these are preceded by a letter marking the attachment to the standard, but this does not seem mandatory, and especially impractical.

Similarly, this is no longer the era of gigantic codes. Codes of a reduced size are now preferred. This is what prompted Professor Loïc Cadiet, consulted by the working party, to write that "*this method would be entirely appropriate for an autonomous code of arbitration if, at least, the principle is retained*"[27]. And Professor Cadiet quotes the Supreme Codification Commission which accepts this "*unusual interweaving of the legislative and regulatory sections*"[28].

It is against this background of modernised codification that this project is being presented.

[26] e.g.: France's Code governing relations between the public and the administration;
[27] L. Cadiet: "*Brève contribution sur le projet de codification autonome du droit de l'arbitrage*" [Brief contribution on the draft autonomous codification of arbitration law], 10 Feb. 2025, spec. p. 6.
[28] Supreme Codification Commission, *Twenty-fifth Annual Report*, 2014, spec. p. 8.

There are three reasons for departing from the usual codification model:

- The disconnection between the regulatory provisions and the legislative provisions, the former not in this case being rules for the application of the latter;

- The objective of legible arbitration law, which requires the adoption of a plan to capture its full content;

- The objective of making French arbitration law attractive, which requires particular clarity on the solely domestic nature of a large part of the legislative provisions, in particular relating to the validity of the arbitration agreement.

As the working party is well aware, this choice constitutes a challenge and an ambition. It responds to the roadmap given to the working party when it was set up on 12 November 2024.

The challenge was also to go to the logical extreme of autonomy of arbitration and therefore to also deal with post-arbitral legal proceedings in a specific way, and even doubly. On the one hand, by reducing as much as possible the references to the provisions of ordinary law of the Code of Civil Procedure so that the arbitration code can be operational in an autonomous manner, which facilitates its implementation, in particular by foreign operators. On the other hand, by creating a specific mechanism for appeals to the Court of Appeal. The procedure to be followed for the appeal is therefore now detached from the appeal procedure of ordinary law and is more suitable for the action for annulment, with in particular the assumed objective of reducing processing times. Inspired by the existing protocol before the International Commercial Chamber of the Paris Court of Appeal, this new appeal regime is detailed in the Code of Arbitration.

Autonomy does not, however, entail the autarky of arbitration law in relation to the rest of French law. Just as the Civil Code requires the Code of Civil Procedure and the Commercial Code and the Consumer Code need to be supplemented by the Civil Code, the establishment of an arbitration code does not exclude recourse to ordinary law, which retains its subsidiary vocation.

However, what we gain in intelligibility, we lose in sobriety. The addition of these provisions (art. 68-130) largely explains the increase in the total number of articles in the code.

The working party has made the choice to accept the increase in the number of articles for the benefit of accessibility and intelligibility. In order to render the presentation as clear as possible, the proposal is to treat the section devoted to arbitration in a separate Book (Book I) and that devoted to appeals (Book II), of equivalent size. And if we accept that the remedies are only an outgrowth, or even a pathology of arbitration, the new French arbitration law would be in Articles 1 to 67 only. Most arbitrations will never be subject to the following articles for the simple reason that the awards will not be appealed. On the other hand, in the event of an appeal, the procedure is now specific and clarified, almost turnkey, which can also have a paradoxical deterrent effect, in particular thanks to the acceleration of the time required to process appeals.

The proposed code is therefore divided into two initial books with intentionally clear titles: “General Provisions” for the first and “Recognition, Enforcement of Awards and Remedies” for the second. Finally, as this code seeks to bring together everything concerning the arbitration law, two other books have been added: the third on “Provisions Specific to Certain Matters” because it is important that the increase in the scope of arbitration takes into account the specificities of certain matters such as family law, employment law, consumer affairs law, etc., and a fourth book with miscellaneous provisions, in particular, the adjustments that should be made in various codes, such as the Code of Judicial Organisation.

The draft arbitration code therefore offers a coherent whole, combining within one single corpus all

of the provisions relating to arbitration and cleaning up all of the articles referencing this subject in the other Codes.

This instrument can essentially be adopted through the regulatory process and, for certain specific provisions of legislative value, almost all of which enshrine positive law without modification, through an *ad hoc* law or a power to legislate by ordinance. The matter must also be referred to the supreme codification committee.

If institutional constraints were to prevent an immediate consecration of the provisions of legislative value, it would be difficult to split up the text to retain the provisions of regulatory value only. Work should be resumed and another text proposed.

> ***Proposal 1: Combine all the texts of legislative and regulatory value into an autonomous code entitled "Code of Arbitration", divide this into several books and harmonise those other codes which include references thereto.***

B- Clarification of legislative sources

a. Observation

The Civil Code devotes three articles to arbitration: articles 2059 and 2060 which concern arbitrability and the capacity to sign an arbitration agreement and article 2061 relating to the arbitration clause.

Articles 2059 and 2060 of the Civil Code are generally considered to be at best unnecessary and, at worst, contrary to positive law. Article 2059 lays down a rule that is redundant given Article 6 of the Civil Code and Article 2060 sets out a rule (prohibitions on entering into an arbitration agreement on matters of public policy) which has been contrary to positive law for 30 years. Article 2060 is therefore misleading, which generates unnecessary litigation.

Finally, these articles have been confined by case law to domestic arbitration only and therefore do not apply to international arbitration, so that they only very imperfectly reflect the state of positive law and undermine the intelligibility of French arbitration law. The limited scope of these three instruments, which is not in doubt, is not mentioned, and only specialists are aware of this, which again does not meet the constitutional objective of the intelligibility of the law.

These articles, only introduced into the Civil Code in 1972, are in fact the product of anachronisms[40]. This explains why the regime now mentioned in the Civil Code no longer corresponds to positive law.

[40] Th. Clay, "*Une erreur de codification dans le code civil: les dispositions sur l 'arbitrage*" [A codification error in the Civil Code: the provisions on arbitration], in *1804-2004. Le code civil. Un passé, un présent, un avenir* [The Civil Code. A past, a present, a future]. Dalloz, 2004, p. 693.

These errors were not ignored during the drafting of the previous reform resulting in the decree of 13 January 2011. Although "*everyone recognised what was inappropriate and clumsy in these texts*", the choice had however been made, "*for the sake of efficiency and wanting to act fast*" to attack "*first the regulatory instruments whose reform seemed easier to obtain than a legislative reform*"[41].

This is not the approach followed here as it seems unsatisfactory to propose a comprehensive reform of arbitration law without attacking its weaknesses, even if these are ensconced within in the Civil Code.

Therefore, faced with this situation, several options are possible, all of which require legislative reform.

Either we rewrite these instruments to bring them into line with positive law and allow improved intelligibility of French arbitration law.

Or we simply repeal Articles 2059 and 2060 of the Civil Code and set out a specific provision for contracts under domestic public law.

Or we propose a reform that amounts to the refinement of arbitrability, takes into account the specificities of each of these three articles and extracts them from the Civil Code where they do not belong, particular not in this location[42].

b. Proposal

The main issue raised by Articles 2059 and 2060 of the Civil Code is that of arbitrability, which is also addressed in its negative aspect: inarbitrability with a number of exceptions.

Rights which a person or entity cannot dispose of freely are not eligible for arbitration (Civil Code, Art. 2059), that is to say, those relating to the status and capacity of persons, divorce and disputes concerning public entities.

[41] J.-L. Delvolvé, "*Présentation du texte proposé par le comité français de l'arbitrage pour une réforme du droit de l'arbitrage*" [Presentation of the text proposed by the French Arbitration Committee for a reform of arbitration law], *Rev. arb.* 2006, p. 491, spec. p. 493.

[42] On this point, the parliamentary debates of Law no. 72-626 of 5 July 1972 establishing an enforcement judge and relating to the reform of civil procedure, which is the one that introduced these articles into the Civil Code, are enlightening. The issue has not given rise to any discussion, either in the National Assembly or in the Senate. The entirety of the debates in the Senate can even be cited here: "*We recall [in the text] the usual prevention of the legislature with regard to arbitration clauses, whenever they are not expressly provided for by law. We are right to be wary of this*" (*Official Journal of the French Senate*, deb. 29 June 1972, p. 1368). The only point that was discussed a little was the place that these new texts should occupy. A Government amendment stipulated that they would appear in a second paragraph of the sacrosanct Article 6 of the Civil Code. It was only through the intervention of the Chairman of the Law Commission, Jean Foyer, that this did not happen. He pointed out that Article 6 of the Civil Code "*laying down a rule binding on all contracts, it is not clear why the second paragraph relates solely to arbitration agreements*" (*Official Journal of the French National Assembly* deb., 23 June 1972, p. 2815). It was therefore necessary to find a place in the Code and it was at numbers 2059 to 2061, since these had been left vacant since the repeal by a law of 22 July 1867 of the provisions of the Napoleonic Code relating to imprisonment in civil matters (Articles 2059 to 2070). This is the reason for their location here.

For decades, legal commentators have observed a general decline in inarbitrability, particularly on the limits of the situations identified in these texts: the consequences of divorce or inheritance, invalidity of a contract signed by a person lacking capacity, civil consequences of a criminal, competition, administrative or disciplinary offence, etc., property and contracts related to an intellectual property right[43]. Especially since, at the same time, as a result of the successive reforms of Article 2061 (in 2001 and 2016) and case law, the scope of the arbitration clause has expanded considerably, since it is now authorised in all contracts, including employment contracts or contracts under family law, sometimes with the sole proviso that it is not enforceable against the weaker party.

Therefore, the state of positive law is now that arbitrability is the principle and inarbitrability the exception for all available rights, that is, all rights that can be the subject of a contract.

The revision of the arbitrability criteria, which has been considered on numerous occasions for several decades, has never resulted in legislative reform. This is mainly explained by the difficulty of identifying a reliable criterion for arbitrability and by the objections, sometimes ideological, to a reduction in the scope of ineligibility for arbitration. But the justification for these objections is weakening as arbitration develops and the guarantees are consolidated.

With a view to a code of arbitration, the working party considered that a distinction should be made between the three articles concerned:

Article 2059 may be retained for educational purposes, in order to provide reassurance on the scope of arbitrability, which does not ultimately change. The criticism of the lack of use of this article in that it would be redundant with Article 6 of the Civil Code loses its force as the article migrates into the Code of Arbitration, in its Article 1. This migration also makes it applicable both domestically and internationally. This point did not escape the working party. However, it was considered that this should not pose difficulties since, even in international matters, one should only be able to go to arbitration on rights which can be disposed of without restriction. In addition, this text sets out a substantive rule of French law, without reference to the determination of governing law to define the contours. Although it reproduces Article 2059 of the Civil Code and is considered by case law not to be applicable to international arbitration, the proposed text does not fundamentally prohibit case law from maintaining this distinction. French case law can indeed be trusted to find the solution here, inspired by the principle of effectiveness of the arbitration agreement and the use of substantive rules of validity.

Article 2060 must be repealed because it lays down a rule that is either useless or contrary to positive law, and which sometimes provokes debates that are particularly sterile because they based on a lack of knowledge of positive law. This rule is unnecessary because it is redundant with regard to the arbitrability of questions relating to the status and capacity of persons, the ineligibility for arbitration of which is already covered by Article 2059. It is contrary to positive law with regard to the inarbitrability of rights that concern all matters of public policy since case law has stated for more than thirty years that it is not because a right is one of public policy that it cannot be submitted to arbitration. It must therefore be repealed and a specific rule for legal entities governed by public law must be included in domestic contracts. In addition, special rules are provided for in family matters as well.

The repeal of Article 2060 of the Civil Code will require all codes referring thereto to be tidied up, which was done in the draft presented (subject to additions, the draft not claiming to be exhaustive).

[43] Cl. Debourg, "*La contractualisation croissant de la justice privé: l'extension du champ de l'arbitrage*" [The growing contractualisation of private justice: extending the scope of arbitration], in G. Cerqueria and A. Schreiber (eds.), *La contractualisation du droit. Approches françaises et brésiliennes* [The contractualisation of law. French and Brazilian approaches], *Société de législation comparée* ed., 2024, p. 1.

It will also be necessary to tidy up the Code of Judicial Organisation (of legislative value) to adapt the references to the Code of Arbitration, which is also proposed below.

Article 2061 can also be repealed, although a distinction should be made between the fate of paragraph 1 and that of paragraph 2. Since the 2016 reform that rewrote Article 2061, paragraph 1 no longer sets out a rule for the validity of the arbitration clause, but simply an acceptance rule. Not only is the article no longer covered by the law but it also has a greater place in the Code of Arbitration than in the Civil Code.

Paragraph 2 essentially concerns the arbitration clause most often included in consumer contracts[44]. However, as positive law currently stands, there is a contradiction with a regulatory provision of the Consumer Code, Article R. 212-2 (10). This article deems unwritten clauses whose purpose or effect is to "*remove or hinder the exercise of legal actions or remedies by the consumer, in particular by requiring the consumer to refer exclusively to an arbitration tribunal not covered by provisions of law or to make exclusive use of an alternative method of dispute resolution*".

It follows from this combination of standards that we do not know today the exact legal regime which governs arbitration clauses freely accepted by consumers. The same arbitration clause in a domestic consumer contract is presumed to be both abusive according to the Consumer Code and perfectly valid according to the Civil Code, although unenforceable against the consumer. On the other hand, in international matters, the Civil Code does not apply and the clause becomes presumed abusive only. Moreover, this entire regime is poorly articulated with Article 1448 of the Code of Civil Procedure on the application of the principle of jurisdiction and competence.

It is therefore necessary to propose a clear regime for the arbitration clause contained in a consumer contract. The best solution is to extend the Civil Code regime to the consumer contract, which will also allow alignment with the regime governing arbitration clauses included in employment contracts. This reform, the purpose of which is to validate arbitration clauses included in consumer contracts but not binding on consumers, in both domestic and international arbitration, would also comply with the requirements of EU law[45]. The proposal is simply to provide that the negative effect of the competence-competence principle does not apply and, where appropriate, that a professional entity must expressly inform the consumer, once a dispute has arisen, that he or she may waive arbitration.

[44] Article 2061, paragraph 2, of the Civil Code: "*The arbitration clause must have been accepted by the party to whom it is opposed, unless the latter has succeeded to the rights and obligations of the party by which it was initially accepted. Where one of the parties has not signed a contract in the course of its professional activity, the clause may not be cited against it*".

[45] *Cass. 1re civ*., 30 Sept. 2020, *PWC*, no. 18-19.241, *JDI* 2020 p. 1327, note E. Gaillard; *JCP* 2020, 1311, note M. de Fontmichel; *Gaz. Pal.* 2020, no. 41, p. 27, note S. Bollée; *LPA* 2020, no. 157 p. 7, note S. Akhouad-Barriga; *D. actu.* 19 Oct. 2020, obs. J. Jourdan-Marques; *D.* 2020, p. 2490, obs. Th. Clay; *D.* 2020, p. 2501, note D. Mouralis; *AJC* 2020, p. 485, note D. Mainguy, *LPA* 2021, no. 12, p. 5, note J. Lefebvre; *LJA*, no. 1463 19 Oct. 2020, obs. S. Saley; *Lexisveille*, 6 Oct. 2020, obs. T. Ducrocq.

However, a final question still arose, that of the hypothesis in which the arbitration clause is inserted in a contract between two persons who are not acting for professional purposes, such as in a lease agreement or in co-ownership regulations. Should this be rendered unenforceable against anyone not acting for professional purposes or only against those who contract with a professional? On this point, the proposal is to not establish unenforceability between "weak" parties. Two reasons can justify this: on the one hand, there is no reason to weaken the binding force of arbitration agreements as a matter of principle. What would this contract between non-professionals be worth if everyone could get rid of it? On the other hand, the *legis ratio* of unenforceability against the consumer and the employee is the fear that the strong party may impose this on the weak party. Since we are between persons of equivalent strength, there is no reason to make the arbitration agreement unenforceable.

Proposal 2: Transpose article 2059 to article 1 of the Code of Arbitration, repeal article 2060 (by providing for specific rules for legal entities governed by public law and for family arbitration), repeal article 2061, paragraph 1, transpose article 2061, paragraph 2, into the Code of Arbitration for consumer and employment disputes.

C- The creation of common provisions for domestic and international arbitration: towards a unification of arbitration rules

a. Observation

French arbitration law is today structured according to a dualist system: it distinguishes between domestic arbitration, with a regime set out in Articles 1442 to 1503 of the Code of Civil Procedure, and international arbitration, with a regime found in Articles 1504 to 1527 of the same Code.

The choice in favour of such a system, inherited from the 1980s, stems above all from a *fait accompli*: that of a policy on case law that has gradually detached international arbitration law from its national roots - as well as its rigid, sometimes hostile, legislative framework - to promote the emergence of an innovative discipline. This dynamic has naturally led to the establishment of a dualism, marked by the coexistence of an autonomous regime and internal and traditional norms.

The texts applicable before 1980 did not indeed distinguish domestic arbitration from international arbitration (see Articles 1003 to 1028 of the Code of Civil Procedure of 1806). It is case law that has laid the foundations for such a distinction, in particular through the development of substantive rules to temper in international arbitration the rigour of the rules applicable in domestic arbitration[46].

[46] If we refer to the "Key decisions in commercial arbitration law" contained in the publication devoted to them by Dominique Hascher and Professor Ibrahim Fadlallah, there are seven decisions (out of a total of 45, including 10 handed down by courts of first or second degree) that predate the 1980 reform, including the *Gosset* decision of 7 May 1963, which established the legal autonomy of the arbitration clause in relation to the contract (*Bull. Civ.* 1963, I, no. 246, p. 208: *Rev.crit. DIP* 1963. 615, note H. Motulsky) or the *Galakis* decision, which ruled out the inability of legal persons under public law to submit to arbitration in international matters and affirmed that the ability of legal entities under public law to have recourse to arbitration did not depend on any law but on a material rule (*Cass. 1st civ.*, 2 May 1966, no. 61-12.255, Galakis: *JDI* 1966, p. 648, note P. Level; *Rev. crit. DIP* 1967, p. 533, note B. Goldman; *D.* 1966, p. 575, note J. Robert; *Grands arrêts de la jurisprudence française de droit international privé* [Key decisions of French case law in international private law], 5th ed., 2006, spec. no. 44, note B. Ancel and Y. Lequette). Comp. J. El Ahdab and D. Mainguy, *Droit de l'arbitrage, théorie et pratique* [Arbitration Law, Theory and Practice], LexisNexis, coll. Manuals, 2021, which present arbitration law without stating whether this is domestic or international.

Because, in 1980, the legislative framework was constrained, the choice was first made to restrict the reform to domestic arbitration only so as not to jeopardise the progress of international arbitration case law whose rules seemed to fall within the legislative field. This difficulty had obviously not escaped the attention of the *Conseil d'Etat*, which had rejected a first draft which aimed to build on the achievements of the case law of international arbitration in order to better dismiss the various prohibitions posed in domestic arbitration. This is why in the report to the Prime Minister, the Minister of Justice was careful to explain this choice and to state that "*the new provisions on international arbitration only concern procedure and in no way call into question the now well-established principles of the Cour de cassation with regard to the legal regime of international arbitration*"[47].

The government had thus initially opted for a reform of domestic arbitration law alone. This was the subject of the first decree no. 80-354 of 14 May 1980[48]. This choice was based on the idea that the extension of domestic rules to the international sphere would naturally result from case law and, where appropriate, by adapting these rules internationally. It thus reflected a major act of confidence in the creative power of judges - especially in a context in which the legislator remained behind. It was also a question of betting on greater flexibility for judges acting in an international context. The First Presiding Judge Pierre Bellet[49] had recalled at the time: "*The French courts, if they hesitate to be liberal in judgment and to assimilate foreign decisions with French decisions, are at least ready to deal on an equal footing with French and foreign judgments*"[50].

Obviously, this confidence placed in an "internationalist" interpretation of the Code by the judges - as well as the bet on their supposed sensitivity to the stakes of international arbitration - was not enough to reassure legal practitioners and business operators since, as early as on 12 May 1981, barely one year after the first decree, a second text was published (Decree No. 81-500 of 12 May 1981)[51], this time to govern international arbitration.

Several arguments were then made for this reversal, including that of the slowness of the case law, which is not put together in "the blink of an eye" and which, with regard to the retroactive effect of court decisions, can be a source of insecurity. An argument based on the accessibility and legibility of the law was also put forward, stating that "*it is certain it is much easier for foreign lawyers to familiarise themselves with a text emanating from the legislative or executive power, with publication in the OJ, than with court decisions*"[52]. Similarly, it had been argued that the more liberal rules adopted in international arbitration were built

[47] Ph. Fouchard, "*Le nouveau droit français de l'arbitrage*" [New French arbitration law], *Revue de droit international et de droit comparé* 1982, p. 29 *et seq*.

[48] Decree no. 80-354 of 14 May 1980 on arbitration and intended to be incorporated into the new Code of Civil Procedure.

[49] First Presiding Judge of the *Cour de cassation* between 1977 and 1980.

[50] P. Bellet and E. Mezger, "*L'arbitrage international dans le nouveau code de procédure civile*" [International arbitration in the new Code of Civil Procedure], *RCDIP*, 1981, p. 611 *et seq*. Finally, the expected flexibility of judges in international matters is explained by the fact that the decisions in question do not concern foreign judgments, but "only" awards, implying that they do not involve questions of sovereignty and that therefore the French judge would tend to be more flexible in their regard.

[51] Decree No. 81-500 of 12 May 1981 establishing the provisions of books III and IV of the New Code of Civil Procedure and amending certain provisions of this Code.

[52] P. Bellet and E. Mezger, "*L'arbitrage international dans le nouveau code de procédure civile*" [International arbitration in the New Code of Civil Procedure], *Rev. crit. Dip*, 1981, p. 611 *et seq*.

in reaction to the stricter rules of domestic law and that it was necessary to be certain that this liberalism was guaranteed for the future.

As in 1980, the question of how to approach domestic and international arbitration was the subject of a debate for the 2011 reform even though it was no longer a question of whether to include international arbitration in the reform, there no longer being any debate surrounding this question. Was it however necessary to maintain a dualist system, to draft common rules for internal and international arbitration or to draft a body of special rules, alongside those applicable to domestic arbitration, in order to avoid a complex and insecure game of referrals?

The method put in place by the *Comité Français de l'Arbitrage* was to set up not a single group of specialists, but two groups: one to draft all texts on domestic arbitration, the other for texts on international arbitration. The option chosen was not to rule "a priori *on the remaining question of principle of determining whether it is better to establish texts uniformly designed for domestic arbitration and international arbitration, and responding to a unitary conception of both, or whether, because of a particular specificity of the second in relation to the first, it is better to devote separate texts to this*[53]*".*

In doing so, as Jean-Louis Delvolvé had pointed out, a "*dialectic*"[54] was created between the texts for the benefit of both and writing a single body of common rules was not envisaged because we were suspicious at the time of the implications of such a method: the risk that a rigour imposed or natural to domestic arbitration would weaken the liberalism desired for international arbitration.

When the work was taken up by the Directorate of Civil Affairs and the Justice Department in order to complete the project that was not making progress[55], this strategy was retained, even if, from that moment, it appeared that this form of presentation could only be a step in the path towards the unification of the regimes. The regulatory authority therefore deliberately chose to avoid any duplication of the provisions applicable to domestic arbitration, preferring to establish a reference to these rules, which was to be achieved with the inextricable Article 1506 which makes reference to no fewer than thirty articles... This approach was based on a rigorous comparative analysis: it was a question of evaluating, on a case-by-case basis, whether the solutions deemed satisfactory for domestic arbitration could be transposed to international arbitration - and *vice versa* - in order to guarantee systemic consistency without sacrificing the specificities of each field by making them sometimes imperative and sometimes suppletive. The system was therefore relatively abstruse and could seem to be just one stage in the move towards the advent of a more coherent law, starting from 1806 and ending in 2025.

The Report to the Prime Minister published in the *JORF* [Official Journal of the French Republic] at the same time as the decree of 13 January 2011 also points to the precautions taken by the drafters with regard to international arbitration law by recalling in the section devoted thereto that "*although the new text does not expressly provide for it, there is no question of returning to two principles enshrined in case law, the consolidation of which in positive law would require the intervention of the legislature. The first is that the State or one of its emanations cannot invoke its own law to oppose the application of a treaty to which it has consented (Cass. Ire civ., 2 May 1966, Galakis). The second is that since an international award is not linked to any state legal order, its compliance must be examined in the light of the rules applicable in the country in which its recognition and enforcement*

[53] J.-L. Delvolvé, "*Présentation du texte proposé par le comité français de l'arbitrage pour une réforme du droit de l'arbitrage*" [Presentation of the text proposed by the French Arbitration Committee for a reform of arbitration law], *Rev. arb.* 2006, p. 491, spec. p. 493.

[54] *Id.*

[55] L. Degos, "*L'histoire du nouveau décret, dix ans de gestation*" [The story of the new decree, ten years in the making], in Th. Clay (ed.), *Le nouveau droit français de l'arbitrage* [New French arbitration law], Lextenso, 2011, p. 25.

are requested (*Cass. 1st civ., 29 June 2007, Putrabali)*"[56].

The thorny issue of the vehicle - legislative or regulatory - likely to govern the matter of arbitration law therefore weighed on the adoption of a dualist regime.

Today, while the legislative framework definitely has room for improvement (see above), it must be noted that, without doubt, by being more flexible[57], this makes it possible to free ourselves from this debate and not remain trapped in the monism/dualism dichotomy.

In addition, the legislative architecture of French arbitration law, marked by a referral mechanism, established in Article 1506 of the Code of Civil Procedure, unnecessarily complicates the distinction between domestic arbitration and international arbitration. Indeed, two main consequences arise from this referral system. On the one hand, there is a core of identical rules applicable to both domestic and international arbitration. This core is not marginal, since the number of articles of domestic law applicable in international matters is greater than the number of articles specific to international arbitration. On the other hand, effective mastery of French international arbitration law requires constant navigation between provisions applicable to domestic arbitration and provisions specific to international arbitration, something which has been criticised from the outset.

Finally, the scattering of the rules relating to the arbitration agreement or the arbitrability of disputes across many other Codes does not allow the reader to determine their applicability in international matters. It is therefore necessary to be familiar with the *Dalico* case law[58] in order to know that the majority of the rules appearing outside the Code of Civil Procedure are not applicable in international arbitration. The solution was confirmed even more explicitly, with regard to Article 2061 of the Civil Code, in the *Zanzi* decision[59].

So, while there is nothing to indicate this on the surface, a large majority of texts outside of the Code of Civil Procedure are without application in international matters. Moreover, certain provisions, because of their status as mandatory rule, apply in international matters, for example, as follows from the *PWC* decision[60], the rules relating to the arbitration clause in consumer affairs law apply in international matters.

[56] Report to the Prime Minister on Decree No. 2011-48 of 13 January 2011 on the reform of arbitration.

[57] In particular, because of the reform of Article 2061 of the Civil Code by the law of 15 May 2001 enshrining the validity of the arbitration clause in domestic law in relations between professionals and which thus gave more space to the regulatory authority to govern the issue, in a more liberal sense.

[58] *Cass. 1re civ*., 20 Dec. 1993, *Dalico*, no. 91-16.828, *JDI* 1994, p. 432 note E. Gaillard; *JDI* 1994, p. 690, note E. Loquin; *Rev. crit. DIP* 1994, p. 663, note P. Maye; *Rev. arb.*, 1994, p. 116, note H. Gaudemet- Tallon.

[59] *Cass. 1re civ*., 5 Jan. 1999, *Zanzi*, no. 96-21.439, *Bull. civ.* I, no. 2; *Rev. arb.*, 1999, p. 260, note Ph. Fouchard; *Rev. crit. DIP* 1999, p. 546, note D. Bureau; *D. Aff.* 1999.291, obs. X. Delpech; *RTD com.*, 1999, p. 3 80, obs. E. Loquin; *Rev. gén. des procédures* 1999, p. 409, obs. M.-Cl. Rivier; *Dr. & patr*, 2000.2514, obs. P. Mousseron; *Gaz. Pal* 13-14 oct. 2000, p. 10, obs. E. du Rusquec.

[60] *Cass. 1re civ*., 30 Sept. 2020, *PWC*, no. 18-19.241, *JDI* 2020 p. 1327, note E. Gaillard; *JCP*, 1311, note M. de Fontmichel; *Gaz. Pal.* 2020, no. 41, p. 27, note S. Bollée; *LPA* 2020, no. 157 p. 7, note S. Akhouad-Barriga; *D. actu.* , 19 Oct. 2020, obs. J. Jourdan-Marques; *D.* 2000, p. 2490, obs. Th. Clay; *D.* 2020, p. 2501, note D. Mouralis; *AJC* 2020, p. 485, note D. Mainguy, *LPA* 2021, no. 12, p. 5, note J. Lefebvre; *LJA*, no. 1463 19 Oct. 2020, obs. S. Saley; *Lexisveille*, 6 Oct. 2020, obs. T. Ducrocq.

Finally, the limitation of the articles of the Civil Code to domestic arbitration is the result of a case law interpretation that has been constant since 1972, but is in no way apparent from the texts, which therefore do not make a distinction there where case law does, which creates a permanent fragility.

b. Proposals

It follows from the above that this issue must be addressed by putting it back in the historical context of its evolution: first, a single internal regime in the Code of Civil Procedure of 1806, then a dualist regime in 1980 and 1981, before these converge substantially under the effect of the case law and the reform of 2011 which units them in the same book of the Code of Civil Procedure with an increasing number of rules in common. This reminder bears witness to a movement towards a single regime, that of international arbitration.

This is the approach adopted by the proposals of the working party which it is possible to think are following the direction of history: this is not a question of a merger between the rules of domestic arbitration and those of international arbitration, but an absorption of the former by the latter.

This choice is also justified for many other reasons:

- The criterion of internationality itself has sometimes seemed obsolete, if not porous, given how quickly one switches from the domestic to the international without even realising it;

- When signing their arbitration clause, parties are not aware of the nature of the dispute that may arise since, by assumption, they are not aware of the subject matter of this dispute which has not yet arisen and which may never arise. The parties therefore do not know what the regime governing their arbitration will be when they sign the arbitration clause because it is the dispute that determines the domestic or international nature of the arbitration, and not the contract. And the question sometimes arises for the first time before the pre-trial judge, at the stage of the admission of the remedy[61]. This uncertainty is not satisfactory for a method of justice that is based on a voluntary and exceptional choice. However, once the system of remedies is unified, then the *raison d'être* of this distinction ceases to exist, and, with it, this difficulty. This is therefore an additional reason for unifying the rules of domestic and international arbitration.

- Arbitration does not change in nature depending on whether it is domestic or international. The arbitrator derives his or her jurisdictional activity from an arbitration agreement and is subject to the same ethical requirements (independence, impartiality, respect for the *inter partes* principle or equality of arms). Finally, the same authority of *res judicata* is attached to the award;

- Under the effect of the 2011 re-codification and the case law that followed, a movement towards convergence of the rules is under way. This is evidenced, for example, by the competence of the arbitrator to rule on mandatory rules[62], the

[61] E.g.: Paris (ord.), 17 May 2023, No. 22/20320. In this case, the Pre-trial Judge of the Paris Court of Appeal preferred to refer the matter to the enforcement judge.
[62] Paris, 19 May 1993, *Labinal*, no. 92-21091, *Rev. arb.* 1993, p. 645, note Ch. Jarrosson - See in this sense P. Mayer, "*Le contrat illicite*" [The unlawful contract], *Rev. arb.* 1984, p. 206; Ch. Jarrosson and L. Idot, "*Arbitration", Rép. dr. communautaire Dalloz*, Jan. 2010, spec. no. 20.

competence-competence principle and the autonomy of the arbitration clause[63]. There are very few really different rules left and most of these differences do not seem to be able to be resolved because they are most often questions that arise in exactly the same terms in domestic and international matters[64]. The differences that remain in positive law are marginal and the structure as a whole is already moving towards what Professor Jean-Baptiste Racine calls "*implicit common ground*" because we must not "*exaggerate*" the differences: "*Arbitration retains its deep essence, whether it is domestic or international*"[65].

- Finally, it must be noted that when two authors, recognised specialists in arbitration, compiled in a reference work the major decisions of the commercial arbitration law in 2019, they chose not to distinguish between those relating to domestic arbitration law and those relating to international arbitration law, after having noted that "*most of the rules developed by case law apply or have ended up applying to both categories of arbitration. Separating them would have been artificial. Distinctions are made where needed*"[66].

However, it remains to retain the flexibility and liberalism of international arbitration and not to weaken them by the more rigid rules of domestic arbitration. Convergence can in no way be at the expense of the rules applicable to international arbitration.

All these reasons thus led the working party to take the step of a common system, accompanied by some special rules for domestic arbitration. Most of these special rules relate to substantive rules, such as public policy, or rules relating to territorial jurisdiction for para- or post-arbitral disputes, but not to arbitration itself.

It is also a means of allowing case law to continue its work by specifying here and there the texts which it will consider necessary to exclude or mitigate the scope of international arbitration for reasons of necessary flexibility. One thinks in particular of the texts of the Code of Civil Procedure to which reference has to date been made by the 2011 decree (in particular, suspension, the interruption of the proceedings) and which are now included in the Code of Arbitration.

Similarly, the working party did not comment on the extent of oversight of breaches of public policy, which is known to remain under discussion. Indeed, following a period of light (maybe, too light) oversight, this is now subject to extensive (maybe, too extensive) oversight, which suggests that it is up to case law to find the right balance, which the proposed text leaves it the prerogative to do.

