Annulment and enforcement of arbitral awards in France

Detlev KÜHNER (*1)

I. The enforcement and annulment proceedings: general overview

A. Applicable rules

i. French Code of Civil Procedure

1 In France, two separate sets of rules apply to domestic arbitrations and to international arbitrations. (*2) As a consequence, two separate sets of rules also apply to the recognition and enforcement of arbitral awards. Articles 1487 *et seq*. of the Code of Civil Procedure ("CCP") apply to domestic arbitral awards, whereas Articles 1514 *et seq*. apply to international arbitral awards, comprising awards rendered in France in international matters and awards rendered abroad.

2 Pursuant to Article 1504 CCP (*3), an arbitration shall be considered to be "international" whenever interests of international commerce are at stake. This already broad legal definition was further extended by case law (*4) which considered that any cross-border money or service transfer is sufficient for a matter to be considered international. Even commercial activities between two French entities may therefore be considered to be of international nature.

3 The French rules on international arbitration being even more arbitration friendly than their domestic counterpart, the broad interpretation of the notion "international" is a welcome fact for arbitration users and practitioners.

(*1) Detlev KÜHNER is a Partner at Paris based law firm BMH AVOCATS.

(*2) Art. 1442–1503 CCP on domestic arbitration and Art. 1504–1527 CCP on international arbitration; the present Article puts the focus on international arbitration. Art. 1506 CCP identifies those provisions of domestic arbitration (Art. 1442 - 1503 CCP) which also apply in international arbitration proceedings.

(*3) Art. 1504 CCP: "Est international l'arbitrage qui met en cause des intérêts du commerce international." Free translation: "An arbitration is international when interests of international commerce are at stake."

(*4) CA Paris 10 May 2007, *Rev.arb.* 2007, 825.

ii. New York Convention

4 France became a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") on 24 September 1959. (*1)

5 It made a reciprocity reservation under the New York Convention. However, by virtue of the "more favourable law" provision contained under Article VII(1) of the New York Convention, French legal provisions on recognition and enforcement of foreign awards apply to awards rendered abroad whether or not they are rendered in a Contracting State.

6 France also made a reservation for commercial relationships at the time of signing the New York Convention but subsequently withdrew this reservation on 27 November 1989. (*2)

7 The French provisions on recognition and enforcement of foreign awards being more favourable, the New York Convention has only a little relevance in France compared to other Member States.

B. Recognition and enforcement

8 The two categories of international awards, i.e. international awards rendered in France and rendered abroad are subject to a very similar recognition and enforcement regime.

9 In order to obtain the recognition or enforcement of these awards in France, it is sufficient pursuant to Article 1514 CCP (*3), that the existence of the award can be proven and that no violation of French international public order exists.

(*1) Decree No 59-1039 of 1 September 1959.
(*2) Decree No 90-170 of 17 November 1989.
(*3) Art. 1514 CCP: "Les sentences arbitrales sont reconnues ou exécutées en France si leur existence est établie par celui qui s'en prévaut et si cette reconnaissance ou cette exécution n'est pas manifestement contraire à l'ordre public." Free translation: "An arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy."

10 In accordance, with Article 1515 CCP (*1), the existence of the award shall be proven by the production of the original of the award and the arbitration clause or duly authenticated copies thereof. Depending on the competent court, a simple translation may be sufficient, in case the documents are not in French.

11 Pursuant to Article 1516 CCP (*2), the competent court for international awards rendered in France is the Tribunal de Grande Instance ("TGI") located at the place of the arbitration. By contrast, recognition and enforcement of international awards rendered abroad have to be systematically sought before the Paris TGI.

12 It is important to note that the exequatur proceedings are not adversarial. Also, there is no full review of the awards by the judge at the first instance level. It is sufficient that the judge is *prima facie* satisfied that no violation of public policy exists. Consequently, almost all awards are either recognised or declared enforceable. However, this decision may be appealed in which case a more detailed review of the award will take place.

(*1) Art. 1515 CCP: "L'existence d'une sentence arbitrale est établie par la production de l'original accompagné de la convention d'arbitrage ou des copies de ces documents réunissant les conditions requises pour leur authenticité. Si ces documents ne sont pas rédigés en langue française, la partie requérante en produit une traduction établie par un traducteur inscrit sur une liste d'experts judiciaires ou par un traducteur habilité à intervenir auprès des autorités judiciaires ou administratives d'un autre Etat membre de l'Union européenne, d'un Etat partie à l'accord sur l'Espace économique européen ou de la Confédération suisse." Free translation: "The existence of an arbitral award shall be proven by producing the original award, together with the arbitration agreement, or duly authenticated copies of such documents. If such documents are in a language other than French, the party applying for recognition or enforcement shall produce a translation. The applicant may be requested to provide a translation by a translator whose name appears on a list of court experts or a translator accredited by the administrative or judicial authorities of another Member State of the European Union, a Contracting Party to the European Economic Area Agreement or the Swiss Confederation."

