1981

French Codification of a Legal Framework for International Commercial Arbitration

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FRENCH CODIFICATION OF A LEGAL FRAMEWORK FOR INTERNATIONAL COMMERCIAL ARBITRATION: THE DECREE OF MAY 12, 1981

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Resolution of a dispute arising under an international commercial contract frequently has been plagued with uncertainty regarding applicable substantive and procedural law. These problems are not necessarily solved by the presence of an arbitration clause in the contract. In the absence of a clearly defined arbitral system, the parties can not be certain of the rules regarding the arbitral procedure or the recognition and enforcement of arbitral awards. By enacting a decree that specifically applies to international commercial arbitration, France has recently taken a major step toward resolving the uncertainties surrounding the resolution of international commercial disputes. The authors analyze the 1981 Decree and explain its implications for arbitration of international commercial disputes in France.

INTRODUCTION

On May 12, 1981, the Prime Minister of France promulgated a decree defining special rules applicable to international commercial arbitration.[1] This decree followed by a year an earlier decree that

The present article is adapted from a chapter of the authors' book scheduled for completion in 1982 on the practice and procedure of International Chamber of Commerce arbitration.

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1. Decree No. 81-500 of May 12, 1981, [1981] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] at 1398-1406 [hereinafter cited as 1981 Decree]. The 1981 Decree may also be found in Recueil Dalloz Sirey, 28e Cahier-Chronique, 9 September 1981. An English translation of the international arbitration provisions of the 1981 Decree is annexed to the present article. The international arbitration section of the Decree is styled as two new titles (Title V and VI), comprising articles 1492-1507, Volume IV of the NOUVEAU CODE DE PROCEDURE CIVILE. *Id.* These titles appear on pages 1402-03 of the JOURNAL OFFICIEL. Subsequent citations to the 1981 Decree will refer to specific articles of the Decree as they appear in the NOUVEAU CODE DE PROCEDURE CIVILE and to the JOURNAL OFFICIEL.

made a major revision of French domestic arbitral procedure.[2] The combined result is a modern legal framework for arbitration that appears likely to enhance France's role as a venue for international commercial dispute resolution.

In providing treatment for international arbitration different from that accorded to purely domestic arbitration, the new French procedure recognizes the special status of international arbitration that has evolved over two decades in French case law.[3] This distinction between domestic and international arbitration comports with the trend in other countries, as evidenced most notably by the English Arbitration Act of 1979.[4] By limiting judicial intervention in, and review of, international arbitration,[5] while still permitting court control of the procedural fairness of the arbitration, the 1981 Decree seeks to encourage a climate favorable to the conduct of international arbitral proceedings within France.

The incentive to provide a special procedure for international arbitration arose from the existing importance of Paris as one of the world's major international arbitral centers.[6] This status had been obtained in part by the active role of French companies in international trade and investment, and the willingness of these companies to agree to arbitration as a vehicle for the resolution of business

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2. Decree No. 80-354 of May 14, 1980, [1980] J.O. at 1238-40 [hereinafter cited as 1980 Decree]. The 1980 Decree may also be found in [1980] Recueil Dalloz Sirey, Législation, [D.S. Leg.], at 207-09. Subsequent citations to the 1980 Decree will refer to specific articles of the Decree as they appear in the NOUVEAU CODE DE PROCEDURE CIVILE and to the pages and corresponding articles in the JOURNAL OFFICIEL.

3. *See* Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity,* 55 TUL. L. REV. 1, 15-16 (1980) [hereinafter cited as Carbonneau]. Carbonneau comments that: "Refusing to be bound by a servile analogy to the domestic law and recognizing the special needs of international commercial arbitration, the French courts have declared *inter alia* that the French State and its entities must abide by arbitration agreements inserted in private international contracts. . . ." *Id.*

4. Arbitration Act, 1979, c. 42. For analyses of the English Arbitration Act, see Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979,* 21 HARV. INT'L L. J. 87 (1980) [hereinafter cited as Park]; Shenton and Toland, *London as a Venue for International Arbitration: The Arbitration Act, 1979* 12 LAW & POL'Y INT'L BUS. 643 (1980). The Act applies to arbitration taking place in England and Wales but grants special treatment to "non-domestic" arbitrations, where at least one party is a nonresident of the United Kingdom. Park, *supra* at 97-100.