It is still these same considerations that have led the working party to retain a definition of international arbitration, not without having sparked debates on the relevance of the economic

[63] Even if domestic arbitration has not yet been affected by a principle of validity as in international arbitration and autonomy is only understood as an autonomy of the clause with respect to the contract, while we know that in international arbitration this autonomy also targets at the independence of the clause with respect to any state law. See in international arbitration *Cass. 1re civ.*, 20 Dec. 1993, *Dalico*, no. 91-16.828, *JDI* 1994, p. 432, note E. Gaillard; *JDI* 1994, p. 690, note E. Loquin; *Rev. crit. DIP* 1994, p. 663, note P. Mayer; *Rev. arb.* 1994, p. 116, note H. Gaudemet-Tallon; in domestic arbitration: *Cass. 2e civ.* [Court of Cassation, 2nd civil chamber], 4 April 2002, *Barbot*, no. 00-18.009, *Bull. civ.* II, no. 68; *D.* 2003, p. 1117, note L. Degos; *Rev. arb.* 2003, p. 103, note P. Didier; *D.* 2003, p. 2470, obs. Th. Clay; *JCP* 2002, II, 10154, note S. Reifegerste; *JCP* 2003, I, 105, § 2, obs. Ch. Seraglini; *Procedures* 2002.112, note R. Perrot; *Procedures* 2002, 162, note H. Croze; *D.* 2002, IR, p. 1402, obs. V. Avena-Robardet.

[64] Th. Clay, "*Pour un renouvellement du critères de l 'internationalité de l'arbitrage*" [In favour of a renewal of the criteria of internationality in arbitration], in *Mélanges en l'honneur du professeur Loïc Cadiet* [Collection in honour of Professor Loïc Cadiet], LexisNexis, 2023, p. 317.

[65] J.-B. Racine, *Droit de l'arbitrage* [Arbitration law], PUF, coll. Themis-private right, 2016, spec. no. 46.

[66] I. Fadlallah and D. Hascher, *Les grandes décisions du droit de l'arbitrage commercial* [Key decisions in commercial arbitration law], Dalloz ed., coll. *Grands arrêts*, 2019, preface.

criterion of internationality, nearly a century old[67], whose handling today can be difficult as its implementation seems disconnected from contemporary realities.

With globalisation, the occurrence of internationality has become almost systematic. To become bound by an international contract, it is example sufficient just to enter into a contract via the internet with a commercial operator located abroad, register with a social media company or book international travel. Moreover, it is not the nature (international or domestic) of the contract that matters but that of the dispute.

Article 1504 of the Code of Civil Procedure now refers to the "*interests of international commerce*", as did Article 1492 before it, thereby enshrining Professor Philippe Fouchard's proposal made in a famous article from 1970[68]. It is however accepted that arbitration, whether domestic or international, makes it possible to resolve disputes that are totally alien to the idea of trade. The reference to the concept of commerciality used in Article 1504 is therefore outdated and in no way refers to that resulting from the Commercial Code. Although this notion has never really posed any difficulties to date, it is nevertheless now time to adapt the terminology to what contemporary arbitration is, namely a method of resolving all disputes, and not only commercial disputes.

A reversal of the definition (defining domestic arbitration) was at one point being contemplated, given the choice to create an arbitration code with a structure based on ordinary law as resulting from international arbitration and the maintenance of some special rules provided for domestic arbitration.

Similarly, consideration was given to drawing inspiration from case law which has long distanced itself from the exact letter of Article 1504 of the Code of Civil Procedure, in favour of a formulation more adapted to contemporary issues by referring to disputes which "*no longer relate to transactions which are settled economically in France, so that they no longer call into question the interests of international trade*"[69].

[67] *Cass. civ.*, 17 May 1927, *Pélissier du Besset, DP* 1928, I, 25, submission by the attorney general P. Matter, note H. Capitant.

[68] Ph. Fouchard, "*Quand un arbitrage est-il international ?*" [When is an arbitration international?], *Rev. arb.* 1970, p. 59; also in *Écrits. Droit de l'arbitrage. Droit du commerce international, Comité français de l 'arbitrage*, 2007, p. 251.

[69] *Id*. Other appeal judgments have used similar criteria: "*[t] he result of this exclusively economic definition is that arbitration has an international character when the dispute submitted to the arbitrator concerns a transaction that is not settled economically in a single State, regardless of the capacity or nationality of the parties, the law applicable to the substance of the dispute or the proceedings, and the seat of the arbitral tribunal. This qualification does not depend on the will of the parties*". *Paris, Ord.*, 1st Dec. 2020, No. 20/08033, *EPPOF*; or "*[the dispute] concerns a transaction that does not resolve itself economically in a single State*", Paris, 8 June 2021, *Aurier*, no. 19/02245.

Finally, the working party considered it more prudent to retain a definition of international arbitration that carries the acquired case law "baggage" while suggesting the deletion of the reference to "trade", considered too restrictive, and the adoption of reference to "economic interests" and to place this definition at the start of the articles of the arbitration code, thereby testifying to the important legacy that this law owes to international matters.

With the same concern for clarification, the working party wished to specify in the definition that it was the dispute that qualified the transaction as domestic or international, and not the contract. This was self-evident, but some may have doubted it, or, at the very least, called for clarification. This has now been done.

The absorption of the domestic arbitration regime by that of international arbitration has a collateral effect on remedies. A distinction is no longer being made between, on the one hand, domestic awards, and on the other hand, international awards and awards handed down abroad. The cursor has indeed moved with, on the one hand, awards handed down in France (domestic or international) and on the other hand, awards handed down abroad (domestic as well as international, since a domestic award handed down abroad will borrow the regime of the international award handed down abroad). This new division is not only much more functional but also better embraces the philosophy of French arbitration law for which the award handed down abroad obeys its own regime.

Proposal 3: Reorganise French arbitration law into shared rules and some special rules granting exceptions, to take into account the specificities of domestic arbitration law.

Proposal 4: Incorporate a definition of the international nature of arbitration into the Code of Arbitration, in a preliminary article.

D- Consecration of the guiding principles of arbitration

a. Observation

As it currently stands, French arbitration law does not provide, at least formally, for any "guiding principle"[70].

However, no one will dispute the specific nature of French arbitration law which is characterised by certain major principles, particularly in international arbitration, some of which have been described as "founding principles". These have been defined as the mandatory rules that define "*the nature and the necessary operating rules independently from the freedom left to the contracting parties to sign and implement the arbitration agreement according to the rules and methods, contingent, formal and substantive, chosen by them*"[71].

[70] Except for the reference by Article 1464 (2) of the Code of Civil Procedure to the guiding principles of the trial set out in Articles 4 to 10, Article 11 (1), Article 12 (2) and (3) and Articles 13 to 21, 23 and 23-1 of the Code of Civil Procedure, which, however, are not applicable in international arbitration.

[71] See in this sense J.-P. Ancel, "*La Cour de cassation et les principes fondateurs de l'arbitrage international*" [The *Cour de cassation* and the founding principles of international arbitration], in *Le juge entre deux millennées. Mélanges offerts à Pierre Drai* [The judge between two millennia. Collection in honour of Pierre Drai], Dalloz, 2000, p. 161.

In addition, some texts relating to arbitration carry the seed of autonomous guiding principles. Article 1464 (3) of the Code of Civil Procedure, according to which "*[t]he parties and the arbitrators shall act expeditiously and faithfully in the conduct of the proceedings*"[72], Article 1510 of the Code of Civil Procedure, according to which "*[w]hatever the procedure chosen, the arbitral tribunal shall guarantee the equality of the parties and respect the inter partes principle*" and Article 1511 of the Code of Civil Procedure, according to which "*[t]he arbitral tribunal shall settle the dispute in accordance with the rules of law chosen by the parties or, failing that, in accordance with those which it considers appropriate. It takes into account, in all cases, industry practices*".

The question of the advisability of consecrating guiding principles[73] specific to arbitration law has therefore naturally arisen, all the more so since such consecration fits perfectly into the perspective of an arbitration code.

It should also be pointed out that the precedent drawn from the guiding principles of the Code of Civil Procedure has spread outside this text, to today concern other sources. So, on the occasion of the reform of contract law, "introductory provisions" have been incorporated into Articles 1101 to 1111-1 of the Civil Code which are misleadingly reminiscent of the guiding principles. Initially, the name of guiding principles had been adopted, before being rejected *in extremis*[74]. It is also being envisaged in employment law[75] and can moreover be found in the special texts applicable to Polynesia[76] and New Caledonia[77]. Today, their consecration has been mentioned for amicable resolution methods[78], following the report of the States General of Justice[79].

The question that arises is the usefulness of these principles. Here again, legal commentary is enlightening: "*These principles "have the formal precedence and the intellectual burden" which are attached to the preliminary provisions. Their legal value is twofold. On the one hand, they are guiding principles because of their generality, their legitimacy (linked to good justice) and their directive virtue as maxims: they are thus intended to guide the interpreter in the ways they indicate, insofar as they are carriers of the spirit of the law. On the other hand, they are rules of law in their*

[72] Y. Derains, "*Les nouveaux principes de procédure: confidentialité, célérité, loyalité*" [New procedural principles: confidentiality, celerity, fairness] in Th. Clay (dir.), *Le nouveau droit français de l'arbitrage* [New French arbitration law], Lextenso, 2011, p. 91.

[73] Concerning the principles contained in the Code of Civil Procedure, it has been written that these "*form the first chapter of the Code express the quintessence of the spirit of the Code. Compared to other codes (the Belgian code is also brand new, the French code is characterised from the outset by the gateway that marks its entry, and it is in this charter of the distribution of roles between judge and parties that its philosophy resides, in large part. These principles are the central link in the chain of fundamental principles that govern the body. They are the brand image of the [code], the permanent trace that the drafters will bequeath to posterity, beyond the necessary technical adaptations of the procedural rules that follow them in articles 30 to 1507*" (C. Chainais, Fr. Ferrand, L. Mayer and S. Guinchard, *Procédure civile. Droit commun et spécial du procès civil. Modes amiables de résolution des diférends (MARD)* [Civil Procedure. Common and special law of civil litigation. Amicable dispute resolution methods], Dalloz, 37th ed., 2024, spec. no. 416).

[74] G. Chantepie and M. Latina, *La réforme du droit des obligations* [Reforming the law of obligations], Dalloz, 2016, spec no. 74; F. Ancel, B. Fauvarque-Cosson and J. Gest, *Aux sources de la réforme du droit des contrats* [The origins of contract law reform], Dalloz, 2017, p. 44.

[75] S. Riancho, *Les principes directrices en droit du travail* [The guiding principles of employment law], Thesis - Paris 2 University, under the supervision of J.-F. Cesaro, defended on 26 Nov. 2019.

[76] Law no. 86-845 of 17 July 1986 on the general principles of employment law and the organisation and the operation of the labour inspectorate and the employment courts in French Polynesia.

[77] Order no. 85-1181 of 13 November 1985 on the general principles of employment law and the organisation and the operation of the labour inspectorate and the employment courts in French Polynesia.

[78] C. Chainais, "*Quels principes directeurs pour les modes amiables de résolution des différends ? Contribution à la construction d'un "système global de justice plurielle*" [Which guiding principles for amicable dispute resolution? Contribution to the construction of a" global system of plural justice""], in *Mélanges en l'honneur du professeur Loïc Cadiet* [Collection in honour of Professor Loïc Cadiet], LexisNexis, 2023, p. 265.

[79] See Proposal 9 of the Report submitted to the Committee of the States General of Justice on 1st February 2022, Subgroup "On the Simplification of Civil Justice".

own right; their violation is autonomous and sufficient grounds for setting aside. They are therefore not reduced to a simple statement of principle, far from it"[80].

Other authors add: "*They combine three characteristics: their generality, their intrinsic legitimacy (linked to the value of the ideal they pursue), their natural vocation to direct the interpretation of the whole code*"[81].

Is it therefore appropriate to enshrine autonomous guiding principles of arbitration law, when those existing in the Code of Civil Procedure are already partly applicable? It is also perfectly true that certain guiding principles of civil litigation are essential for arbitration. Arbitration law cannot be conceived without respect for the *inter partes* principle or neglecting the principle of provision. There is nothing to prevent the inclusion of certain guiding principles directly in those contained in Articles 1 to 29 of the Code of Civil Procedure, if necessary after some adaptations.

The fact remains that arbitration law must not be confused with civil procedure.

Moreover, by its very partial reference, Article 1464 (2) of the Code of Civil Procedure reveals that only certain guiding principles are directly applicable to arbitration. This partial reference illustrates, on the one hand, that not all of the guiding principles of civil litigation are applicable to arbitration and, on the other hand, that other specific guiding principles may be necessary for arbitration. In particular, the hybrid nature of arbitration and its partly contractual nature justify principles distinct from those exclusively reserved for civil proceedings. In addition, the inescapable interactions between arbitration and state justice also explain new guiding principles. Finally, looking at it in a different way, seen from abroad, isolates a number of "rules" that are presented as originalities, if not guiding principles, such as the issue of the autonomy of the arbitration agreement, the competence-competence "principle", the "principle" of equality of the parties, etc. These principles are universal. They therefore have their place in the Code of Arbitration, which is intended to be a universal reference.

b. Proposal

For all the reasons mentioned, the working party considers it useful to establish guidelines specific to arbitration.

Once the principle had been established, the working party discussed at length which of them it therefore wished to highlight. There were many opinions on this point, with several members wishing for a "*minimalist*" approach so as not to weaken these principles by having too many of them[82].

[80] C. Chainais, Fr. Ferrand, L. Mayer and S. Guinchard, *Procédure civile. Droit commun et spécial du procès civil. Modes amiables de résolution des différends (MARD)* [Civil procedure. Ordinary and special law of civil trial. Amicable dispute resolution methods], Dalloz, 37th ed., 2024, spec. no. 416.

[81] G. Cornu and J. Foyer, *Procédure civile* [Civil procedure], PUF, 2nd., 1996, spec. no. 96.

[82] Some wished to drastically limit these principles while others proposed adopting fewer than ten.

Without an absolute majority within the group, the choice was ultimately guided by the purpose sought.

First, the rules characteristic of French arbitration law, which are its trademark and which establish its influence abroad, are established as guiding principles:

- The autonomy of the arbitration agreement (Art. 2);
- The arbitrator's priority when ruling on his or her own jurisdiction (Art. 7);
- Expeditiousness and faithfulness (art. 8);
- The choice by the parties of the applicable law and the possibility for the court to take usages into account (art.9);
- Amicable composition (art. 10);
- The definition of the award and the consecration of its authority (art. 17);
- Recognition of awards annulled abroad (art. 19);
- The prohibition on relying on domestic law in international arbitration so as to avoid arbitration (art. 3);
- The importance given to the common will of the parties (preliminary article, art. 15 and 18);
- Confidentiality (art. 12).

Secondly, the standards whose purpose is to feed into all of the other rules contained in the text of the Code have been established as guiding principles. These are principles of interpretation that are used to guide the parties, the arbitrators and the judges in the implementation of the rules of French arbitration law, such as the principle of loyalty (art. 13), the principle of good faith (art. 4) or the principle of effectiveness (art. 5).

Finally, standards that aim to defend the values of French arbitration law have been raised to the level of guiding principles: the principle of freedom to stipulate (art. 1), the principle of arbitrators' independence and impartiality (preliminary art. and art. 6), the *inter partes* principle (art. 11), the principle of equality between the parties (art. 15), the principle of proportionality (art. 14) or that of the prevention of denial of justice (art. 16). These are all markers of what French arbitration law means.

With regard to the **principle of independence and impartiality**, the objective is to make this a marker of French arbitration law, throughout the arbitral proceedings. It is known that this is not necessarily the choice of all legal regimes and in particular of English law which, for example, does not include any mention of a duty of independence[83]. Mentioned in the preliminary article of the Code and also established as a guiding principle (art. 6), the independence and impartiality of the arbitrator are thus doubly highlighted.

[83] English law has chosen to mention only the duty of impartiality (see Arbitration Act 1996, section 33). This choice was maintained in the Arbitration Act 2025. It is based on the idea that only impartiality matters and that a duty of independence would be difficult to handle in practice given that there are only a few specialist arbitrators in certain sectors (e.g., sport, insurance).

This principle is then set out in article 35 of the Code which reproduces the terms of the current Article 1456 of the Code of Civil Procedure and the duty of disclosure associated therewith (which is therefore imposed as the principle throughout the procedure)[84]. The reader may be surprised not to see consolidated the case law having admitted the exception of notoriety and the duty of curiosity of the parties, which exempts the arbitrator from revealing allegedly well-known facts. After discussing this, the working party preferred not to do so, having been more sensitive to a strict approach consisting of considering that the arbitrator must reveal everything that, in the minds of the parties, could affect his or her independence or impartiality and that it is not for the arbitrator to avoid this obligation on the grounds that the facts are supposedly common knowledge, something which is subjective and random; just as it is not for the parties to be in a state of permanent research. It will therefore be up to case law to go into further detail (or not) on this point.

With regard to the **principle of equality**, it should be noted that this principle is recalled not only at the stage of the creation of the arbitral tribunal (art. 15) but also throughout the arbitral proceedings (art. 11). This is a cardinal principle since it is important that the parties, for which the arbitration is carried out and from which it proceeds, are treated equally, and even fairly. The legitimacy of the arbitration is at stake.

The **principle of confidentiality** of the arbitration is also established as a guiding principle in both domestic and international arbitration (art. 12). Confidentiality is a principle of French arbitration law. This is even, according to the investigations, one of the main reasons why the parties resort to arbitration. This principle was enshrined for domestic arbitration by the 2011 decree in Article 1464 of the Code of Civil Procedure, which states that arbitral proceedings are confidential unless the parties stipulated otherwise. This express recognition of the principle of confidentiality in domestic arbitration has not, however, been explicitly affirmed in international arbitration.

If practice was able to accommodate the silence of the 2011 decree on international arbitration, the 2018-2022 programming law on justice of 23 March 2019 upset the balance by enshrining the principle of confidentiality in electronic matters for both domestic and international arbitration[85].

So, the principle of confidentiality is now enshrined in domestic arbitration (whether electronic or not) and in international electronic arbitration, but not in international non-electronic arbitration. This inconsistency must be corrected, in particular given that legal commentary is divided on the scope that should be given to the silence of the law in international matters: should it be seen as a contrast to domestic arbitration that the principle of confidentiality does not apply to international arbitration, or on the contrary that this principle is so pervasive in international matters, even if it is possible to stipulate an exception, that it does not need to be expressly stated in the Code? A symposium on this issue in 2022 failed to provide a solution[86], which shows the need to clarify positive law since it is

[84] It should be noted that English law codified this duty of disclosure at the end of the Arbitration Act 2025. On the issue, more generally, see E. Loquin, "*Vers un encadrement contractuel de l'obligation de révélation imposée à l'arbitre par l'article 1456 du code de procédure civile*" [Towards a contractual framework for the obligation to disclose imposed on the arbitrator by Article 1456 of the Code of Civil Procedure], in *Mélanges en l'honneur du professeur Hervé Le Nabasque* [Collection in honour of Professor Hervé Le Nabasque], LexisNexis, to be published in 2025.

[85] Law no. 2019-222 of 23 March 2019 on the 2018-2022 programme and judicial reform, *JORF* no. 0071 of 24 March 2019, article 4 of which, concerning electronic arbitration, both domestic and international, provides that "*Natural persons or legal entities offering, for remuneration or not, an online arbitration service are subject to obligations relating to the protection of personal data and, unless the parties agree, confidentiality. The online service provides detailed information on how the arbitration is conducted. The arbitral award may be rendered in electronic form, unless one of the parties objects*".

[86] International Arbitration Institute, "Transparency in international arbitration", *IAI Series on International Arbitration*, 9 Dec. 2022, to be published in 2025. On the issue, legal commentary is divided. For authors resisting the recognition of a principle of confidentiality in international arbitration, see: Y. Derains, "*Les nouveaux principes de procédure: confidentialité, célérité, loyauté*" [New procedural principles: confidentiality, expeditiousness, fairness], *op. cit.*, spec.

still unclear in positive law whether or not the principle of confidentiality applies in principle in international arbitration.

The working party proposes putting an end to this uncertainty and extending to international arbitration the rule already applicable to domestic arbitration, while reserving the necessary exceptions, in particular to cover investment arbitration. It is also proposed to raise this rule within the guiding principles. This elevation to the rank of guiding principles should probably not be taken as a sign of an evolution in the conception of confidentiality in French arbitration law, always conceived as a characteristic dependent on the will of the parties,[87] as suggested by the reference to the contrary will of the parties. It also recognises the superiority of the principle of publicity to which the parties can always return if they wish.

A variation of confidentiality is provided within the articles dealing with the procedure before the Court of Appeal. Article 113 provides that "*The court may, at the request of the parties or of one of them, adapt the reasoning of its decision and the modalities of its publication to the needs of the confidentiality of the arbitration*".

It will have been understood that it is no longer a question of the confidentiality of the arbitral body, but of the confidentiality of the arbitral proceedings before the national courts.

This is to allow the court of appeal to adapt the reasoning of the decision and its publication in order to ensure the protection of the confidentiality of the case which can always be submitted to the arbitral tribunal when the court of appeal is involved, for example, via the appeal against a partial award.

As shown above, respect for confidentiality is traditionally put forward as one of the reasons leading the parties to turn to arbitration. However, once the case is brought before the national courts, the principle of confidentiality is rejected in favour of the principle of publicity.

Provisions exist, which make it possible to ensure a certain degree of confidentiality of the proceedings conducted before the national courts. However, it must be noted that they are never used by the parties and it is not known whether this is due to ignorance of the applicable rules, their inadequacy or an absence of need.

no. 26; E. Loquin, "*La réforme du droit français interne et international de l 'arbitrage. Commentaire du décret n° 2011-48 du 13 janvier 2011*" [The reform of domestic French law and international arbitration law. Commentary on decree no. 2011-48 of 13 January 2011], *RTD com*., 2011, p. 255, spec. no. 92; J.-B. Racine, *Droit de l'arbitrage* [Arbitration law], PUF, coll. Themis-private right, 2016, spec. no. 665. For authors in favour, see in particular: S. Bollée, "*Le droit français de l 'arbitrage international après le décret n° 2011-48 du 13 janvier 2011*" [French international arbitration law according to decree no. 2011-48 of 13 January 2011], *Rev. crit. Dip*, 2011, p. 553, spec. no. 8; Ch. Jarrosson and J. Pellerin, "Le droit français de l 'arbitrage après le décret du 13 janvier 2011" [French arbitration law after the decree of 13 January 2011] *Rev. arb*. 2011, p. 5, spec. no. 86; Ch. Seraglini and J. Ortscheidt, *Droit de l 'arbitrage interne et international* [Arbitration law, domestic and international], LGDJ, 2nd ed., 2019, spec. no. 798; M. de Boisséson, Cl. Fouchard and J. Madesclair, *Le droit français de l'arbitrage* [French arbitration law], pref. G. Kauffmann-Kohler, LGDJ, 2023, spec. no. 641.

[87] In this respect again, French law differs from English law which, in case law, recognises an obligation of confidentiality in arbitration, as an implicit clause in the arbitration agreement. In addition, the Arbitration Act 2025 did not wish to consolidate this obligation in a text and left it to case law to define the contours.

In addition, the provisions relating to the protection of trade secrets may not be considered suitable for preserving the confidentiality of arbitration, the scope of which is broader than the concept of trade secret, as defined in Article L. 151-1 of the Commercial Code (and invoking the protection regime established by the Commercial Code presupposes a demonstration of the existence of information covered by this qualification).

It is to remove these uncertainties that a specific text is proposed to ensure adequate protection for arbitration litigation, based on the request of the parties.

This protective measure should not, however, prevent the publication of the decision and the legal grounds relating to the review of the award; confidentiality may only apply to the disputed matter submitted to the arbitral tribunal, subject to any limitations related to the protection of trade secrets.

Therefore, the extension of the possibility to request that the debates take place and that the decision be handed down *in camera* for the needs of the confidentiality of the arbitration was not retained, in favour of a mechanism allowing the adaptation of the reasoning of the decision and its publication.

Finally, as part of the consecration of the guiding principles, it is necessary to mention the **principle of proportionality** (article 14) and the **prevention of a denial of justice** (article 16) in that these constitute genuine innovations.

Article 14 is as much an incentive as a support to the arbitral tribunal. It invites the latter to "*adopt a procedure adapted to the complexity and scale of the dispute*". Faced with certain abuses that we are witnessing and the recurring criticisms that are made regarding the cost and length of arbitration, this is an invitation to be measured, on all levels: the time, the volume of the submissions, the requests for document production, the duration of the hearings, the number of witnesses to be heard and of course the cost to the parties. This text is not prescriptive ("*the court shall strive to*"), but it will allow the arbitral tribunal to rely on this to best organise the conduct of the arbitral proceedings and impose on the parties the meaning of the measure. It is a principle of acting in a measured way that is enshrined here, bringing French arbitration law into line with contemporary issues.

It is also in the light of this principle of a measured approach that it is necessary to integrate environmental issues that arbitration proceedings can no longer ignore. Arbitration must be less wasteful and show proportionality when an international study has shown that a medium-sized arbitration case generates 418,531.02 kilos of CO^2 which, in order to be off-set, would require the planting of nearly twenty thousand trees, a figure equivalent to all the trees in Central Park[88].

Article 16 on the **denial of justice** aims to give full meaning to this notion. The denial of justice is not limited here to a question of territorial jurisdiction, but introduces a new attribution to the supporting judge, who becomes the judge responsible for the prevention of the denial of justice, more widely considered. His or her role extends both materially, in the event of the impossibility of appealing to an arbitrator, and substantively, when the obtaining of an award within a reasonable timeframe is compromised. In particular, a case may be brought before this judge in the event of a serious failure by the centre for arbitration.

In addition, while it is important to maintain two separate arbitration support networks depending on whether the parties have chosen an centre for arbitration or to rely on the supporting judge, there are certain hypotheses in which the denial of justice arises precisely from the interaction with the rules of arbitration. In these cases, the supporting judge may intervene to prevent a brutal application of the rules of arbitration from leading to a denial of justice.

[88] L. Greenwood and K. A.N. Duggal, "The Green Pledge: No talk, More action", *Kluwer Arbitration Blog*, 20 March 2020.

This text finds a version in Article 33 of the Code in the very particular case of an impecunious party, which gives rise to a risk of denial of justice. It is provided that the supporting judge may "*be involved by a party for the purpose of pronouncing any measure likely to allow the implementation of the arbitration*". No truly and effectively impecunious party must be deprived of access to the arbitral tribunal.

This report on the guiding principles cannot be complete without mentioning the discussions that led the working party in relation to the introduction of a guiding principle aimed at requiring the arbitral tribunal to take into account "*human, environmental and compliance issues, as well as respect for the fundamental rights and freedoms of the parties*". This proposal gave rise to particularly lively discussions.

Some saw this as a scarecrow likely to make French arbitration law less attractive and to weaken arbitral awards, opening up cases of recourse on the pretext of bad faith, even though these values would already be taken into account under the control of domestic or international public policy.

Others felt, conversely, that such a text would have the advantage of enshrining an arbitration law connected to values not exclusively oriented towards the economy, noting furthermore that such a principle would not be redundant with the control of public policy, which occurs *ex post*, whereas this text imposes an *ex ante* responsibility and that this principle would allow a noteworthy introduction of compliance law in arbitration. They added that the promotion of such values could make it possible to display attachment to a virtuous arbitral practice.

In the state of these differences, after much hesitation, the choice was made not to include it in the draft Code, considering that the final choice was more of a legal policy decision that the working party believes it cannot itself alone decide.

Proposal 5: Consecrate guiding principles of French arbitration law.

E- The unification of arbitration litigation

The unification in question relates to two points:

a. **The unification of international arbitration litigation for the benefit of the ordinary courts**

1. Observation

The organisation of justice in France is based on a jurisdictional dualism. Since the *Inserm* decision of the Court for Jurisdictional Disputes of 17 May 2010 (no. 3754)[78], there has been a duality of jurisdiction between judicial and administrative orders regarding the review of international arbitral awards; the principle jurisdiction of the ordinary courts affirmed by the Court for Jurisdictional Disputes examining exceptions in favour of the administrative courts for certain arbitration agreements. The criterion of distribution between the two orders is not organic but is based on the fact that the contract falls under an administrative regime of public order involving control of the compliance of the international arbitration award with the mandatory rules of French public law.

The duality of competences between the judicial and administrative orders in the control of international arbitral awards has been the subject of multiple criticisms for nearly twenty years now and is difficult to understand for foreign operators who are subject to a judicial duality of which they are unaware.

Since the *Inserm* judgment, and even if there have been others since, five elements make it possible to reconsider this position and move towards one single judicial order.

In the first place, as early as 2011, the so-called *Prada* report on strengthening the legal competitiveness of Paris as a seat denounced the "*relative blurring of our international arbitration law following the recent jurisprudence of the Tribunal des Conflicts [...] which poses a substantive and procedural problem with regard to the use of arbitration by French public entities*" and noted that "*seen from abroad, in particular from economic operators [this distribution of jurisdiction] cannot eliminate a sense of complexity and uncertainty that is not conducive to the readability of French arbitration law and therefore detrimental to the choice of Paris as the seat of arbitration*"[79].

This report therefore proposed to "*entrust to the courts of law a block of exclusive jurisdiction for the examination of appeals against arbitration awards pronounced following disputes arising from the performance of contracts arising from international trade to which public entities are parties*" while providing, however, that this oversight should relate to compliance with a number of "*essential principles of French administrative law, in particular the principle of equality in public procurement, free access to public procurement, the principle of continuity of public service, the non-alienability of the public domain*", the prohibition on contravening the said principles in the awards being introduced in Article 2060 of the Civil Code[80].

[78] *T. confl.,* May 17, 2010, *Inserm*, No. 3754, *AJDA* 2010, p. 1047; *Rev. arb.* 2010, p. 275, concl. Mr. Guyomar; *Paris Journ. Intern. Arb.* 2010, p. 489, concl. M. Guyomar; *Gaz. Pal.* 23-27 May 2010, p. 27, note M. Guyomar; *JCP* 2010, 552, note Th. Clay; *D.* 2010, p. 2633, note S. Lemaire; *Rev. crit. Dip* 2010, p. 653, obs. M. Laazouzi; *JCP* 2010, p. 557, obs. E. Gaillard; *Paris Journ. Intern. Arb.* 2010, p. 1017, § 27, obs. D. Hascher and B. Castellane; *AJDA* 2010, p. 1564, obs. P. Cassia; *JDI* 2011, p. 841, note E. Loquin; *Dalloz actualités* 2010, p. 1359, obs. X. Delpech; *D.* 2010, p. 2330, obs. S. Bollée; *JCP* 2010, I, 644, § 5, obs. J. Ortscheidt; *JCP* 2010, I, 1101, § 7, obs. B. Plessix; *JCP* 2010, I, 1191, § 6, obs. Th. Clay; *D.* 2010, p. 2944, obs. Th. Clay; *Rev. arb.* 2010, p. 275, and 253, note M. Audit; *JCP* 2010, I, 886, § 9, obs. C. Nourissat; *Procedures* 2010, 274, note C. Nourissat; *Procedures* 2010, 299, obs. S. Deygas; *CAPJiA* 2010, p. 639, obs. S. Lazareff; and p. 717, note D. Foussard; and p. 877, note J. Ortscheidt; *RTD com.* 2010, p. 525, obs. E. Loquin; *LPA* 2011, No. 3 8, p. 13, obs. M. Raux; *RD imm.* 2010, p. 551, obs. S. Braconnier; *RJEP* 2010, p. 40, note E. Paris; *Annonces Seine* 13 Dec. 2010, No. 63, p. 7, obs. A. Job; *Lebanese Arbitration Rev.* 2010, No. 53, p. 9.

[79] Report on Certain Factors Strengthening the Legal Competitiveness of the Paris as a Seat of Arbitration, March 2011, p. 2.

[80] *Id*., p. 17.

This last recommendation was intended to reassure the supporters of the dualist approach, supporters of maintaining the jurisdiction of the administrative courts, who were highlighting the liberalism of the ordinary courts in France in assessing the validity of the arbitration agreement and subjective arbitrability[81], as well as a less thorough oversight of international public policy than that carried out by the administrative courts.

Secondly, one of the main arguments of the supporters of oversight by the administrative courts was that oversight by the courts of the judicial order of allegations of violation of international public policy seemed to them too light to be compatible with administrative public policy[82]. However, case law of the judicial courts has reversed this point and, with the *Belokon*[83] and *Sorelec* [84]4 judgments, has enshrined a review now so strong that some believe it goes too far. In any case, international public policy is now monitored more thoroughly by the ordinary courts.

Thirdly, during the reform of Article 2061 of the Civil Code in the context of the adoption of the so-called "21st Century Justice" act in 2016, an amendment favourable to the concentration of litigation in favour of the judiciary was filed before the Law Commission, supported by the Minister of Justice Jean-Jacques Urvoas and by the President of the Law Commission Dominique Raimbourg. Arguing the need to "*bring to an end the conflicts of jurisdiction between the administrative courts and the ordinary courts regarding certain international arbitrations*", which "*generates disorder and uncertainty, especially for international operators*" and sensitive to the fact that "*the resulting legal uncertainty harms the economic attractiveness of France*, the amendment noted that "*the ordinary courts are already in charge of almost all litigation relating to arbitration and have a specific procedure in the Code of Civil Procedure — which is not the case for the administrative court — so we may as well concentrate litigation before the ordinary courts. This made it possible to secure procedures and actors with one single court having jurisdiction, according to one single procedure*"[85]. Withdrawn for the first time, an identical amendment was presented fifteen days later in public session, this time by the rapporteur of the draft bill, *député* Jean-Michel Le Bouillonnec[86]. This was a question of supplementing via a new provision Article L. 311-11 of the Code of Judicial Organisation which confers jurisdiction on the Court of Appeal for: "*4) International arbitral awards or enforcement orders for international arbitral awards or awards handed down abroad, in any matter, in the cases and conditions provided for by Book IV of the Code of Civil Procedure*". It was simple, clear and operational.

