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National Report of France

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As a preliminary comment, it should be noted that French law distinguishes between domestic arbitration (Article 1442 to 1503 of the Code of Civil Procedure, hereafter referred to as "CCP") and international arbitration (Article 1504 of the CCP), arbitration being "*international*" when "*international trade interests are at stake*" (Article 1504 of the CCP). The following report deals only with international arbitration.

1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?

France recognizes the positive effect of competence-competence, according to which only the arbitral tribunal has jurisdiction to rule on its jurisdiction (Article 1465 of the CCP) and the negative effect of the competence-competence, according to which the state courts must deny jurisdiction when seized despite an arbitration agreement (Article 1448 of the CCP).

There is only one limited exception.

State courts have jurisdiction over the merits of a dispute despite an arbitration agreement provided that (i) no arbitral tribunal has yet been seized and (ii) the arbitration agreement is **manifestly** void or inapplicable (Article 1448 of the CCP). Such cases are very rare in practice, as state courts tend to favor the enforceability of arbitration agreements. In this respect, it should be noted that French courts recognize the "*autonomy*" of the arbitration agreement from the underlying contract and, based on this principle, have extended the binding effect of an arbitration agreement to non-signatories involved in the negotiation, performance or termination of the underlying agreement[1].

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

In order to have an arbitration agreement enforced by a state court, a party must raise before the court a motion challenging its jurisdiction. To be admissible, such motion must

[1] Cass. Civ 1, 27 March 2007, n°04-20842, Bull. 2007, I, n°129

be raised in *limine litis*, i.e before any defense as to the merits or as to the admissibility of the claim has been raised (Article 74 of the CCP).

Procedural specificities exist depending on the court before which the proceedings are initiated.

When the proceedings are initiated before the *Tribunal de grande instance*, such motion should be raised before the *Juge de la mise en état*, who has exclusive jurisdiction to rule on motions challenging the jurisdiction of the tribunal. The decision of the *Juge de la mise en état* may be appealed within 15 days from the date of service (Article 776 of the CCP).

When the proceedings are initiated before another court than the *Tribunal de grande instance*, the court itself will decide on the motion challenging its jurisdiction. If the court's decision rules only on jurisdiction, it may be appealed through a specific procedure called "*contredit*", within 15 days from the date of the decision (Article 82 of the CCP). If the decision rules both on jurisdiction **and** on the merits, it may be appealed within 1 month from the date of service.

It should be noted however that these time limits are increased by two months when the parties are domiciled abroad (Article 643 of the CCP).

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

Pursuant to Article 1448 § 2 of the CCP, a court may not decline jurisdiction on its own motion. It is necessary that a party challenges its jurisdiction on the basis of an arbitration agreement.

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

French law contains no specific provision regarding a declaratory action to obtain an affirmative declaration by the court about an arbitration agreement. To our knowledge, such action was never brought before the state courts. In our opinion, it would encounter

two major obstacles regarding the jurisdiction of the courts and the admissibility of the action.

Jurisdiction

As indicated above (see Question 1.1), only the arbitral tribunal has jurisdiction to rule on its own jurisdiction, i.e., the existence, validity, enforceability, scope of an arbitration agreement. State courts only have jurisdiction if the arbitral tribunal has not yet been seized and the arbitration agreement is manifestly void or inapplicable.

Consequently, assuming it could be admissible, a declaratory action could only aim at requesting the court to declare the arbitration agreement not manifestly void or inapplicable. The courts would not have jurisdiction to make a more thorough review of the arbitration agreement.

Admissibility

Under French law, to be admissible, a claim shall be brought by a party having "*a legal existing and current interest (locus standi)*" in bringing proceedings. A "*legal interest*" exists when the lodging of a claim may change one's legal situation. For this reason, French courts are traditionally rather reluctant in holding a declaratory action to be admissible.

To our knowledge, an action aiming at having the French courts decline their jurisdiction was held admissible and well-founded in only two cases, which occurred under very specific circumstances (American courts had rendered *forum non conveniens decisions* under the reserve that the French courts accept jurisdiction) and did **not** involve any arbitration agreement[2]. As there is no interest in having a court declare that an arbitration agreement is not manifestly void or inapplicable, such action should therefore be declared inadmissible.

The only situation we can think of where such action might have an interest for the party would be to resolve a difficulty in the constitution of an arbitral tribunal, for instance if the administrative body decides *prima facie* that there is no arbitration clause, or in an *ad hoc* arbitration, if party-appointed arbitrators refuse to accept their mission because they consider that no arbitration convention exists (although we doubt this could ever happen in practice). Such action may only be brought before the *juge d'appui* (see Question 2.1 below), bearing in mind that it cannot decide on the validity/enforceability/scope of the arbitration agreement.