(*2) Art. 1516 CCP: "La sentence arbitrale n'est susceptible d'exécution forcée qu'en vertu d'une ordonnance d'exequatur émanant du tribunal de grande instance dans le ressort duquel elle été rendue ou du tribunal de grande instance de Paris lorsqu'elle a été rendue à l'étranger. La procédure relative à la demande d'exequatur n'est pas contradictoire. La requête est déposée par la partie la plus diligente au greffe de la juridiction accompagnée de l'original de la sentence et d'un exemplaire de la convention d'arbitrage ou de leurs copies réunissant les conditions requises pour leur authenticité." Free translation: "An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de Grande Instance of the place where the award was made or by the Tribunal de Grande Instance of Paris if the award was made abroad. Exequatur proceedings shall not be adversarial. Application for exequatur shall be filed by the most diligent party with the Court Registrar, together with the original award and arbitration agreement, or duly authenticated copies of such documents."

C. Means of recourse

i. International awards rendered in France

Challenge of awards

13 Pursuant to Article 1518 CCP (*1), international awards rendered in France may be subject to an action to set aside. All kind of awards, *i.e.* interim awards, partial awards etc., can be subject to an action to set aside immediately after having been rendered. The action to set aside has to be filed with the Court of Appeal of the place of arbitration within one month after notification of the award, in accordance with Article 1519 CCP. (*2) With respect to foreign parties, this time-limit is prolonged by two additional months resulting in a three-month time-limit. The decisions of the Court of Appeal may be challenged before the Court of Cassation on legal grounds.

14 The number of actions to set aside awards filed before the Paris Court of Appeal has increased quite considerably over the last years. Thus, the number of actions filed has more or less doubled in recent years from roughly 10 to over 20 cases per year. At the same time, the percentage of successful setting aside actions has also doubled and one out of four award challenges has been successful since 2016. (*3)

15 Notification of the award shall normally be carried out by an official notification ("signification") by bailiff. However, the parties can derogate from that need. It is nevertheless regrettable that the French courts have not confirmed that award notifications effected by arbitral institutions can constitute valid derogations. (*4)

16 Consequently, any such derogation must be expressly agreed upon by the parties. This can typically be done at the stage of the drafting of the arbitration clause or at the stage of the Terms of Reference in an ICC Arbitration. However, like in the case of notification of state court judgments, the notification of arbitral awards must meet minimum standards, in the form of an instruction how and when an action to set aside the award must be filed. (*5)

(*1) Art. 1518 CCP: "La sentence rendue en France en matière d'arbitrage international ne peut faire l'objet que d'un recours en annulation." Free translation: "The only means of recourse against an award made in France in an international arbitration is an action to set aside."

(*2) Art. 1519 CCP: "Le recours en annulation est porté devant la cour d'appel dans le ressort de laquelle la sentence a été rendue. Ce recours est recevable dès le prononcé de la sentence. Il cesse de l'être s'il n'a pas été exercé dans le mois de la notification de la sentence. La notification est faite par voie de signification à moins que les parties en conviennent autrement." Free translation: "An action to set aside shall be brought before the Court of Appeal of the place where the award was made. Such recourse can be had as soon as the award is rendered. If no application is made within one month following notification of the award, recourse shall no longer be admissible. The award shall be notified by service, unless otherwise agreed by the parties."

(*3) "Le contrôle des sentences par le juge étatique. Jusqu'où ira-t-il?", Journal Spécial des Sociétés, no 43, p.9.

(*4) CA Paris 06 March 2014, no 13-16113; CA Paris 17 March 2015, no 15-02556.

(*5) This obligation is enshrined in Art. 680 CCP.

17 Article 1520 CCP(*1) only provides five limited grounds for setting aside arbitral awards as follows:

a. The arbitral tribunal wrongly upheld or declined jurisdiction

18 This ground concerns the scope of the arbitration clause and the State courts will fully examine the arbitrator's decision on jurisdiction both, from a factual and from a legal perspective. (*2) Two categories of objections have to be distinguished:
– The so-called "fins de non-recevoir" (admissibility objections), which are only decided upon by the arbitral tribunal without additional control by the state court judge; and
– The so-called "exceptions de competence" (jurisdictional objections), which are subject to a control by the State courts.

19 In a recent decision, the Paris Court of Appeal confirmed that the question to know how to deal with arbitration clauses providing for prior conciliation or mediation is a matter of admissibility and therefore not subject to the state court's control. (*3)

b. The arbitral tribunal was not properly constituted

20 The arbitral tribunal may not have been properly constituted right from the beginning. However, there are other situations later on in the proceedings, e.g. when it comes to the replacement of the entire arbitral tribunal or of one of its members, when the will of a party or the parties' agreement may not have been respected.