[81] *Cass. 1st civ*., 2 May 1966, *Galakis*, No. 61-12.255; *JDI* 1966.648, note P. Level; *Rev. crit. DIP* 1967, p. 533, note B. Goldman; *D.* 1966.575, note J. Robert; *Grands arrêts de la jurisprudence française de droit international privé* [Key decisions of French case law on international private law], 5th ed., 2006, spec. no. 44, note B. Ancel and Y. Lequette.
[82] Paris, 18 Nov. 2004, *Thales*, no.2002/19606, *Rev. crit. Dip* 2006. 104, note S. Bollée; *RTD com.* 2005, p. 263, obs. E. Loquin; *RTD Eur.* 2006, p. 477, obs. J.-B. Blaise; *Cass. 1re civ*., 4 June 2008, *SNF*, no. 0615.320, *Cytec*, *Bull. civ.* I, no. 162; *Rev. arb. 2008.* 473, note I. Fadlallah; *JDI* 2008, p. 1107, note A. Mourre; *D. actu*. 6 June 2008, obs. X. Delpech; *RTD com.* 2008, p. 518, obs. E. Loquin; *RTD Eur.* 2009, p. 473, chron. L. Idot; *LPA* 2008, no. 199, note P. Duprey; *D.* 2005, p. 3050 , obs. Th. Clay; *JCP* 2008. I. 164, no. 8, obs. Ch. Seraglini, and *Actu.* 430, obs. J. Ortscheidt.
[83] *Cass. 1st civ.*, 23 March 2022, *Belokon*, No.17-17.981; *JDI* 2023, p. 149, note E. Loquin; *JCP* E 2023. 1067, obs. D. Mainguy; *Rev. arb*. 2022, p. 951, note M. Audit and S. Bollée; *JCP* 2022, 724, § 7, obs. Ch. Seraglini; *D. actu*. 10 May 2022, note V. Chantebout and 20 May 2022, obs. J. Jourdan-Marques; *D.* 2022, p. 660, obs. S. Bollée; *D.* 2022, p. 1773, obs. S. Bollée; *D.* 2022, p. 2330, obs. Th. Clay; *RTD* civ. 2022, p. 701, obs. Ph. Théry; *JDI* 2022, p. 681, obs. K. Mehtiyeva; *Gaz. Pal., May 3*, 2022, p. 11, obs. L. Larribère; *Procedures* 2022.173, note L. Weiller; *RDC* 2022, no. 3, p. 43, note Y.-M. Serinet and X. Boucobza; *Paris Journ. Intern. Arb.* 2022, p. 1125, obs. L. Achtouk-Spivak; *JCP* 2022. act. 676, note B. Remy; *Gaz. Pal*. 12 Apr. 2022, No. 12, p. 31, obs. C. Berlaud.
[84] *Cass. 1st civ*., 7 Sept. 2022, No.20-22.118, *Sorelec*, *JDI* 2023, p. 1331, note Cl. Debourg; *Rev. arb*. 2022, p. 1388 and 1251, note Ch. Jarrosson; *D.* 2022 p. 1773, obs. S. Bollée; *D.* 2022, p. 2330, obs. Th. Clay; *Procedures* 2022.253, obs. L. Weiller; *D. Actu*. 28 Oct. 2022, Obs. J. Jourdan-Marques; *Gaz. Pal*. 8 Nov. 2022, p. 11, obs. L. Larribère; *Paris Journ. Intern. Arb.* 2022, p. 1125, obs. L. Achtouk-Spivak; *JCP* E 2023. 1067, obs. D. Mainguy; *Global Arbitration Rev.* 9 Sept. 2022, obs. C. Sanderson.
[85] E. Pochon, Amendment CL74, 29 April 2016, Explanatory Memorandum.
[86] J-M Le Bouillonnec, Amendment 395, 18 May 2016

However, against all expectations, this amendment was withdrawn *in extremis* by the Minister of Justice, who was nevertheless personally in favour, for reasons which remain mysterious to this day and which cannot be reduced to what the Minister said that day in session: a "*very complicated amendment on a very sensitive subject, to which access is not spontaneous*". The President of the Law Commission therefore accepted this withdrawal, not without specifying that it was important to resolve the problem: "*Paris as a seat is, in terms of arbitration, important; it must not be allowed to be overshadowed by overly complicated litigation on appeal*"[87].

Fourthly, the recent report by the working party of the States General of Justice on economic and social justice in turn pronounced itself in favour of the creation of a "*block of jurisdiction for the ordinary courts to defend Paris to go-to seat for international arbitration*"[88].

This report points out that "*[t]he recognition of the jurisdiction of the administrative courts as the body responsible for oversight of the enforcement in matters of public contract has thrown a cloud over the uniqueness of the judicial order of the enforcement* " and underlines the stakes attached to this issue in view of the competition between the major States in this area.

Fifthly, Law no. 2024-537 of 13 June 2024 aimed at increasing corporate funding and the attractiveness of France has been perceived by some authors as already enshrining the unification of arbitral disputes before the ordinary courts[89]. Article 25 of this law does in fact grants the Paris Court of Appeal domestic jurisdiction to hear appeals for the annulment of awards handed down in international arbitration, in the cases and under the conditions provided for by the Code of Civil Procedure, and appeals against a decision that rules on an application for recognition or enforcement of an award handed down in international arbitration, in the cases and under the conditions provided for by the same Code, without excluding international awards that would concern legal entities governed by French public law. There is therefore no reason to distinguish according to some authors[90].

2. <u>Proposal</u>

It therefore seems desirable to remove all uncertainty and to assert without fear, in a logic of unification, the exclusive jurisdiction of the ordinary courts. The working party therefore considers it necessary to have an integrated, centralised and legible system for the review of international arbitral awards[91]. In addition to the fact that bringing all disputes before the Paris Court of Appeal would be an essential driver in strengthening the influence of Paris as a global arbitration venue, it would also make it possible to put an end to this incongruity which sees the administrative courts rule without relying on a codified procedure since the Code of Administrative Justice contains no

87 On this point, see Th. Clay, "*L'arbitrage, les modes alternatifs de règlement des différends et la transaction dans la loi « Justice du XXIe siècle »*" [Arbitration, alternative dispute resolution and settlements in the 'Justice for the 21st Century' Act], *JCP* 2016, no. 1295, spec. 29 to 31.

88 Report by the Committee of the States General of Justice, October 2021-April 2022, Appendix 15, pp. 76 *et seq.*

89 J. Jourdan-Marques, "*Le législateur torpille les jurisprudences INSERM et SMAC*" [The legislator torpedoes INSERM and SMAC case law], *D.* 2024. 1296.

90 Article 25 thereof amends Article L. 311-16-1 of the Code of Judicial Organisation so as to confer on the Paris Court of Appeal domestic jurisdiction to hear actions for the annulment of awards handed down in international arbitration, in the cases and under the conditions provided for by the Code of Civil Procedure, and appeals against a decision ruling on an application for recognition or enforcement of an award handed down in international arbitration, in the cases and under the conditions provided for by the Code of Civil Procedure - See to this effect *D. Actu.* 10 Oct. 2024, Obs. J. Jourdan-Marques. See also C. Nourissat, "*De la compétence exclusive de la Cour d'appel de Paris pour connaître des recours contre les awards arbitrales internationales*" [The exclusive jurisdiction of the Paris Court of Appeal to hear appeals against international arbitration awards], *JCP* 2024, 1075.

91 The reservation expressed on this point by a member of the working party speaking as a representative of the *Ordre des avocats aux Conseil d'État et à la Cour de cassation* must be noted.

provision on the oversight of arbitration awards, which creates uncertainty and unpredictability. The only existing text is currently in the Code of Civil Procedure. This observation will play more strongly in the presence of an Code of Arbitration.

The proposed centralisation consists simply of recalling the exclusive jurisdiction of the Paris Court of Appeal in international arbitration by stating that appeals are made "only" before this court (Articles 75 and 79). This clarification is to be understood in the continuation of the affirmation of this same exclusive competence within the judicial order by the "attractiveness" law of 13 June 2024. The fact that this jurisdiction would henceforth appear in the Code of Arbitration and no longer in the Code of Civil Procedure makes it possible to overcome the difficulty of articulation with the Code of Administrative Justice which had been noted by some commentators on the law of 13 June 2024[92]. The Code of Arbitration goes beyond the division between the judicial and the administrative, and this is indeed the *raison d'être* of the unification of litigation within a single jurisdictional order. In a way, the articulation takes place in two stages, first in the Code of Arbitration (Articles 75 and 79) for the determination of the competent jurisdictional order between the judicial order and the administrative order, then, in the Code of Judicial Organisation (Article L. 311-16-1), for the distribution within the judicial order, in favour of the International Commercial Chamber of the Paris Court of Appeal. Naturally, the jurisdiction set out here would also cover that of the supporting judge who would be the Presiding Judge of the Paris Court of Justice, who would also be the judge responsible for the enforcement.

However, in order to allow the ordinary courts to benefit from the guidance of the administrative judge, the suggestion was made to institute a referrals procedure for an opinion of the *Conseil d'État* for actions for annulment and appeals of enforcement orders of international arbitral awards involving a legal entity governed by French public law.

Depending on the consultations and exchanges with the administrative order, additions may be necessary to specify the conditions of arbitrability of administrative contracts relating to international trade.

The specificity of the matter, as well as the fears expressed by some concerning compliance with the principles of French administrative public order, also lead to questions about the advisability of a framework by law for the arbitrability and oversight of international awards involving public entities under French law.

It would then be a question of specifying the conditions under which these public entities could sign arbitration clauses in their international contracts and of specifying that the oversight carried out by the ordinary courts will focus on compliance with the fundamental principles of French public law. This approach also raises questions about the identification of the principles limiting the use of international arbitration and the compatibility of the approach with the New York Convention and European Union law. In particular, mention was made of the risk that the question would arise at European level of a breach of equality between States, which would result from the fact that French public entities benefit from a regime of which foreign public entities who are members of the EU would be deprived. The possibility for a French public entity to invoke its domestic law to oppose arbitration could therefore benefit other States. This difficulty results less from the amendments proposed above than from the limits on arbitrability set out in special provisions. Many States have recourse to arbitration, including States outside the European Union, which should be taken into account when drafting the text so as not to dissuade them from choosing Paris as the seat of

[92] P. Coleman, "*L'unification du contentieux de l'arbitrage international en matière administrative en faveur de la Cour d'appel de Paris ?*" [Unification of international arbitration proceedings in administrative matters in favour of the Paris Court of Appeal?], *Dr. adm.*, no. 8-9, alert 96.

arbitration.

The 2011 *Prada* report included proposals to this effect, which envisaged an amendment to Article 2060 of the Civil Code via the addition of two additional paragraphs. However, it is probably not the best legislative approach to add paragraphs in a very specific area, which rarely applies, to such an important general provision.

The working party considered that Article L. 311-6 of the Code of Administrative Justice, which is doubly obsolete, should instead be updated[93]. On the one hand, because some cases concerned transactions that are necessarily international (points 3 and 5), and, on the other hand, because others referred to articles already integrated elsewhere (2), or even already repealed... (4, 6 and 7). Some tidying up is therefore essential. The new Article L. 311-6 of the Code of Administrative Justice could therefore retain the principle of arbitrability of disputes under public international law, maintain point (1) and retain the possibility of exceptional arbitrability authorised by decree by importing paragraph 2 of Article 2060 of the Civil Code.

Finally, this must be harmonised with the five other Codes that depend on it: the Public Procurement Code (Articles L. 2197-6 and L. 2197-7), the Energy Code (Article L. 511-13), the Heritage Code (Article L. 112-26), the Code governing relations between the public and the administration (Article L. 432-1), and the Local Authorities Code (Article L. 1424-20), as well as certain specific laws. This legal work can only be fully carried out with administrative litigation specialists.

Proposal 6: Affirm the exclusive jurisdiction of the ordinary courts to hear applications for enforcement for all international arbitral awards and appeals against all international arbitral awards, including those relating to administrative law contracts signed by public bodies.

[93] Article L. 311-6 of the Code of Administrative Justice (current version):
"By way of derogation from the provisions of this Code determining the jurisdiction of courts of first instance, it is possible to have recourse to arbitration in the cases provided for by:
1. Articles L. 2197-6 and L. 2236-1 of the Public Procurement Code,
2. Article 7 of Law No. 75-596 of 9 July 1975 on various provisions relating to the reform of civil procedure;
3. Article L. 321-4 of the Research Code,
4. Articles L. 2102-6, L. 2111-14 and L. 2141-5 of the Transportation Code;
5. Article 9 of Law no. 86-972 of 19 August 1986 on various provisions relating to local authorities;
6. Article 28 of Law no. 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service,
7. Article 24 of Law no. 95-877 of 3 August 1995 transposing Directive 93/7 of 15 March 1993 of the Council of the European Communities on the return of cultural objects unlawfully removed from the territory of a Member State".

b. **The grouping and territorial specialisation of the ordinary courts, as supporting judge and appeal judge**

Among the various proposals that emerged, it was suggested that the name "arbitration judge" be substituted for that of "supporting judge". Not without hesitation, the working party finally considered that, while this proposal had some relevance and was in line with the logic of the increase in the powers of the supporting judge proposed elsewhere (*see below*), it was preferable to keep this name which has been widely adopted by practitioners. In addition, the term "arbitration judge" could contribute to confusion with the arbitrator, who is, in fact, the real arbitration judge. Finally, it had the drawback of suggesting that the arbitrator would himself or herself be supervised by the ordinary courts, which does not correspond to the French standalone conception of arbitration.

On the other hand, several proposals are made to take into account the specific nature of arbitration litigation and which contribute to its autonomy.

1. Removal of the residual jurisdiction of the Presiding Judge of the Commercial Court

As the law stands, in domestic matters, the arbitration agreement may appoint as a supporting judge, by way of exception, the presiding judge of the commercial court, except with regard to challenges for recusal which in any event fall under the jurisdiction of the presiding judge of the ordinary courts (Article 1459, paragraph 2).

This legacy of the 1980 decree seemed obsolete and had to be abandoned. The 2011 decree had already come a long way by depriving the Presiding Judge of the Commercial Court, when acting as a supporting judge, of the opportunity to rule on applications for recusal. The situation had become inextricable since this supporting judge could appoint, but not challenge. The challenge was to be made by the Presiding Judge of the Court of Justice, who himself could not reappoint if the parties had targeted the Presiding Judge of the Commercial Court. We must therefore go to the end of the road started in 2011 and put an end to this absurd situation.

In addition, by strengthening the powers of the supporting judge, in particular with regard to the denial of justice, but also by allowing him or her to render enforceable the interim decisions or procedural orders of the arbitral tribunal, it is important for this jurisdiction to specialise. The creation in the courts of specialised clusters would be appropriate in this respect, as is already the case in the Paris Court of Justice, which is an additional reason for all the powers of the support court to fall to the presiding judge of the court.

Proposal 7: Removal of the residual jurisdiction of the Presiding Judge of the Commercial Court as a supporting judge.

2. Concentration of international arbitration litigation in favour of the courts of justice of Paris

Law No. 2024-537 of 13 June 2024 made it possible to centralise, before the Paris Court of Appeal and its International Commercial Chamber, appeals against enforcement orders and actions for the annulment of international arbitral awards.

However, the unification movement is not total since, for international awards handed down in France, the enforcement judge remains the court of justice within whose jurisdiction the award was handed down, pursuant to Article 1516 of the Code of Civil Procedure. In practice, most international awards are issued in Paris, seat of the International Court of Arbitration of the International Chamber of Commerce.

In order to make our system our legible, promote its attractiveness and, in continuity with the entire project that combines all awards handed down in France, whether domestic or international, it is proposed to grant exclusive jurisdiction to the enforcement judge in Paris for all international awards handed down in France. An amendment to Article 1516 of the Code of Civil Procedure is necessary here.

Proposal 8: Grant the courts in Paris exclusive jurisdiction to hear all disputes concerning international arbitral awards.

3. Specialisation around a few jurisdictions for the handling of domestic arbitration

The judicial processing of domestic arbitration is not, as it stands, centralised in any genuine way[94].

The competent supporting judge is, in principle, the presiding judge of the court of the place designated by the arbitration agreement or, failing that, the court in whose jurisdiction the seat of the arbitral tribunal has been fixed (Art. 1459).

Similarly, exequatur is the responsibility of the court within whose jurisdiction this award was handed down (Art. 1487). The appeal and the action for annulment are brought before the Court of Appeal in whose jurisdiction the award was handed down (Art. 1497).

While it gives pride of place to proximity and contractual freedom, this system does not promote the specialisation of judges or the optimisation of the processing of applications. It is for this reason that the advisability of consolidating the arbitration proceedings before the courts in Paris could be questioned.

[94] An initial step was taken following Decree No. 2019-912 of 30 August 2019 which amended the Code of Judicial Organisation in order to establish specialist divisions within certain courts of justice, and therefore had an indirect impact on the territorial jurisdiction of the supporting judge in domestic arbitration. Thus, Article L. 211-9-3, I of the Code of Judicial Organisation states that "*When there are several courts in the same* département, *these may be specially designated by decree to hear alone, in all the jurisdictions of these courts: 1) Some of the civil matters whose list is determined by decree in the Council of State, taking into account the volume of the cases concerned and the technicality of these matters*". Article R. 211-4 I., 10) provides in this regard that in civil matters, "the courts specially designated on the basis of Article L. 211-9-3 alone hear, in all the jurisdictions of the courts of the same *département* or, under the conditions provided for in III of Article L. 211-9-3, in two *départements*, one or more of the following jurisdiction: "(...) *10) Unless otherwise stipulated by the parties and subject to the jurisdiction of the Paris Court of Justice or its President Judge in international arbitration as well as the jurisdiction of the Court of Appeal or its first Presiding Judge in appeal proceedings, claims based on Book IV of the Code of Civil Procedure*;"

The solutions to this problem are not necessarily the same depending on whether the functions envisaged consisting of providing support to the arbitral body or overseeing the award.

- **The support function:** after consultation, the working party agreed to favour a local treatment of the support function for the constitution of the arbitral tribunal. This is justified in particular by the fact that the draft predicts more frequent recourse to arbitration, including by less familiar operators and for smaller scale disputes, which encourages the retention of a support court physically close to the litigants. However, in order to strengthen the effectiveness of the system and to ensure better knowledge of the subject matter by the judges called upon to intervene, the working party decided in favour of a reorganisation by clusters. This approach would include the designation by regulation of a list of competent courts, such as Specialist Inter-Regional Jurisdictions (*JIRS*) or specialist intellectual property jurisdictions;

- **The oversight of arbitral awards:** the question of the organisation of the oversight of domestic awards is more complex. The imperative of specialisation must here be reconciled with the reality of litigation, the contours and socio-economic aspects of which remain poorly known. Account should also be taken of the possible extension of the scope of arbitrability to new sectors. Centralising all litigation in Paris could only be conceivable if the resources of the Paris courts concerned were adequately bolstered. Without prejudice to a prior study on the reality of the litigation that could better inform such a choice, the working party is, at this stage, of the opinion that a grouping by interregional clusters, with the same judicial map as that used for the support function, would be appropriate.

Proposal 9: Rationalise the judicial treatment of domestic arbitration by encouraging specialisation on the part of judges.

II. Substantial changes (with a constant structure): towards a more flexible, more protective and more effective French arbitration law

A. A more flexible arbitration law

We have recalled above the historical, judicial and legal issues having led to the establishment of a dualist arbitration regime.

The first evidence of this desire for flexibility results from the option chosen by the working party to establish common rules, which, as has already been indicated, has tended towards aligning the domestic arbitration regime with that of international arbitration, which is more flexible.

Several other proposals demonstrate this.

a. Abandon the reference to commerce

"Commerce" is referred to twice in positive arbitration law: firstly, in the definition of the internationality of arbitration (Article 1504: "*Arbitration is international where it calls into question the interests of international commerce*") and, secondly, in the application that the arbitral tribunal makes of the uses (Article 1511, paragraph 2: "*It takes into account, in all cases, commercial practice*").

However, this reference to commerce seems anachronistic, if not outdated. It belongs to a time when the arbitration clause was authorised in commercial matters and prohibited in civil matters. This regime is exactly a century old since it dates from the law of 31 December 1925.

Since the reform of Article 2061 by Law No. 2001-420 of 15 May 2001 on new economic regulations, arbitration clauses have been authorised in professional civil matters. And since the 2016 reform, it is authorised in all contracts where the parties have free disposal, some of which are far from concerning commerce.

The reference to "commerce" can therefore be dropped without causing any harm. It should be added that, in international matters, many international arbitrations have for a long time now not called into question the interests of international "commerce", the definition of which, moreover, may vary from country to country. Moreover, the "commerce" aspect of the economic criterion is never examined. As far back as 1996, Professors Fouchard, Gaillard and Goldman already considered that the commercial nature did not matter when establishing the internationality of arbitration[106], which other commentators confirm by writing that "*French case law has completely exempted itself from the reserve of commerciality*"[107]. Finally, France lifted its reservation of commerce in the New York Convention in 1989, almost 35 years ago[108].

This is even more true today where the field of arbitrability has conquered territories that are not commercial, such as conflicts between independent professionals or under real estate law, employment law, family law, consumer affairs law, etc. All these matters can fall within the scope of international arbitration without in any way calling into question the interests of international "commerce".

And finally, what about investment arbitration, international by nature, and which is not commercial? This is also the reason why we should stop contrasting "commercial" arbitration with investment arbitration. For a long time now, traditional arbitration has been more than just commercial and should therefore be called "arbitration" or "ordinary law arbitration", as opposed to investment arbitration.

For these reasons, the working party wished to eliminate the reference to commerce contained in the provisions relating to arbitration under ordinary law, in two ways, on the one hand, by replacing the expression "interests of international commerce" with that of "international economic interests", more in line with contemporary reality and positive law; and, on the other hand, by expanding the scope of the uses to be taken into account by the arbitrator when making his or her decision. While it is certain that one of the main interests of arbitration is that the arbitral tribunal may apply rules of law that are not necessarily domestic laws, and that it must take into account usages, it should not be

[106] Ph. Fouchard, E. Gaillard and B. Goldman, *Traité de l'arbitrage commercial international* [Treatise on international commercial arbitration], Litec, *1996*, spec. no. 58 *et seq.*

[107] J. El-Ahdab and D. Mainguy, *Droit de l'arbitrage. Théorie et pratique* [Arbitration law. Theory and practice]. LexisNexis, coll. Manual, 2021, Spec. No. 167. In this sense, see M. de Boisséson, Cl. Fouchard and J. Madesclair: *Le droit français de l'arbitrage* [French arbitration law]. Preface by G. Kaufmann-Kohler. LGDJ, 2023, spec. no. 259-262.

[108] Ph. Fouchard, "*La lifting par la France de sa réserve de commercialité pour l'application de la Convention de New York*" [The lifting by France of its reservation regarding commerciality for the application of the New York Convention], *Rev. arb.* 1990, p. 571.

the case that inappropriate usages apply to disputes that have nothing to do with each other. The customs of trade apply to commercial relations, not to others. There are many other uses (insurance, marine, mining) that must apply. The same applies to all uses of the procedure which are not more commercial, but which are nevertheless necessary. It is therefore both important not to limit the reference to commercial uses alone and also to avoid the cross-application of uses from one sector to another. This will be the responsibility of the arbitral tribunals. It was however necessary to put an end to the reduction to the uses of commerce alone. This is what is proposed here.

Finally, a reference to uses should be the subject of particular vigilance in certain areas, such as in family matters, because it is not a question of importing uses contrary to public policy by means of arbitration. This may be the subject of a subsequent assessment by the Chancellery.

Proposal 10: Abandon the reference to commerce, both for the definition of the internationality of arbitration and for the application of practices by the arbitral tribunal.

b. The simplification of the formal requirements applicable to the arbitration agreement

In ordinary French contract law, consensualism is a fundamental principle. While this principle is well-established with regard to the arbitration agreement in international arbitration, it is not applied in domestic arbitration, for which Article 1443 of the Code of Civil Procedure always imposes the requirement of a written document in order to be valid.

With the aim of harmonising the rules between domestic and international arbitration, a reform is envisaged to remove this requirement for written form (art. 21). In addition, practice has shown that arbitration agreements are always concluded in written form. Making this a condition of validity contrasts with the rest of contract law which, in principle, does not make written form a rule of validity and seems excessively suspicious with regard to the arbitration agreement. This suspicion could be understood at one time, but it is no longer the case today. This amendment entails that of Article R. 711-75-1 of the Commercial Code which required that the arbitration clause and the arbitration agreement concluded by the public institutions of the network of chambers of commerce and industry be in writing.

At the same time, a simplification of the substantive condition is proposed: that of the determination of the object of the arbitration agreement (Art. 20). While it is undisputed that the very purpose of the arbitration clause is to be limited to a specific dispute, to make this a condition for validity is open to discussion and does not appear to have to remain as a condition of validity, especially as it is not in international matters. Here again, therefore, the domestic regime is aligned with the international regime.

These proposals are not prejudicial to the parties, since the requirement for a written document will remain in evidence. Thus, at the time of the enforcement or the action for annulment, it will be necessary to produce the arbitration agreement or a copy thereof, which means that in practice it will be necessary in any case for the arbitration agreement to be set out in a document that does not necessarily constitute a written deed in the strict sense. In addition, in the case of natural persons deemed to be “weak parties”, the protection results from the unenforceability against them of the arbitration agreement (see below).

Proposal 11: Simplify the formal requirements applicable to the arbitration agreement.

c. Allow the arbitral tribunal to rule as in non-contentious matters?

The working party questioned the appropriateness of entrusting the arbitrator with a non-contentious assignment. This proposal does not address a question of arbitrability. It was not a question of rendering non-contentious matters eligible for arbitration as defined by French law.

More specifically, it was intended to draw inspiration from the applicable procedure "as in non-contentious matters" and to authorise the parties to submit to arbitration, even in the absence of existing and current litigation, including for latent disputes, a question or difficulty encountered in the context of their contractual relationship in the event that the parties have provided for oversight by the arbitrator.

For example, difficulties could arise from the implementation of a compliance obligation[98], or even from the oversight of the monitoring of such a measure (the "monitor" arbitrator); or to submit to arbitration what is currently entrusted to "dispute boards" such as the advance resolution of a disagreement[99].

However, after much discussion, the working party did not accept this proposal for the main reason that it blurred the office of the arbitrator who is above all a judge settling a dispute. Too often, there is still confusion between the arbitrator and the mediator, and this possibility of bringing a non-contentious matter before the arbitrator, even though it does fall within the definition of his or her mission to settle a dispute, could exacerbate this confusion. It has therefore been waived, but it is still mentioned here so that the discussion can continue.

d. The award

1. Definition of the award

It seemed appropriate to propose a definition of the award (Art. 17). This enshrines the definition resulting from case law[100].

Such a definition does not cover provisional or protective measures for two reasons. On the one hand, it seemed to the working party that it was important to distinguish between awards that definitively settle a question, even partial, even by agreement, and provisional or protective measures that, as their name indicates, are not definitive.

[98] V. J. Jourdan-Marques, "*L'arbitre, juge ex ante de la compliance?*" [The arbitrator as ex ante judge of compliance], in M.-A. Frison-Roche (ed.), *La juridictionnalisation de la Compliance*, coll. Régulations & Compliance, Journal of Regulation & Compliance (JoRC) and Dalloz, 2023, pp. 317-334.

[99] With regard to the decisions handed down by the arbitrator, these would not constitute awards since, by hypothesis, the dispute did not arise. In doing so, these decisions should not have the force of *res judicata* or give rise to an appeal to the national courts. At most, one could imagine an appeal by a party who had been denied a request to the arbitrator, made to the same arbitrator, inviting the latter modify or retract his or her decision. Only then, the procedure necessarily becoming adversarial, would a genuine dispute arise and give rise to an award, subject to appeal.

[100] Paris 25 March 1994, *Sardisud, Rev. arb.* 1994, p. 391, note Ch. Jarrosson; *RTD com.* 1994, p. 483, obs. E. Loquin.

It is in fact valid not to take part in the blurring of the boundaries between procedural orders and arbitral awards.

On the other hand, the draft proposes an innovation to allow the enforcement of these provisional or protective measures, in Article 41, since the supporting judge will now be able to render them enforceable under the conditions set out in this article. It is precisely because these decisions of the arbitral tribunal are not "awards" that it is possible to go through a declaration of enforceability by the supporting judge.

2. Signature of the award

With a view to bring the domestic and international regimes into alignment, it is the version of Article 1513 of the Code of Civil Procedure that is retained (Article 62), instead of the current Article 1480, it being observed that the absence of the "required" signatures no longer constitutes a case of opening to annulment of domestic awards since Article 1492 (6) has not been included in Article 81 of the Code of Arbitration.

Moreover, the establishment in 2011 of a different regime for signing the award depending on whether it is domestic or international, had been open to criticism. There is nothing to justify that, when a majority is impossible to find, the chairman can sign alone in international matters (Art. 1513), but not in domestic matters (Art. 1480). The international arbitration solution was a step forward, directly inspired by the ICC Rules of Arbitration (Art. 31, § 1), allowing the president of the arbitral tribunal not to be imprisoned by symmetrically recalcitrant co-arbitrators. It is time for this to be extended to domestic matters where the arbitrators are often less experienced, sometimes excessively espousing the requests of the parties by which they were designated, particularly in disputes relating to retail.

3. Electronic awards

When an award is submitted for enforcement, Articles 1487 and 1513 of the Code of Civil Procedure, in the version in force, require the "original" or a "copy" of the award for which enforcement is being requested. However, in exclusively electronic arbitrations, in which the documents have no tangible materiality, there are no originals. And if there is no original, there can be no copies. It may be argued that there are only originals or only copies, but the fact remains that the wording used in these articles, inspired by the New York Convention of 1958 (Article IV, § 1, *b*), is obsolete. The proposal was therefore made to insert an explicit reference to the electronic award, first, in Article 64, and then in Articles 68 to 70 devoted to the recognition and enforcement of awards.

Even if these last details may not be necessary, since the texts governing, on the one hand, the electronic documents and signature[101] and, on the other hand, the reliable copies[102], could suffice, it seemed preferable to set this out clearly in the Code of Arbitration. Pending the establishment of an electronic ledger, the only way to allow the filing of a natively digital award, it will be necessary for the parties to submit a digital copy.

4. Communication of the award

The regime set up by the 2011 decree refers to the notification of arbitral awards to the parties to

101 Civil Code, articles 1366 and 1367.

102 Civil Code, article 1379, and Decree No. 2016-1673 of 5 December 2016.

trigger the start of the deadlines for appeal[103]. The term "notification" has proved to be too narrow to cover all of the methods used to communicate procedural documents to the parties. Above all, it is not uncommon to see arbitral awards for which the deadlines never run, thus allowing the parties to exercise an action for annulment several years after they have been handed down.

It is therefore proposed to replace "notification" with the concept of "communication" which is broader and capable of adapting to both domestic and international or foreign arbitration, as well as electronic arbitration.

The choice to have recourse to arbitration must include the choice to recognise simpler methods of communication, even if these methods are used to calculate time limits for appeal.

The arbitral award may thus be communicated "in the forms and modalities provided for by the arbitration agreement or rules and, failing that, by any means" (Article 65). Of course, this flexibility must not be at the expense of proof of this communication which must, in the event of difficulty, be reported, by one method or another. In addition, it will be necessary to proceed by service of process with respect to a party who has not appeared at the arbitration (Art. 65, para. 2).

One issue was addressed by the working party: that of the requirement for the stipulation of remedies and time limits. As it stands, the text refrains from providing for such a requirement which is a source of complication. It seems possible not to impose such a formality by relying on the case law of the European Court of Human Rights, which has recognised that a litigant can waive the rights guaranteed by Article 6 (1) of the Convention by freely, lawfully and unequivocally consenting to an arbitration clause in commercial arbitration[104].

In addition, the European Court of Human Rights considers that it cannot be inferred from Article 6 (1) of the Convention the obligation to indicate in the decisions rendered the methods and timetable for filing an appeal against such decisions[105]. If the Court considers that the starting point of the period begins to run from the date of the notification, it does not, however, impose any condition relating to the manner in which this notification must be made, and even less so as to the formalities which it must complete.

[103] On which: J. Jourdan-Marques, "Notification et arbitrage" [Notification and arbitration], *Rev. arb*. 2023, p. 570.
[104] ECHR, October 2, 2018, No. 40575/10 and 67474/10, see in particular § 146-147. On the other hand, the Court decides that if the waiver is not free or is ambiguous, the arbitration procedure must offer all of the guarantees of Article 6.
[105] ECHR, 4 July 2000, *Société Guérin Automobiles v. the 15 States of the European Union*, No. 51717/99.

It stressed in fact that "*Article 6 of the Convention cannot be understood as including a guarantee for the parties to be notified in a particular way, for example, by registered letter*"[106].

It further considered that the failure to mention the time limits, their method of calculation and the remedies available in a contested deed is not a requirement guaranteed by Articles 6 § 1 and 13 of the Convention[107]. According to the ECHR, it is incumbent on the litigant after he has become aware of the disputed judgment to make inquiries into this himself and, if necessary, to surround himself with informed advisors[108].