5. *See* notes 16, 45-50 & 62-65 *infra* and accompanying text.

6. Carbonneau, *supra* note 3, at 3 n.3.

disputes.[7] Moreover, the increasing use of the Paris-based Court of Arbitration of the International Chamber of Commerce (ICC)[8] by multinational enterprises has frequently led to the conduct of arbitral proceedings in France even where none of the parties are French. The choice of Paris as a venue for arbitration has also been inspired by its reputation as an acceptable meeting ground for parties of diverse economic and cultural tendencies, including the divergent interests of developed and developing countries.[9]

France may also have commended itself as a place for arbitration because of the traditionally liberal, or *laissez faire*, position taken by its courts with respect to arbitration. French judges have demonstrated a particular reticence to interfere with the arbitral process when international commercial relations are implicated.[10] This attitude of judicial restraint has been embodied in the 1981 Decree.[11]

The Need for the Decree

The growth in the number of international arbitrations held in France had led French courts to an increasing concern for balance between the arbitral autonomy necessary for effective commercial

7. "Paris is an important center for commercial arbitrations, and arbitration clauses are a fairly common feature of the commercial agreements made between French and foreign parties." *Id.*

8. J. G. Wetter, The International Arbitral Process: Public and Private, Vol. II 145 (1979). Of the more than 4,000 claims filed with the ICC during its fifty-eight year history, about 1,200 were submitted in the last five years. Case No. 2977 was filed on July 5, 1976. *See id.*, at 180. By the same month in 1981, new cases were docketed well past No. 4150.

It should be noted that the location of the ICC in Paris does not mean that the arbitral tribunal constituted for each case must sit in that city. ICC arbitrations are conducted all over the world, including the Far East, Africa, and South America; the vast majority of ICC arbitrations take place in Europe, notably in Switzerland, the United Kingdom, and France. *See id.* at 162-64.

9. Carbonneau states that:

> In terms of political ideology, Paris represents a sort of middle ground between the East and West; France is neither part of the NATO military alliance nor a country within the Eastern bloc. As a consequence, it can serve as an appropriate territory upon which to receive parties with widely divergent social, political and economic philosophies.

Carbonneau, *supra* note 3, at 3 n.3.

10. *See id.* at 5. *See* notes 25-36 *infra* and accompanying text.

11. *See* notes 45-50 & 62-65 *infra* and accompanying text.

arbitration on the one hand, and the need to ensure the integrity of arbitral awards rendered in France on the other.[12] The procedures for appeal and review of international arbitration taking place in France were based on case law and a series of disparate legal texts that frequently led to confusion and abuse.[13] While a legislative definition of the procedures applicable to international commercial arbitration would have been desirable in any event, two developments in 1980 gave special impetus for the 1981 Decree.

One development was the promulgation of the Decree of May 14, 1980, overhauling French civil procedure relating to arbitration in general.[14] The intent of the reform was to clarify and codify the judicial gloss of several decades on the basic French arbitration statute.[15] The particular goals of the 1980 reform included the consolidation of the confusing multiplicity of procedures for challenge of awards, the reduction of the use of dilatory tactics during arbitration, and the limitation of judicial interference during arbitral proceedings.[16] The 1980 Decree implemented these reforms by replacing the arbitration provisions of the Code of Civil Procedure with approximately fifty new articles.[17] Since the Decree made no reference whatsoever to international arbitration, commentators immediately called for clarification of the Decree's international impact.[18] Such clarification seemed all the more necessary since, in a number of instances, prior French case law had not interpreted

12. *See* Carbonneau, *supra* note 3, at 59-60.

13. *See* Bredin, *The Paralysis of Foreign Arbitral Awards through the Abuse of Remedies,* 89 JOURNAL DU DROIT INTERNATIONAL 639-65 (1962).