[2] CA Paris, 6 March 2008, RG n°06/15786, *Flash Airlines*; Cass. Civ. 1, 7 December 2011, n°10-30319, Bull. 2011, I, n° 210

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

There is no procedural requirement that would be specific to declaratory actions under French law. As stated before, the main issue in this type of actions is for the claimant to demonstrate that it has a "*legal interest*" in acting (see Question 1.4).

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

Under French law, an objection to the state court's jurisdiction shall always be brought before any defense as to the merits or as to the admissibility of the claim. This remains true when the objection is based upon an arbitration agreement (See Question 1.2).

As regards declaratory actions on arbitral jurisdiction, as stated at Question 1.4, assuming that such action could be successful, it would have to be initiated before the arbitral tribunal has been constituted.

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the *doctrine of assertion* or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

There is no such doctrine in France.

When proceedings are brought on the merits despite an arbitration clause, French courts can merely perform a *prima facie* control of the arbitration agreement in order to decide if it is **manifestly** void or inapplicable (See Question 1.1 above).

In the context of an action to set aside an award or an appeal against an enforcement order of an award, French courts perform a **comprehensive review** of the arbitral tribunal's

jurisdiction. They can rely on "*any point of fact or law in order to assess the scope of the arbitration agreement*"[3]. The only limit is that they are prohibited to review the award as to its substance.

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

If the arbitral tribunal has already been constituted, it has exclusive jurisdiction to rule on its own jurisdiction. If it has not yet been constituted, the state courts will refer the whole matter to the arbitral tribunal unless the arbitration agreement is manifestly void or inapplicable to part of the claim. If it is the case, the courts will retain jurisdiction only for this part.

In the context of an action to set aside an award or an appeal against an enforcement order of an award, the courts can split the case and decide that some of the claims fall within the jurisdiction of the arbitral tribunal, and that some do not.

In this respect, French courts widely admit that the arbitrator's jurisdiction is not limited to the only scope of contractual liability and can extend to tort liability depending on the way the arbitration agreement is drafted.[4]

1.9 Does your jurisdiction allow for *anti-arbitration injunctions* or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

In two decisions, French Courts had to rule on whether they could order injunctions to an arbitral tribunal that was already constituted.

In a case where one party was requesting a stay of the arbitral proceedings, the President of the Paris Court of First instance rejected the request on the ground that *"if the summary proceedings judge can order a conservatory measure to secure the enforcement of the arbitral award, he cannot order an injunction to stay the proceedings. Order such measure would constitute an interference with the arbitral proceedings which does not fall within the jurisdiction of national courts, even in summary proceedings*"[5]. It was a clear indication that if French Courts may intervene in support of the arbitration, they should not interfere in any manner with arbitral proceedings.

[3] Cass. Civ 1, 6 October 2010, n°08-20563, Bull. 2010, I, n°185

[4] CA Paris, 14 March 2012, RG n°11/12354

[5] TGI Paris, 29 March 2010, RG n°10/52825

This was confirmed in a second case when a party contended that the nomination of an arbitrator was invalid, and thus jeopardizing the entire constitution of the arbitral tribunal. The Paris Court of first Instance ruled that the arbitral tribunal had exclusive jurisdiction to rule on the regularity of its constitution, and thus that state Courts could not be seized in summary proceedings to rule on arbitral jurisdiction[6]. This decision was confirmed by the Court of Appeal[7].

More than one year later, the French *Cour de Cassation,* went further by ruling that "*the arbitral tribunal is an autonomous international jurisdiction, the Court of appeal exactly ruled that it does not fall within the power of French state court to intervene in an arbitral proceedings"*[8], without any reference to summary proceedings. In other words, once the arbitral tribunal is constituted, national courts cannot interfere in the arbitration proceedings.

In the same case, an action on the merits before the Civil court of first Instance of Paris was initiated to obtain the annulment of the appointment of one of the arbitrators by one party, on the basis that the mandate of the person that had been appointed to represent this party became null and void (the Court order appointing this agent was annulled by the Court after the appointment of the arbitrator). The French *Cour de Cassation* ruled that the Civil court of first Instance had jurisdiction and confirmed that the appointment of the arbitrator should be annulled[9], adding that the arbitral tribunal had to draw the legal consequences on the regularity of its constitution.

A distinction should be made between these two situations. In the first decision, the dispute was about the arbitration agreement (ability of the dispute to be submitted to arbitration). Following the negative effect of the competence-competence principle, state courts cannot have jurisdiction in that situation. In the second case it was related to the validity of the arbitrator's contract (ability of the arbitrator to be an arbitrator), where the competence-competence has no role to play.