21 The most frequent subject matter under this rubric is the lack of independence of one or more arbitrators, which entails an improper constitution of the arbitral tribunal. (*4) However, for an action to set aside an award on this ground to be successful, it is necessary that the applicant had already raised the issue of lack of independence during the arbitration proceedings, provided that this was at all possible. (*5)

(*1) Art. 1520 CCP: "Le recours en annulation n'est ouvert que si : 1 Le tribunal arbitral s'est déclaré à tort compétent ou incompétent ; ou 2 Le tribunal arbitral a été irrégulièrement constitué ; ou 3 Le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée ; ou 4 Le principe de la contradiction n'a pas été respecté ; ou 5 La reconnaissance ou l'exécution de la sentence est contraire à l'ordre public international." Free translation: "An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy."
(*2) CA Paris 19 March 2013, *Rev.arb.* 2013, 449. The intensity of review may vary from ground to ground and is always limited by the interdiction of a "révision au fond": thus, there is a full review with respect to decisions on jurisdiction, arbitrator independence and due process.
(*3) CA Paris 28 June 2016, no 15/03504.
(*4) Cass. Civ. 1re, 16 March 1999, *Rev.arb.* 1999, 308.
(*5) CA Paris 31 January 2008, *Rev.arb.* 2008, 487.

22 Likewise, decisions of arbitral institutions regarding the appointment (*1) and the challenge (*2) of arbitrators may be disputed by the parties, provided they had raised the issue during the arbitration proceedings.

23 As a last point, both parties must be treated equally in the context of the constitution of the arbitral tribunal. Following the famous Dutco Decision of the French Court of Cassation of 1992 (*3), the leading arbitral institutions gradually inserted provisions in their rules allowing the institution to appoint the entire arbitral tribunal, in case several claimant or respondent parties are unable to agree on a common co-arbitrator. (*4) As a result, there exist fewer situations in practice in which a problem of unequal treatment of the parties may arise in the context of the constitution of the arbitral tribunal.

c. The arbitral tribunal ruled without complying with the mandate conferred upon it

24 The classical cases falling under this rubric are *ultra petita* and *infra petita* decisions. These decisions will be dealt with below in a separate section. More generally speaking, arbitral tribunals must respect and implement the procedural rules agreed upon in the arbitration proceedings. Thus, the arbitral tribunal has to make its communications in the language of the arbitration and must make sure that appropriate translations of all documents produced in another language are provided. However, a party invoking that kind of misconduct by an arbitral tribunal in a setting aside procedure must also be able to show a concrete disadvantage. (*5)

25 Yet other problems may arise in the context of *amiable composition*, e.g. if the arbitral tribunal has decided the case as *amiable compositeur* without having been authorised by the parties to do so. (*6) Also, arbitrators acting as *amiable compositeurs* have to explain in their award to which extent they made use of their powers as *amiable compositeur.* Even if the arbitral tribunal has not made any use of its powers to act as *amiable compositeur,* it must expressly state and explain so in the award. (*7)

26 Even if, according to French case law, the lack of putting reasons in an award does not constitute a violation of French international public policy in international arbitration proceedings, an award may be challenged if the obligation to provide reasons either

(*1) Cass. Civ. 1re, 07 January 1992, no 89/18708.
(*2) Cass. Civ. 1re, 12 January 1996, *Rev.arb.* 1996, 428.
(*3) *Supra* footnote 2.
(*4) E.g. Art. 12(8) of the ICC Rules of Arbitration.
(*5) CA Paris 27 June 2002, *Rev.arb.* 2003, 427.
(*6) Cass. Civ. 1re, 12 October 2011, *Rev.arb.* 2012, 91.
(*7) CA Paris 15 January 2004, *Rev.arb.* 2004, 907.

results from the applicable procedural rules (*1), the arbitration agreement (*2) or the applicable arbitration rules. (*3)

27 Yet another element which may be invoked under this ground is the lack of respecting time limits by the arbitral tribunal. Even though the CCP does not foresee a time limit for international arbitration proceedings within which the arbitration proceedings must have been accomplished, such a time limit may result from the applicable procedural rules or the applicable rules of arbitration. In ICC Arbitration, the 6-month time limit to render the final award may be prolonged by the ICC Court upon request or on its own initiative. (*4)

28 However, even if there is no predetermined time limit for the duration of the arbitration proceedings, a setting aside action may be successfully filed against an award in case an appropriate time limit to render the award was considerably exceeded without justification. (*5)

d. Due process was violated

29 The arbitral tribunal must make sure that each party has at all times and timely access to the entire correspondence and to all documents exchanged in the arbitration. It must also make sure that these documents are produced in the language of the arbitration and that otherwise translations are produced.