However, it states that "*the right of action or appeal must be exercised from the moment when the interested parties can effectively know the judicial decisions that impose a burden on them or could affect their rights or legitimate interests [, ... the] notification, as an act of communication between the judicial body and the parties, [serving] to make known the decision of the court, as well as the grounds on which it is based, if necessary to allow the parties to appeal*"[109].

It will therefore be up to the centres for arbitration to appropriate these principles (in particular, on the fact that it is the proof of receipt that will trigger the timetable run and not proof of issuance of the communication). If necessary, in the event of difficulty, case law will draw all the consequences it deems appropriate.

Proposals 12, 13, 14 and 15: Establish a definition of the award, simplify the rules for signing the award; enshrine the electronic award in the Code and authorise its communication under the conditions defined by the parties.

B. A more protective arbitration law

As indicated in the introduction to this report, the working party has been attentive to the promotion of an arbitration law that does not sacrifice anything to the protection of the rights of the parties.

Part of this desire is the establishment of the guiding principles and particularly, for the reasons that have already been set out, that of proportionality (art. 14) but also that aimed at preventing any risk of denial of justice for those litigants who have chosen arbitration (art. 16).

Other rules can also be mentioned.

106 ECHR, judgment of 26 January 2017, *Ivanova and Ivashova v. Russia*, No. 797/14 67755/14, § 46.

107 ECHR, Decision of 4 July 2000, Société Guérin automobiles v. 15 States of the European Union, No. 51717/99.

108 ECHR, [GC], Judgment of 23 May 2016, *Avotins v. Latvia*, no. 17502/07, § 123.

109 ECHR, 25 January 2000, *Miragall Escolano and Others v. Spain*, No. 33933/96, §. 37.

a. Uneven composition of arbitral tribunals sitting in France (art. 26)

The current regime allows arbitral tribunals with an even number of arbitrators in international matters, but not in domestic matters. The legitimacy of this difference does not appear with the force of evidence since the arbitrators are in the same situation in domestic and international matters.

The working party questioned this dichotomy and whether it should be maintained. Three solutions were *a priori* possible: the *status quo*, the extension of parity in internal matters or the extension of the requirement for imparity in international matters. However, none of these solutions seemed satisfactory to the working party.

On the one hand, it appeared that an even-numbered arbitral tribunal could constitute a distortion of arbitration, which is above all justice. Parity in itself contains a risk of turning into a negotiation rather than a decision. Moreover, judicial collegiality still requires odd numbers. And the French arbitration model is rooted in the judicial justice model. On the other hand, it seemed that care should be taken not to prevent in principle the recognition or enforcement in France of awards handed down abroad by courts constituted with an even number of judges.

Following the general logic of the working party, the difference is therefore also made here between, on the one hand, arbitral awards handed down in France, whether domestic or international, which must be rendered by an uneven number of arbitrators, and, on the other hand, awards handed down abroad which may be handed down by an even number of arbitrators, under the control of the enforcement courts. It will be up to the latter to make the choice not to reject only on the sole grounds that the arbitral tribunal by which it was handed down was composed of an equal number of arbitrators.

Proposal 16: Require an uneven number of arbitrators in the composition of arbitral tribunals, except for awards handed down abroad.

b. Clarify the conditions to be met by the arbitrator (Art. 27)

As with the uneven number requirement, and for the same reason, current law distinguishes between domestic and international arbitration in terms of the conditions to be met by the arbitrator. In domestic matters, the arbitrator must be a "*natural person enjoying the full exercise of his or her rights*", whereas in international matters, the arbitrator does not even need to be a natural person. It appeared to the working party that this distinction had two major drawbacks, which have long been noted by commentators.

On the one hand, there is no *a priori* justification that the "human" qualities of the arbitrator vary according to whether he or she is involved in domestic arbitration or in international arbitration. It is still the same individual who decides and it is important that the arbitrator remains a natural person. The position of the arbitrator in relation to the dispute does not change depending on whether the matter is domestic or international.

On the other hand, the expression "*full exercise of his or her rights*", which was further expanded by the 2011 decree, is a source of ambiguity because it is not known where such full exercise ends. The reference to civil capacity, a well-known legal concept, seems more appropriate. A person lacking capacity obviously has no place in an arbitral tribunal.

It was therefore important to recall that the arbitrator must be a natural person with legal capacity, especially at a time when we are seeing draft arbitration documents generated entirely by Artificial Intelligence. As interesting as these may seem, it is not the model of arbitration that the working

party wants to defend, which remains committed to the human dimension of justice in general and arbitration in particular.

An arbitral tribunal sitting in France must therefore be composed of natural persons having legal capacity, and this requirement does not appear excessive.

However, as with the issue of numbers, the working party did not wish to exclude from recognition or enforcement in France awards potentially handed down by legal entities, or, at the very least, signed by legal entities, even if it is natural persons who, in reality, decide.

Pursuing the general logic of its *summa divisio*, the working party makes a distinction here between arbitral awards handed down in France, domestic or international, which must be handed down by tribunals composed by natural persons with legal capacity, and awards handed down abroad, which may be handed down by legal entities, under the supervision of the enforcement courts. It will also be up to the enforcement courts not to refuse such awards simply because they were handed down by a legal entity.

Proposal 17: Require that arbitrators ruling in France be natural persons with capacity, without preventing the recognition or enforcement in France of awards handed down abroad by legal entities.

c. The establishment of the contractual nature of the relationship between the arbitrator, the parties and the centre for arbitration

Even if the contractual nature of the relationship between the arbitrator, the parties and the centre for arbitration has been skilfully challenged by legal commentators[110], it is not really doubtful, has been enshrined for a long time in case law[111], and even dates back to Roman law. Moreover, it is universally accepted and already appears implicitly in the current text resulting from the 2011 decree, as Jean-Baptiste Racine immediately noted: "the figure of the arbitrator's contract is present as a watermark in certain provisions of the decree of 13 January 2011"[112]. It appeared to the majority of the members of the working party that it was time for this to be enshrined in the Code, in particular because it offers greater predictability and security. It is also a safer framework in the event that the arbitrator's third-party liability is called into question.

[110] L. Jandar, *La relation entre l'arbitre et les parties. Critique du contrat d'arbitre* [The relationship between the arbitrator and the parties. Criticism of the arbitrator's contract]. Foreword by F.-X. Train, LGDJ, coll. New Thesis Library, 2021.

[111] *Cass. 1re civ.*, 17 November 2010, CNCA-CEC, no. 09-12.352, *Bull. civ.* I, no. 233; *Rev. arb.* 2011, p. 943, note Ch. Jarrosson; *LPA* 2011, no. 225-226, p. 120, obs. L. Degos; *D.* 2010, p. 2935, obs. Th. Clay; *Dalloz actualités* 2010 , p. 2849, obs. X. Delpech; *JCP* 2010, 1236. - Name confirmed by: *Cass. 1er civ.*, 1st Feb. 2017, *Sté Getma*, no. 15-25.687, *Dalloz Actualité*, 21 Feb. 2017, obs. X. Delpech; *D.* 2017, p. 304; *ibid.* p. 2054, obs. L. d 'Avout and S. Bollée; *ibid.* p. 2559, obs. Th. Clay; *RTD civ.* 2017, p. 394, obs. H. Barbier; *ibid.* p. 421, obs. P.-Y. Gautier; *Rev. arb.* 2017, p. 493, note Ch. Jarrosson; *JCP* 2017, 339, note S. Bollée; *Procedures* 2017.68, note L. Weiller; *RTD com.* 2017, p. 849, obs. E. Loquin; *DRC* 2017, p. 299, note M. Laazouzi; *Gaz. Pal.* 18 July 2017, p. 28, obs. D. Bensaude; *Letter Ch. Arb. Intern. Paris*, Apr. 2017, no. 13, note P. Cavalieros; *Paris Journ. Intern. Arb.* 2017, p. 709, note Ph. Stoffel- Munck.

[112] J.-B. Racine, "*Le nouveau arbitre*" [The New Arbitrator], in Th. Clay (ed.), *Le nouveau droit français de l'arbitrage* [New French arbitration law], Lextenso,
2011, p. 117, spec. nos. 30 *et seq.*

This consecration follows three paths. In the first place, it is recalled that the arbitrator is bound to the parties by a contractual relationship, the one now commonly referred to as "arbitrator's contract" and it is specified that this relationship is established between, on the one hand, each arbitrator and, on the other hand, all parties (art. 26, para. 2)[113]. It is indeed important to emphasise that the arbitrator is indeed contractually bound to all of the parties and not only to the party by which he or she was appointed. This is precisely what distinguishes the arbitrator from an agent. The arbitrator acts on behalf of all the parties together, and it is to them jointly that he or she owes the award. And this legal relationship is also not unrelated to the principle of equality of the parties in the constitution of the arbitral tribunal, recalled in the draft.

Secondly, it is stated that when the arbitration is institutional, the arbitrator's contractual relationship with the parties is doubled by two other contractual relationships, on the one hand, between the centre for arbitration and the parties, commonly referred to as the contract for the organisation of the arbitration, and, on the other hand, between the centre for arbitration and the arbitrator, often referred to as the contract for arbitral cooperation (art. 22). This is nothing new in positive law because all this has been established and acquired for several decades, even if the contract for arbitral cooperation has not yet been studied in great detail.

Third, the draft settles a question that, in actual fact, rarely arises: that of which version of the arbitration rules applies when it has changed between the signature of the arbitration agreement that refers to it and the request for arbitration. According to the rules of civil law, it is in principle the old rules that may be imposed by the parties on the centre for arbitration, unless a transitional provision is inserted in the arbitration rules themselves. This situation is unsatisfactory in that, on the one hand, one might think that the new rules contain progress compared to its previous version, and, on the other hand, it makes two different arbitration rules coexist within the same centre for arbitration, with in particular scales that are not the same. This is why it was decided to adopt the most commonly accepted solution: the version of the arbitration rules in force at the time of the request for arbitration will be applicable (Art. 22 (3)). This proposal only concerns institutional arbitrations, precisely because of the contractual relations between the protagonists, and not the arbitration rules for *ad hoc* arbitrations, such as the UNCITRAL rules, the version of which referred to in the arbitration agreement is incorporated therein and can only be amended with the consent of the parties.

Proposal 18: Establish the contractual nature of the relationship between the arbitrator, the parties and the centre for arbitration and specify the version of the arbitration rules applicable.

d. The introduction of a mechanism for if a party is impecunious

The particular issue of the impecuniousness of a party caught the attention of the working party[114].

[113] Th. Clay, *L'arbitre* [The arbitrator]. Preface by Ph. Fouchard, Dalloz, coll. *Nouvelle bibliothèque. de thèses*, 2001, spec. no. 587-1079.

[114] See P. Mayer, "*Partie impécunieuse et arbitrage, lois de police et arbitrage - À propos de deux arrêts récents de la Cour d'appel de Paris rendus dans les affaires Monster Energy et Accessoires Company*" [Impecunious party and arbitration, policy laws and arbitration - On two recent decisions of the Paris Court of Appeal in the *Monster Energy* and *Accessoires Company* cases], *JDI* 2022, studies, 3, spec. no. 15.

It appears from case law that impecuniousness does not render the clause manifestly null and void or manifestly inapplicable and that it is up to those whom case law has called the "stakeholders of the arbitration" to ensure access to arbitral justice[115]. However, the question of the powers of the supporting judge to intervene in support of an impecunious party has not yet been decided.

It follows that the parties must try to have recourse to arbitration before returning to the national courts but that the intervention of the supporting judge in support of such an attempt arises. The supporting judge was however created precisely to support the parties and the arbitrators and to allow the arbitral proceedings to take place.

The working party therefore proposes devoting the involvement of the supporting judge to providing support for the arbitral proceedings in the presence of an impecunious party and to allowing such judge to impose "*any measure*" that may be useful (art. 33).

Granting such a power to the supporting judge is likely to show that French arbitration law is not indifferent to the situation of those lacking in funds, but that the objective remains at all times to allow the arbitration to take place.

It will be up to the parties and the supporting judge to give substance to this article, by showing creativity, and to grow good practices.

However, it is not a question of requiring centres for arbitration or arbitrators to work for free if they do not consent to this (this would be to impose a form of forced contract for free) but to take into account the impecuniousness of a party if this generates a genuine denial of justice[116].

Broadly speaking, these measures could be:

- Procedural: invite the parties, or even the arbitrators, to a hearing to find a solution to allow the arbitration to take place;

- Substantive: in agreement with the parties, adapt the arbitration clause to make the arbitration less expensive - one arbitrator rather than three, recourse to a less expensive institution than that stipulated; challenge any arbitrator who causes a financial freeze because of his or her refusal to perform the mission at a lower price; appoint an arbitrator who accepts financial conditions deemed reasonable by the parties; provide for terms of arbitral proceedings at a reduced cost and, in particular, the suppression of document disclosure, a limit on submissions, a reduction in the number of hearings or other expedited and economic terms.

Proposal 19: Introduce a mechanism for if a party is impecunious.

[115] *Cass. 1re civ.*, 28 Sept. 2022, *CSF*, no. 21-21.738, *D.* 2022, p. 2022, obs. N. Dissaux; *Procédures* 2022.249, note L. Weiller; *D. actu.* 28 Oct. 2022, obs. J. Jourdan-Marques; *Gaz. Pal*. 8 Nov. 2022, p. 1, obs. L. Larribère; *D.* 2022, p. 2207, obs. Th. Clay; *Cass. 1re civ*., 27 Sept. 2023, *Lavau*, no. 22-19.859, *Rev. arb.* 2023, p. 1115, note M. de Fontmichel; *JCP* 2023, 1254, § 2, obs. L. Jandard ; *D. actu*. 13 Nov. 2023, obs. J. Jourdan-Marques; *D.* 2023, 2278, obs. Th. Clay; Paris 26 Feb. 2013, *Lola Fleurs*, no. 12/12953, *Rev. arb*. 2013, p. 746, note F.-X. Train; *Paris Journ. intern. arb*. 2013, p. 479, note A. Pinna; *D.* 2013, p. 2936, obs. Th. Clay.

[116] *Cass. 1st civ.*, 13 Dec. 2017, No.16-22.131, Garoubé, *D.* 2018.18; *Paris Journ. intern. arb*. 2017. 701, note H. Barbier, and 2018. 299, obs. M. de Fontmichel; *Procedures* 2018. 50, note L. Weiller; *Rev. arb.* 2018. 70, note V. Chantebout; *Gaz. Pal.* 20 March 2018, p. 21, obs. D. Bensaude; *JCP* 2018. 8. In this case, the denial of justice, admitted in the first instance, was dismissed on appeal and before the *Cour de cassation*.

e. Removal of the option to waive remedies

A landmark innovation of the 2011 decree, the possibility of waiving actions for annulment in international matters has not had the hoped-for success since, to our knowledge, it has not been implemented once since 2011. This proves that this possibility has not appealed to practitioners.

This would not be sufficient cause for its removal, especially since it still exists in certain legal regimes, such as Swiss (*LDIP*, Art. 192), Belgian (Judicial Code, Art. 1718), Swedish (Arbitration Act, March 4, 1999, Art. 51), Tunisian (Code of Arbitration, April 26, 1993, Art. 78-6) and Peruvian (*Decreto Legislativo que norma el arbitraje* No. 1071, 1st Sept. 2008, Art. 63) law. And French law today goes further than most of these regimes by allowing a waiver in all cases, and not, as in Belgium, Switzerland or Sweden, only if neither party is located in the country concerned[117].

Despite this, it must be noted that this waiver has not generated interest. This is undoubtedly due to the formality imposed by Article 1522 which requires a special agreement, which is likely to create concern, but also because there is an indisputable danger in agreeing in advance to prohibit any form of appeal against an award.

The working party was very divided on whether this possibility of waiving the right to appeal should still be maintained. One part of the group considered that this represented a freedom that it cost nothing to maintain, adding that this was justified in particular for arbitrations having their seat in France, but which had no other points of contact with the country. In contrast, another part of the group thought that the absence of any example in nearly fifteen years of practice showed that this option did not correspond to a need and that, after all, the French arbitration model, as liberal as it is, could not allow arbitration awards handed down in France to flourish without the slightest control, in particular, on their compliance with international public policy. This was not the model that French law wanted to promote.

After long discussions, it was decided to abandon this option, while however admitting that it was useful from a theoretical point of view in 2011 because it helped to de-territorialise international arbitration located in France. This was a symbolic provision that was justified. But it is no longer as useful today, even from a symbolic point of view, especially in view of all the other provisions of the Code of Arbitration which form part of this affirmation of the autonomy of arbitration, starting with the Code itself.

The option of waiving an action for annulment therefore now seems to have more drawbacks than advantages, so that it is preferable to remove this option. This also has the advantage of bringing domestic and international arbitration into alignment on this point, which is a substantial advantage as the regimes come together.

[117] J. Burda, "*La renunciation au recours en annulation dans le nouveau droit français de l'arbitrage*" [Waiver of annulment proceedings under the new French arbitration law], *RTD com.* 2013, p. 653.

Proposal 20: Remove the right to waive actions for annulment.

f. Arbitration in family law, employment law and consumer affairs law

One of the objectives of the working party was to clarify the application of the rules of arbitration law in family law, employment law and consumer affairs law.

In family law, the concept of unavailability of rights is known to have reached a certain complexity, where the boundaries between property and non-property rights are blurring under the effect of their increasing contractualisation[118]. Recent reforms, such as the divorce by mutual consent set out in a deed produced by lawyers and registered with a notary, known as "divorce without the courts" (law on the modernisation of justice of the 21st century of 18 November 2016) and the de-judicialisation of divorce by mutual consent (the 2018-2022 scheduling law and reform for justice of 23 March 2019), transferred the management of consensual separations away from the courts[119]. This development raises one key question: do agreements between former spouses on parental authority or the place of residence of their children, negotiated with their lawyers, make these rights "available" and therefore likely to be submitted to arbitration, as family property rights are already? There are two opposing schools of commentary. On the one hand, a civil law approach that considers these rights as available as long as the parties exercise voluntary control (abandonment or adjustment), including in family matters. On the other hand, a proceduralist approach that considers, on the contrary, that these rights remain unavailable, because they are linked to exclusive jurisdiction. Their out-of-court resolution would not result from intrinsic availability, but from the absence of a dispute. Arbitration, which requires a dispute to be resolved, would therefore be excluded despite private agreements[120]. This dichotomy in terms of commentary calls for clarification, between contractual logic and protection of family public order.

In employment law, it is established that French law is marked by the *a priori* jurisdiction of the Employment Tribunal (*conseil de prud'hommes*) (Article L. 1411-4 of the Employment Code), which however does admit arbitration under certain conditions. In its previous version, resulting from the law of 18 January 1979 (known as the "*loi Boulin*"), the arbitration agreement was expressly accepted after the termination of the contract. Although abandoned in 1982[121], this exception was upheld by case law[122], confirming that the unavailability of the employee's rights ceases with the relationship of subordination.

[118] Cl. Debourg, "*La contractualisation croissant de la justice privé: l'extension du champ de l'arbitrage*" [The growing contractualisation of private justice: extending the scope of arbitration], in G. Cerqueria and A. Schreiber (eds.), *La contractualisation du droit. Approches françaises et brésiliennes* [The contractualisation of law. French and Brazilian approaches], *Société de législation comparée* ed., 2024, p. 1.

[119] D. Fenouillet and P. de Vareilles-Sommières (eds.), *La contractualisation de la famille: Economica* [Contractualisation and the family: Economica], 2001; S. Moracchini-Zeidenberg, "*La contractualisation du droit de la famille*" [The contractualisation of family law], *RTD civ.* 2016, p. *773; Dr. & patr.* 2017, no. 275, obs. H. Fulchiron.

[120] See more generally on this issue: G. Barbe and M. de Fontmichel, "*Les clauses compromissoires en droit de la famille*" [Arbitration clauses in family law], *Dr. famille* no. 4, April 2020, p. 16; G. Barbe and M. de Fontmichel, "*La pratique de l'arbitrage en matière de divorce, de séparation et de successions*" [The practice of arbitration in relation to divorce, separation and estates], *JCP* 2018, 1062; B. Mallet-Bricout, "*Arbitrage et droit de la famille*" [Arbitration and family law], *Dr. &* Patr. May 2002, p. 59.

[121] *JO Déb., AN* [Official Journal of Debates, French National Assembly], 28 Jan. 1982, p. 582, and 14 Apr. 1982, p. 1054; *JO Déb. Senate* [Official Journal of Debates, French Senate], 7 Apr. 1982, p. 934.

[122] *Cass. Soc.* [Court of Cassation, Employment Division], 5 Nov. 1984, no.82-10.511: *JCP* 1985, II, 20510, note N.S.; *Rev. arb.* 1986, p. 47 (1st esp.), note M.-A. Moreau-Bourlès.

Labinal[123] confirmed that the arbitrability of post-rupture disputes was not excluded by the public policy of protection, thus allowing arbitration provided that the contract has been broken and the dispute has arisen. Regarding arbitration clauses, case law first validated these in international contracts[124], while making them unenforceable against the employee, leaving the latter with the choice between arbitration and the ordinary courts, before this same regime was extended to domestic contracts in 2011[125]. This unenforceability is justified by public policy, the jurisdiction of the employment tribunal being qualified as "*mandatory rules*"[126], and sanctioned by a neutralisation of the clause without cancellation of the contract, in accordance with Article 2061 of the Civil Code. It is in this context that the current reform aims to enshrine a balance between the effectiveness of arbitration and employee protection, already anchored in positive law for 26 years in international matters and 14 years in domestic matters.

In consumer affairs law, there are also uncertainties as to the relationship on domestic matters of Article R. 212-2 (10) of the French Consumer Code with Article 2061 (2) of the Civil Code, because the fields of application of these articles are not coordinated, as shown above.

An improved legibility of positive law is therefore proposed in these three areas.

With regard to arbitration in family matters, the working party agreed on the need to clarify the status of existing law which allows recourse to arbitration for property-related matters and excludes this for all others. The draft text therefore recalls that it is not possible to agree to arbitration on issues relating to the status and capacity of individuals (Article 132). The national courts therefore retain sole jurisdiction for the pronouncement of a divorce.

In addition, even on property-related issues, it was considered necessary to adapt arbitration law by imposing additional guarantees and, in particular, by re-establishing the requirements in terms of form of the arbitration agreement (reinforced requirements in terms of form since this requires a written document and, for the arbitration clause, a document countersigned by lawyers - art. 134), by imposing a requirement for the training of arbitrators (art. 135), by making it mandatory for the parties to be represented by a lawyer (art. 136), by imposing the possibility of an appeal against the award (art. 138) and by adding in cases for opening for annulment the respect of the best interests of the child (Art. 139). Finally, the specificity of family issues and the experience of judges specialising in the subject matter led the working party to entrust the family courts with the enforcement in this

[123] *Paris* [Court of Appeal], 19 May 1993, *Labinal*, no.92-21091; *Rev. arb.* 1993, p. 645, note Ch. Jarrosson; *JDI* 1993, p. 957, note L. Idot; *RTD com.* 1993, p. 494, obs. J.-Cl. Dubarry and E. Loquin; *Europe* 1993, 299, and 300, obs. L. Idot; *Contracts., Conc., Conso.* 1993, 136, note L. Vogel; *LPA* 1995, no. 26, p. 7, note S. Rottman; 8 *Intern. Arb. Rep.* 7 [1993]. - On appeal dismissed, Cass. com., 14 Feb. 1995, *Europe* 1995, 146 (4th esp.), obs. L. Idot. - On this point, See J.-B. Racine, *L'arbitrage commercial international et l'ordre public* [Commercial arbitration and public policy], Preface by Ph. Fouchard. Foreword by L. Boy. *LGDJ*, coll. Private Law Library, 1999, spec. no. 42-64.

[124] *Cass. 1re civ.*, 5 January 1999, *Sté Banque Worms*, no. 96-20.202, *Bull. civ.* I, no. 1, *Bull. civ.* I, no. 2; *Rev. arb.* 1999, p. 260, note Ph. Fouchard; *Rev. crit. dip* 1999, p. 546, note D. Bureau; *JDI* 1999 p. 784, note S. Poillot Peruzzetto; *D. affaires* 1999, p. 474, note X. Delpech; *RTD com.* 1999, p. 380, obs. E. Loquin; *RGDP* 1999, p. 409, obs. M.-Cl. Rivier; *Dr. & patr.* 2000, p. 2514, obs. P. Mousseron; *RDAI* 1999, p. 823, obs. Ch. Imhoos; *Gaz. Pal.* 14 Oct. 2000, p. 10, obs. E. du Rusquec.

[125] *Cass. soc.*, 30 Nov. 2011, *Deloitte*, nos. 11-12.905 and 11-12.906, *Rev. arb.* 2012, p. 333, note M. Boucaron- Nardetto; *JCP* 2011, 1417, obs. N. Dedessus-Le-Moustier; *Procedures* 2012.42, note L. Weiller; *Procedures* 2012.75, obs. A. Bugada; *D.* 2012, p. 2997, obs. Th. Clay; *RTD com.* 2012, p. 528, obs. E. Loquin; *RTD com.* 2012, p. 351, obs. A. Constantin; *RLDA* Feb. 2012, No. 68, note F. Laronze; *Dr. soc.* 2012, p. 309, note B. Gauriau; *JCP* 2012, *act.*, 690 § 6, obs. Th. Clay; *JCP* 2012, *doctr.*, 843, § 2, obs. Ch. Seraglini; *LPA* 2012, No. 141, p. 14, obs. A. Constantin; *Dalloz actualités* 2011, 3002; *Dalloz actualités*, 3 Jan. 2012, obs. L. Perrin; *JCP* S 2012, 1049, obs. S. Brissy; *LPA* 2012, No. 89, p. 8, note. L. Posocco; *Gaz. Pal.* 2-3 March 2012, p. 29, obs. V. Orif.

[126] *Paris*, 24 March 1995: *Rev. arb.* 1996, p. 259, note J.-M. Talau. - On all these points, see J.-B. Racine, *L'arbitrage commercial international et l'ordre public* [International commercial arbitration and public policy]. Preface by Ph. Fouchard. Foreword by L. Boy. LGDJ, coll. Private Law Library, 1999, spec. no. 119-130.

matter rendered in adversarial proceedings (article 140).

The question of extending arbitration beyond property-related matters has arisen, in particular to decide questions relating to the exercise of parental authority. Some members of the group were hostile to this. Others (the majority) are rather favourable in principle, but with reservations on this prospect considering that they do not have the time to assess its scope. It should be noted in this regard that the time constraints did not allow the judges specialising in this subject matter to be heard.

For this reason, the extension to non-property related matters and "methods for the exercise of parental authority" is not formally proposed by the draft, leaving it to the Chancellery to investigate this issue further if necessary.

With regard to arbitration in employment law and consumer affairs law, the proposed measures aim to recall that although the arbitration agreement is possible in these matters, it cannot be imposed by the strong party on the so-called "weak" party, which will always have the possibility of rejecting its application and returning to the jurisdiction of the national courts (art. 143 and 145). In addition, in these matters, the competence-competence principle is rejected so that the consumer (art. 144) or the employee (art. 146) is not subject to the obligation to go through the constitution of an arbitral tribunal in order to be able to request the jurisdiction of the national courts.

Proposal 21: Codify positive law on arbitration in family matters, employment law and consumer affairs law by adding exceptional rules providing protection for family arbitration.

g. Protection of third parties

This protection of third parties is manifested in two ways:

- **By the admission of ancillary voluntary intervention before the Court of Appeal (art. 117)**

After having first considered that the voluntary intervention of a third party in the arbitration during the proceedings for the annulment of the award was admissible, if it justified a specific interest in taking action, case law nowadays decides that, unless all the parties to the arbitration agree, this voluntary intervention, for example by the guarantor or even the subrogatee, is inadmissible, on the basis, on the one hand, that Articles 328 and 554 of the Code of Civil Procedure are apparently inapplicable to the action for annulment and, on the other hand, that the intervention would be incompatible with the contractual nature of the arbitration[127].

[127] *Paris*, 10 September 2024, no. 24/00151 and no.24/00152, *D. Actu*. 10 Oct. 2024, obs. J. Jourdan-Marques; *Gaz Pal.* 22 Oct. 2024, p. 3, obs. L. Larribère; *JCP* 2024. 1334, § 9, obs. L. Jandard; *D.* 2024, p. 2207 obs. Th. Clay; *Global Arbitration Rev.* 10 Sept. 2024, obs. S. Moody; *IA Reporter* 17 Sept. 2024, obs. D. Charlotin; Paris, 22 March 2022, no. 20/05699.

An award, whether domestic or international, is nevertheless likely to prejudice the rights of third parties upon which it is enforceable. However, in the absence of any possibility of intervention in the oversight procedure initiated by one party or in any proprietary remedy, these third parties find themselves deprived of their right to an effective remedy. The intervention also promotes the consistency of the trial, in general, by avoiding possible disparities in judgments and the difficulties of implementing the award in one and the same case.

However, the voluntary intervention of a third party in the proceedings does not seem incompatible with the contractual nature of the arbitration at the stage of the review of the validity of the award itself by the judge; the contractual component of the arbitration has no impact on the latter's office when he or she rules on an action for annulment or on the appeal of an enforcement. Indeed, judges do not draw their jurisdictional power from the agreement of the parties.

If the provisions of the Code of Civil Procedure relating to intervention can be declared applicable before the judge reviewing the award, despite the absence of a formal reference made by Articles 1495 and 1527 of the Code of Civil Procedure, since there are indeed many rules drawn from this code implemented before this judge although the texts relating to arbitration do not refer to it, it is probably preferable, for the sake of clarity and therefore readability of French arbitration law, to provide for the intervention by a special text in the arbitration code.

Since neither the action for annulment nor the appeal against the enforcement order is open to third parties, these remedies can also be brought only on a principal and non-incidental basis, the voluntary intervention of the third party can only be ancillary, intended to support the claims of an applicant or the respondent in the appeal.

The proposal is for the third party to be required to demonstrate that it has a direct interest in the preservation of its own rights to support a party's claim (for annulment of the award or dismissal of the appeal against it, dismissal or obtaining enforcement). The interest must be direct, not in relation to the pleas raised, but in relation to the solution of the dispute, namely the decision requested from the court before which the case has been brought, as it will then be enshrined in the operative part of the judgment. The party must, for example, be directly affected by the contested award to support a party's claims for annulment or rejection of the application for enforcement.

An indirect interest would not be enough. A third party to the remedy or appeal against the order refusing an enforcement could not be filed on the sole pretext that such third party could be unhappy or dissatisfied with this award, or that he or she would represent collective interests offended, or on the contrary defended or enshrined, by the solution of the award.

Such a proposal must be put into perspective with the possibility for a third party to file a third party opposition against the judicial decision that rules on the award.

Proposal 22: Admit ancillary voluntary intervention before the Court of Appeal.

- **By clarifying the rules on third-party opposition (art. 129)**

The working party questioned the admission of third party opposition to the international arbitral award. Indeed, in the context of domestic arbitration, third-party opposition is now provided for in Article 1501 of the Code of Civil Procedure. This article is a repetition of former Article 1481, paragraph 2, of the same Code and lays down a logical rule: whenever

an award causes a grievance for a third party, he or she must be able to see it declared unenforceable. The provision is all the more important since the confidentiality of the arbitration prevents third parties from having knowledge of the award, as long as the effects of the latter have not occurred. Authorising the third party opposition therefore allows third parties to defend their rights.

However, third-party opposition is not currently allowed against international awards in the name of the universalist French conception of international arbitration, which states that it is not possible to apply to the national courts regarding the merits of the dispute, which the third-party opposition would lead to, since the judge will inevitably have to determine whether or not the decision is prejudicial.

Yet, these reluctances can be reversed. The third-party objection is indeed unrelated to the domestic or international nature of the arbitration: it is simply aimed at protecting the rights of third parties who were unable to participate in the arbitration proceedings and thereby exercise their right of defence. The domestic or international nature is irrelevant for the third party who is foreign to the operation. Moreover, its effects being limited territorially, this remedy does not present any risk to the effectiveness of the arbitration proceedings. In this way, although the admission of the third-party opposition in international matters would be contrary to French case law, it is supported by commentators, in particular because it would offer more guarantees[128].

The possibility for third parties to oppose, in France, an award infringing their rights would be the mark of fair justice, *inter partes* et *erga omnes*.

But there is an important difficulty: determining the rules of devolution of competence to the French courts. Should this competence be reserved for a specific jurisdiction? Indeed, unlike domestic arbitration where it is possible to identify the competent court in the absence of arbitration, the French courts do not always have jurisdiction to hear a dispute involving international economic interests. So the rule adopted for domestic arbitration cannot be extended to international arbitration. The solution that might have seemed the most appropriate would have been to concentrate the litigation within a specialist court, i.e., the Paris Court of Appeal, already exclusively competent in international matters for the supporting judge and for the action for annulment.

Despite these elements, the working party considered it preferable not to take this step, thus consolidating the jurisprudence of the *Cour de cassation*[129], without going beyond it. In order not to prejudice the consistency of the law of arbitration, and because the position of the third party is the same in domestic and international arbitration, the working party considered it preferable to remove the third party objection to the award in domestic arbitration. In other words, third parties objections to awards will no longer be allowed against arbitral awards, neither domestic nor international.