It should be pointed out that in those two cases, the arbitral tribunals were already constituted when the court proceedings were initiated. We are not aware of any decision rendered in a case where the arbitral tribunal was not yet constituted.

However, if the arbitral tribunal has not yet been constituted, the state court can only rule on the manifest nullity or inapplicability of the arbitration agreement. Therefore, before the constitution of the arbitral tribunal, a request for injunction that would aim at preventing an arbitration to be initiated would possibly be rejected by state courts.

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

[6] TGI Paris, 6 January 2010, RG n°09/60539

[7] CA Paris, 5 November 2010, n°10/01117

[8] Cass. Civ 1, 12 October 2011, n°11-11058, Bull. 2011, I, n°163

[9] Cass. Civ 1, 28 March 2013, n°11-11320, Bull. 2013, I, n°58

In the cases mentioned at Question 1.9, the request was directed both at the opposing party and the arbitrators.

However, as explained here above, the injunctions were rejected.

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

The two main grounds for state courts to have jurisdiction are that they are:

- the court of the place where the defendant lives (Article 42 of the CPP);
- in contractual matters, the court of the place of the actual delivery of the chattel or the place of performance of the agreed service (Article 46 of the CPP).

Therefore, if either one of those two places is located in France, French courts would legally have jurisdiction.

It should be pointed out that in its decision of 2011 mentioned at Question 1.9, the French *Cour de Cassation* explicitly ruled that French courts do not have any jurisdiction to issue an injunction that would aim at ordering the arbitral tribunal to interrupt their proceedings, even though one of the party was French, and the dispute was about a mandate given by French jurisdiction to a person that had to represent the party[10].

Indeed, in this case, following the arbitration agreement in the contract, any dispute that were to arise would be handled by an ad hoc arbitration proceedings, in accordance with the regulation of the United Nations Commission on International Trade Law, the appointing authority would be the Arbitration Institute of the Stockholm Chamber of commerce, the seat of arbitration would be Stockholm and the proceedings would be in English. The French *Cour de cassation* ruled that in international arbitration, the arbitral tribunal was considered as an autonomous international jurisdiction, and that therefore French jurisdiction could not interfere with an international arbitral proceedings. Therefore, in international arbitration, French jurisdiction do not have the power to interfere with arbitral proceedings.

Nevertheless, it is worth mentioning that following the second decision of the French *Cour de Cassation* on the same case[11], state courts have jurisdiction to rule on the validity of the arbitrator's contract. Therefore, the court with jurisdiction was the civil court of first instance, because the dispute was about the arbitrator's contract which is a civil contract. To determine which judge had jurisdiction, Article 42 of the CPP was applicable: here the defendant being the arbitrator, it was the court of the place where the arbitrator lives that had jurisdiction.

[10] Cass. Civ. 1, 12 October 2011, n°11-11058, Bull. 2011, I, n°163

[11] Cass. Civ 1, 28 March 2013, n°11-11320, Bull. 2013, I, n°58

Therefore, French principles of jurisdiction are applicable when the state courts have jurisdiction, i.e. when they do not interfere with arbitral proceedings.

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

We are not aware of any decision where an anti-arbitration injunction was issued by a state court.

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

France has instituted a judge acting in support of the arbitration (*juge d'appui*), who, among other missions[12], can offer assistance in appointing arbitrators.

Subject to the jurisdiction of an arbitral institute (see Question 2.6 below), the *juge d'appui* may appoint one or more arbitrator(s):

- in proceedings with a sole arbitrator, when the parties fail to reach an agreement on the arbitrator (Article 1452 §1 of the CCP),
- where there is a three-member panel of arbitrators, when a party fails to appoint a co-arbitrator, or when the parties fail to reach an agreement on the President of the panel (Article 1452 §1 of the CCP),
- when there are more than two parties to an arbitration and they do not agree on the appointment of the arbitrator(s) (Article 1453 of the CPP).

He also has power to decide "*any other dispute relating to the constitution of the arbitral tribunal*" (Article 1454 of the CCP).

[12] The *juge d'appui* also has power to decide on the legitimacy of an arbitrator's resignation or dismissal (Articles 1457 and 1458 of the CCP), to decide on challenge of arbitrators (Article 1459 of the CCP) or to extend the arbitration proceedings' time-limit (Article 1463 of the CCP).

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

Subject to the jurisdiction of an arbitral institute (see Question 2.6 below), when the parties face difficulties in the constitution of a three-member panel of arbitrators, the following prerequisites apply:

- the *juge d'appui* can appoint a co-arbitrator provided that one of the parties has not complied with another party's request to appoint an arbitrator within **one month** as from the receipt of the said request (Article 1452 §2 of the CCP),
- the *juge d'appui* can appoint the President of the arbitral tribunal provided that the co-arbitrators have not reach an agreement within one month as from the acceptance of their mission (Article 14525 §2 of the CCP).