30 Even more importantly, the arbitral tribunal has to make sure that the parties have the opportunity to comment on any important research or investigation activities or on any interim findings made by the arbitral tribunal before these elements are incorporated into the award. This issue will be dealt with in more detail in a separate section below.

e. Recognition or enforcement of the award is contrary to international public policy

31 Against the background that there is no universally valid definition of international public policy, French international public policy is the relevant yardstick for control. The French courts continue to interpret French international public policy restrictively. In particular, the interdiction of a control which would amount to a "révision au fond" also applies to this ground. (*6)

(*1) CA Paris 14 January 1997, *Rev.arb.* 1997, 395.
(*2) CA Paris 28 June 1988, *Rev.arb.* 1989, 328.
(*3) Cass. Civ. 1re, 18 March 1980, *Rev.arb.* 1980.
(*4) Art. 31 of the ICC Rules of Arbitration, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.
(*5) CA Paris 28 February 2008, Dalloz 2008, 1325.
(*6) CA Paris 14 June 2001, *Rev.arb.* 2001, 773.

32 Consequently, the lack of providing reasons in an award does not amount to a violation of French international public policy but may only qualify as a non-fulfilment of the arbitral tribunal's mandate (ground 3 above), in case a duty to provide reasons actually existed.

33 Likewise, the mere misinterpretation of factual and legal elements does normally not constitute a violation of French international public policy either. (*1) A more detailed analysis can be found below in a separate section.

Challenge of court orders granting or refusing recognition or enforcement

34 According to Article 1523 CCP (*2), the court order refusing recognition or enforcement of an arbitral award is subject to appeal. The scope of this appeal is in principle limited to issues of international public policy, unless one of the parties requests the court to rule on its setting aside action, which will be the situation in most cases.

35 It follows from Articles 1516 (*3) and 1523 CCP that any appeal must be filed with the Court of Appeal of the place of arbitration within one month after notification of the court order refusing recognition. With respect to foreign parties, this time-limit is prolonged by two additional months resulting in a three-month time-limit. The decisions of the Court of Appeal may be challenged before the Court of Cassation on legal grounds.

36 However, if an award is granted exequatur, no appeal is possible directly against a court order granting exequatur. The award rendered in France in international arbitration is only subject to an action to set aside as described above. Such action entails *ipso jure* recourse against the court order granting exequatur.

ii. International awards rendered abroad

Challenge of awards

37 Under French law, only awards rendered in France can be challenged before the French courts. The only means of recourse against awards rendered abroad therefore is to challenge court orders granting or refusing recognition or enforcement.

(*1) Cass. Civ. (1ère)13 October 1981, *Rev.arb.* 1983, 6.

(*2) Art. 1523 CCP: "La décision qui refuse la reconnaissance ou l'exequatur d'une sentence arbitrale internationale rendue en France est susceptible d'appel. L'appel est formé dans le délai d'un mois à compter de la signification de la décision. Dans ce cas, la cour d'appel connaît, à la demande d'une partie, du recours en annulation à l'encontre de la sentence à moins qu'elle ait renoncé à celui-ci ou que le délai pour l'exercer soit expiré." Free translation: "An order denying recognition or enforcement of an international arbitral award made in France may be appealed. The appeal shall be brought within one month following service of the order. If the order is appealed, and if one of the parties so requests, the Court of Appeal shall rule on an action to set aside unless the parties have waived the right to bring such action or the time limit to bring such action has expired."

(*3) *Cf.* section 11 above.

Challenge of court orders granting or refusing recognition or enforcement

38 Article 1525 CCP (*1) provides for appeal against a court order refusing or granting exequatur to an award rendered abroad. It follows from Articles 1516 (*2) CCP and 1525 CCP that any appeal must be filed with the Paris Court of Appeal within one month after notification of the court order refusing recognition. With respect to foreign parties, this time-limit is prolonged by two additional months resulting in a three-month time-limit. The decisions of the Paris Court of Appeal may be challenged before the Court of Cassation on legal grounds.

39 In case of an appeal of an order refusing enforcement, the debate is limited to issues of international public policy.

40 In case of an appeal of an order granting enforcement, the court of appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520 CCP. This provision more or less incorporates the grounds for refusal of enforcement enumerated in Article V of the New York Convention.

41 However, contrary to Article V(1)(*e*) of the New York Convention, French courts may grant exequatur of awards annulled in their country of origin. This point will be dealt with in more detail below in a separate section. The French courts may also consider as grounds against an order granting exequatur whether the judge who issued it exceeded its powers (*3) or whether the party requesting exequatur lacks an interest to do so. (*4)

(*1) Art. 1525 CCP: "La décision qui statue sur une demande de reconnaissance ou d'exequatur d'une sentence arbitrale rendue à l'étranger est susceptible d'appel. L'appel est formé dans le délai d'un mois à compter de la signification de la décision. Les parties peuvent toutefois convenir d'un autre mode de notification lorsque l'appel est formé à l'encontre de la sentence revêtue de l'exequatur. La cour d'appel ne peut refuser la reconnaissance ou l'exequatur de la sentence arbitrale que dans les cas prévus à l'article 1520." Free Translation: "An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed. The appeal shall be brought within one month following service of the order. However, the parties may agree on other means of notification when an appeal is brought against an award bearing an enforcement order. The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520."
(*2) Cf. section 11 above.
(*3) CA Paris 22 March 2001, *Rev.arb.* 2002, 723.
(*4) Cass. Civ. (1ère) 14 November 2007, *JCP* (G) 2008 I., 164.