On the other hand, since it is important for third parties to retain the possibility of opposing awards, it is through court decisions ruling on awards that they will be able to act. So, whether the award is domestic or international, in accordance with the most recent case law which admitted the third party opposition to a judgment of the Court of Appeal which confirmed the enforcement of an international arbitral award handed down abroad[130], the third party opposition will be admitted against the court

[128] J. Jourdan-Marques, *Le contrôle étatique des sentences arbitrales internationales* [State control of international arbitral awards], LGDJ, coll. Private Law Library, 2017, no. 160 and no. 245 *et seq.*

[129] *Cass. 1re civ.*, 8 October 2009, *Association de défense de la bibliothèque polonaise* [Association for the Defence of the Polish Library], No 07-21.990; *Bull. civ.*
I, no. 201; *Rep. com. Dalloz*, act. Nov. 2009, p. 6, obs. X. Delpech; *D.* 2009, p. 2959 obs. Th. Clay.

[130] *Cass. 1re civ.*, 26 May 2021, *Central Bank of Libya*, no. 19-23996; *D.* 2021, p. 1034; *D. actu.*, 18 June 2021, obs. J. Jourdan-Marques; *JCP* E 2022. 1081, note D. Mainguy; *Gaz. Pal.* 22 June 2021, p. 30, obs. C. Berlaud; *DRC* 2021, no. 3, p. 52, obs. Y.-M. Serinet and X. Boucobza; *Gas. Pal*. 31 August 2021, p. 25, obs. Ph. Casson; *Procedures* 2021.225, note L. Weiller; *Rev. arb.* 2021, p. 476, note S. Akhouad-Barriga; *JCP* 2021, 1280, obs. Ch. Seraglini; *D.* 2021, p.

decisions ruling on the arbitral awards, whether it is a decision relating to an action for the annulment of an application for enforcement, provided that a specific grievance arises for the third party from this decision.

Finally, the proposal has been made to specify, so as not to refer to, an examination of the merits of the award (when this oversight is not possible for the parties), that the third party must register its appeal in the cases of initiation specified in Article 81.

Proposal 23: Make the third-party objection inadmissible against arbitral awards and admissible against court decisions relating to arbitral awards.

C- A more effective arbitration law: the arbitration body and the case before the national courts

The search for efficiency must be the purpose of any arbitration. The preliminary article of the Code reminds us of this in a timely manner. The search for effective dispute resolution is therefore consubstantial with arbitration. It also includes the principle of proportionality already mentioned (art.14).

But it is not enough to assert efficiency. It is also necessary to give the stakeholders the means to achieve this. This is the objective of the following proposals.

a. Specify the conditions for implementing the negative effect of the competence-competence principle (Article 23)

In order to strengthen the priority jurisdiction of the arbitral tribunal to rule on its own jurisdiction, it was envisaged to prohibit the national courts from verifying the manifestly null or manifestly inapplicable nature of an arbitration agreement as soon as a "request for arbitration" had been made (contrary to Article 1448 of the current Code of Civil Procedure).

This proposal was eventually rejected, in particular because of the risk of procedural abuse. In cases where the arbitration agreement is grossly inapplicable or null and void, the risk of exposing the respondent before the national courts to the obligation to set up an arbitral tribunal because their opponent has acted in haste by filing a request for arbitration even though it is obvious that the arbitral tribunal will declare itself incompetent has been considered serious enough not to retain it.

Similarly, the working party also waived the obligation on the judge to *ex officio* raise its lack of jurisdiction, thus preserving the possibility of an automatic waiver of arbitration (for example, if the respondent does not contest jurisdiction).

However, the working party considered it useful to propose a rewrite of Article 1448 of the Code of Civil Procedure to make this more readable.

The working party also took the opportunity to provide an additional clarification in order to clear up a point not currently clarified: that of the date on which the judge must assess the constitution of the arbitral tribunal, which is the moment beyond which it can no longer rule. Rather than the date of its referral as so far, it is the date on which it rules that has been chosen, which therefore leaves more time to allow the implementation of the arbitration. This solution is logical because if when the judge decides the arbitral tribunal is constituted, then there is no longer any reason for the ordinary courts to decide again.

In addition, the wording of the article which lays down the principle of competence-competence of the arbitral tribunal has been slightly modified to be in accordance with positive law: it was indeed incorrect to say that the arbitral tribunal was the "sole" judge of its jurisdiction since the judge of the appeal is also, after him. The word "alone" has therefore been replaced by "in priority", which is more in line with the state of positive law.

Finally, the last paragraph of Article 1448 prohibiting any stipulation to the contrary has been deleted.

It is known that this paragraph is not applicable in international matters. Its deletion therefore makes it possible to stipulate otherwise, including in domestic arbitration, which will allow the parties to expressly stipulate in their arbitration agreement that the judge is authorised to carry out a thorough examination of the arbitration clause, or allow the parties to set aside the priority given to the arbitrator. However, nothing calls into question the case law of the *Cour de cassation* which specified that, to be possible, such a derogation must be express and unequivocal[131].

Proposal 24: Specify the conditions for implementing the negative effect of the competence-competence principle.

b. Allow the consolidation of procedures (art. 25)

The experience of recent decades has shown that it happens, if not frequently, at least regularly, that parallel arbitral proceedings arise, with regard to related disputes, or that several requests for arbitration are made with regard to contracts having links between them.

In the absence of regulatory provisions, the privity of arbitration agreements prevails: each arbitration must prosper separately and intervention is impossible. The solutions available before the state courts in favour of the proper administration of justice are therefore not available.

Of course, more and more arbitration rules allow, under certain conditions, the joinder and submission of claims under different contracts to the same arbitral tribunal. When the parties have designated such a rule, they have given their consent and there is no prejudice to their will and the privity of the arbitration agreement.

[131] *Cass. 1re civ.*, 9 March 2022, *Allianz Global*, No.20-21.572, *Rev. arb.* 2022, p. 959, note S. Willaume; *Rev. arb.* 2022. 1306, note F.-X. Train; *JCP* 2022. 724, § 1st, obs. L. Jandar, and 347; *D. actu.* 25 March 2022, note J. Billemont, and 20 May 2022, obs. J. Jourdan-Marques; *Gaz. Pal.* 3 May 2022, p. 2, obs. L. Larribère.

However, this system may prove useful in *ad hoc* arbitration or in institutional arbitration in cases where the arbitration rules have not made any provision: in this case, the Code of Arbitration will give the centre for arbitration and the arbitral tribunal additional power. On the other hand, the parties may agree that these mechanisms will not be applicable, or will obey different conditions.

It is therefore proposed, unless the parties otherwise agree, that in the case of claims based on several contracts or in relation to several contracts, these will be brought in a single arbitral proceeding, pursuant to one or more arbitration agreements.

Two conditions must however be met: the mutual compatibility of the arbitration agreements and the existence between the claims of a link such that it is in the interest of good justice to have them investigated and judged together by the arbitral tribunal.

Proposal 25: Facilitate the consolidation of proceedings before the arbitral tribunal.

c. Allow the arbitral tribunal to liquidate the penalty for non-performance imposed thereby (art. 59)

As the law stands, the arbitral tribunal may order a penalty for non-performance but nothing is said about its ability to liquidate such penalty. This is the purpose of article 59 of the Code: the arbitral tribunal may do so "*as long as it is examining the case in question*".

This proposal does not however authorise the arbitral tribunal to continue to examine the case in order to liquidate the penalty for non-performance imposed thereby in its final award, i.e. Once it is no longer examining the case.

Proposal 26: Allow the arbitral tribunal to liquidate the penalty for non-performance imposed thereby.

d. Laying the foundations for a future arbitral class action (art. 124 *et seq.*)

The working party questioned the advisability of making it possible to organise "class action" arbitration, as is practised, in particular, in the United States. Class action before an arbitral tribunal has already been the subject of doctrinal research[132].

Without prejudice to a wider consultation and an impact study to measure the support for such a system as well as the needs for such legislation, a few articles are proposed for the Code of Arbitration with the aim of giving arbitrators a free hand to organise this procedure as best as possible, guaranteeing the necessary flexibility in the matter.

However, the time allotted to the working party meant that it was not able to examine this point in greater depth. The Ministry of Justice will take this up if it deems it appropriate.

Proposal 27: Consider the introduction of class action arbitration.

[132] P. Capelle, *L'arbitrage collectif* [Class action arbitration], pref. by Th. Clay, Dalloz, coll. New Thesis Library, 2022.

e. Strengthen the concentration of grounds and procedural fairness (art. 13)

1. Observation

Delaying tactics by parties have long been denounced in arbitration[133] and it is precisely in an attempt to defeat these that the French courts, the case law of which was enshrined in 2011 by the legislature, instituted this plea of inadmissibility.

Article 1466 of the Code of Civil Procedure thus establishes a presumption of waiver to invoke, in particular before the judge, the plea that was not raised in due time before the arbitral tribunal, because it could (with the exception of pleas based on Article 1520 (5) of the Code of Civil Procedure alleging that the recognition or enforcement of the award would violate international public policy), which cannot be waived.

Another exception has been raised by case law, in matters of jurisdiction since it has been held that "*when jurisdiction has been debated before the arbitrators, the parties are not deprived of the right to invoke on this question, before the annulment judge, new pleas in law and arguments and to adduce, for this purpose, new evidence*"[134].

For a long time now, the judge responsible for reviewing the arbitral award has had an extensive power of examination in matters of jurisdiction: not bound by the qualifications adopted by the arbitrators or the parties, this judge verifies *ex officio* all the conditions of jurisdiction of the arbitral tribunal, analysing "*all the elements of fact and law*", as it is traditionally put. Such a prerogative allows this judge to rule on points not raised during the arbitration or not decided in the award, since the arbitral jurisdiction has been discussed before the arbitrators.

This latitude feeds a recurring criticism: some see it as a conversion of the action for annulment into an appeal in disguise, unduly prolonging the arbitration process. This logic reaches its climax when the arbitral tribunal has declared itself to not have jurisdiction: if the judge considers this ground inadmissible, he then proceeds to an exhaustive review of the arbitral jurisdiction, even beyond the arguments initially invoked. Such a situation raises practical questions, in particular on the articulation between the decision of the national courts and the possible constitution of a new arbitral tribunal.

2. Proposal

The proposal being made is to rewrite Article 1466 in order to overturn the aforementioned "*Schooner*" case law to combat what Professor Loïc Cadiet described in his 1996 article, the foundation stone in this area, as "*precautionary savings*"[135], i.e. the practice by one party of keeping

[133] Y. Derains, "*Mesures dilatoires en matière d'arbitrage et moyens de l'opposition*" [Time-wasting measures in arbitration and ways of objecting to them], in *Mélanges Arthur Bülow* Carl Heymanns ed., 1981, p. 31; E. Gaillard, "*Les manoeuvres dilatoires des parties et des arbitrateurs dans l'arbitrage commercial international*" [Time-wasting maneuvres by the parties and the arbitrators in international commercial legislation], *Rev. arb.* 1990, p. 759; B. M. Cremades: "*Le devoir de diligence des protagonistes de l 'arbitrage commercial international face aux tactiques dilatoires*" [The duty of care of the protagonists of international commercial arbitration faced with time-wasting tactics], ICC Publishing, no. 598, 1998, p. 36

[134] *Civ. 1ère*,, 2 Dec. 2020, *Sté Schooner*, No. 19-15.396, *JDI* 2021, p. 1394, note M. de Fontmichel; *Rev. arb.* 2021, p. 419, note P. Duprey and M. Le Duc; *Procedures 2021.40*, note L. Weiller; *D.* 2021, p. 1832, obs. L. d 'Avout; *JCP* 2021.696 § 8, obs. L. Jandard; *D. Actu*. 24 Dec. 2020, Obs. J. Jourdan-Marques; *Gaz. Pal*. 5 Jan. 2021, p. 35, obs. C. Berlaud; *Gaz. Pal*. 9 March. 2021, p. 34, obs. D. Bensaude; *D.* 2021, p. 2272, obs. Th. Clay; *Paris Journ. Intern. Arb.* 2022, p. 1113, obs. A. Rafiq.

[135] *L. Cadiet, "La renonciation à se prévaloir des irrégularités de la procédure arbitrale"* [The decision not to make use of irregularities in the arbitral procedure], Rev. arb. *1996, p. 3.*

quiet on certain irregularities before the arbitrators only to invoke them later, should the award be unfavourable to such party.

To give importance to this rule, which participates in the implementation of a principle of procedural fairness, it is now among the guiding principles of arbitration and aims precisely at the chosen wording of the *Schooner* judgment so that it can be reversed (art. 13).

Supplementing this principle was envisaged with a rule inserted in the body of the text to specify that it is intended to call into question only the *Schooner* case law, that is to say, on the sole question of jurisdiction, so as not to call into question the oversight possible in the event of a violation of public policy (oversight that cannot be waived). Upon reflection, it was considered preferable not to "legislate" on this point, leaving it to the case law to define the scope of this rule, beyond the question of jurisdiction, the intention of the working party not being an extension to the case of openness based on public policy.

Consideration was also given for a time to detailing the *ex officio* action, the members in favour of this solution considering that this option is already made available by Article 125, paragraph 2, of the Code of Civil Procedure, by analysing the waiver or estoppel as depriving one party of its interest in relying on the argument. In favour of a clarification in Article 1466 of this faculty for the judge, it has been argued that if the nature of the plea of inadmissibility allows *ex officio* action, it is at the cost of a complex detour which requires navigating in the Code of Civil Procedure and to ruling on the nature of the waiver, which is not easily accessible, in particular to a foreign lawyer. This proposal was therefore ultimately not retained. This option could prevent the tacit waiver of the parties to the arbitration agreement, which occurs when the respondent refrains from raising an objection based on lack of jurisdiction. It will be up to case law to take this up if necessary and to provide useful developments.

Proposal 28: Strengthen the concentration of resources and procedural fairness.

f. Expansion of the powers of the supporting judge

The suggestion is made to retain the powers currently granted to the supporting judge[136] but also to go further than the 2011 decree by proposing an extension of these powers and making this a genuine jurisdiction of support for arbitration that goes beyond questions of constitution only. The supporting judge is there for the parties, either because they face an insurmountable blockage or to render enforceable a decision handed down by the arbitral tribunal in the course of arbitration or to make sure that arbitral justice can be rendered.

[136] Namely: intervene in the absence of an arbitration institution for the choice and methods of appointment of an arbitrator (arts. 1452, 1453 and 1454); not appoint an arbitrator if the clause is manifestly null or inapplicable (art. 1455); hear the dispute relating to the reason invoked by an arbitrator who withdraws (art. 1457), hear the question of the dismissal of the arbitrator (art. 1458) or the extension of the arbitration period (art. 1463).

1. The supporting judge ensures the prevention of any denial of justice (art. 16)

As already mentioned above during the review of the guiding principles, this text gives a new dimension to the supporting judge.

2. The supporting judge ensures respect for the equality and the will of the parties (art. 15)

Reference is made to the previous developments on the principle of equality of the parties.

3. The supporting judge, recourse in the event of the impecuniousness of one of the parties (art. 33)

Reference is made to previous developments on impecuniousness.

4. The supporting judge competent to rule on the issue of a deed or a document (art. 42)

As positive law currently stands, Article 1469 provides that "*[i]f a party to the arbitral proceedings intends to disclose a notarised or privately executed deed to which it was not a party or an exhibit held by a third party, it may, at the invitation of the arbitral tribunal, have this third party summoned to appear before the presiding judge of the court of justice for the purpose of obtaining the issuance of an enforcement copy or the production of the deed or document*".

It is now proposed to entrust this to the supporting judge, and no longer to the presiding judge of the court of justice. The procedure will be expedited on the merits (art. 39).

5. The supporting judge competent to grant the enforcement of a protective or provisional measure handed down by the arbitral tribunal (art. 41)

The working party proposes assigning a new power to the supporting judge, that of conferring enforcement on protective or provisional measures handed down by the arbitral tribunal[137], which involves, in principle, the emergency arbitrator, or the decision on the constitution of the *cautio judicatum solvi*.

On the other hand, the working party did not wish to entrust the supporting judge with the power to grant injunctions and in particular anti-suit injunctions to protect the jurisdiction of an arbitral tribunal sitting in France. This issue has been debated. The working party waived it for three main reasons. On the one hand, such an injunction could not be directed against proceedings brought in a European Union Member State, in accordance with the case law of the CJEU[138], which limits its

[137] See S. Bollée, "*Les pouvoirs inhérents des arbitres internationaux*" [The inherent powers of international arbitrators], *Rec. Cours Académie droit international de La Haye*, coll. Pocket, 2023.

[138] ECJ 10 Feb. 2009, *Allianz SpA v. West Tankers*, No. C-185/07, *LPA* 2009, No. 53, note S. Clavel; *D.* 2009, p. 981, note C. Kessedjian, and p. 2384, obs. S. Bollée; *JCP* 2009. II. 227, note P. Callé; *RTD civ.* 2009, p. 357, obs. Ph. Théry; *RTD com.* 2009, p. 644, obs. Ph. Delebecque; *Rev. arb.* 2009, p. 407, note S. Bollée; *Rev. crit. Dip* 2009, p. 373,

scope. On the other hand, unlike common law systems, there is no system of contempt of court in French law which makes it possible to impose heavy sanctions on a party who does not comply with a court order, which in fact limits its effectiveness. Finally, it was observed that this measure would probably be less effective abroad.

6. The supporting judge as a means of recourse to constitute a new arbitral tribunal (arts. 66, 82 and 128)

In three cases subsequent to the arbitral award, it is possible that the arbitral tribunal may need to be reconstituted and that this is not possible. It is therefore necessary to find a mechanism that allows a new tribunal to be put together. When there is no centre for arbitration, the supporting judge seems to be the best solution to act in these three situations.

This is the case, firstly, when there is a request for rectification of a material error, interpretation or failure to rule. This option is currently entrusted by Article 1485 of the Code of Civil Procedure "*to the court that would have had jurisdiction in the absence of arbitration*". The proposal is (art. 66 (3)) to entrust the supporting judge with the task of finding a solution to allow a decision to be made on this rectification.

This is the case, secondly, when there is an application for review. When the tribunal cannot be reconstituted, positive law distinguishes between domestic arbitration, for which the appeal must be brought before the court of appeal which would have had jurisdiction to hear the other appeals against the award (art. 1502 (3)), and international arbitration, for which no provision is made, which suggests that another arbitral tribunal must be constituted. The proposal is made here (art. 128, para. 2) to align the regimes of the two arbitrations and, again, to entrust this reconstitution mission to the supporting judge.

This is the case, finally, when the Court of Appeal implements the new system allowing a stay of proceedings so that the arbitral tribunal can regularise its award and thus avoid its annulment (see art. 82 below). It is once again the supporting judge who may be asked to constitute a new arbitral tribunal if the one having ruled cannot be reconstituted.

7. Provide for a possible appeal before the supporting judge in the event of a challenge refused by the centre for arbitration?

The working party discussed at length the advisability of providing for a possible appeal before the supporting judge in the event of a refusal to challenge an arbitrator by the centre for arbitration in order to allow for the renewal of the request for challenge before the supporting judge when this request was initially rejected by the centre for arbitration, within fifteen days of notification of the contested decision[139]. Provision should also be made for a right of appeal against the order handed down by the supporting judge and a purging mechanism by providing that if the party claiming recusal before the arbitration institution does not renew its application before the supporting judge, it is deemed to have consented to the decision of the centre and may not invoke the circumstances on which its application for recusal was based in support of an action for annulment.

note H. Muir Watt; *JCP* 2009. I. 148, § 3, obs. Ch. Seraglini; *JCP* 2009. I. 462, § 4, obs. J. Béguin; *DMF* 2009, p. 211, obs. R. Carrier; *JCP* 2009. I. 181, § 18, obs. F. Riem; *Gaz. Pal*., 17-18 July 2009; *Cah. arb.* 2009/2, p. 20, obs. A. Mourre and A. Vagenheim

[139] This option is provided for in the UNCITRAL Model Law on International Commercial Arbitration (article 115) and exists in the English Arbitration Act as well as in the Netherlands.

This option has the advantage of settling what is a weakness of institutional arbitration compared to *ad hoc* arbitration, even though institutional arbitration is supposed to best protect the interests of the parties resorting to arbitration. Indeed, as the law of arbitration currently stands, a circumstance invoked before a centre for arbitration in support of an application for recusal may be invoked once again before the Court of Appeal in support of an application for the annulment of an award. The arbitral edifice is therefore at risk throughout the institutional arbitration proceedings as soon as a challenge is rejected. Conversely, in the *ad hoc* arbitration, the supporting judge rules definitively on the application for recusal, without the appellant being able to invoke the disputed circumstance again in support of an action for annulment of the award. This situation can be considered paradoxical.

After reflection, it was finally decided not to retain this mechanism which, while not without interest (in particular on the purging effect it introduces), raises fears of systematic appeals to the supporting judge to challenge the appointment of an arbitrator or to request a recusal and thus a risk of paralysis of the arbitration, sometimes from the outset, especially since it would be necessary, in this case a question most often relating to the independence and impartiality of the arbitrator, to provide for an appeal against the decisions of the supporting judge, which would risk prolonging the constitution phase of the arbitral tribunal far too long.

In addition, the procedure applicable before the supporting judge is a procedure "*accelerated on the merits*", it is in principle not subject to appeal, other than in exceptional circumstances (see articles 32, 41 and 42). It would therefore be necessary to create a specific regime of recourse when the supporting judge decides on the independence and impartiality of the arbitrator, which is not satisfactory.

Finally, it was considered important to retain the two parallel arbitration support circuits depending on whether the parties chose institutional arbitration, with the centre for arbitration, or *ad hoc* arbitration, with the supporting judge. Providing for the supporting judge to intervene despite the centre for arbitration would blur this parallelism, which must only be admitted in the event of a denial of justice.

Proposal 29: Expand the jurisdiction of the supporting judge.

g. The introduction of an autonomous procedural regime before the Court of Appeal (art. 88 *et seq.*)

1. Observation

The current text provides that the appeal and the action for annulment are filed in accordance with the rules relating to the procedure in litigation matters provided for in articles 900 to 930-1 of the Code of Civil Procedure (Articles 1495 and 1527).

By not referring to the "*rules relating to the procedure in litigation matters before the Court of Appeal*" as did the previous Article 1487 of the Code of Civil Procedure**,** Article 1495 of the Code of Civil Procedure preferred to expressly refer to the articles concerned, precisely so as to avoid the application of certain provisions governing the appeal and deemed inappropriate (for example, the provisions concerning cross-appeals, the expiry of the right of appeal Article 528-1 of the Code of Civil Procedure, or the rules relating to the cancellation of the appeal which appeared in 2011 in Article 526 of the Code of Civil Procedure).

However, this method has two drawbacks. In the first place, it makes the text less accessible and less easily understood since it is necessary to have access to a Code of Civil Procedure in order to know precisely the articles concerned. Secondly, it makes the texts on arbitration dependent on the reforms to the appeal for ordinary law, without the impact on arbitration litigation always being perfectly measured when these reforms are adopted.

Faced with these pitfalls, the idea of a return to the previous Article 1487 of the Code of Civil Procedure was explored. However, this generic formula, while adding simplicity, did not resolve the risks of legal uncertainty or procedural contradictions.

For this reason, working party, pursuing the logic of autonomy of arbitration law and specific codification, in the end opted for the development of rules adapted to its judicial litigation, oriented towards efficiency and time savings.

2. Proposals

Since the working party took the view that arbitration law would gain in autonomy, resulting in the proposal of a single code, it was considered appropriate to limit, whenever possible, the references to the Code of Civil Procedure and to introduce specific rules for the examination of proceedings before the Court of Appeal, so that all of the rules applicable would be available to everyone in one single Code.

This procedure is inspired by the current texts but proposes adaptations that were considered necessary and useful to arbitration disputes.

The following in particular is therefore being proposed:

- **The establishment of a mandatory procedural timetable** by the pre-trial judge providing the parties with visibility on the closing date, the date of the oral submissions and the date on which the decision will be handed down (art. 92);

- **The removal of the possibility for the Court of Appeal to rule on the merits** (not taken over from Article 1493 of the Code of Civil Procedure): this proposal gave rise to discussions within the working party, some having considered that it could be useful to maintain this option in matters of domestic arbitration. However, for others, this appeared to be incompatible with the logic of recourse to arbitration, which is above all the choice of the parties to leave the national courts at a distance from the examination of the merits of the dispute.

- **The introduction of the possibility for the supporting judge** (art. 35) **or the court of appeal** (art. 109) to proceed with **the questioning of the arbitrator** or to take his or her statements. This is not a question of asking arbitrators about their judicial mission, but for example to hear from them

where their independence or impartiality is in question. The terms of this questioning do not expressly refer to the articles of the Code of Civil Procedure. It will be necessary to refer to this, unless the necessary adaptations are made. It was considered, for example, that it was not appropriate to refer to Article 211 which requires the witness to be heard under oath, which does not seem appropriate for the arbitrator. Naturally, the arbitrator could also proceed by written declaration.

- **The establishment of a regime of effective sanctions** for the party who, without legitimate reason, does not comply with this timetable, such as a civil law fine of a significant amount adapted to the nature of the dispute (art. 92 and 127).

It is also proposed to **consolidate in the Code of Arbitration some of the rules applicable before the International Commercial Chamber of the Paris Court of Appeal**, in application of the procedural protocol[140] that prevailed upon its creation, and in particular:

- The possibility of producing documents in English without a translation or in languages other than French and English with an unofficial and uncertified translation (art. 111);

- The possibility for the parties, their counsel, witnesses, technical experts and experts to speak in English before the judge, without translation (art. 112);

- The possibility of agreeing an exception to the provisions of Article 202 of the Code of Civil Procedure for written statements from third parties (Article 111).

The working party also considered the advisability of providing for the cancellation of the action for annulment in the event of non-enforcement of the award by the claimant, on the existing model for the appeal against enforceable judgments (art. 526 of the Code of Civil Procedure), or even the cancellation of the appeal in the event of non-enforcement of the judgment of the Court of Appeal (art. 1009-1 of the Code of Civil Procedure).

These proposals triggered discussions within the working party. Without denying their interest for avoiding time-wasting remedies, some have observed that the implementation of these provisions can be delicate when the award concerns the payment of large sums and that the risks for the debtor of not being able to recover the sums thus paid if the award were to be annulled are serious.

The risk that such a measure would lead parties to prefer to set the seat of arbitration outside France in these disputes with significant economic issues was raised as plausible.

Even if one alternative suggestion, consisting of providing for the possibility of obliging the appellant to place part of the amount levied in escrow, is possible, the working party finally chose not to take up this proposal, without prejudice to a more in-depth impact study which could be carried out later to re-evaluate this option.

On the other hand, the proposal is made to specify in article 127 mentioned above that the cancellation may be pronounced when the applicant does not justify having executed the civil law fine, under the conditions of article 1009-1 of the Code of Civil Procedure. The purpose of this proposal (art. 127, para. 3) is to avoid any ambiguity, as may have been the case with the non-execution of the order to pay the costs imposed on the basis of Article 700 of the Code of Civil Procedure.

There are indeed examples of cancellation, on the basis of Article 1009-1 of the Code of Civil

[140] Protocol on the procedure before the International Chamber of the Paris Court of Appeal, 7 February 2018: https://www.cours-appel.justice.fr/sites/default/files/2021-11/Guide%20de%20procédure%20-%20Guide%20to%20proceedings.pdf.

Procedure, of appeals for non-payment of the costs fixed under Article 700 of the same Code handed down by the Court of Appeal[141]. Decisions to the contrary have held that failure to comply with the sentence imposed solely on the basis of Article 700 of the Code of Civil Procedure cannot justify the cancellation of the appeal, because of its necessarily incidental in nature, unless it disproportionately affects the right of access to the *Cour de cassation*[142]. It seemed appropriate to expressly provide that such a cancellation will be possible when the civil law fine has not been paid.

Proposal 30: Introduce an autonomous procedural regime for the examination of remedies before the Court of Appeal.

h. Exclude appeals in domestic matters

1. Observation

In domestic arbitration, as the law currently stands, the arbitral award may be made subject to only one type of remedy according to the will of the parties: either the appeal or the action for annulment. And the system established by the text is always of the alternative type: if the appeal is open, the action for annulment is inadmissible.

The 2011 reform, however, brought about a notable change by simplifying and partially reversing the hierarchy of appeals. Previously, the principle was the appeal against the award, unless waived by the parties in the arbitration agreement, and unless the parties had entrusted the arbitral tribunal with a mission of amicable composition, in which case the award was not subject to appeal unless expressly stipulated otherwise[143]. The system resulting from the 1980 decree was therefore complex. It was improved and simplified by the 2011 decree.

Indeed, today, Article 1489 of the Code of Civil Procedure states that "*the award is not subject to appeal unless the parties wish otherwise*", henceforth making the action for annulment the principle. There are now very few appeals against awards.

2. Proposal

The solution still remains contrary to the spirit of the arbitration, since the appeal establishes a double degree of jurisdiction before the national courts while the parties specifically wished to remove the examination of their dispute from the national courts. A unification of the system of remedies by exclusion of the appeal would complete the evolution started in 2011 and make it consistent with the review of the award by the national courts.

The working party therefore proposes removing the remedy of appeal in domestic arbitration, knowing that it is already unavailable in international arbitration.

[141] *Cass. 1st civ*., Ord., 13 October 2022, *State of Libya v. Cengiz Company*, No. 21-22.978; *Cass. 1st civ*., Ord., 25 May 2023, *State of Libya v. Nurol*, No. 22-11.436,
[142] *Cass. 1st civ*., Ord., 5 October 2023, *Republic of Cyprus*, No.22-19.229; *Cass. 1st civ.*, Ord., 5 October 2023, *Santullo Group*, no. 22-18.383.
[143] On this subject, see E. Loquin, "*À la recherche d'un mystère non encore éclairci : l'interdiction de modifier l'économie du contrat, limite ultime aux pouvoirs des arbitres amiables compositeurs à l'égard du contrat*" [In search of a mystery not yet clarified: the prohibition on modifying the overall structure of the contract, ultimate limit to the powers of arbitrators in amicable composition with regard to the contract], *in Mélanges en l'honneur du professeur Loïc Cadiet*, LexisNexis, 2023, p. 927.

Moreover, there is no constitutional principle imposing a double degree of jurisdiction[144]. This is not even a general principle of law prohibiting the regulatory authority from providing for cases in which decisions are rendered in the first and last resort[145].

This proposal was nevertheless the subject of reservations within the working party. Several members defended the maintenance of the possibility of appeal, seeing this as encouraging confidence in parties reluctant to arbitrate, especially in sectors where economic and relational issues require a double degree of jurisdiction. This is the case, for example, with franchise disputes. But it finally seemed more consistent to remove the possibility of appealing against domestic awards, on the one hand, because it is unnatural to leave recourse to the courts of justice to those who have chosen to exclude it; on the other hand, because it makes it possible to align the regimes of domestic and international arbitration, which, in terms of the making available of remedies, is particularly valuable.

In any event, this deletion does not apply to arbitration in family matters (art. 138), and consideration could be given to adopting the same solution for employment or consumer affairs disputes.

Proposal 31: Exclude appeals except in exceptional cases.

D- A more effective arbitration law: the recognition and enforcement of awards

Effectiveness should not only be sought in the conduct of the arbitration. It must also be an objective to ensure the enforcement of awards. These are the purposes of the following proposals.

a. The best consideration of the recognition of awards

1. Observation

The working party noted an insufficient distinction between the recognition and enforcement of awards. This is implied in Article 1514 of the Code of Civil Procedure, which provides that "*arbitral awards are recognised or enforced in France if their existence is established by the person who relies on them and if this recognition or enforcement is not manifestly contrary to international public policy*" and in Article 1523 of the same Code, the first paragraph of which states: "*[a] decision which refuses the recognition or enforcement of an international arbitral award handed down in France is subject to appeal*". Similarly, Article R. 212-8 (2) of the Code of Judicial Organisation provides that "*[t]he court has sole jurisdiction over: [...] 2° Applications for recognition and enforcement of foreign judicial decisions and public documents as well as French or foreign arbitral awards*".

[144] *Cons. const.* 12 Feb. 2004, No. 2004-491 DC: "*the principle of double degree of jurisdiction does not, in itself, have constitutional value*".
[145] *CE*, 17 Dec. 2003, *Meyet et al*., no. 258253,

The case law, for its part, enshrines this distinction by referring to the possibility of an "*enforcement order for the purposes of recognition*"[146].

2. Proposal

The difference between the concepts of recognition and enforcement should, however, in the opinion of the working party, be better reflected in the Code.

The formalisation of the distinction between the application for recognition (in the sense of recognition of substantial effectiveness) and application for enforcement (which is generally understood to include recognition of substantial effectiveness, but which above all makes it possible to give enforceable force to the award) is thus proposed (art. 68 to 73).

However, it is not a question of calling into question the effects which are usually attached to the arbitral award, which has, from the time of its pronouncement, "*the authority of res judicata in relation to the dispute which it resolves*" (art. 17, paragraph 2), a rule moreover raised to the rank of guiding principle.

Likewise, this formalisation does not exclude the possibility of incidental recognition, which is also expressly enshrined (art. 69, final paragraph).

Similarly, the possibility of recognition of the award in the event of rejection of the action for annulment or the appeal of the enforcement order is also introduced (art. 85, para. 2). This proposal aims to draw the consequences of the option that has been admitted in case law for the judge to recognise an award without conferring enforcement in order, for example, to make a receivable enforceable in insolvency proceedings[147].