In other cases where the *juge d'appui* has power to appoint arbitrators, its intervention is only subject to an existing dispute between the parties regarding the constitution of the arbitral tribunal.

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

Subject to the jurisdiction of an arbitral institute (see Question 2.6 below), according to the Article 1455 of the CCP, the *juge d'appui* can appoint an arbitrator subject to the finding that the arbitration agreement is not **manifestly void or inapplicable**.

There is no further review of the arbitral tribunal's jurisdiction by the *juge d'appui*.

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

Jurisdiction

Subject to the jurisdiction of an arbitral institute (see Question 2.6 below), according to Article 1505 of the CCP, the *juge d'appui* has jurisdiction provided that:

- the arbitration proceedings are seated in France **or**,
- the parties have agreed that the arbitration proceedings will be ruled by French procedural law **or**,
- the parties have expressly granted jurisdiction to the French courts in order to rule on disputed relating to the arbitral proceedings **or**,
- one of the parties is exposed to a denial of justice.

Unless the parties have otherwise agreed, the *juge d'appui* will be the President of the Paris Court of first instance.

Procedure

According to Article 1460 of the CCP, the *juge d'appui* may be seized either by a party, the tribunal or one of its members. The applicable time-limits are the one stated at Question 2.2. The proceedings are adversarial and oral, i.e. the parties are bound by their oral pleadings, which prevail over their written submissions.

Recourses

The decision of the *juge d'appui* is subject to appeal only if it finds that the arbitration agreement is manifestly void or inapplicable and thus refuses to appoint an arbitrator.

Otherwise, the only available recourse against the decision issued by the *juge d'appui*, created by case law, is called "*appel nullité*". It shall be filed within 15 days as from the service of the decision (Articles 492-1 and 490 of the CCP).

The admissibility of an "*appel-nullité*" is very limited, as it is subject to the demonstration of an actual misuse of power by the judge, i.e. to the demonstration that the judge has either exceeded its powers or refused to use some of his prerogatives. It has been ruled that the appointment or an arbitrator by a *juge d'appui*, based on a manifestly void arbitration agreement could not characterize such misuse of power[13].

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

Contrary to most arbitral institutes, the state courts do not appoint arbitrators based on a list that would be available to them. Besides, there is no specific rules that the courts would have to follow when appointing an arbitrator.

In practice, the state courts try to take into account the opinion/suggestions of the parties.

[13] Cass. Civ 1, 30 October 2006, n°04-17167, Bull. 2006, I, n°442, p.379

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

When arbitration proceedings are administered by an institute, the jurisdiction of the *juge d'appui* is excluded. Therefore, only the institute may offer assistance to the parties in the constitution of the arbitral tribunal.

However, it should be noted that, even when arbitration proceedings must be organized by an arbitration center, the *juge d'appui* has subsidiary jurisdiction in deadlock situations. He can, for instance, offer assistance in identifying which arbitration center should organize the arbitration proceedings when a pathological arbitration agreement mentions two arbitration centers[14], or when an arbitration agreement mentions a non-existing arbitration center as it occurred in a case where the parties had mentioned "*the Official Paris Chamber of Commerce*" instead of the International Chamber of Commerce[15]. Such arbitration agreements are indeed not deemed manifestly void or inapplicable by French case law. The *juge d'appui* also has subsidiary jurisdiction when the institute fails to act or to find a solution to a dispute regarding the constitution of the arbitral tribunal[16].

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

If they all agree, the parties may always dismiss an arbitrator without requesting the assistance of the state courts (Article 1458 of the CCP).

Subject to the foregoing regarding arbitral institutes (See Question 2.6), when a disagreement arises between the parties, the assistance of the *juge d'appui* may be sought to remove and/or replace an arbitrator. This may happen in case of challenge, resignation or death of an arbitrator.

Challenge of an arbitrator

Arbitrators may be challenged on the basis that they lack independence or impartiality, or that they do not meet any specific requirement set out in the arbitration agreement.