D. Suspensive effect

42 Pursuant to Article 1526 CCP (*1) neither the action to set aside the award nor the appeal against the court's enforcement order suspends enforcement of an award. (*2)

43 In exceptional cases, the competent judge may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.

44 By contrast, appeals of the decisions of the Court of Appeal before the Court of Cassation have no suspensive effect. In other words, the applicant must first execute the Appeal Court judgment before it files an appeal before the Court of Cassation. If it fails to do so, the opponent may request that the proceedings before the Court of Cassation be suspended until the Court of Appeal judgment is executed. (*1)

E. Costs

45 Generally speaking, the French courts only reimburse a small portion of the legal costs incurred by the prevailing party. (*4) However, in international arbitration proceedings, the Paris Court of Appeal has taken some inspiration from international practice, notably from the Swiss Federal Court (*5) and may order the losing party to pay the total amount of legal costs incurred by the prevailing party.

46 Since there are no noteworthy court fees in France, the legal costs are essentially composed of the fees and expenses of the lawyers.

(*1) Art. 1526 CCP: "Le recours en annulation formé contre la sentence et l'appel de l'ordonnance ayant accordé l'exequatur ne sont pas suspensifs. Toutefois, le premier président statuant en référé ou, dès qu'il est saisi, le conseiller de la mise en état peut arrêter ou aménager l'exécution de la sentence si cette exécution est susceptible de léser gravement les droits de l'une des parties." Free translation: "Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award. However, the first president ruling in expedited proceedings or, once the matter is referred to him or her, the judge assigned to the matter, may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties."

(*2) Prior to 2011, former Article 1506 CCP provided that once exequatur of an award was obtained, its execution was suspended pending the time limit for the setting aside action. If such action was brought, the execution of the award continued to be suspended until the decision in that action was taken. If, however, the arbitrators had declared their award provisionally enforceable, it could be executed as soon as exequatur was obtained.

(*1) Art. 1009-1 CCP.

(*4) Generally, one-third of the legal costs is reimbursed.

(*5) In particular, in situations in which the reimbursement is used to sanction setting aside actions which were manifestly unfounded.

F. Remission

47 Under French law, the Arbitral Tribunal becomes *functus officio* once an arbitral award has been rendered. Unlike in other legal systems, there is no possibility for the French courts to remit the matter to the Arbitral Tribunal in case an award is annulled. Rather, the parties are put in the situation before the arbitration started, allowing them to start new arbitration proceedings on the basis of the existing arbitration agreement. (*1)

48 There exist however two exceptions to the above principle, i.e. (i) the possibility for the arbitrators to correct, interpret and complete the award pursuant to Article 1485 CCP (*2) after the arbitral award has been rendered and (ii) the revision of arbitral awards pursuant to Article 1502 CCP, in case of exceptional circumstances such as fraud or the appearance of previously unknown elements. In that situation only the case may be remitted to the Arbitral Tribunal for revision.

G. Prescription

49 Pursuant to Articles 111-4 and 111-3 no 2 CPCE (Civil Procedural Code for Enforcement), the prescription period of arbitral awards is 10 years, starting from the day on which the award was declared enforceable. (*3)

(*1) This does not apply in situations in which an award was annulled because the Arbitral Tribunal had erroneously retained jurisdiction on the basis of an invalid arbitration agreement.

(*2) Art. 1485 CCP: « La sentence dessaisit le tribunal arbitral de la contestation qu'elle tranche. Toutefois, à la demande d'une partie, le tribunal arbitral peut interpréter la sentence, réparer les erreurs et omissions matérielles qui l'affectent ou la compléter lorsqu'il a omis de statuer sur un chef de demande. Il statue après avoir entendu les parties ou celles-ci appelées. Si le tribunal arbitral ne peut être à nouveau réuni et si les parties ne peuvent s'accorder pour le reconstituer, ce pouvoir appartient à la juridiction qui eût été compétente à défaut d'arbitrage. » Free translation: "Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award. However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard. If the arbitral tribunal cannot be reconvened and if the parties cannot agree on the constitution of a new tribunal, this power shall vest in the court which would have had jurisdiction had there been no arbitration." Pursuant to Article 1506 4° CCP, only the first two paragraphs of Article 1485 CCP are applicable in international arbitration proceedings.

(*3) There is no case law available and legal commentators have divergent views notably as to the starting date of the 10 year prescription (date of the signature of the award versus date of declaration of enforceability).