Finally, the working party considered it appropriate to supplement this panel in favour of "recognition of recognition" by the insertion of an action for unenforceability (Article 72). A consecration of this type is a novelty. Its purpose is to deprive the award of its *res judicata* and it allows anyone who doubts that an award handed down abroad can be enforced in France to anticipate the difficulty. This action is also consistent with the recognition of the *Putrabali* case law, which has the effect of neutralising the international effects of a foreign annulment of an award[148], by offering the party found against a safety valve. This is hereby provided for in France with an appeal against the award, which cannot be an action for annulment when the seat of the arbitration is abroad.

[146] *Cass. 1st civ*., 15 May 2024, *StéHydro Construction & Eng*, No. 23-11.012, *D.* 2024, p. 1735, spec. p. 1745, obs. S. Bollée; *D. actu.* 14 June 2024, obs. J. Jourdan-Marques; *Procedures* 2024.202, note L. Weiller; *JCP* 2024. 1334, § 5, obs. Ch. Seraglini; *Gaz. Pal.* 22 Oct. 2024, p. 9, obs. L. Larribère; *JCP E* 2024. 1255, note Ph. Casson; *IA Reporter* May 28, 2024, obs. D. Charlotin.

[147] *Cass. 1re civ.*, 15 May 2024, *StéHydro Construction & Eng*, no.23-11.012, *D.* 2024, p. 1735, spec. p. 1745, obs. S. Bollée; *D. actu.* 14 June 2024, obs. J. Jourdan-Marques; *Procedures* 2024. 202, note L. Weiller; *JCP* 2024. 1334, § 5, obs. Ch. Seraglini; *Gaz. Pal.* 22 Oct. 2024, p. 9, obs. L. Larribère; *JCP E* 2024. 1255, note Ph. Casson; *IA Reporter* 28 May 2024, obs. D. Charlotin; Cass. com., 12 Nov. 2020, no. 1918.849, *Bull. civ.* I; *D.* 2020, p. 2286.

[148] *Cass. 1re civ.* 29 June 2007, *Sté Putrabali*, no. 05-18.053 and no. 06-13-293, *Bull. civ.* I, No. 250 and 251; *Rev. arb.* 2007, p. 507, note. E. Gaillard; *JDI* 2007, p. 1236, note Th. Clay; *Gaz. Pal.* 21-22 Nov. 2007 p. 2, note Ph. Pinsolle; *Gaz. Pal.* 21-22 March 2008 p. 23, note Cl. Debourg; *Rev. crit. dip* 2008, p. 109, note S. Bollée; *LPA* 2007, no. 192, p. 20, note M. de Boisséson; *D*. 2007.*AJ*.1969, note X. Delpech; *D.* 2008, p. 1429, obs L. Degos; *JCP* 2006.I.216 § 7, obs. Ch. Seraglini; *RJDA* 2007.883, obs. J.-P. Ancel; *D.* 2008, p. 189, obs. Th. Clay; *RTD com.* 2007, p. 682, obs. E. Loquin; *Gaz. Pal.*, 21-22 Nov. 2007, p. 3, obs. S. Lazareff; *International Arbitration* 2007, p. 277, note Ph. Pinsolle; *Bull. ASA* 2007, p. 217, note P.-Y. Gunter; *American Review of Intern. Arb*. 2007, p. 309, note H. Smit; *Revista brasileira de arbitragem* 2008, no. 18, p. 114, note L. Weiller.

Proposal 32: Allow better consideration of the recognition of awards.

b. Strengthen the enforcement of awards

Several measures are proposed to allow a faster expiry of the appeal periods and to make it easier for the parties to enforce awards.

1. Cancellation of the suspensive effect of the appeal

The Decree of 13 January 2011 cancelled the suspensive effect on time limits of appeals against international arbitral awards but not against domestic arbitral awards.

In domestic matters, unless the award is also accompanied by provisional enforcement and is subject to enforcement, it cannot be the subject of any enforcement measure for a period of one month following its notification. Subject to the same reservations, if an appeal or an action for annulment is filed against it, the enforcement of the award is also suspended during the course of such proceedings (art. 1496).

The current solution thus has the disadvantage of allowing a party to find time-wasting methods of avoiding the enforcement of an arbitral award by filing an appeal against the award, even if it has no chance of success, for the sole purpose of delaying its enforcement.

It is certainly possible, in order to circumvent the manoeuvre, to ask the arbitral tribunal or the judge to accompany the award with provisional enforcement, which makes it possible, once an enforcement has been issued for the award, to take immediate enforcement measure, but this complicates the enforcement of the award by multiplying the procedures.

When the judgments of the ordinary courts have seen their regime modified in favour of the provisional enforcement of a right, maintaining a difference between domestic awards and international awards hardly seems justified. The domestic award appears to be the most difficult decision to enforce at first instance, which is paradoxical to say the least.

So, if the suspensive effect of the appeal in domestic matters were removed, the award would not simply be *de jure* provisionally enforceable, but immediately enforceable.

Any fears as to the irreparable consequences of immediate enforcement may be resolved by a safeguard: the possibility of adjustment or suspension, such as that recognised in international matters in Article 1526 of the Code of Civil Procedure, which it is sufficient to extend to domestic arbitration.

Removing the suspensive effect in domestic matters has several advantages. On the one hand, it accelerates the enforcement of the arbitral award since the creditor may immediately initiate enforcement measures without having to wait for the outcome of the appeal periods, or request provisional enforcement from the arbitral tribunal or the judge. On the other, it discourages purely time-wasting remedies, intended to delay the enforcement of the award in order, for example, to organise its insolvency. Finally, the regime of domestic arbitration and that of international arbitration are thus aligned.

The working party is well aware that, in counterpoint, this increases the risks of impossibility of restitution in the event of annulment of the award and risks creating parallel litigation tending to seek the responsibility of the State for the defective functioning of the public service of justice, as well as litigation for applications to halt enforcement, which would probably be more abundant than the current one for provisional enforcement.

If the Chancery deems it useful, a prior impact study could be considered to measure more precisely the implications of this paradigm shift in terms of domestic arbitration.

Proposal 33: Remove the suspensive effect of the action for annulment in domestic matters.

2. Clarify the enforcement by the first presiding judge of the Court of Appeal and the pre-trial judge

The Decree of 13 January 2011 authorised the first presiding judge and the pre-trial judge to grant the enforcement of the award to allow enforcement measures to be taken even before the Court of Appeal rules on the action for annulment (and the appeal in domestic matters) which it has been asked to examine (art. 1498 and 1521).

But nothing has been specified as to the conditions under which these judges may grant enforcement to the proceedings before them, nor further to the remedies available against their orders.

With regard to the means of appeal, these are not identical.

Under ordinary law, the orders of the first presiding judge may give rise to an appeal to set aside if this remedy is not closed off by a special text. The orders of the pre-trial judge may give rise to an application for interim relief, under certain conditions laid down by Article 9138 of the Code of Civil Procedure. However, it has already been held that the application for interim relief is not open against an order granting or rejecting the application for enforcement, even in the case of an excess of power[149].

Conversely, as it currently stands, in the absence of any text prohibiting it, an appeal to set aside may be filed against the order of the first presiding judge while the application for interim relief is not possible in relation to the orders of the pre-trial judge.

Harmonisation is therefore desirable in this complex area, which could also specify the conditions of the enforcement by the first presiding judge and the pre-trial judge, which are not by the texts issued by the decree of 2011.

On the very conditions of the enforcement, there is *a priori* no reason why they should not be those of common law of Articles 1488 (domestic arbitration) and 1514 (international arbitration) of the Code of Civil Procedure, texts which are not drafted in a strictly identical manner.

[149] *Paris* 23 Nov. 2021, no. 19/15670; Paris 29 Oct. 2019, no. 19/12047.

And since no remedy is available against the order of the pre-trial judge granting or refusing enforcement, which does not put an end to the proceedings before the Court of Appeal within the meaning of Article 913-8 of the Code of Civil Procedure, for the sake of harmonisation, it seems desirable for the orders handed down by the first presiding judge to also not be subject to appeal, especially since this appeal has no interest if the Court of Appeal rules before the *Cour de cassation* rules.

The clarification of the enforcement regime by the first presiding judge and the pre-trial judge is set out in Articles 83 and 84. It should contribute to strengthening the legibility of French arbitration law and therefore, ultimately, to increasing the attractiveness of the Paris as a seat of arbitration.

In this regard, if the case law rendered pursuant to Article 1526 of the Code of Civil Procedure, according to which "*the only legal remedy to suspend its effects is the judgment or the adjustment of the enforcement of the award itself, pronounced by the first presiding judge ruling in summary proceedings, if this enforcement is likely to seriously prejudice the rights of one of the parties*"[150] is not consolidated, the working party has no volition to call it into question.

On the other hand, the working party is in favour of aligning the regime of suspension of enforcement of awards, which is not currently the same in domestic and international matters. In the first case, the enforcement of the award may be stopped or adjusted when its enforcement "*is likely to result in manifestly excessive consequences*" (art. 1497), while in the second case it may be if it is "*likely to seriously prejudice the rights of one of the parties*" (art. 1526). The working party wished to put an end to this difference in wording, which is unjustified in arbitration and which can be explained only by the fact that the wording for domestic arbitration aligns with that of court judgments.

However, the wording of Article 1526 is doubly better: on the one hand, because it makes it possible to detach itself from that of ordinary justice and therefore from any changes in its interpretation for judgments; on the other hand, it benefits from case law interpretations going back to 2011, in a homogeneous and coherent manner, which only needs to be extended to domestic arbitration. The working party therefore adopted the formula of international arbitration, now common.

Proposal 34: Clarify the regime for enforcement by the first presiding judge and the pre-trial judge.

3. <u>Trigger the start of the time limit for appealing orders refusing recognition or enforcement, starting from the date of the decision (art. 78)</u>

Anyone seeking recognition or enforcement of an award must be in control of their proceedings. The current requirement for a notification makes the triggering of the time limits for exercising the remedy purely hypothetical. Indeed, only the applicant is informed of the refusal to grant enforcement and the opposing party is never in a position to give notice thereto of a refusal of which it is not aware.

[150] *Cass. 1ère civ.*, 15 May 2024, *Sultan of Sulu*, No. 22-21.854, *Paris Journ. Intern. Arb.* 2024, no. 4, note. J. Jourdan-Marques, forthcoming; *D. actu*. 14 June 2024, obs. J. Jourdan-Marques; *Rev. arb*. 2024, p. 708 and 887, note M. Plisonnier; *Procedures* 2024.207, note L. Weiller; *Gaz. Pal*. 22 Oct. 2024, p. 10, obs. L. Larribère; *D.* 2024. 2207, obs. Th. Clay; *JCP* 2024, 1334, § 7, obs. L. Jandard.

The proposal is therefore to have the period during which an appeal can be filed start from the decision. This contributes to the effectiveness of the arbitration.

Proposal 35: Trigger the start of the time limits for appealing orders refusing recognition or enforcement from the date of the decision.

4. Specify the consequences of the annulment of an award, or the refusal of enforcement for an award handed down abroad, on the awards related thereto (art. 86)

i. Observation

In its part devoted to arbitration, the Code of Civil Procedure does not contain any provision identical to that of Article 625, paragraph 2, of the same code, which provides that the cassation "*entails, without there being any need for a new decision, the annulment by consequence of any decision which is the continuation, application or enforcement of the annulled judgment or which is related to it by a necessary arm's length*".

So, not only does an action for annulment of a first award not entail an action for annulment of a subsequent award, but even if a partial award ruling on jurisdiction or on the principle of liability has been annulled for one of the grievances provided for by the Code of Civil Procedure, the annulment of the subsequent award does not automatically result. It is indeed necessary to refer the case back to the court responsible for the annulment to have this pronounced and sometimes to conclude at length on the consequences of the annulment of a first award.

ii. Proposals

In order to facilitate the work of the judge and the parties, improve the legibility of arbitration law, speed up procedures and for the sake of the economy of justice, it is proposed that a provision be inserted in the Code of Arbitration that overcomes this difficulty. Despite what the text does not specify, the only issue is the annulment of an award handed down in France and not the effects in France of an annulment of an award abroad.

This insertion avoids having to refer the matter to the courts with a request for the annulment of a second award by way of consequence, whereas either the causes having led to the annulment of the first award extend to the following award (e.g. lack of independence of an arbitrator), or the annulment of the award renders the following award null and void (e.g. award on the principle of compensation before the quantum award).

In principle, when the partial award is annulled in its entirety, because the arbitral tribunal could not decide the dispute, either because it wrongly declared itself competent or because it was improperly constituted, then this annulment consequently deprives the final award subsequently rendered by the same arbitral tribunal under the same conditions of any legal basis.

However, the solution is different in the case of a partial annulment of the partial award affecting only certain parties to the arbitration in a multi-party arbitration; in this situation, the final award should follow the same fate.

Similarly, the consequences are different when the annulment of the partial award is pronounced because of a defect that does not directly affect the arbitrator's power of judgment: the disregard of his mission or of the adversarial principle by the arbitral tribunal in a partial award does not necessarily affect the validity of the following awards. And when the solution of a partial award clashes with the requirements of French international public policy, this undoubtedly does not vitiate the other awards.

In this case, the annulment, in whole or in part, of the awards subsequently handed down by the arbitral tribunal is in practical terms incurred only incurred as a result if they are, with regard to the parts of the decision in question, the consequence, the application of or are attached to the cancelled award by the necessary link if dependency.

Proposal 36: Stipulate that the annulment of an award or the refusal to enforce an award handed down abroad may result in the same penalty as a consequence on the awards related thereto.

5. <u>On the abusive nature of the action for annulment</u>

With a view to unifying the rules of domestic arbitration and international arbitration that it has adopted (see above), the working party considered the cases for the opening of an action for annulment or an appeal against an enforcement (current articles 1492 and 1520).

It was first decided that it was appropriate to maintain the order of the claims filed against awards, in particular because they adopt the chronology of an arbitration.

Then, with regard to Article 1492 (6), which is not found in international arbitration, the question arose as to whether, on the one hand, its maintenance in domestic arbitration was justified and, on the other hand, whether the cases to which it relates merited annulment in all cases. This penalty may seem severe, for example when the time limit for rendering the award is exceeded by a few days.

Several solutions were considered, such as the deletion of point 6 (and the consequential deletion of Article 1483), or the addition of a statement tending to make the annulment conditional on the demonstration of a claim: "*However, the omission or inaccuracy of a statement intended to establish the regularity of the award may only result in its nullity if the party invoking it demonstrates that the omission or inaccuracy causes harm thereto. Likewise, this omission or inaccuracy cannot result in the nullity of the award if it is established, by the procedural documents or by any other means, that the legal requirements have, in fact, been observed*".

Finally, the choice was made to delete point 6 and adopt a common text for cases of annulment in domestic and international arbitration.

The formal requirements of the internal award have seemed so obvious that they are almost never lacking, and when this is the case, it either means that the document does not constitute

an arbitral award at all, or that it is an oversight that can be easily remedied without resulting in the annulment of the award.

The same applies to the reasoning of the arbitral award which is a requirement of domestic and international public policy and which must be included in the award, as set out in Article 63 of the draft Code.

Furthermore, on this point, there is no reason to treat domestic and international awards differently, as they must contain the same elementary particulars.

Finally, with regard to a very short overrun of time limit, of just a few hours or days, it was proposed within the working party that this should result in the annulment of the award only if this excess causes harm. The objective was, on the one hand, that the arbitral tribunal should not be under the threatening pressure of a party who could multiply the delaying tactics as the term approaches, and, on the other hand, that an award should not be set aside for a modest overrun.

After much hesitation, it was ultimately not what was retained by the working party which considered, on the one hand, that such a leniency — which would only concern *ad hoc* arbitration — sent the wrong signal in relation to the objective of expeditiousness in the arbitration, and that, on the other hand, the removal of the six-month period in domestic arbitration left the possibility for the parties and the arbitrators to jointly determine the duration of the arbitration, which made it even more legitimate to respect the time limit.

Moreover, it is known that the *Cour de cassation* has stated that Article 1520 of the Code of Civil Procedure "*concerns the review of the award only, which it limits in order to rule out any assessment of the arbitrator's good or bad judgment, but does not preclude the examination of the plea of inadmissibility raised in relation to the application for enforcement*"[151]. This case law, which thus opens up the oversight of any pleas of inadmissibility relating to the application for enforcement, has not been expressly consolidated. This absence should not be interpreted as the wish of the working party to call this solution into question. This point was not actually discussed.

Proposal 37: Delete the grounds for formal annulment of the awards referred to in Article 1492 (6).

6. Allow the judge to stay the proceedings in order to invite the arbitral tribunal to regularise its award to allow its recognition and/or enforcement (art. 82)

This highly innovative proposal was suggested during the hearings. It allows the Court of Appeal, hearing an appeal, to choose to stay proceedings and to return to the arbitral tribunal the task of rectifying or even completing its award, in order to avoid a possible annulment or refusal of enforcement should it remained unchanged. This provision is inspired by Belgian law (Article 1717 § 6 of the Judicial Code). The potential of this text remains to be assessed but it could be singularly important in practice to save awards that merit saving. On thinks in particular of the examination before the Court of Appeal of new grounds based on public policy not raised before the arbitral tribunal (in particular, corruption) and which would therefore authorise the Court of Appeal to refer

[151] *Cass. 1re civ.*, 13 April 2023, *Citgroup*, no.21-50.053, *D.* 2023, p. 739; *D. Actu.*, 30 May 2023, obs. J. Jourdan-Marques; *Rev. arb*. 2023, p. 671, note S. Bollée; *JCP* 2023, 1254, § 7, obs. L. Jandard; *Procedures* 2023. 174, note L. Weiller; *Gas. Pal*. 31 Oct. 2023, p. 1, obs. L. Larribère; *Paris Baby Arbitration* 2023, no. 62, p. 7, obs. L. Ettabouti; *D.* 2023, p. 2278, obs. Th. Clay; *JDI* 2024, p. 781, obs. K. Mehtiyeva.

to this tribunal the task of examining these grounds.

Such an innovation forms part of a design that is not so far removed from the practice (upstream, this time) of the Commercial Court of London known as "early neutral evaluation" or "ENE").

Proposal 38: Allow the judge to stay the proceedings in order to invite the arbitral tribunal to regularise its award to allow its recognition and/or enforcement, and avoid its annulment.

E- Clarify interactions relating to the centre for arbitration, the rules of arbitration and interactions with the national courts

Several provisions are proposed in reference to centres for arbitration and their mission.

Firstly, a change of name should be noted. The Code of Civil Procedure currently refers to the "*entity responsible for organising the arbitration*". The proposal is to replace this name with the simpler name commonly used in practice of "*centre for arbitration*" already used by the *Cour de cassation*.

This change of name should not however be seen as a sign of a desire to change the role of centres for arbitration in the sense that they would no longer be confined to the organisation of arbitration alone and could, if necessary, exercise the functions of arbitrators. To date, Article 1450 of the Code of Civil Procedure states that if the arbitration agreement designates a legal entity, it has the power to organise the arbitration only. The *Cour de cassation* recently ruled that, in matters of domestic arbitration, the supporting judge, asked to examine difficulties in the constitution of the arbitral tribunal, may appoint a natural person as arbitrator "*without being allowed to delegate this power to a legal entity*"[152].

Secondly, an incise is introduced into Article 22 of the Code of Arbitration to qualify the nature of the relations that may be established between the parties, the centre for arbitration and the arbitrators, as has been seen above.

Thirdly, new tasks are entrusted to the centres for arbitration, such as finding solutions in the event of the impecuniousness of a party (art. 33) or being placed under the responsibility of the supporting judge, guarantor regarding the denial of justice, which includes that of the failure of the centre for arbitration (art. 16).

Proposal 39: Clarify interactions relating to the centre for arbitration, the rules of arbitration and interactions with the national courts.

[152] *Cass 1re civ.*, 29 November 2023, *Sté Médiafi*, no. 22-18.630, *Bull. civ.* I; *Rev. arb.* 2024, p. 137, note J. Ortscheidt; *D. actu.* 12 Jan. 2024, obs. J. Jourdan-Marques; *JCP* 2023, 1402 and 1439, and 2024. 782, § 1st, obs. P. Giraud; *JCP E* 2023, 1097, and 2024, 1111, obs. Ph. Casson; *Procedures* 2024.36, note L. Weiller; *Gas. Pal*. 7 May 2024, p. 5, obs. L. Larribère; *JDI* 2024, p. 776, obs. K. Mehtiyeva.

III- Adjustment modifications: towards improved coherence and articulation of the instruments in force

Adjustments have appeared necessary due either to original imperfections that have appeared over time or to adjustments related to parallel legislative or regulatory developments or to developments in case law.

But especially outside of the Code of Civil Procedure, there are some one hundred articles that directly concern arbitration in twenty-three different codes, proof that arbitration is already everywhere:

1. **Civil Code**: art. 2059, 2060, 2061, 387-1- 4, 506, 1171, 1230 and 1989;
2. **Employment Code**: art. L. 1411-4, L. 1221-5, L. 1235-1, L. 1235-2, L. 1235-3, L. 12353-1**,** L. 1235-11, L. 1235-12, L. 1235-13, R. 1412-1, L. 2524-1 to L. 2524-11 and R. 2524-1 to R. 2524-22 and L. 2523-5;
3. **Code of Administrative Justice**: art. L. 311-6;
4. **Consumer Code**: art. R. 212-2;
5. **Commercial Code**: art. L. 442-1, L. 442-4, L. 721-3, L. 721-5, R. 662-3, L. 622-7 (II), para. 1, L. 631-14, L. 642-24, D. 711-75, L. 444-1A, R. 711-75-1, D. 771-75-2; R. 771-75-3 and L. 441-8;
6. **Code of Civil Enforcement Procedures**: art. L. 111-1-1, L. 111-1-2 and L. 111-1-3;
7. **Intellectual Property Code**: art. L. 331-1, L. 521-3-1, L. 615-17, L. 716-6. R. 324-10, R. 321-44, R. 214-18, L. 722-8 and L. 623-31;
8. **Rural and Maritime Fisheries Code**: art. L. 253-3, L. 521-4, L. 631-28, L. 632-1-3, R. 653-20 and R. 831-6;
9. **Energy Code**: art. L. 511-13, L. 144-6 and R. 144-8;
10. **Education Code**: art. L. 123-6, D. 123-10, D. 762-14 and D. 123-9 to D. 123-11;
11. **Research Code**: art. L. 321-4. D. 345-6, R. 326-6, R. 327-5, R. 334-6, R. 325-6, R. 322-6, R. 353-12, R. 353-7 and R. 324-6;
12. **Public Procurement Code**: art. L. 2197-6, L. 2236-1, L. 3137-4, L. 3137-5, R. 2197-25, L. 2397-3, R. 2397-4, L. 2197-7, R. 2236-1 and R. 2323-2;
13. **Heritage Code**: art. L. 112-26;
14. **Social Security Code**: art. L. 932-37;
15. **Code of relations between the public and the administration**: art. L. 432-1;
16. **Planning Code**: art. R. 321-6, R. 328-7 and R. 321-18;

17. **Postal and Electronic Communications Code**: art. R. 20-29-29;

18. **Sports Code**: art. R. 211-6, R. 114-10 and R. 114-13;

19. **General Tax Code**: art. 80 *duodecies*;

20. **General Code for Local Authorities**: art. L. 1424-20 and R. 1425-18 to R. 1425-21;

21. **Code of Judicial Organisation**: art. R. 211-4 and L. 311-16-1;

22. **Defence Code**: art. R. 3411-37;

23. **Penal Code**: art. 434-9, 435-7 and 435-9.

With the advent of the Code of Arbitration, a very careful tidying up of the provisions in force will need to be carried out[153].

The working party has already proposed bringing the provisions of several codes into line, mainly in private law, in particular because certain articles are intended to be incorporated into the Code of Arbitration. This is particularly the case for family, employment or consumer affairs conflicts which will also require adjustments to be made in the Civil Code, the Employment Code and the Consumer Affairs Code. Proposals are made here.

But beyond the Code of Arbitration, other Codes will also have to be modified. This is the case in particular with the Commercial Code, which contains a general article authorising recourse to arbitration in cases where the commercial courts have jurisdiction (Article L. 7213). This article now appears to be devoid of purpose. Coming from the Napoleonic codification in Article 631 of the original Commercial Code, while it has navigated from Code to Code to arrive at the current definitive form, Article L. 721-3 of the Commercial Code has been obsolete at least since 2016, and probably even since 2001. It was on this date that Article 2061 of the Civil Code was first amended to shift from the prohibition in principle to the validity in principle of the arbitration clause inserted in a contract signed "*on the basis of a professional activity*". Beyond the question of the validity of the arbitration clause, it was the *summa divisio* between the civil act and the commercial act that was replaced by a more operational distinction between the professional act and the non-professional act, which already seemed much more in line with contemporary private law. This new wording of Article 2061 of the Civil Code covered all the hypotheses of Article L. 721-3 of the Commercial Code, except one: disputes relating to transfers of shares in non-trading companies (*sociétés civiles*) agreed for non-professional purposes. This final limit in turn was removed in 2016 when the "Justice of the 21st century" law once again amended Article 2061 of the Civil Code to authorise arbitration clauses in all contracts for which the parties have the free disposal of rights. Regardless of the civil or commercial, professional or not, nature of the contract, the arbitration agreement is valid, but unenforceable against the weaker party. The final paragraph of Article L. 721-3 of the Commercial Code no longer serves any purpose and the regime must be solely that of ordinary law of the Code of Arbitration. The repeal of this paragraph of Article L. 721-3 of the Commercial Code is therefore now proposed.

More marginally, Articles D. 711-75 and R. 711-75-1 of the Commercial Code which concern arbitration agreements signed by public institutions from within the network of chambers of

[153] See again Th. Clay, "La codification de l'arbitrage hors le code de procédure civile" [*The codification of arbitration other than in the Civil Code*], in *Écrits sans esprit* in *Écrits sans esprit de système. Mélanges en l'honneur du professeur Philippe Delebecque* [Writings without a system. Collection in honour of Professor Philippe Delebecque], Dalloz, 2024, p. 375.

commerce and industry can also be aligned with the new common law.

In addition to the Commercial Code, the Employment Code must also advantageously be amended to bring this into line with positive law[154]. We know that an arbitration agreement is authorised to resolve employment disputes, whether in domestic or international matters. Simply, when it takes the form of an arbitration clause, it is unenforceable against the employee. This is how positive law currently stands.

The difficulty comes from the fact that a cursive reading of the Employment Code could lead one to believe something else because it is misleading. By stating that the Employment Tribunal has "exclusive jurisdiction" to hear disputes relating to employment contracts, Article L. 411-4 of the Employment Code implies that no other court may have jurisdiction. And when this same article adds that "any clause to the contrary is deemed unwritten", it could be seen as an even stronger assertion as it is thus repeated. In reality, this exclusive jurisdiction must be understood only within the judicial order, against other courts of this order, such as the commercial court or the court of justice, and the clause to the contrary referred to is the choice of venue clause which would contravene these rules of distribution within the judicial order. This is precisely what Article L. 1221-5 states ("Any clause conferring jurisdiction included in an employment contract is null and void").

This exclusivity does not work against arbitration since it has been permitted for employment contracts since 1984. For the avoidance of doubt, it should therefore be specified in this article that "Any agreement to the contrary is deemed unwritten... with the exception of the arbitration agreement and the arbitration clause featured in the employment contract". In line with this amendment, and once again for the purpose of the avoidance of doubt, Article R. 1412-1 of the same Code, concerning the territorial jurisdiction of the employment tribunal, should be amended to add that this does not apply in arbitration any more than it does in mediation.

Finally, to complete this process of clarification, it would be useful to add in the Code of Arbitration this time, on the one hand, that disputes arising from an employment contract may be the subject of an arbitration agreement (arbitration clause), but that, as for the consumer contract, the arbitration agreement is unenforceable against the employee. The latter can therefore always waive this. Therefore, the arbitration constitutes an offer made to the employee who can impose it on the employer, while the reverse is not true. And moreover, as appears in Article 144 of the draft Code, the negative effect of the competence-competence principle does not apply to disputes arising from an employment contract, in the same way as for the consumer contract.

Other codes of private law include the Rural and Maritime Fisheries Code, which provides for the use of arbitration to share trials and studies involving the use of vertebrate animals before an application for authorisation to place a plant protection product on the market. Article L. 253-3 offers the administrative authority the option to "*order the parties concerned to submit the dispute to arbitration, under the conditions provided for in part I of Book IV of the Code of Civil Procedure*". However, arbitration cannot be the product of an injunction. It is only possible if it proceeds from a free and informed choice to make use of arbitration. This injunction is therefore contrary to the very institution of arbitration. It merits being replaced by an invitation to have recourse to arbitration.

Finally, there are many provisions of the Intellectual Property Code which, with the advent of the Code of Arbitration, will have to be tidied up, which is proposed here.

In contrast, with regard to the Codes of public law already mentioned above, namely the

[154] See Th. Clay, "*L'arbitrage, justice du travail*" [Arbitration, employment justice], *in* M. Keller (ed.): *Procès du travail. Travail du procès* [Proceedings at work. Work of proceedings].
LGDJ, coll. Bibliothèque de l'Institut André Tunc, vol. 16, 2008, p. 99.

Administrative Justice Code (art. L. 311-6), the Public Procurement Code (art. L. 2197-6 and L. 2197-7), the Energy Code (art. L. 511-13), the Heritage Code (art. L. 112-26), the Code governing relations between the public and the administration (art. L. 432-1) and the Local Authorities Code (art. L. 1424-20), in-depth legislative work will have to be carried out to harmonise the various provisions between them. The working party considered that this work should be carried out in coordination with specialists in public law. It contented itself with formulating proposals that are intended solely to initiate the discussions that will have to take place on this subject.

IV- Proposals without changes to the law: towards improved promotion and knowledge of the law of arbitration

A. Promote transparency in the appointment of arbitrators by supporting judges

The working party considers that it would be relevant to promote transparency in the appointment of arbitrators by supporting judges, for the purposes of democratic oversight.

Several avenues are proposed on this point:

- The mandatory disclosure of the names of the arbitrators appointed when publishing the decisions of the supporting judges in Open Data. However, this measure should be accompanied by targeted information-providing and training work with the courts concerned - which the principle of interregional specialisation should promote;

- The publication each year of a list of the arbitrators appointed by each court on the websites of the courts of appeal concerned. This measure would promote more effective oversight because it is more visible. It could be at the origin of a positive movement as this could have a beneficial impact on other categories (e.g. experts).

B. Strengthen the training of judges called upon to deal with the subject matter:

Several avenues are suggested:

- Strengthen the training offered by the *ENM* to judges, through the creation of modules, internships or dedicated programmes;

- Create and circulated decision support tools;

- Provide digital tools (memos, outlines, library of grounds, presentation and contact details of the relevant interlocutors, etc.);

- Restore the principle of trainee judges working at the International Chamber of Commerce.

C. Promoting French arbitration law

The aim here is to consider "efficiency" or its corollary, the attractiveness of arbitration, and to consider the means of its "enhancement", i.e., an attractive presentation in terms of the stakeholders involved in the arbitration.

From this point of view, few public "measures" and no rules exist except a few lines in the work carried out by the Ministry for Europe and Foreign Affairs and the Ministry of Justice in their Strategy of Influence through Law. Objective 3 of this document quickly covers arbitration, the International Chamber of Commerce and the International Commercial Chamber of the Paris Court of Appeal as elements in the attractiveness of French law[155].

Faced with this situation, little information is available. Very little data are available: number of arbitrations having their seat in France, amounts involved, financial stakes for Paris as a forum, including fees paid in France, for arbitrations and related proceedings (enforcement, action for annulment, associated proceedings, etc.), so that numerical comparisons are difficult to establish.

The ICC is the main arbitration institution in France and it releases via its annual report a large volume of information that other arbitration centres could draw on. All this data could be centralised by the Ministry of Justice.

The "enhancement" of French arbitration law involves formal methods:

- A code of arbitration, for example, is a generally closed whole, which has the advantage of being highly accessible. Its translation into English, Arabic, Spanish, Italian, German, Russian, Chinese, etc., would be an easy means of dissemination;

[155] Ministry for Europe and Foreign Affairs, Ministry of Justice, Strategy of Influence through Law, March 2023. Objective 3: "*Strengthen French legal attractiveness. In a context of competition between legal regimes and fora, it is necessary to promote the attractiveness of France and its capital city. The legal sector is also an economic sector whose weight is estimated in France at 1.8% of GDP and which as such is a tool for the benefit of France's economic development. In this regard, the International Chambers of the Commercial Court of Paris and the Court of Appeal of Paris offer an attractive judicial system suitable for international commercial disputes. Before these chambers, the parties to the disputes may apply either French law or any other law applicable to the merits of the case, submit their documents and speak in English. This dynamic procedure allows easier access to French commercial courts and favours the choice of these courts in jurisdiction clauses. In addition, the Paris is one of the leading international arbitration venues. The International Court of Arbitration of the International Chamber of Commerce (ICC) is indeed one of the arbitration institutions most frequently designated in international contracts...)*".

- A “commentary” on the reform, which would itself be published in these languages, would undoubtedly contribute to its promotion, which would tend to involve all those involved in arbitration and in particular all those who are not part of the working party.

One first method for “domestic” promotion: provide information on the “new” arbitration law in France across the different domestic “seats” of arbitration.

A second method is “external” promotion, taking advantage of the various initiatives to promote French law: Identify the means to translate the code of arbitration into languages useful for its circulation; promote a general commentary on the code of arbitration, under the same conditions; organise one or more presentation events, in Paris and elsewhere, covering the code of arbitration; meet with foreign arbitration centres and inform them about the usefulness of choosing Paris as the seat for their arbitrations.