Regarding lack of independence or impartiality, it should be noted that arbitrators have a duty to disclose, prior to the acceptance of their mission, any circumstances that may affect their independence or impartiality, this being interpreted by case-law "*any circumstances that may create a reasonable doubt in the parties' mind, as to the independence and impartiality of the*

[14] Cass. Civ 1, 20 February 2007, n°06-14107, Bull. 2007, I, n°62 p.56

[15] TGI Paris, 13 December 1988, Rev. arb. 1990, p. 521 ; CA Paris, 28 October 1999 : *Rev. arb.* 2002, p. 175

[16] TGI Paris, 24 February 1992 and 15 April 1992, *Rev. arb.* 1994 n°3, p.557; TGI Paris, 18 January 1991, *Rev. arb.* 1996 n°4, p.503; TGI Paris, 20 October 2013, RG n°13/57483

arbitrator"[17]. They must also disclose any such circumstances appearing after the acceptance of their mission (Article 1456 §2 of the CCP).

In practice, the *juge d'appui* will intervene in two situations: (i) when an arbitrator has revealed a circumstance which a party considers to actually affect its independence or impartiality, (ii) when a party discovers a circumstance which an arbitrator has failed to disclose and which it considers to actually affect the independence or impartiality of the arbitrator. In any case, he must be seized within one month from the disclosure or the discovery of the fact giving rise to the difficulty (Article 1456 §3 of the CCP).

When the *juge d'appui* decides to remove an arbitrator, he can let the parties appoint a substitute arbitrator or directly appoint an arbitrator if it is requested by the parties.

Resignation of an arbitrator

Arbitrators have a duty to carry out their mandate until it is completed. They may resign only if they "*have a legitimate reason*" to do so or are "*legally incapacitated*"(Article 1457 §1 of the CCP). The illness of an arbitrator or an existing conflict of interests with a party, occurred after the acceptance of his mission, would qualify as a legitimate reasons or legal incapacity.

When one of the parties disagrees on the reason given by the resigning arbitrator, it can seize the *juge d'appui* within one month as from the legitimate reason or legal incapacity has been disclosed (Article 1457 § 2 of the CCP). The *juge d'appui* will resolve the difficulty and decide if the resignation is justified. If so, it will either replace the resigning arbitrator or invite the parties to do so.

Death of arbitrator

Although the CCP does not provide for any express provision in this respect, the *juge d'appui* shall assist the parties in replacing an arbitrator who died in the course of his mission in case the parties cannot agree on a substitute arbitrator. Indeed Article 1454 of the CCP states that the *juge d'appui* has power to decide "*any other dispute* [than the one expressly mentioned by the CCP] *relating to the constitution of an arbitral tribunal*".

2.8 If so, please describe the procedure therefore briefly.

The procedure is the same as the one described at Question 2.4.

[17] *Tecso*, Cass. Civ 1, 10 October 2012, n°11-20299, Bull. 2012, I, n°193, and CA Lyon, 11 March 2014, R.G. n°13/00447

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

In principle, pursuant to Article 1468 of the CCP, "*the arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order*", and "*amend or add to any provisional or conservatory measure that it has granted*". The only limit is that, even once the arbitral tribunal has been constituted, the state courts have exclusive jurisdiction to order conservatory attachments and judicial securities.

In practice, the parties often comply voluntarily with provisional or conservatory measures taken by the arbitral tribunal.

However, assuming that they do not respect the order, the only way to enforce the conservatory or provisional measures ordered by an arbitral tribunal, is to obtain an enforcement order by the state courts, called *exequatur*.

The measures must qualify as an award

To obtain such enforcement order, the decision issued by an arbitral tribunal must qualify as an "*award*".

According to the *Cour de cassation*'s ruling in a recent case, an award is "*a decision putting an end to a dispute regarding the merits or the admissibility of a claim, or a decision ruling on a procedural objection thereby putting an end to the case*"[18].

In this case, an arbitral tribunal had issued an award ordering the sequestration of monies. In a subsequent order, the tribunal had ordered that the monies be consigned in the hands of the President of the Paris Bar pending the signing of an escrow agreement. The *Cour de cassation* held that this order could not qualify as an arbitral award as it was merely arranging the transitional period between the award and the signing of an escrow agreement[19].

However, in an earlier case, the Paris Court of Appeal had ruled that an interim injunction could qualify as an award[20].

The question of whether an interim injunction issued by an arbitral tribunal could qualify as an award is thus not entirely clear under French law.

[18] Cass. Civ 1, 12 October 2011, n°09-72439, Bull. 2011, I, n°164

[19] Cass. Civ 1, 12 October 2011, n°09-72439, Bull. 2011, I, n°164

[20] CA Paris, 7 October 2004, *JDI* 2005 n°2, p.341

The enforcement procedure

Assuming that an interim order issued by an arbitral tribunal could qualify as an award, the procedure to obtain an enforcement order by a State court is the same as for any award. It can be roughly described as follows.