II. Interaction between annulment and enforcement of awards

A. Waiver of action to set aside (*1)

50 The waiver of action to set aside can either result from the party's conduct during the proceedings or be expressly agreed upon by the parties.

51 Pursuant to Article 1466 CCP (*2), a party must object to any irregularity which occurred during the arbitral proceedings in a timely fashion. Otherwise, it cannot avail itself of such irregularity at a later stage in a setting aside procedure. By this mechanism, a party may be deprived from invoking some or even all grounds for setting foreseen under Article 1520 CCP and may reasonably have to limit or even renounce such action.

52 Pursuant to Article 1522 CCP (*3), the parties may agree to waive their right to bring an action to set aside an award at any time. It should be highlighted that this possibility exists for all parties to the arbitration, irrespective of their place of business or residence and of their nationality. (*4)

53 Exceptionally, in that situation, the enforcement order may be appealed, whereas orders granting enforcement are normally not appealable pursuant to Article 1524(1) CCP. (*5) This is logical, since parties may normally file a setting aside action against

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(*1) Only applicable to international awards rendered in France.

(*2) Article 1466 CCP : « La partie qui, en connaissance de cause et sans motif légitime, s'abstient d'invoquer en temps utile une irrégularité devant le tribunal arbitral est réputée avoir renoncé à s'en prévaloir. » Free translation : "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity."

(*3) Art. 1522 CCP: "Par convention spéciale, les parties peuvent à tout moment renoncer expressément au recours en annulation. Dans ce cas, elles peuvent toujours faire appel de l'ordonnance d'exequatur pour l'un des motifs prévus à l'article 1520. L'appel est formé dans le délai d'un mois à compter de la notification de la sentence revêtue de l'exequatur. La notification est faite par voie de signification à moins que les parties en conviennent autrement." Free translation: "By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside. Where such right has been waived, the parties nonetheless retain their right to appeal an enforcement order on one of the grounds set forth in Article 1520. Such appeal shall be brought within one month following notification of the award bearing the enforcement order. The award bearing the enforcement order shall be notified by service, unless otherwise agreed by the parties."

(*4) This appears to be the most liberal approach: whereas other jurisdictions such as Switzerland also provide for this possibility, they do so only subject to a number of conditions.

(*5) Art. 1524 (1) CCP: "L'ordonnance qui accorde l'exequatur n'est susceptible d'aucun recours sauf dans le cas prévu au deuxième alinéa de l'article 1522. Toutefois, le recours en annulation de la sentence emporte de plein droit, dans les limites de la saisine de la cour, recours contre l'ordonnance du juge ayant statué sur l'exequatur ou dessaisissement de ce juge." Free translation: "No recourse may be had against an order granting enforcement of an award, except as provided in Article 1522, paragraph 2. However, an action to set aside an award shall be deemed to constitute recourse against the order of the judge having ruled on enforcement or shall bring an end to said judge's jurisdiction, as regards the parts of the award which are challenged." By contrast, orders refusing enforcement can always be appealed, pursuant to Art. 1523 CCP, cf. footnote 33 above. Likewise, both, orders granting and refusing enforcement, can be appealed with respect to arbitral awards rendered outside France, pursuant to Article 1525 CCP, *cf.* footnote 34 above.

the arbitral award and said action constitutes at the same time recourse against the enforcement order.

54 Such appeal shall be brought within one month following notification of the award bearing the enforcement order before the court of appeal of the place of arbitration pursuant to Articles 1522 (3) (*1) and 1527 CCP. (*2)

55 It could be argued that the waiver of an action to set aside only has limited effect, since the order granting enforcement can be appealed anyhow. However, it should nevertheless not be overlooked that, unlike in the situation of an action to set aside, in the event of an appeal of the enforcement order, the award remains fully intact and only enforcement in France may be refused. Consequently, the arbitral award may still be enforced in other countries.

B. Enforcement of annulled awards

56 Arbitral awards rendered outside France can only be set aside at the respective place of arbitration in accordance with the rules applicable in the country where the place of arbitration is located.

57 Pursuant to Article V(1)*(e)* of the New York Convention (*3), a country may refuse to recognise and enforce an arbitral award which was set aside in another country.

58 However, by virtue of the "more favourable law" provision contained under Article VII(1) of the New York Convention, the French legislator has only foreseen five grounds in Article 1520 CCP for setting aside and for refusing recognition and enforcement of arbitral awards, none of which refers to awards which were set aside in another country.

(*1) Footnote 3, page 44.

(*2) Art. 1527 CCP: "L'appel de l'ordonnance ayant statué sur l'exequatur et le recours en annulation de la sentence sont formés, instruits et jugés selon les règles relatives à la procédure contentieuse prévues aux articles 900 à 930-1. Le rejet de l'appel ou du recours en annulation confère l'exequatur à la sentence arbitrale ou à celles de ses dispositions qui ne sont pas atteintes par la censure de la cour." Free translation: "Appeals against orders granting or denying enforcement and actions to set aside awards shall be brought, heard and decided in accordance with the rules applicable to adversarial proceedings set forth in Articles 900 through 930-1. A decision denying an appeal or application to set aside an award shall be deemed an enforcement order of the arbitral award or of the parts of the award that were not overturned by the court."