A third method could consist of an impact study or an annual report, quantified, on the economic influence of the presence of an active arbitral community in France and in particular in Paris, i.e. on the activity of law firms, arbitral institutions, the International Chamber of Commerce in particular, perhaps also the valuation of the work of the judges, and more broadly the economic ecosystem impacted by arbitration activity in its broadest sense: other legal professionals and participants (court officers, stenotypists, translators, couriers, etc., “Delos” type centres, etc.), as well as hotel, catering, transport, various entertainment activities. Arbitration venues such as London, Hong Kong or Singapore regularly highlight this economic component of arbitration law, in particular to facilitate politically the adoption of reforms and the defence of a legislative, regulatory and structural framework favourable to arbitration. This would make it possible to continue the work of the 2011 *Prada* report in order to update all the economic data.

The following proposals are made:

a. “Domestic” promotion: communicate on the “new” arbitration law in France across the different domestic “seats” of arbitration;

b. “External” promotion building on the various initiatives aimed at promoting French law:

    1. Identify ways to translate the code of arbitration into languages useful for its circulation;

    2. Promote general comments on the code of arbitration, under the same conditions;

    3. Organise one or more presentation events, in Paris and elsewhere, in relation to the code of arbitration;

    4. Meet with foreign centres for arbitration and inform them about the usefulness of establishing Paris as the seat for their arbitrations.

c. Compile an impact study or an annual report, quantified, on the economic influence of the presence of an active arbitration community in France (model of arbitration venues such as London, Hong Kong or Singapore).

d. Publicise the quality of arbitration training in French universities that offer multiple courses, in French and English, at all levels of study, with different formats, in initial training or continuing professional development. The offer of training in arbitration, especially in the universities of the Île-de-France region, is unparalleled on a global scale.

Proposal 40: Take measures to encourage the improved promotion and knowledge of French arbitration law

CODE OF ARBITRATION

BOOK ONE - General provisions

Preliminary article :

Arbitration is a jurisdictional method of dispute resolution. It is international when the dispute involves international economic interests.

Arbitration is based on the common will of the parties, the independence and impartiality of the arbitrators, the requirement for the proper administration of justice and the search for effective dispute resolution.

Part I. Guiding principles

Chapter I. The arbitration agreement

Article 1

Any person or entity may agree to submit to arbitration those rights of which he or she may freely dispose.

Article 2

The arbitration agreement is autonomous from the contract in which it is stipulated. It is not impacted should the contract be ineffective.

The existence and effectiveness of the arbitration agreement are assessed in the light of the common will of the parties.

In international arbitration, the existence and effectiveness of the arbitration agreement are assessed without necessary reference to any national law, subject to respect for international public policy.

Article 3

In international arbitration, no party may invoke their domestic law to challenge the arbitrability of the dispute or their capacity to be a party to an arbitration to which he or she has consented.

Article 4

The arbitration agreement must be enforced in good faith.

Article 5

The arbitration agreement is interpreted in such a way as to ensure its useful effect.

Chapter II. The arbitral tribunal

Article 6

The arbitrator must be and remain independent and impartial.

Article 7

The arbitral tribunal has primary jurisdiction to rule on disputes relating to its own jurisdiction.

Chapter III. Arbitration proceedings

Article 8

The parties and the arbitrators must act expeditiously and faithfully in the conduct of the proceedings.

Article 9

The arbitral tribunal settles the dispute in accordance with the rules of law chosen by the parties or, otherwise, in accordance with those it deems appropriate.

The arbitral tribunal takes usages into account.

Article 10

The parties may entrust the arbitral tribunal with the task of ruling in amicable composition.

Article 11

The arbitral tribunal must under all circumstances and whatever the procedure chosen observe and enforce observance of the adversarial principle. It guarantees compliance with the principle of equality between the parties.

Article 12

Unless otherwise provided or agreed by the parties, the arbitration is subject to the principle of confidentiality.

Article 13

Any party which knowingly and without just cause fails during the course of the arbitration proceedings to invoke any irregularity, complaint or grounds in a timely manner will be deemed to have waived its right to do so.

Article 14

The arbitral tribunal endeavours to adopt a procedure adapted to the complexity and value of the dispute.

Article 15

The centre for arbitration or, otherwise, the supporting judge guarantee the effectiveness of the volition of the parties to have recourse to arbitration.

They ensure compliance with the principle of equality of the parties in the appointment of arbitrators, unless the parties have waived this either expressly or tacitly after the dispute first arose.

Article 16

The supporting judge ensures against any risk of denial of justice.

Chapter IV. The arbitral award

Article 17

The arbitral award is the act of the arbitral tribunal which settles on a definitive basis, in whole or in part, the dispute submitted to it, whether on the merits, on jurisdiction or on a procedural aspect which leads it to terminate the proceedings.

Once handed down, the arbitral award has *res judicata* in relation to the dispute which it settles.

Article 18

The parties undertake to enforce the arbitral award voluntarily.

Article 19

The annulment, abroad, of the arbitral award by the judge with jurisdiction over the seat of the arbitral tribunal is not grounds for the refusal to recognise or enforce the award.

Part II. The arbitration agreement

Chapter I. Form and content of the arbitration agreement

Article 20

The arbitration agreement takes the form of an arbitration clause or agreement.

The arbitration clause is the agreement by which the parties undertake to submit their possible disputes to arbitration.

The arbitration agreement is the agreement by which the parties to a dispute agree to submit this to arbitration. It determines the subject matter of the dispute. It may be signed even in the course of proceedings already underway before a court.

Article 21

The arbitration agreement is not bound by any requirement as to form. It appointments the arbitrator or arbitrators, if necessary by reference to a set of rules of arbitration, or provides for the terms of their appointment. Failing this, the appointments are made in accordance with the provisions of Articles 28 to 32.

Article 22

Reference to a set of rules of arbitration or the centre having issued them render these rules applicable.

The rules are binding on all parties, the arbitrators and the centre for arbitration. They organise the contractual relations between such parties.

In the absence of any stipulation to the contrary, the applicable version of the rules is that in force on the date of the request for arbitration.

Chapter II. The effects of the arbitration agreement on the jurisdiction of the ordinary courts

Article 23

When a dispute under an arbitration agreement is brought before an ordinary court, the latter must declare that it lacks jurisdiction.

It may nevertheless find that it does have jurisdiction where:

1) the arbitration agreement is manifestly null and void or manifestly inapplicable, and
2) the arbitral tribunal has not been set up on the date on which it rules.

The state court may not of its own motion declare that it has no jurisdiction.

Part III. The arbitral tribunal

Chapter I. The request for arbitration

Article 24

The dispute is brought forward via any means or, where applicable, by reference to the rules of arbitration, to the arbitral tribunal either jointly by the parties or by the first party to act.

Article 25

Unless the parties agree otherwise, claims based on or in connection with more than one contracts may be filed in a single set of arbitral proceedings, pursuant to one or more arbitration agreements, provided that such agreements are compatible and that there is such a connection between the claims that it is in the interest of good justice to have investigated and tried together.

Chapter II. Creation of the arbitral tribunal

Article 26

When sitting in France, the arbitral tribunal is composed of one or more arbitrators, in odd numbers only.

Article 27

When the arbitral tribunal sits in France, the role of arbitrator is exercised by a natural person with legal capacity.

Each arbitrator is contractually bound with all parties.

Article 28

Any difficulties related to the constitution of the arbitral tribunal are settled, in the absence of agreement between the parties, by the arbitration centre or, otherwise, the supporting judge.

Article 29

If the arbitration agreement does not stipulate the number of arbitrators and if the parties do not agree, the centre for arbitration or, failing that, the supporting judge will do so.

Article 30

If the parties are unable to agree on the appointment of the arbitrator(s):

1 For arbitration by a sole arbitrator, the latter is appointed by the centre for arbitration or, failing that, by the supporting judge;

2. For arbitration by three arbitrators, each party appoints one arbitrator and the two arbitrators thus chosen then appoint the third arbitrator. If a party does fails to appoint an arbitrator within one month of receipt of the request made thereto by the other party or if the two arbitrators do not agree on the choice of the third arbitrator within one month of the acceptance of their appointment, the centre for arbitration or, failing that, the supporting judge proceeds with such appointment.

Article 31

Where the dispute is between more than two parties and they do not agree on the details regarding the constitution of the arbitral tribunal, the centre for arbitration or, failing this, the supporting judge, appoints the arbitrator(s).

Article 32

If the arbitration agreement is manifestly null and void or manifestly inapplicable, the supporting judge acknowledges this and declares that there are no grounds for designation.

This judgment may be appealed within fifteen days of service of the decision.

Article 33

In the event of the impecuniousness of one of the parties effectively depriving it of its access to the arbitral tribunal and when, if necessary, the arbitration centre has not found a solution to maintain the procedure under its auspices, a case may be filed with the supporting judge by a party for the purpose of obtaining any measure likely to allow the implementation of the arbitration.

Article 34

The arbitral tribunal is set up once the arbitrator or arbitrators accept the assignment entrusted to them. The dispute is then submitted to the tribunal on this date.

Article 35

It is up to the arbitrator, before accepting his or her appointment, to disclose any circumstances likely to affect his or her independence or impartiality. The arbitrator is also required to disclose immediately any circumstances of the same nature that may arise after the acceptance of its mission.

In the event of a dispute over the continued appointment of an arbitrator, the difficulty is settled by the centre for arbitration or, failing that, by the supporting judge before which the case is brought one month following the disclosure or discovery of the disputed fact.

The supporting judge may question the arbitrator or take his written statement.

Chapter III. The judge's support for the arbitration

Section 1. The supporting judge

Article 36

The supporting judge is the president of the court.

Article 37

The supporting judge is competent when:

1. Arbitration takes place in France; or
2. The parties agreed to have the arbitration covered by French procedural law;
or
3) The parties have expressly granted jurisdiction to the French courts to hear any disputes relating to the arbitral proceedings; or
4) If one of the parties is exposed to a risk of denial of justice; or
5) When applied to by a party pursuant to Article 42 and when the deed or document whose production is requested is kept or held by a person resident in France and none of the criteria of jurisdiction referred to in 1) to 4) grant such competence thereto.

Article 38

In international arbitration, the territorially competent supporting judge is, unless otherwise specified, the presiding judge of the Paris Court of Justice.

In matters of domestic arbitration, the court with territorial jurisdiction is, unless otherwise provided, that within whose jurisdiction the seat of the arbitral tribunal has been fixed, or, failing that, that of the place where one of the respondents is resident or, if no respondent is resident in France, of the place in which the claimant is resident.

Article 39

The case is brought before the supporting judge either by a party or by the arbitral tribunal or one of its members.

The supporting judge rules in accordance with the expedited procedure on the merits by a judgment not subject to appeal, except in cases of abuse of power.

When an appeal is planned against a judgment handed down by the supporting judge, or in case of excess of power, the appeal to set aside is filed, investigated and judged according to the rules provided for in Articles 88 *et seq.* of this Code.

Section 2. Investigative, protective or provisional measures before the national courts

Article 40

Until such time as the arbitral tribunal has been set up, the existence of an arbitration agreement does not prevent a party from bringing an action before a national court for the purpose of obtaining a measure of inquiry or, in urgent cases, an interim or conservatory measure.

Subject to the provisions governing protective seizures and court-ordered guarantee measures, the application is brought before the presiding judge of the Court of Justice or Commercial Court, who rules on the investigative measures under the conditions set out in Article 145 of the Code of Civil Procedure and, in urgent cases, on the provisional or protective measures requested by the parties to the arbitration agreement.

Article 41

Any party may apply to the supporting judge to have the latter order the enforcement of a protective or provisional measure decided by the arbitral tribunal under articles 56, 57 and 59.

The supporting judge upholds the application unless the enforcement of the measure is likely to cause serious prejudice to the rights of one of the parties or if the measure is contrary to public policy with regard to domestic arbitration or, in matters of international arbitration, to international public policy.

As an exception to Article 39, the supporting judge rules by a judgment subject to appeal within fifteen days following service of the decision. This judgment does not have *res judicata* in the main proceedings.

Article 42

If a party to the arbitral body intends to disclose a deed or private deed to which it was not a party or a document held by a third party, it may, upon invitation from the arbitral court, have such third party summonsed to appear before the supporting judge in order to obtain delivery of an enforcement copy or the production of the deed or exhibit.

The supporting judge, if he or she considers this application justified, orders the issuance or production of the deed or exhibit, in the original, as a copy or as an extract, as the case may be, under the conditions and subject to the guarantees set thereby, if necessary subject to a penalty for non-performance.

This decision may be appealed within fifteen days of service of the decision.

Part IV. The arbitration proceedings

Chapter I. The mission of the arbitral tribunal

Article 43

The subject matter of the dispute is determined by the respective claims of the parties.

The arbitral tribunal must decide on all issues submitted thereto and only on such issues.

Article 44

The arbitrator must continue his or her mission until completion unless able to show an impediment or legitimate grounds for abstention or resignation.

In the event of a dispute over the reality of the grounds cited, the difficulty is settled by the centre for arbitration or, otherwise, decided by the supporting judge in response to an application within one month following the impediment, abstention or resignation.

Article 45

The arbitrator may only be removed by the unanimous consent of the parties. In the absence of unanimity, the provisions of Article 44, paragraph two, apply.

Article 46

If an arbitration deadline limiting the duration of the arbitral tribunal's mission has been set, this period may be extended either by agreement of the parties or by the centre for arbitration or, failing this, by the supporting judge.

Article 47

The expiry of the arbitration deadline results in the end of the arbitration proceedings.

Chapter II. The arbitral body

Article 48

Unless the parties otherwise agree, the arbitral tribunal determines the arbitral proceedings, either directly or by reference to any rules of arbitration or rules of procedure, without being obliged to follow the rules established for the ordinary courts of law.

Article 49

Unless otherwise provided, the proceedings are interrupted by:

1. The launch of insolvency proceedings for the benefit of one of the parties if this entails assistance or divestiture of the debtor;
2. The obtaining or loss of capacity to take legal action by a party;
3. The dissolution of a legal entity or the death of a natural person, parties to the proceedings.

The arbitral tribunal is informed of the cause of interruption by the most diligent party.

Article 50

Under no circumstances can the proceedings be interrupted if the event occurs or if the arbitral tribunal is informed of its occurrence after the closure of the proceedings.

Article 51

Acts performed after the interruption of the proceedings are deemed null and void unless they are expressly or tacitly confirmed by the party for whose benefit the interruption is intended.

Article 52

The arbitral tribunal may, when applicable, stay the proceedings, This decision suspends the proceedings for the length of time or until the occurrence of an event determined thereby.

The arbitral tribunal may, depending on the circumstances, cancel the stay of proceedings or reduce the period.

Article 53

Unless the parties otherwise agree, the arbitral body is also suspended in the event of the death, loss of capacity, abstention, resignation, challenge or dismissal of an arbitrator until the arbitrator appointed in replacement accepts his or her mission.

The new arbitrator is appointed according to terms agreed between the parties or, failing that, according to those which governed the appointment of the arbitrator whom he or she replaces.

Article 54

The interruption or suspension of the proceedings does not relieve the arbitral tribunal of jurisdiction.

The arbitral tribunal may invite the parties to inform declare thereto any initiatives taken with a view to resuming the proceedings or terminating the causes of interruption or suspension. In the event of default by the parties, it may terminate the proceedings.

Article 55

Proceedings are resumed from the point at which they were interrupted or suspended when the causes for their interruption or suspension cease to exist.

Upon the resumption of proceedings after their interruption, the arbitral tribunal may, as an exception to Article 46, decide that the deadline applicable to the proceedings will be extended by a period of no more than six months.

Chapter III. Investigative, protective or provisional measures before the arbitral tribunal

Article 56

The arbitral tribunal carries out the necessary investigative acts unless the parties authorise it to task one of its members with doing so.

The arbitral tribunal may hear any individual. This hearing may give rise to the taking of an oath.

If one party holds evidence, the arbitral tribunal may require such party to proceed with its disclosure in accordance with the methods determined by the arbitral tribunal and, if necessary, subject to a penalty for non-performance.

Article 57

The arbitral tribunal may order the parties, under the conditions determined thereby and, if necessary, subject to a penalty for non-performance, to comply with any protective or provisional measure it deems opportune. The arbitral tribunal may modify or complete the protective or provisional measure ordered thereby.

However, the national judge has exclusive jurisdiction to impose protective attachments and judicial securities.

Article 58

The arbitral tribunal has the power to decide issues of verification of written documents or forgery. It lays down the rules applicable to the verification of written documents or forgery. Unless the parties agree otherwise, it may refer, where appropriate, to the provisions of Articles 287 to 294 and Article 299 of the Code of Civil Procedure.

In the event of registration of a forgery, Article 313 of the Code of Civil Procedure is applicable before the arbitral tribunal.

Article 59

While still examining the matter, the arbitral tribunal may liquidate any penalty for non-performance imposed thereby.

Part V. The award

Article 60

As soon as possible, and at the latest after the final hearing, the arbitral tribunal indicates the provisional date on which the award will be handed down.

Article 61

The deliberations of the arbitral tribunal are held in secret.

Article 62

If not stipulated in the arbitration agreement, the award is handed down on the basis of a simple majority. It is signed by all of the arbitrators.

However, if a minority of the arbitrators refuse to sign the award, this is stipulated by the other arbitrators in the award.

If there is no majority, the award is issued by the chairman individually. If the other arbitrators refuse to sign, this is stipulated by the chairman in the award which he or she then signs alone.

The award handed down under the conditions provided for in either of the two preceding paragraphs has the same effects as if it had been signed by all of the arbitrators or handed down on the basis of a majority.

Article 63

Reasons must be provided in support for the arbitral award.

Unless the otherwise stipulated by the parties, the arbitral award briefly sets out the respective claims of the parties and the grounds put forward in support therefore.

Article 64

The award may be issued in electronic form, provided that it is drafted, signed and retained under conditions likely to guarantee its integrity.

Article 65

The award is communicated to the parties by the arbitral tribunal or the centre for arbitration, in the form and manner provided for in the arbitration agreement or rules. Otherwise, it may be communicated by any means.

When a party has failed to appear, the award is notified by service of process.

Article 66

The award brings to an end the submission of the dispute to the arbitral tribunal.

However, at the request of a party, the arbitral tribunal may interpret the award, make good any material errors or omissions relating thereto or supplement the award where it has failed to rule on an aspect of a claim. The arbitral tribunal rules after having heard or called the parties.

Unless the parties otherwise agree, the application is filed with the same arbitral tribunal. If it cannot be reconvened, another arbitral tribunal is constituted by the centre for arbitration or, failing that, by the supporting judge.

Article 67

Unless otherwise stipulated, applications made pursuant to the Article 66, paragraph two, must be submitted within three months of the communication of the award.

The corrective or completed award must be issued within three months from the date of referral to the arbitral tribunal. This period may be extended under the conditions of Article 46.

The corrective or completed award is communicated in the same form as the original award.

BOOK TWO - Recognition, enforcement of awards and remedies

Part I. Recognition and enforcement of awards

Article 68

The existence of an arbitral award is established by the production of the original, or an electronic version, accompanied by the arbitration agreement or copies of these documents meeting the conditions required for their authenticity.

If these documents are not written in French, the applicant produces a translation. The applicant may be asked to produce a translation drawn up by a translator included on a list of court-appointed experts or by a translator authorised to work with the court or administrative authorities of another European Union Member State, a State party to the Agreement on the European Economic Area or the Swiss Confederation.

Article 69

The arbitral award is subject to recognition or exequator ordered by virtue of an order issued by:

1. In matters of domestic arbitration, the court within whose jurisdiction this award was handed down;
2. In international arbitration, the courts of justice of Paris.

The procedure is not adversarial.

The application is filed by the most diligent party with the office of the clerk of the court, accompanied by the original or an electronic version of the award and a copy of the arbitration agreement or copies thereof meeting the conditions required for their authenticity.

The award may also be recognised incidentally.

Article 70

The recognition or enforcement is affixed to the original or, if this is not produced, to the copy of the arbitral award meeting the conditions provided for in the preceding article. If the award was issued in electronic form or signed electronically only, the recognition or enforcement is affixed to a paper copy.

Where the arbitral award is not drawn up in French, the recognition or enforcement must also be affixed to the translation produced under the conditions provided for in Article 68.

Article 71

Recognition or enforcement cannot be granted if the award, the existence of which is established, is manifestly contrary to:

1. Public policy, in matters of domestic arbitration;
2. International public policy, in matters of international arbitration.

The decision refusing to grant recognition or enforcement must state the reasons on which it is based.

Article 72

An arbitral award handed down abroad may be the subject of an action for unenforceability under the conditions set out in this book.

It shall be declared unenforceable if it is manifestly contrary to:

1. Public policy, in matters of domestic arbitration;
2. International public policy, in matters of international arbitration.

Reasons must be provided in support for the decision declaring the award to be unenforceable.

Article 73

Notification of the decision granting or refusing recognition or enforcement, as well as the decision on unenforceability, is delivered by service of process unless the parties agree otherwise.

Part II. Remedies

Chapter I. The action for annulment and the appeal against the order ruling on the enforcement, recognition or unenforceability

Section 1. The action for annulment of an award handed down in France

Article 74

An award rendered in France may be the subject of an action for annulment.

Any stipulation to the contrary is deemed unwritten.

Article 75

The action for annulment is brought:

1. In matters of domestic arbitration, before the Court of Appeal within whose jurisdiction the arbitral award was handed down;
2. In international arbitration, before the Court of Appeal of Paris only.

Article 76

The action for annulment is admissible upon communication of the award under the conditions set out in Article 65. It ceases to be admissible if it has not been exercised within the following month.

Section 2. The appeal against the order ruling on the recognition or enforcement of an arbitral award handed down in France

Article 77

An order granting recognition or enforcement to an award handed down in France is not subject to appeal, except in cases of abuse of power.

However, an action for annulment of the award automatically entails an action against the order of the judge having ruled on the recognition or enforcement of the judgment, or the removal of the case from the jurisdiction of the judge.

Article 78

An order that refuses recognition or enforcement of an award handed down in France may be appealed.

The appeal ceases to be admissible if it has not been lodged within one month from the date of the decision.

In the event of an appeal, the court of appeal hears, at the request of a party, the action for annulment against the award handed down in France unless the deadline for its exercise has expired.

Section 3. The appeal against an order ruling on the recognition, enforcement or unenforceability of an arbitral award handed down abroad

Article 79

An order ruling on an application for recognition, enforcement or unenforceability of an award handed down abroad is subject to appeal to the Court of Appeal of Paris only.

Article 80

An appeal filed against the order granting recognition, enforcement or declaring the award unenforceable must be lodged within one month of notification of the decision.

An appeal against the order refusing recognition, enforcement or declaring the award enforceable must be lodged within one month of the date of the decision.

Section 4. Common provisions

Subsection 1 - Cases for appeal

Article 81

An appeal against the order granting recognition, enforcement or unenforceability and the action for annulment are available only if:

1. The arbitral tribunal has wrongly declared itself competent or incompetent; or
2. The arbitral tribunal was improperly constituted; or
3. The arbitral tribunal has ruled without complying with the mission entrusted thereto; or
4. The adversarial principle has not been respected; or
5. The recognition or enforcement of the award is contrary to public policy in matters of domestic arbitration or to international public policy in matters of international arbitration.

Article 82

When presented with an application to set aside an arbitral award, the judge may, if necessary, suspend the annulment proceedings for a period of time fixed by the judge in order to give the arbitral tribunal the opportunity to restart the arbitral proceedings and rule on the matters it determines.

If the arbitral tribunal cannot be reconvened and the parties cannot agree on its reconstitution, another arbitral tribunal is composed by the centre for arbitration or, otherwise, by the supporting judge.

Subsection 2 - The decision or the adjustment to the enforcement of the award

Article 83

The action for annulment brought against the award and the appeal against the order granting the enforcement, recognition or unenforceability do not suspend the award.

However, the first presiding judge acting in summary proceedings or, once put in charge of the case, the pre-trial judge may, by an order not subject to appeal, halt or organise the enforcement of the award if such enforcement is likely to cause serious prejudice to the rights of one of the parties.

Subsection 3 - The enforcement granted by the first presiding judge or the pre-trial judge

Article 84

The first president judge or, once put in charge of the case, the pre-trial judge may, by an order not subject to appeal, issue an enforcement for the arbitral award if this is not manifestly contrary to:

1. Public policy, in matters of domestic arbitration; or
2. International public policy, in matters of international arbitration.

The procedure relating to this request for enforcement is adversarial.

Subsection 4 - The consequences of the appeals on the award

Article 85

The dismissal on the merits of the appeal or action for annulment renders enforcement the arbitral award or those of its provisions that are not affected by the restrictions imposed by the court.

The court that dismisses the appeal or the action for annulment may limit its decision to the sole recognition of the award.

Article 86

The annulment of an award entails, without there being any need for a new decision, the corresponding annulment of any award which is the result, application or enforcement of the annulled award or which is dependent thereupon by the necessary link.

The refusal to recognise or enforce an award results, without grounds for a new decision, in the refusal of recognition or enforcement, by way of consequence, of any award which is the result, application or enforcement of the award for which enforcement has been refused or which is related thereto by the necessary link.

Subsection 5 - The procedure before the panel of the Court of Appeal

Article 87

By way of derogation from the provisions of Book II, Part VI of the Code of Civil Procedure, the appeal against the order ruling on the enforcement and the action for annulment of the award is filed, heard and decided in accordance with the provisions of this section.

§ 1: The statement of appeal and the appointment of a lawyer

Article 88

Appeals are filed by declaration to the office of the clerk to the court, containing, in order to be valid:

1. For each of the appellants:
   a) If a natural person: their surname, first names, profession, home address, nationality, date and place of birth;
   b) If a legal entity: its legal form, company name, registered office address and the body or individual by which it is legally represented.

2. For each of the respondents, their surname, first names and home address for a natural person or their name and registered office address for a legal entity;
3. The appointment of a lawyer representing the claimant or the appellant;
4. Indication of the award or decision appealed, as well as the object of the appeal.

The statement of appeal is dated and signed by the appointed lawyer. It is accompanied by a copy of the award or decision appealed and may be completed by an appendix. Its submission to the office of the clerk constitutes a request for the case to be added to the court list.

Article 89

Unless a fixed date procedure provided for in Article 114 is applied, in the month following the notice of referral sent thereto by the clerk, the appellant must serve the statement of appeal, via any means, to each of the parties to the arbitral proceedings having led to the award being handed down, informing them of their obligation to appoint a lawyer to represent them.

If the respondent has not appointed a lawyer within one month of such notice being served, the claimant proceeds by service within one month. If the respondent appoints a lawyer before this service of process, this is served on the respondent's lawyer.

If the notices and service of process referred to in the two preceding paragraphs are not provided, the statement of appeal is automatically deemed to have lapsed.

In order to be valid, the deed used for service indicates to the respondent that:
1. Failure to appoint a lawyer within fifteen days of such service means that a judgment may be handed down the respondent on the sole basis of the evidence submitted by the opposing party;
2. Should the respondent fail to file submissions within the period referred to in Article 92 or 93, a civil fine may be imposed.

The claimant provides proof to the office of the clerk evidencing the notices served and service of process carried out.

Article 90

The first presiding judge designates the chamber to which the case is allocated. Where the appeal is brought before the Paris Court of Appeal, the case is distributed to the International Commercial Chamber of that Court of Appeal.

The office of the clerk informs the lawyers appointed according.

§ 2: Case management

Article 91

The case is heard under the oversight of a judge from the chamber to which the case has been allocated, appointed by the presiding judge of the chamber.

Article 92

In order for the declaration of appeal, submitted *ex officio*, to be valid, the appellant has three months staring from the declaration of appeal in which to file its submissions with the office of the clerk.

The respondent has three months from the notification made thereto of the appellant's submissions provided for in the previous paragraph in which file its submissions with the office of the clerk, subject otherwise to a fine.

Subject to the penalties provided for in the paragraphs above, the submissions are notified to the parties' lawyers within the time limit for their submission to the office of the clerk. Subject to the same penalties, these must be served on those parties having failed to appoint a lawyer within no more than one month following the expiry of the deadlines stipulated in the previous paragraphs; however, if, in the meantime, such parties appoint a lawyer prior to the service of the submissions, notice must be served on their lawyer.

The submissions required in the preceding paragraphs are those addressed to the Court, which are filed with the office of the clerk and served within the prescribed time limits and which determine the subject matter of the appeal.

Article 93

When the Court hears an appeal filed against a judgment handed down by the supporting judge, in accordance with the accelerated procedure on the merits, the deadlines set out in article 92 are equal to one month.

Article 94

The pre-trial judge may, at the request of a party or *ex officio*, extend or reduce the time limits provided for in article 92 or article 93. This decision, taken by reference added in the file, constitutes a measure of judicial administration.

Article 95

The pre-trial judge examines the case within one month of the expiry of the deadlines imposed for filing submissions and disclosing the exhibits stipulated in articles 92 or 93.

The pre-trial judge sets the date for the closing hearing and the pleadings. However, if the case requires further exchanges of submissions, the pre-trial judge sets the timetable for these, after having obtained the opinion of the lawyers.

The procedural timetable is mandatory. Its deadlines may only be extended where there is serious and duly justified cause.

A party who, without legitimate reason, fails to carry out the procedural acts incumbent upon such party, within the required deadlines, may be ordered to pay a civil fine of up to €10,000.

The pre-trial judge may, *ex officio,* after giving notice to their lawyer, issue a delisting or partial closure order.

Article 96

The pre-trial judge ensures the fair conduct of the proceedings, the prompt exchange of submissions and the disclosure of documents.

The pre-trial judge may order the lawyers acting for the parties to render their submissions compliant with the provisions of Articles 122 and 123. He or she may invite them to respond to any grounds in response to which they have not filed submissions and to provide the factual and legal explanations necessary for the resolution of the dispute.

The pre-trial judge exercises all powers necessary for the disclosure, obtaining and production of exhibits.

He or she may obtain disclosure of the original of the exhibits submitted in the proceedings or request a copy.

The pre-trial judge may make all useful communications to the parties' lawyers and, if necessary, issue injunctions to them.

Article 97

The pre-trial judge may at any time hear the lawyers acting for the parties.

He or she may hear from the parties, either at their request or on an *ex officio* basis. The hearing takes place on an adversarial basis unless one of the parties, duly summoned, fails to appear. In all cases, it takes place in the presence of the parties' lawyers or they must be duly summoned.

Article 98

The pre-trial judge orders the joinder or separation of proceedings.

He or she may order removals from the roll in the cases and under the conditions of Articles 382 and 383 of the Code of Civil Procedure.

He or she may rule on costs and on applications filed on the basis of Article 700 of the Code of Civil Procedure

Article 99

The measures taken by the pre-trial judge are not subject to appeal. They are recorded in the file. Notice is given to the lawyers retained.

However, in the cases listed in Article 95 (4), Article 96 (3), Article 98 (3) and Article 100, the pre-trial judge rules by a reasoned order, subject to the rules specific to investigative measures. This order may be appealed under the conditions provided for in Article 103.

Article 100

The pre-trial judge, from the moment of appointment until divestiture, has sole authority in order to:

1. State that the declaration of appeal has lapsed;
2. Declare the appeal inadmissible and decide in this context on any issue relating to its admissibility. The pleas of inadmissibility must be invoked simultaneously, or those not invoked are declared inadmissible;
3. Declare acts of procedure to be inadmissible in application of Article 930-1 of the French Code of Civil Procedure;
4. Rule on procedural objections relating to the appeal and on incidents bringing the appeal proceedings to an end;
5. Allocate a provision for the proceedings;
6. Grant a provision to the creditor when the existence of the obligation cannot be seriously contested. The pre-trial judge may make the enforcement of his or her decision subject to the provision of a bond;
7. Order all other provisional measures, including protective measures, with the exception of preventive attachments and provisional mortgages and pledges, and also modify or supplement, should a new event occur, the measures potentially already ordered;
8. Order, even *ex officio*, any investigative measures. The pre-trial judge monitors the performance of the investigative measures ordered thereby, as well as those ordered by the court. As soon as the investigative measure ordered has been carried out, the proceedings continue at the behest of the pre-trial judge.

In the cases provided described in this article, the pre-trial judge examines those submissions addressed to him or her separately from the submissions addressed to the court.

Article 101

Orders issued by the pre-trial judge have *res judicata* in the main proceedings in relation to the dispute which they resolve when they rule on:

1. A procedural objection relating to the appeal proceedings;
2. An incident terminating the appeal proceedings;
3. The admissibility of the appeal;
4. The lapse of the declaration of appeal;
5. The inadmissibility of submissions and procedural documents pursuant to Article 930-1 of the Code of Civil Procedure.

Article 102

The order is issued, immediately if necessary, once the lawyers have been heard or called.

The lawyers for the parties are convened to the hearing by the clerk.

In an emergency, one party may, by notice between lawyers, invite the other to appear before the pre-trial judge on the date, time and place fixed thereby.

Article 103

The orders of the pre-trial judge are not subject to any appeal independently of the judgment on the merits.

However, they may be referred by application to the court within fifteen days of their date when they have the effect of terminating the proceedings or when they acknowledge that proceedings have come to an end.

They may be referred under the same conditions when they rule on:

1. A procedural exception relating to the appeal;
2. The admissibility of the appeal;
3. The admissibility of submissions in application of Article 930-1 of the Code of Civil Procedure;
4. An incident terminating the appeal;
5. The lapse of the statement of appeal.

The application, submitted to the office of the clerk of the chamber before which the case is called, is dated and signed.

In addition to the references required by Article 88, it must in order to be admissible contain an indication of the decision appealed and a statement of the pleas in fact and in law.