An application must be filed before the first instance court of the place where the award was rendered or Paris if the award was rendered abroad (Article 1516 of the CCP). The proceedings are conducted *ex parte*. The applicant must establish the existence of the award by producing the original award and the arbitration agreement or authenticated copies of them, and their official translation if they are not written in French (Article 1515 of the CCP). The enforcement will be granted provided that the award is not "*manifestly contrary to public policy*" (Article 1517 of the CCP).

If the award has been rendered abroad, it may always be appealed within one month as from its service (plus two month when the party is domiciled aboard). The grounds for appeal are as follows (Article 1520 of the CCP):

- the arbitral tribunal wrongly upheld or denied jurisdiction **or**;
- the arbitral tribunal was not properly constituted **or**;
- the arbitral tribunal did not comply with the mandate conferred upon it **or**;
- due process was violated **or**;
- the recognition and enforcement is contrary to international public policy.

If the award has been rendered in France:

- The order denying enforcement may be appealed within one month as from its service (plus two month when the party is domiciled aboard). In this case, the court can decide on a motion to set aside the award, if asked so by one of the parties. The grounds to set aside an award are the ones stated at Article 1520 of the CCP (see above).
- The order granting enforcement cannot be subject to an appeal, but the award itself can be directly subject to an action to set aside, which is deemed to constitute also an appeal against the enforcement order (Article 1524 of the CCP). In this case, the grounds for setting aside the award are the same as the ones stated at Article 1520 of the CCP (see above). However, it must be noted that the enforcement order granting enforcement can be appealed if the parties have waived their right to apply for the setting aside of the award (Article 1522 of the CCP).

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

If they qualify as awards, interim injunctions rendered by an arbitral tribunal seated abroad can be enforced in the way described at Question 3.1.

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

We are not aware of any case-law on this subject matter.

We assume that, if the measure is not available in France, it may be deemed to be "*manifestly contrary to international public policy*" and not be granted enforcement by the state court (See Question 3.1).

In any event, the French authorities in charge of the enforcement of the measure cannot go beyond what is legally authorized by French law.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

A distinction should be made between conservatory attachments or judicial securities on the one hand, and other interim or conservatory measures on the other hand.

Conservatory attachments or judicial securities

Whether before or after the arbitral tribunal has been constituted, state courts have exclusive jurisdiction to order conservatory attachments or judicial securities provided that the claim appears "*well founded in principle*" and that "*there are circumstances likely to threaten recovery of the debt*" (Article L. 511-1 of the Code of civil enforcement procedures).

Once the order is issued, the applicant party must respect several time-limits, which will not be detailed in this report. The only requirement that is worthy of mention is that the applicant must initiate the proceedings on the merits (here, the arbitration proceedings)

within one month as from the decision ordering the measure, failing which the measure with expire (Article R. 511-7 of the Code of civil enforcement proceedings).

Other interim or conservatory measures

Before the arbitral tribunal has been constituted and provided the matter is "*urgent*", a party may apply to any competent state court in order to obtain interim or conservatory measures other than conservatory attachment and judicial securities, in summary proceedings (Article 1449 of the CCP).

In such cases, the requirements applicable to any such measures under French law, must also be fulfilled. Consequently, state courts may only order interim or conservatory measures:

- if the claim is not "*seriously disputable*" or
- to prevent "*imminent damage*" or
- to abate a "*manifestly illegal nuisance*" (Articles 808 and 809 of the CCP).

In practice, when ordered to prevent imminent damage or to abate a manifestly illegal nuisance, the measure must be time limited and conditioned upon the filing of arbitration proceedings.

A party's application for interim relief or conservatory measures do not lead to any particular consequence as regards the main claim in terms of time-limits or procedural requirements.

3.5 May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?

In principle, once the arbitral tribunal has been constituted, the state courts can no longer grant any interim or conservatory measures (Article 1449 of the CCP).

The only exception to this rule relates to conservatory attachments and judicial securities. State courts has **exclusive jurisdiction** to order such measures, **before and after** the constitution of the arbitral tribunal. The procedure has been described at Question 3.4.

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

State courts can order the reimbursement of legal costs in proceedings for interim relief. In practice, the amounts allocated on account of legal costs are limited and do not cover the actual legal costs incurred by a party.

If the claim is subject to an arbitration agreement and the arbitral tribunal has not yet been constituted, no reimbursement of the legal costs may be ordered as they have not yet been incurred by the parties.

Once the arbitral tribunal has been constituted, the state courts lack jurisdiction to order interim measures, except for conservatory attachments and judicial securities. In a situation where a party default to advance its share of the arbitration costs, the other party could request a state court to order a conservatory attachment or judicial security.

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

In France, state courts play a role in the gathering of evidence for use in arbitration.

Before the arbitral tribunal has been constituted, state courts may order the taking of evidence (Article 1449 of the CCP).