(*3) Art. V(1): "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that part furnishes to the competent authority where the recognition and enforcement is sought, proof that: (…) (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

59 Against this background, French courts have at several occasions, in particular in the Hilmarton Decision of 2004 (*1) and in the Putrabali Decision of 2007 (*2) found, that the annulment of an international award (*3) rendered outside France has no consequences on its recognition and enforcement in France.

60 According to these decisions, international awards do not form part of the legal order of the jurisdiction where they were made. In addition, international awards are considered to be decisions of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Consequently, these awards remain in existence even if set aside in another country and may be recognised in France if they are not contrary to international public policy.

61 The downside of this very liberal approach is that the international co-ordination of judicial control over arbitral awards, which the New York Convention sought to achieve, is impaired as a consequence of this case law, as an award set aside in the country where it was made may still be declared enforceable in another country.

62 The following scenario shows the difficulties which may arise in practice: in the Hilmarton Case, the award was set aside in Switzerland but recognised in France. Thereafter, a second award was rendered by the Arbitral Tribunal in Switzerland. However, this second award, even though enforceable in Switzerland and most other countries, was not enforceable in France, since the recognition of the first award prevented recognition and enforcement of the second award. (*4)

63 The result was that of the existence of two conflicting awards which could be enforced in France (first award) and in Switzerland and elsewhere (second award). This may obviously give rise to additional proceedings, thereby adding to the complexity of the enforcement proceedings.

64 The international public policy standard which applies in case of setting aside actions and in case of actions for recognition and enforcement are identical.

(*1) Cass. Civ. (1ère) 23 March 1994, *Rev.arb.* 1994, 327.
(*2) Cass. Civ. 1ère) 29 June 2007, *Rev.arb.* 2007, 507.
(*3) However, domestic awards set aside in their country of origin cannot be recognised in France.
(*4) Cass. Civ. (1ère) 10 June 1997, *Rev.arb.* 1997, 376.

III. The concept of "public policy" in enforcement and annulment proceedings

65 The fifth ground for annulment under Article 1520 CCP is used as a kind of catch-all provision. However, since it is very difficult to meet the very high threshold of a violation of French international public order, this provision is mostly used in order to support other grounds for setting aside an award.

66 In 2004, the Paris Court of Appeal found in the famous *Thales* Case that a violation of French international public policy is only given, in case this violation is clear, concrete and effective. (*1) This position was confirmed by the Cour de Cassation in a decision of 4 June 2008 which held that "regarding the violation of international public policy, the judge may only assess the recognition or enforcement of the award in light of the compatibility of its solution with this public policy, and his scrutiny is limited to a clear, effective and concrete violation." (*2)

67 However, in a number of recent decisions, in which the infringement of penal law provisions such as money laundering and corruption (*3) or fraud and falsification (*4) were at stake, the Paris Court of Appeal decided to review the facts in full detail. More importantly, the Court did not follow the arbitral tribunal's assessment and annulled the award. (*5) This seems to confirm a trend towards a stricter control of violations of French international public policy in cases which touch upon penal law infringements.

68 It is therefore likely that the fifth ground for setting aside will, at least in cases involving penal law matters, be more and more invoked as an independent ground for setting aside rather than in support of other grounds.

IV. Annulment and refusal of enforcement on grounds relating to the power of the arbitral tribunal

A. Does an arbitrator have the power to raise legal issues *ex officio* or would that lead to annulment/refusal for enforcement?

69 Unlike in other jurisdictions, the French courts have a rather narrow understanding of the *iura novit curia* principle. In a series of decisions, the French courts held that *ex officio* applications of legal provisions that were not pleaded by the parties, even if this does not constitute an unexpected and unforeseeable development of the case, may

(*1) CA Paris 18 November 2004, *Rev.arb.* 2005, 529.
(*2) Cass. Civ. (1ère) 04 June 2008, Dalloz 2008, 1684.
(*3) CA Paris 21 February 2017, no 15/01650.
(*4) CA Paris 16 January 2018, no 15/21703.
(*5) CA Paris 21 February 2017, no 15/01650.

entail a violation of the adversarial principle and can be a valid ground for the annulment or refusal of enforcement of an award. (*1)

70 This principle also applies in situations in which international public policy issues are at stake, which arbitrators are only in very exceptional cases supposed to raise *ex officio* according to French case law. (*2)

71 However, the trend towards a stricter control of international public policy issues by the French courts described in the previous chapter will most probably also have a certain impact on the arbitrators' conduct with regard to international public policy issues. (*3) It can therefore no longer be said with certainty that an award will generally not be set aside if neither the arbitrator nor the parties have raised an international public policy issue and that the arbitral tribunal has therefore not dealt with the issue.