§ 3: Closing and referral to the oral hearing

Article 104

The investigation is terminated by an order, without reasons attached, which cannot be appealed. A copy of this order is issued to the lawyers.

The pre-trial judge declares the investigation closed as soon as the state of the case allows and refers the case to the court to be argued on the date sets thereby. The closing date must be as close as possible to the date fixed for the arguments.

Article 105

If one of the parties does not carry out the procedural acts for which it is responsible within the deadlines set by the timetable provided for in Article 95, the pre-trial judge may order the closure of the proceedings in regard thereof, *ex officio* or at the request of a party, except, in the latter case, for the possibility for the pre-trial judge issue a refusal via a reasoned order not subject to appeal. A copy of the order must be sent to the defaulting party, to the actual place of residence or home

address.

The pre-trial judge withdraws the order for partial closure, *ex officio* or when presented with submissions to this end, to allow this judge to reply to new claims or to new grounds presented by a party after this order. The same applies in the event of serious and duly justified cause.

If no other party is to present submissions, the pre-trial judge orders the closure of the investigation and the referral to the court.

Article 106

After the order closing the proceedings, no submissions can be filed and no exhibit produced, under penalty of inadmissibility declared automatically.

However, submissions that seek the resumption of the proceedings as they stood at the time of the interruption are admissible.

Where their cause arises or is revealed after the closing order, applications made pursuant to Article 47 of the Code of Civil Procedure, applications for the nullity of the declaration of appeal, those relating to incidents terminating the appeal proceedings as well as please for inadmissibility based on the inadmissibility of the appeal shall be admissible.

Article 107

The order closing the proceedings may only be revoked if serious grounds have arisen since it was issued.

The order closing the proceedings may be revoked, of its own motion or at the request of the parties, either by reasoned order handed down the pre-trial judge or, after the opening of the proceedings, by court order.

Article 108

Lawyers for the parties must, fifteen days before the date set for the oral pleadings, file with the court the files comprising a copy of the exhibits referred to in the submissions and numbered in the order shown in the list of exhibits.

The pre-trial judge may also, at the request of the parties' lawyers and once agreed, if necessary, by the Public Prosecutor's Office, authorise the filing of the files with the office of the clerk on a date set thereby, when he or she considers that the case does not require pleadings.

The pre-trial judge remains responsible for the opening of the hearing or until the date set for the submission of the files by the lawyers.

The pre-trial judge, if applicable, gives an oral report on the case at the hearing before the pleadings. This report may also be made by the presiding judge of the chamber designated to hear the case or another adviser designated by the latter.

The report sets out the subject matter of the appeal, the parties' claims and arguments, and mentions the elements likely to inform the debate, without making known the opinion of the judge who is the author.

The pre-trial judge or the judge in charge of the report may, unless the parties' lawyers object, hold the hearing alone to hear the pleadings. This judge reports to the court in his or her deliberations.

Article 109

The court may proceed with the questioning of the arbitrator or take the arbitrator's written statements.

§ 4: Special provisions for appeals to the International Commercial Chamber of the Paris Court of Appeal

Article 110

Actions for annulment of arbitral awards and appeals against decisions ruling on the recognition or enforcement of arbitral awards handed down abroad brought before the Paris Court of Appeal are decided by the International Commercial Chamber of this Court in accordance with the procedure provided for in subsection 5 and the following provisions.

Article 111

The parties may add exhibits in the English language to the case file without translation.

When the translation of one or more documents freely offered by one of the parties is disputed, the pre-trial judge may order a sworn translation of all or part of these documents to be produced, at the expense of the party determined thereby, under the conditions provided for in Article 269 of the Code of Civil Procedure.

By way of derogation from the provisions of Article 202 of the Code of Civil Procedure, certificates may be typed.

Article 112

The pleadings are held in French.

Parties, witnesses and technical specialists, including experts, as well as counsel for the parties, when foreigners, are allowed to speak in English, if they so wish.

With the agreement of the court, the proceedings may be the subject of simultaneous translation, for the comfort of one of the parties, performed by an interpreter chosen thereby and at its expense.

When one of the parties, an expert or a witness wishes to speak in a foreign language other than English, simultaneous interpretation is provided by an interpreter chosen by mutual agreement between the parties at the expense of the party requesting the hearing. In the event of disagreement between the parties on the choice of the interpreter within the time limit set by the pre-trial judge, the latter will appoint the interpreter.

Article 113

Proceedings are public unless the court decides that they will take place in chambers, in accordance with the provisions of Article 435 of the Code of Civil Procedure.

The court may, at the request of the parties or of one of them, adapt the reasoning of its decision and the modalities of its publication to the needs of the confidentiality of the arbitration.

§ 5: Fixed date proceedings

Article 114

If the rights of a party are in danger, the Presiding Judge of the Chamber to which the appeal has been allocated may, on request, fix by order the day on which the case will be called as a priority.

The application is submitted by the applicant or the appellant to the presiding judge within one month of the declaration of appeal. It may be submitted by the defendant or the respondent responsible for its production within a period of two months from the date of the declaration of appeal.

Article 115

The application must set out the nature of the risk, contain the declaration of appeal or recourse, submissions on the appeal or recourse and refer to the exhibits. One copy of the application and documents must be submitted to the presiding judge of the chamber hearing the appeal for inclusion in the court file.

The appellant summons the opposing party to appear on a fixed date. Copies of the application, the order handed down by the presiding judge of the chamber and the statement of appeal are attached to the summons.

The summons informs the defendants or respondents that, should they fail to appoint a lawyer before the date of the hearing, a judgment may be handed down against them on the sole basis of the evidence submitted by the appellant. It also orders the defendant or respondent to disclose all documents they intend to submit before the date of the hearing.

The appellant submits the documents referred to in the schedule attached as an appendix to the summons as soon as the lawyer acting for the respondent or the appellant has been appointed.

A copy of the writ of summons is given to the office of the clerk. This delivery must be completed before the date set for the hearing, failing which the declaration will lapse; the lapse is automatically declared by order of the presiding judge of the chamber to which the case is allocated.

Article 116

On the date of the hearing, the presiding judge ensures that sufficient time has elapsed since the summons to allow the assigned party to prepare its defence. He or she may, if necessary, postpone the examination of the appeal to a later hearing to be fixed thereby.

If the defendant or respondent has appointed a lawyer, the hearings take place immediately or at the next hearing, in the state in which the case is then found.

If the defendant or the respondent located in France has not appointed a lawyer before the hearing, the Presiding Judge of the Chamber may order his or her reassignment. In the same case, if the defendant or the respondent is resident for service of process abroad, this is carried out in the same way as in Article 688, paragraphs 2 to 7, of the Code of Civil Procedure.

In the absence of an appearance by the defendant or the respondent, on summons or reassignment, as the case may be, a judgment may be handed down against him on the sole basis of evidence submitted by the claimant or the appellant. The same applies to the defendant or the respondent domiciled abroad when the formalities of Article 688 paragraphs 2 to 7 of the Code of Civil Procedure have been complied with.

§ 6: Miscellaneous Provisions

Article 117

Taking action before the Court of Appeal is admissible only in support for the claims of a party and if its author has a direct interest, for the preservation of his or her rights, in the decision likely to be rendered.

Article 118

The following are applicable to the procedure for examining appeals against orders having ruled on the enforcement and actions for the annulment of arbitral awards:

1. The provisions of Book I, Part VII of the Code of Civil Procedure, relating to the judicial administration of evidence without prejudice to the application of paragraph 5 of Articles 106 to 109 of this Code;
2. Articles 930-1 to 930-3 of the Code of Civil Procedure;
3. Articles 963 to 964-1 of the Code of Civil Procedure.

Article 119

The appointment of a lawyer by the defendant or the respondent is declared to the other parties by notification between lawyers.

This deed states:

1. If the party is a natural person: their surname, first names, profession, domicile, nationality, date and place of birth;
2. If a legal entity: its legal form, company name, registered office address and the body by which it is legally represented.

Article 120

The submissions of the parties are signed by their lawyer and served in the form of notifications between lawyers. They are not admissible until the information mentioned in the second to fourth paragraphs of the previous article has been provided. This grounds for inadmissibility may be remedied until the day of the pronouncement of the closure or, in the absence of case management hearings, until the opening of the proceedings.

The disclosure of the documents is validly attested by the signature of the addressee lawyer shown on the note drawn up by the lawyer carrying out the disclosure.

Article 121

The submissions are notified and the documents communicated simultaneously by the lawyers for each of the parties to the lawyers for the other party. In the event of multiple claimants or multiple respondents, they must be communicated to all appointed lawyers.

A copy of the submissions is delivered to the office of the clerk with the reasons for their notification.

Exhibits submitted and filed in support for inadmissible submissions are themselves inadmissible.

Article 122

The submissions contain, in the header, the information required by paragraphs two to four of Article 119. They expressly set out the claims of the parties and the factual and legal arguments on which each of these claims is based, indicating for each claim the documents relied on and their numbering. A summary of the documents is attached.

Article 123

The submissions must clearly include a statement of the facts and the procedure, a discussion of the claims and the grounds and a section summarising the claims. If, in the discussion section, new grounds not featured in previous submissions are cited in support of the claims, these must be presented in a formally distinct manner.

The court only rules on the claims set out in the operative part and only examines the grounds in support of these claims if they are invoked in the discussion.

In their final submissions, the parties reiterate the claims and grounds previously presented or invoked in their previous submissions. Failing this, they are deemed to have abandoned them and the court rules on the final submissions lodged only.

Article 124

In order to be admissible, as determined *ex officio*, the parties must submit, in the submissions referred to in Article 92, all of their claims on the merits summarised in the operative part of these submissions. Inadmissibility may also be claimed by the party against whom subsequent claims are made.

Nevertheless, and without prejudice to Article 107, claims remain admissible if they are intended to reply to the opposing party's submissions and exhibits or to obtain a judgment on issues arising after the first submissions, from the occurrence or disclosure of a fact.

Article 125

The deadlines imposed for filing submissions set out in Articles 92 and 93 are suspended by a decision requiring the parties to meet with a mediator in accordance with Article 127-1 of the Code of Civil Procedure or ordering mediation in accordance with Article 131-1 of the same Code. The suspension takes effect, as the case may be, until the expiry of the time allowed for the parties to meet with a mediator or for the completion of the mediator's mission.

Article 126

A party whose statement of appeal has lapsed pursuant to Articles 92 or whose appeal has been declared inadmissible is no longer be entitled to file an appeal against the same award or the same enforcement decision in respect of the same party.

Article 127

In the event of abuse of the appeal process, a civil fine of up to €300,000 may be imposed on the claimant, without prejudice to any damages that may be claimed.

Abuse in the exercise of the appeal may result in particular from the manifestly unfounded nature of the complaints invoked by the claimant.

In the event of an appeal to set aside, the case may be struck out if the claimant does not show that it has executed this sentence under the conditions of Article 1009-1 of the Code of Civil Procedure.

Chapter II. Alternative remedies

Article 128

An application for review is available against the arbitral award in the event of fraud.

Unless the parties otherwise agree, the application for review must be filed before the same arbitral tribunal. If it cannot be reconvened, another arbitral tribunal must be established by the centre for arbitration or, failing that, by the supporting judge.

An application for review is admissible within two months of the party becoming aware of the fraud it invokes.

Article 129

The arbitration award may not be challenged by a third party.

However, a third party challenge may be filed against the decision on the recognition or enforcement of an arbitral award, in the cases provided for in Article 81.

Article 130

The arbitral award is not subject to appeal, opposition or appeal to set aside.

BOOK THREE - Provisions specific to certain subjects

Part I. Arbitration of family disputes

Chapter I - Arbitration in family matters

Article 131

Arbitration in family matters is governed by Books I and II of this Code, subject to the following provisions.

Article 132

The spouses, the partners bound by a civil partnership arrangement and the cohabiting partners may, via an arbitration agreement, agree to submit the following matters to arbitration:

1. The property-related consequences of divorce and legal separation, of annulment of the marriage of the spouses or of the termination of the civil partnership arrangement or a common-law union;
2. Claims relating to the operation, liquidation and division of matrimonial property ownership regimes and joint ownership arrangements between persons bound by a civil partnership agreement or between cohabiting partners, the court-ordered separation of property.

Article 133

There can be no agreement to submit to arbitration on matters relating to the status and capacity of individuals, or on the pronouncement of divorce or legal separation, or on the annulment of marriage.

Article 134

In order to be valid, an arbitration agreement must be in writing.

When the parties resort to arbitration by way of a arbitration agreement, this must in order to be valid take the form of a private document countersigned by lawyers.

Article 135

Only those fulfilling the conditions provided for by decree of the Council of State may be appointed as arbitrator in family matters.

Article 136

Lawyers must be appointed for family arbitrations. Any unrepresented party is deemed to be in default. If such party wishes to apply for legal aid, they must, however, be granted a period of time by the arbitral tribunal, provided that it justifies the speed of the steps taken to this end.

Article 137

In any proceedings concerning a minor capable of discernment, Articles 388-1 of the Civil Code and 338-1 of the Code of Civil Procedure are applicable to the arbitral tribunal.

Article 138

The arbitral award is subject to appeal, unless otherwise decided. The appeal is admissible as soon as the award is handed down. It ceases to be admissible if it has not been exercised within one month of notification of the award.

The appeal seeks the reversal or cancellation of the award. It is formed, investigated and judged according to the rules provided for in Articles 88 *et seq.* of this Code.

The court rules in law or in amicable composition within the limits of the mission of the arbitral tribunal.

Article 139

If the parties have waived the appeal, the action for annulment is open in the cases provided for in Article 81 and when the award disregards the best interests of the child.

Article 140

An arbitral award in family matters can only be enforced by virtue of an enforcement decision issued by the family court judge within whose jurisdiction it was handed down, upon completion of an adversarial procedure.

The decision granting enforcement is not subject to appeal.

However, the appeal or the action for annulment of the award automatically entails, within the deadlines set for any the referral to the court, an appeal against the decision of the judge who ruled on the enforcement or the divestiture of that judge.

[***Additional amendments to be made to the Civil Code:***

Article 1

In Article 265-2, paragraph one, of the Civil Code, the words: “during the divorce proceedings” are replaced by: “on the occasion of their divorce, before or during the divorce proceedings”. After the word: “marital” the words “. They may also agree to submit the liquidation and division of their marital property regime to an arbitral tribunal” are added.

[New Article 265-2: *The spouses may, on the occasion of their divorce, before or during the divorce proceedings, enter into all agreements for the liquidation and division of their marital property regime. They may also agree to submit the liquidation and division of their marital property regime to an arbitral tribunal*.]

Article 2

In Article 268, paragraph one, of the Civil Code, after the words "consequences of the divorce", the words "or to its enforcement the arbitral award handed down on all or part of the consequences of the divorce that they will have submitted to arbitration" are added.

Article 268, paragraph two, of the Civil Code is worded as follows: "In pronouncing the divorce, the court approves the agreements after verifying that the interests of each of the spouses and children are safeguarded, or shall confer enforcement on the arbitration award if the latter is not, in the case of domestic arbitration, manifestly contrary to public policy and, in the case of international arbitration, to international public policy".]

Chapter II- Arbitration in inheritance matters

Article 141

Issues relating to inheritance can be submitted to arbitration, as long as the estate has not been settled.

Article 142

In the cases provided for in Article 141, the arbitration is governed by Books 1 and 2 of this Code.

Part II. Arbitration of employment disputes

Article 143

Any dispute relating to an employment contract may be submitted to arbitration, via an arbitration clause or agreement.

However, once the dispute has arisen, the arbitration clause is unenforceable against the employee.

Article 144

Sections 23 and 32 do not apply where the employer is the claimant.

[***Additional amendments to be made to the Employment Code:***

Article 1

Article L. 1411-4 of the Employment Code is modified as follows:
"The Employment Tribunal has sole jurisdiction, irrespective of the amount of the claim, to hear the disputes referred to in this chapter. Any agreement to the contrary is deemed to be unwritten, with the exception of the arbitration agreement and the arbitration clause inserted in the employment contract.

The Employment Tribunal does not have jurisdiction to hear disputes attributed to another jurisdiction by law, in particular, by the Social Security Code in relation to accidents in the workplace and occupational illnesses".

Article 2

Article R. 1412-1 of the Employment Code is modified as follows:

"Unless they have recourse to arbitration or mediation, the employer and the employee bring disagreements and disputes before the Employment Tribunal which has territorial jurisdiction.

This Tribunal is:
1. That within whose territorial jurisdiction the establishment in which the work is carried out is located;
2. Or, when the work is carried out at home or outside of any company or establishment, the one within whose jurisdiction the employee's home is located.

The employee may also refer the matter to the employment tribunals of the place where the undertaking was contractually made or that of the place in which the employer is established".]

Part III. Arbitration of consumer affairs disputes

Article 145

Any dispute relating to a consumer affairs agreement may be submitted to arbitration, via an arbitration clause or agreement.

However, once the dispute has arisen, the arbitration clause is unenforceable against the consumer.

Article 146

Articles 23 and 32 do not apply where the professional is the claimant.

[***Additional amendments to be made to the Consumer Affairs Code:***

Article 1

In part 10 of Article R. 212-2-10 of the Consumer Affairs Code, the words “to refer exclusively to an arbitration tribunal not covered by provisions of law or” are deleted; after the word “method”, the word “alternative” is replaced by the word “amicable”.

[New Article R. 212-2-10 of the French Consumer Affairs Code: *In agreements signed by and between professionals and consumers, clauses are deemed to be abusive as per the provisions of paragraphs one and five of Article L. 212-1 (unless otherwise established by the professional) if their purpose or effect is to:*

(-)

Article 1 *Remove or hinder the exercise of legal actions or remedies by the consumer, in particular by obliging the consumer to make exclusive use of an amicable method of dispute resolution*.]

Part IV. Arbitration in the Commercial Code

[***Amendments to be made to the Commercial Code:***

Article 1

The final paragraph of Article L. 721-3 of the Commercial Code is repealed:

Article 2

In Article D. 711-75 of the Commercial Code, the words “by arbitration clause or agreement” are deleted.

Article 3

In Article R. 711-75-1 of the Commercial Code, the words “The arbitration clause and compromise are set out in writing by” are replaced by “The arbitration agreement is agreed by”.]

Part V. Arbitration in the Intellectual Property Code

[***Amendments to be made to the French Intellectual Property Code:***

Article 1

In the final paragraph of Article L. 331-1 of the Intellectual Property Code, the words “Articles 2059 and 2060 of the Civil Code” are replaced by “Article 1 of the Code of Arbitration”.

Article 2

In the second paragraph of Article L. 521-3-1 of the Intellectual Property Code, the words “Articles 2059 and 2060 of the Civil Code” are replaced by “Article 1 of the French Code of Arbitration”.

Article 3

In the second paragraph of Article L. 615-17 of the Intellectual Property Code, the words “Articles 2059 and 2060 of the Civil Code” are replaced by “Article 1 of the French Code of Arbitration”.

Article 4

In the final paragraph of Article L. 623-1 of the Intellectual Property Code, the words “Articles 2059 and 2060 of the Civil Code” are replaced by “Article 1 of the Code of Arbitration”.

Article 5

In Article L. 716-6 of the Intellectual Property Code, the words “Articles 2059 and 2060 of the Civil Code” are replaced by “Article 1 of the Code of Arbitration”.

Article 6

In the second paragraph of Article L. 722-8 of the Intellectual Property Code, the words “Articles 2059 and 2060 of the Civil Code” are replaced by “Article 1 of the Code of Arbitration”.]

Part VI. Arbitration in the Rural and Maritime Fisheries Code

[***Amendments to be made to the Rural and Maritime Fisheries Code:***

Article 1

In Article L. 253-3 of the Rural and Maritime Fisheries Code, the words “enjoins the parties concerned to submit the dispute to arbitration, under the conditions provided for in Book IV, Part I, of the Code of Civil Procedure” are replaced by the words “invites the parties concerned to submit the dispute to arbitration, under the conditions provided for by the Code of Arbitration”.

Article 2

Article L. 521-4 of the Rural and Maritime Fisheries Code is repealed.]

Part VII. Arbitration in administrative matters

[Article L. 311-6 of the Code of Administrative Justice is to be rewritten in order, first, to bring it into line with the Code of Arbitration, second, to transpose Article 2060 of the Civil Code, and finally to delete the references to the provisions already repealed or already incorporated (2, 4, 6 and 7). As 3 and 5 are aimed at necessarily international operations, there remains only no. 1.

Other articles in other public law codes will also need to be harmonised.

The whole cannot be modified without close consultation with administrative litigation specialists. In the meantime, the status of the working party's proposal is as follows]

Section 1: Provisions relating to the Code of Administrative Justice

[Amendments to be made to the Code of Administrative Justice:

Article 1

Article L. 311-6 of the Code of Administrative Justice states:

"By way of derogation from the provisions of this Code determining the jurisdiction of the courts of first instance, it is possible to have recourse resort to arbitration when the dispute involves international economic interests or in the cases provided for by Articles L. 2197-6 and L. 22361 of the Public Procurement Code.
Categories of public establishments of an industrial and commercial nature may also be authorised by decree to agree to arbitration".]

Section 2: Provisions relating to miscellaneous other Codes

This section is intended to consolidate or amend the provisions relating to arbitration in the various Codes for which it will be necessary to bring the texts into line with the Code of Arbitration, in particular by deleting the reference to Book Four of the Code of Civil Procedure and replacing this with a reference to the " Code of Arbitration".

Several Codes are concerned, in particular (without limitation):

- The Public Procurement Code (Article L. 2197-6; Article L. 2197-7; Article L. 23973; Article L. 3137-4; Article L. 3137-5; Article R. 2197-25; Article R. 2397-4);
- The Energy Code (Article L. 511-13);
- The Heritage Code (Article L. 112-26);

- The Code governing relations between the public and the administration (Article L. 432-1);
- The Local Authorities Code (Article L. 1424-20);
- (…)

BOOK FOUR - Miscellaneous provisions

Part I. Provisions relating to the Code of Judicial Organisation

[Amendments to be made to the Code of Judicial Organisation:

Article 1

In Article L. 311-16-1, 1) of the Code of Judicial Organisation, the words "Code of Civil Procedure" are replaced by "Code of Arbitration".

Article 2

Article R. 211-4, part II, 10) of the Code of Judicial Organisation, the words "Book IV of the Code of Civil Procedure" are replaced by "Code of Arbitration".

Article 3

Article L. 213-3 of the Code of Judicial Organisation is supplemented by a paragraph as follows:

"5. As a judge responsible for the enforcement of awards handed down pursuant to Article 131 of the Code of Arbitration".]

Part II. Provisions relating to class action arbitration

[preliminary draft text:

Article 1

A collective or class action arbitration is organised on the basis of an arbitration agreement referring directly to such an arbitration.

Article 2

The request for arbitration is presented on behalf of a particular class of claimants or on behalf of a yet to be determined set of claimants.

Article 3

A class action arbitration consists of at least three arbitrators. Once constituted, and depending on the difficulty of the dispute, the arbitral tribunal may propose to the parties the extension of number of arbitrators, to another odd number.

Article 4

In the absence of an agreement between the parties on the applicable procedure and its methods, these are determined by the arbitral tribunal.

Article 5

The arbitral tribunal determines the scope of the arbitration in consideration of the subject-matter of the dispute. Unless otherwise stipulated, the court determines the conditions governing the notification to be made to the class determined thereby, taking into account the subject-matter of the claims, the group defined, the modalities necessary, including the time limit, to respond to the notice and participate in the arbitration.]

Part III. Interim provisions

[For the record, provisions should be stipulated to govern the application of these new texts over time].

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CONSOLIDATED LIST OF THE 40 PROPOSALS MADE BY THE WORKING PARTY

Proposal 1: Combine all the texts of legislative and regulatory value into an autonomous code entitled "Code of Arbitration", divide this into several books and harmonise those other codes which include references thereto.

Proposal 2: Transpose article 2059 to article 1 of the Code of Arbitration, repeal article 2060 (by providing for specific rules for legal entities governed by public law and for family arbitration), repeal article 2061, paragraph 1, transpose article 2061, paragraph 2, into the Code of Arbitration for consumer and employment disputes.

Proposal 3: Reorganise French arbitration law into shared rules and some special rules granting exceptions, to take into account the specificities of domestic arbitration law.

Proposal 4: Incorporate a definition of the international nature of arbitration into the Code of Arbitration, in a preliminary article.

Proposal 5: Consecrate the guiding principles of French arbitration law.

Proposal 6: Affirm the exclusive jurisdiction of the ordinary courts to hear applications for enforcement for all international arbitral awards and appeals against all international arbitral awards, including those relating to administrative law contracts signed by public bodies.

Proposal 7: Removal of the residual jurisdiction of the Presiding Judge of the Commercial Court as a supporting judge.

Proposal 8: Grant the courts in Paris exclusive jurisdiction to hear all disputes concerning international arbitral awards.

Proposal 9: Rationalise the judicial treatment of domestic arbitration by encouraging specialisation on the part of judges.

Proposal 10: Abandon the reference to commerce, both for the definition of the internationality of arbitration and for the application of practices by the arbitral tribunal.

Proposal 11: Simplify the formal requirements applicable to the arbitration agreement.

Proposals 12, 13, 14 and 15: Establish a definition of the award, simplify the rules for signing the award; enshrine the electronic award in the Code and authorise its communication under the conditions defined by the parties.

Proposal 16: Require an uneven number of arbitrators in the composition of arbitral tribunals, except for awards handed down abroad.

Proposal 17: Require that arbitrators ruling in France be natural persons with capacity, without preventing the recognition or enforcement in France of awards handed down abroad by legal entities.

Proposal 18: Establish the contractual nature of the relationship between the arbitrator, the parties and the centre for arbitration and specify the version of the arbitration rules applicable.

Proposal 19: Introduce a mechanism for if a party is impecunious.

Proposal 20: Remove the right to waive actions for annulment.

Proposal 21: Codify positive law on arbitration in family matters, employment law and consumer affairs law by adding exceptional rules providing protection for family arbitration.

Proposal 22: Admit ancillary voluntary intervention before the Court of Appeal.

Proposal 23: Make the third-party objection inadmissible against arbitral awards and admissible against court decisions relating to arbitral awards.

Proposal 24: Specify the conditions for implementing the negative effect of the competence-competence principle.

Proposal 25: Facilitate the consolidation of proceedings before the arbitral tribunal.

Proposal 26: Allow the arbitral tribunal to liquidate the penalty for non-performance imposed thereby.

Proposal 27: Consider the introduction of class action arbitration.

Proposal 28: Strengthen the concentration of resources and procedural fairness.

Proposal 29: Expand the jurisdiction of the supporting judge.

Proposal 30: Introduce an autonomous procedural regime for the examination of remedies before the Court of Appeal.

Proposal 31: Exclude appeals except in exceptional cases.

Proposal 32: Allow better consideration of the recognition of awards.

Proposal 33: Remove the suspensive effect of the action for annulment in domestic matters.

Proposal 34: Clarify the regime for enforcement by the first presiding judge and the pre-trial judge.

Proposal 35: Trigger the start of the time limit for appealing orders refusing recognition or enforcement, starting from the date of the decision.

Proposal 36: Stipulate that the annulment of an award or the refusal to enforce an award handed down abroad may result in the same penalty as a consequence on the awards related thereto.

Proposal 37: Delete the grounds for formal annulment of the awards referred to in Article 1492 (6).

Proposal 38: Allow the judge to stay the proceedings in order to invite the arbitral tribunal to regularise its award to allow its recognition and/or enforcement, and avoid its annulment.

Proposal 39: Clarify interactions relating to the centre for arbitration, the rules of arbitration and interactions with the national courts.

Proposal 40: Take measures to encourage the improved promotion and knowledge of French arbitration law.

Proposals not accepted after discussion:

Rejected proposal 1: Addition of a guideline aimed at requiring the arbitral tribunal to take into account "*human, environmental and compliance issues, as well as respect for the fundamental rights and freedoms of the parties*".

Rejected proposal 2: Rename the supporting judge the "arbitration judge".

Rejected proposal 3: Provide for a possible appeal before the supporting judge in the event of a challenge refused by the centre for arbitration.

Rejected proposal 4: Possibility for the arbitrator to rule on a claim for compensation.

Rejected proposal 5: Give the supporting judge the power to grant injunctions and in particular "anti-suit" injunctions to protect the jurisdiction of an arbitral tribunal sitting in France.

Rejected proposal 6: Provide for the cancellation of the action for annulment in the event of non-compliance with the award by the appellant.

Rejected proposal 7: Provide for the reintroduction of awards having incurred a very short delay in publication which does not lead to a complaint.

ENGAGEMENT LETTER

MINISTÈRE
DE LA JUSTICE
Liberté
Égalité
Fraternité

The French Minister of Justice

Dear Sir/Madam, member of the working party

Paris, 12 November 2024

Dear Sir/Madam,

Paris is one of the leading international centres for arbitration. It hosts the seat of the International Court of Arbitration of the International Chamber of Commerce (ICC). The International Commercial Chamber of the Paris Court of Appeal, after having been established by means of procedural protocols in 2018, saw its existence and its jurisdiction to hear appeals in arbitration matters enshrined in the law of 13 June 2024. In the opinion of all legal professionals, our arbitration legislation is an essential structure for promoting France's influence and attractiveness in this field.

Thirteen years after the last arbitration reform, I have considered it necessary to set up a working party to assess the needs for developments and possible revisions in order to guarantee the effectiveness of French arbitration law through constant adaptation and modernisation.

In view of your academic and professional experience, we considered it important for you to be able to participate in the work of this group.

Together with the other members of the group, your duties will include:

- assessing the effectiveness of existing provisions in the field of domestic and international arbitration and reporting on current difficulties or shortcomings;
- issuing recommendations and drafting proposals aimed at remedying or improving the existing system;
- drafting a report summarising the group's findings, reflections and proposals.

Co-chaired by Mr François Ancel, advisor to the *Cour de cassation*, and Mr Thomas Clay, the working party, which may, if necessary, carry out any consultations it deems useful to ensure the relevance and usefulness of the solutions envisaged, will submit a report on the changes that could be made to the arbitration procedure **during the month of March 2025**. It will benefit from the support and assistance of the Directorate of Civil Affairs and the Ministry of Justice.

Yours faithfully,

The Minister of Justice,

COMPOSITION OF WORKING SUB-GROUPS

"Arbitral body" subgroup: Marc Henry (co-rapporteur) and Denis Mouralis (co-rapporteur), Sandrine Clavel, Jean-Yves Garaud, Daniel Mainguy, Philippe Pinsolle and Daniel Schimmel.

"Proceedings before the National Courts" subgroup : Daniel Barlow (co-rapporteur) and Claire Debourg (co-rapporteur), Sandrine Clavel, Carine Dupeyron, Marc Henry, Emmanuel Jolivet, Jérémy Jourdan-Marques, Daniel Mainguy and Daniel Schimmel.

"Oversight of Awards" subgroup: Jérôme Ortscheidt (co-rapporteur) and Philippe Pinsolle (co-rapporteur), Daniel Barlow, Valence Borgia, Claire Debourg, Carine Dupeyron, Marc Henry, Jérémy Jourdan-Marques, Eric Loquin and Daniel Mainguy.

"Structure of the Code of Arbitration" subgroup : Jérémy Jourdan-Marques (co-rapporteur) and Daniel Mainguy (co-rapporteur), Daniel Barlow, Valence Borgia, Sandrine Clavel, Carine Dupeyron, Jean-Yves Garaud, Emmanuel Jolivet and Denis Mouralis.

LIST OF PERSONS INTERVIEWED OR CONSULTED

Interviewees:

- Laure Aldebert, judge, First Vice-President at the Paris Court of Justice, Coordinator of the Economic and Commercial Activity Division
- Frédérique Cassereau, lawyer, managing partner of Hoche Avocats, secretary general of the *Centre d'Arbitrage et de Médiation du Travail* (Employment Arbitration and Mediation Centre)
- Hubert Flichy, honorary lawyer, Flichy-Grangé Avocats, President of the *Centre d'Arbitrage et de Médiation du Travail* (Employment Arbitration and Mediation Centre)
- Maximin de Fontmichel, professor, Paris-Saclay University
- Marie-Anne Frison-Roche, Lecturer in Law, University Professor
- Charles Jarrosson, Professor Emeritus, University of Paris-Panthéon-Assas
- Luca de Maria, lawyer, partner - PMG Avocats
- Elodie Mulon, lawyer, partner - Chauveau, Mulon & Associés, chair of the Family Disputes Arbitration Centre
- Gilles Pellissier, member of the *Conseil d'État*
- Jacques Pellerin, lawyer, partner - PMG Avocats
- Jean-Baptiste Racine, Professor, University of Paris-Panthéon-Assas

Invited contributions:

- Guillaume Barbe, lawyer, partner - Ivoire, secretary general of the Family Disputes Arbitration Centre
- Loïc Cadiet, Emeritus Professor, University of Paris 1 Panthéon-Sorbonne, former member of the *Conseil supérieur de la magistrature*
- Bruno Cressard, Honorary President of the Bar Association, lawyer, partner - Cressard & Le Goff, President of the Federation of Arbitration Centres

Spontaneous contributions:

- Maxime Desplats, lawyer, DLA Piper
- Yann Schneller, lawyer, partner - Darci
- Sébastien Manciaux, Professor, University of Bourgogne Europe
- Coline Vuillermet, President of Neo-Justice; Thomas Saint-Aubin, Co-President of the IDAM association; Ivan Kasic, President of Justicity; and Benjamin English, President of Eurojuris France (madecision.com)