Once the arbitral tribunal has been constituted, it has, in principle, jurisdiction to order any evidentiary measures (Article 1467 of the CCP). However, state courts still have a role to play in the gathering of evidence in two situations.

First, state courts have exclusive jurisdiction to order the taking of evidence **held by a third party** (Article 1469 of the CCP).

Second, the measures taken by the arbitral tribunal can only be enforced with the assistance of the state courts, through the specific procedure called *exequatur*. On this specific issue, we refer to our answer to Question 3.1 above.

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

When the request is filed before the arbitral tribunal has been constituted, the proceedings are usually adversarial and initiated by a summons to appear. However, they may be conducted *ex parte*, if it is absolutely necessary for the success of the requested measure. In this case, the party requesting the measure must file a petition.

Once the arbitral tribunal has been constituted, state court proceedings for the gathering of evidence may only be brought against a third party to the arbitration proceedings (Article 1469 of the CCP and Question 4.1 above). They are adversarial. The third party is summoned before the President of the court of civil instance having territorial jurisdiction, upon leave of the arbitral tribunal. The proceedings are conducted in a similar way as for summary proceedings ("*comme en matière de référés*").

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

Articles 1449 and 1469 of the CCP govern the assistance that state courts can provide in the gathering of evidence, when the dispute is subject to an arbitration agreement.

Article 145 of the CCP defines the conditions upon which state courts may provide assistance to the parties before proceedings are initiated on the merits. It is made applicable to disputes subject to an arbitration agreement by Article 1449 of the CCP, under the condition that the arbitral tribunal has not yet been constituted.

Articles 179 to 184-2 of the CCP describe the measures that may be ordered by a state court.

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

Before the arbitral tribunal has been constituted

State courts may assist the parties in the taking of evidence before the arbitral tribunal has been constituted, upon the conditions set out at Article 145 of the CCP.

First, there must not be any pending claim on the merits, but such claim must be reasonably foreseeable. Second, the requesting pary must have a "*legitimate reason*" to ask the measure. This means that the requested measure must be useful to the party i.e. it is likely to influence the outcome of the proceedings that may be brought on the merits. Third, the requested measures must be "*legally admissible*". For instance, general investigative measures (fishing expeditions) are forbidden.

After the arbitral has been constituted

After the arbitral tribunal has been constituted, states courts may only intervene to offer assistance in the taking of evidence held by third party. According to Article 1469 of the CCP, "*if one of the parties to arbitral proceedings intends to rely on an official [acte authentique] or private [acte sous seing privé] deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the Tribunal de grande instance for the purpose of obtaining a copy thereof [expedition] or the production of the deed or item of evidence*".

In other words, the only conditions upon which the state courts may order measures for the taking of evidence are that (i) evidence is held by a third-party and (ii) the arbitral tribunal has invited one of the parties to request such evidence.

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?

Before the arbitral tribunal has been constituted, state courts can order the appointment of an expert to conduct expertise proceedings or a bailiff to make inspections. They can also order the communication of documentary evidence.

In theory, state courts can make personal verifications and inspections, hear the parties and confront the parties, or order investigations involving the hearing of witnesses. In practice, such measures are almost never sought.

Once the arbitral tribunal has been constituted, as stated by Article 1469 of the CPP, state courts can only force a third party to produce an official [*acte authentique*] or private [*acte sous seing privé*] deed to which it was not a party or any other evidence held by a third party.

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

The evidence gathering before the state courts is governed by the rules of French law set out above in this report, bearing in mind that the state courts have significant discretion in deciding whether they will order a requested measure or not. They will have limited consideration for other sources such as the legal rules of an arbitral institute, unless they can used them to attest the intent of the parties.

The evidence gathering before the arbitral tribunal is governed by the rules of the arbitral institutes if any. Guidance is also often sought from the IBA Rules on the Taking of Evidence in International Arbitration.

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

There is no distinction in this respect under French law. We are not aware that such distinction would be made in practice.

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

Before the arbitral tribunal has been constituted, state courts can order disclosure from **anyone** holding evidence in France, including third parties, under the conditions set out at Article 145 of the CCP (See Question 4.4.).

After the arbitral tribunal has been constituted, the state courts can assist the arbitral tribunal with the production of evidence held by a **third party only** (Article 1469 of the CPP).

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

State courts indeed have power to compel someone to disclose evidence. The conditions have been set out at Question 4.4.

It should be recalled that the state courts have discretionary powers to decide if the requested measures should be ordered or not.

4.10 What can the state court do if the discovery or disclosure target fails to comply?

The only way for state courts to ensure the compliance with the measures ordered is to impose a penalty payment in case of non-compliance.