72 A recent decision of the Paris Court of Appeal is quite instructive on how far arbitrators can go in their legal reasoning and findings. (*4) In that decision, the Claimant had requested the payment of interest on a given principal amount and the arbitrator ruled that this amount had to be qualified as compensation for the damages suffered by the Claimant in consequence of the suspension of the enforceability of a first instance judgment, and that applying a 6 % annual rate on capital was a fair way of calculating such damage.

73 The Paris Court of Appeal ruled that the Sole Arbitrator had based his decision on legal grounds that were not pleaded by the parties. It concluded that as a result, the parties were denied the right to be heard on such grounds since these grounds were newly and *ex officio* raised by the arbitrator. In particular, the Paris Court of Appeal criticised the arbitrator's autonomous decision to requalify the relief sought by Claimant as a claim for the compensation of damages while the Claimant had instead requested the payment of interest on the principal amount due by Respondent.

74 A possible criticism of the above decision would be that the result was exactly the same, no matter whether the Sole Arbitrator had granted 6% interest on the principal amount as compensation for damages as it did or whether it had simply granted interest of 6 % on the principal amount.

(*1) CA de Paris 19 June 2008, no 06/17901; Cass. Civ. (1ère) 29 June 2011, no 10/23321.
(*2) *Cf.* section 62 above.
(*3) *Cf.* section 63 above.
(*4) CA de Paris 25 March 2016, no 14/19164.

75 However, whether this case law of the Paris Court of Appeal should, in the end, be welcomed or not will, in essence, depend on whether the standpoint of an arbitrator or that of a party representative is taken. Obviously, arbitrators will appreciate more flexibility in their legal assessment, whereas party representatives will mainly want to make sure that their respective clients have had ample opportunity to comment on all legal aspects which form part of the Arbitral Tribunal's decision.

76 Be that as it may, it must be recommended to arbitrators sitting in France to have a prudent approach vis-à-vis the *iura novit curia* principle, which is found to be rather inappropriate for international arbitration proceedings. Arbitrators should therefore only in very limited and exceptional situations touching upon issues of international public order apply legal provisions *ex officio*. In case of doubt, preference should always be given to solutions which allow the parties to comment prior to the Arbitral Tribunal's decision.

77 Along these lines further inspiration can be taken from the 15 recommendations adopted by the International Law Association (ILA) in 2008.(*1)

B. Do ultra/infra petita awards lead to setting aside and/or refusal of enforcement?

78 Ultra petita decisions are decisions in which the Arbitral Tribunal went beyond the relief sought by the parties and granted more than what was requested. Awards may be set aside or refused enforcement on that basis also in France.

79 As an example, an award in which the Arbitral Tribunal granted a higher interest rate which had not been asked for by the parties may be set aside for the Arbitral Tribunal having decided ultra petita. (*2)

80 The situation is not exactly the same in cases in which the Arbitral Tribunal decided infra petita, i.e. granted less than was requested by the parties. In that regard, the Paris Court of Appeal found that an infra petita decision would in principle not amount to a situation of non-compliance with the arbitrator's mandate and could therefore not give rise to a setting aside action. (*3)

(*1) The French version of the recommendations was published in *Rev.arb.* 2009, 451, www.ila-hq.org/.
(*2) CA Paris 01 December 2011, no 10/19655.
(*3) CA Paris 20 November 2012, no 11/01378.

81 The reason is that the applicant may still revert to the Arbitral Tribunal and ask for completion of the award pursuant to Article 1485 CCP. (*1)

82 It is therefore only in cases in which the request for completion was still not dealt with satisfactorily in the eyes of the applicant that an action to set aside the award may be envisaged on that basis. (*2)

(*1) Art. 1485 CCP (the first two paragraphs of that provision also apply to international awards rendered in France and abroad, pursuant to Art. 1506 (4) CCP): "La sentence dessaisit le tribunal arbitral de la contestation qu'elle tranche. Toutefois, à la demande d'une partie, le tribunal arbitral peut interpréter la sentence, réparer les erreurs et omissions matérielles qui l'affectent ou la compléter lorsqu'il a omis de statuer sur un chef de demande. Il statue après avoir entendu les parties ou celles-ci appelées. Si le tribunal arbitral ne peut être à nouveau réuni et si les parties ne peuvent s'accorder pour le reconstituer, ce pouvoir appartient à la juridiction qui eût été compétente à défaut d'arbitrage." Free translation: "Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award. However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard. If the arbitral tribunal cannot be reconvened and if the parties cannot agree on the constitution of a new tribunal, this power shall vest in the court which would have had jurisdiction had there been no arbitration."
(*2) CA Paris 04 March 2004, *Rev.arb.* 2005, 143.