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

Only the parties to the arbitration can request assistance from state courts.

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

Before the arbitral tribunal has been constituted

When proceedings are adversarial, the disclosure target may suggest the court to limit the measure or to take alternative measures than the ones requested. Once the court has ordered a measure, the only way to seek relief is to lodge an appeal against the court's decision, within 15 days from the date of service (plus two months if the appealing party is domiciled abroad). However, the filing of an appeal **does not suspend** the enforcement of the decision.

When proceedings have been conducted *ex parte*, relief must be sought through a specific procedure called "*référé-rétractation*". The disclosure target must summon the other party before the court in order to challenge the decision taken by this court. Obviously, such recourse can only be exercised once the measure has been executed.

After the arbitral tribunal has been constituted

After the arbitral tribunal has been constituted, as stated above, state courts can only offer assistance in taking evidence held by a third-party. Two points worth mentioning:

First, the proceedings are necessarily adversarial, i.e. the third party can explain its position as to why the measure should not be ordered (Article 1469 of the CCP).

Second, an appeal can be lodged against the court's decision within the same time-limits as described above (15 days from the date of service, plus two months in case the appealing party is domiciled abroad). However, in this case, the filing of an appeal **does suspend** the enforcement of the court's decision (Article 1469 of the CCP).

4.13 What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

When a party asks a state court to order the disclosure of some evidence, the disclosure target may always oppose legitimate reasons to convince the court that it should not grant the request.

The fact that the target evidence is privileged can characterize such legitimate reason and justify the reject of the request. However, decisions in this respect are always rendered on a case-by case basis, depending on the nature of the confidentiality protection opposed by the disclosure target and on the particular circumstances of each case. In most cases, the

court balance the interests of the parties, so as to decide whether they should order the disclosure or not.

Concerning professional confidentiality protections, some are absolute while others can suffer exceptions. For instance, the attorney-client privilege is absolute. It cannot be breached, even with the client's consent. On the contrary, banking secrecy can be set aside under some circumstances and does not always prevent the disclosure of evidence held by a bank[21].

It should be mentioned that, under French law, the breach of professional confidentiality protections comes under criminal law (Article 226-13 of the Penal Code). However, when a party is requested by a court to disclose some information that are covered by processional secrecy, it cannot incur criminal liability.

Concerning trade secret, the *Cour de cassation* ruled that it does not constitute in itself a hindrance to the disclosure of evidence were such disclosure is useful and necessary for the protection of the rights of the party requesting it[22]. Depending on the circumstances, and particularly on the usefulness of the requested measure and the likeliness of a claim on the merits, trade secret can successfully be opposed by a disclosure target, for instance, where the disclosure would reveal a manufacturing secret[23] or the business structure of a competitor[24].

Finally, it should be noted that the experts appointed by state courts are bound by professional secrecy and cannot disclose the information they get outside the expertise proceedings (Article 274 of the CPP).

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

The procedure set out at Article 145 of the CPP can only be implemented if the arbitral tribunal has not yet been constituted. Therefore, state courts cannot enquire into the view of the arbitral tribunal.

The procedure set out at 1469 of the CCP (assistance of state courts for the taking of evidence held by a third party when the arbitral tribunal has been constituted), can only be implemented with the consent of the arbitral tribunal. Once the state courts are seized, they do not need to enquire into the view of the arbitral tribunal, and, to our knowledge, they do not do so in practice.

[21] Cass. Com. 16 December 2008, n°07-19777, Bull. 2008, IV, n° 206

[22] Cass. Civ 2, 8 February 2006, n°05-14.198

[23] Cass. Civ 2, 14 March 1984, n° 82-16.076, Bull. civ. 1984, II, n° 49; Cass. Civ 2, 25 May 1987, n°86-10808

[24] Cass. com., 5 January 1988, n° 86-15.322, Bull. civ. 1988, IV, n° 7

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

State courts do not need to enquire into the ultimate admissibility of the evidence in the arbitration proceedings.

Before the arbitral tribunal has been constituted, the state courts' only concerns are that (i) the measure their order is "*legally admissible*" and (ii) likely to be useful for the party which requests it.

After the arbitral tribunal has been constituted, state courts can only be seized upon leave of the arbitral tribunal. There is therefore little doubt about the admissibility of the evidence in the arbitration proceedings.

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

State courts have the power to order reimbursement of attorney's fees or expenses incurred by the disclosure target. Most of the time however, as stated at Question 3.6, the allocated amounts do not cover the actual attorney's fees incurred by a party.

Plus, when state courts are seized before any action on the merits, very often, they let the court or tribunal which will be seized on the merits decide on this issue.

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