14. 1980 Decree, note 2 *supra.*

15. *See* Cornu, *La Reforme du Droit Francais de l'Arbitrage: Décret du 14 Mai 1980, Présentation de la Reforme,* [1980] REVUE DE L'ARBITRAGE 583-84 [hereinafter cited as Cornu]; Paulsson, *France and the Arbitral Process in 1980: A New Law and a Major Court Decision,* [1981] SVENSK OCH INTERNATIONELL SKILJEDOM 40 (Arbitration Institute of the Stockholm Chamber of Commerce) [hereinafter cited as Paulsson]. A number of French practitioners and scholars analyzed the 1980 Decree in great detail at a colloquium in Paris on September 25, 1980. The papers presented at the colloquium, as well as the records of discussions, are reproduced in *La Reforme du Droit Francais de l'Arbitrage: Décret du 14 Mai 1980,* [1980] REVUE DE L'ARBITRAGE 583.

16. Cornu, *supra* note 15, at 583-84.

17. The provisions of the 1980 Decree, *supra* note 2, appear as articles 1442-1491 of the NOUVEAU CODE DE PROCÉDURE CIVILE.

18. *See* Robert, *La Reforme du Droit Francais de l'Arbitrage: Décret du 14 Mai 1980, Bilan d'une Reforme,* [1980] REVUE DE L'ARBITRAGE 704, 705; *See also* Paulsson, *supra* note 15, at 43-44.

domestic procedural constraints to apply in the international context.[19]

The second major development in 1980 was two decisions by the Paris Court of Appeals to decline jurisdiction to vacate two separate arbitral awards rendered in Paris under the ICC Rules of Arbitration. In both cases the Court took the position that it lacked jurisdiction to hear the challenges because of the non-French character of the awards.

The first case, *General National Maritime Transport Company v. Götaverken Arendal A.B.*, decided in February 1980,[20] involved an ICC award rendered in favor of a Swedish shipyard that had built three petroleum tankers for an agency of the Libyan government. The shipyard sought to execute the award in Sweden, where the defendant's vessels had been arrested.[21] The Libyan company sought to have the award set aside in France by direct appeal, *appel en nullité*, to the Court of Appeals. Under then existing law, such a procedure was available only for French, as opposed to international, arbitral awards.[22] The Libyan action was doubtless designed to impede the enforcement action in Sweden, which, like some fifty-six other states,[23] is a party to the New York Convention of 1958 on

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19. *See* Société Gosset v. Société Carapelli, Judgment of 7 May 1963, Cass. Civ. 1re, [1963] Recueil Dalloz, Jurisprudence, [R. D. Jur.] 54, [1963] REVUE DE L'ARBITRAGE 60 [hereinafter cited as *Gosset*]. The *Gosset* case held that the legal rule invalidating an arbitration clause where the principal contract is nullified does not apply to international arbitration clauses. [1963] REVUE DE L'ARBITRAGE at 61. The French Court of Appeals has also held that nullification of an international contract on grounds of French public policy could still give rise to arbitrable issues. *See* Jean Tardits et Cie. v. Société Wynmouth Lehr et Cie., Judgment of 15 February 1966, Cour d'Appel, Orléans, [1966] Dalloz Sirey, Jurisprudence [D. S. Jur.] 340, 341, [1966] REVUE DE L'ARBITRAGE 109, 110. *See generally* Carbonneau, *supra* note 3, at 32-37.

20. Gen. Nat'l Maritime Transp. Co. v. Société Götaverken Arendal A.B., Judgment of 21 February 1980, Cour d'Appel, Paris, [1980] R. D. S. Jur. 568 [hereinafter cited as *Götaverken*]. The *Götaverken* case, with commentaries, is also published in [1980] REVUE DE L'ARBITRAGE 524, and in [1980] JOURNAL DU DROIT INTERNATIONAL PRIVÉ 763; an English translation of the case's dispositive section is annexed to Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L COMP. L. Q. 358, 385 (1981) [hereinafter cited as Paulsson: *Arbitration Unbound*].

21. *Götaverken, supra* note 20, [1980] REVUE DE L'ARBITRAGE 524-28.

22. Paulsson: *Arbitration Unbound, supra* note 20, at 370.

23. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention]. Fifty-seven states, including Sweden, had ratified the Convention as of January 1, 1981. U.S. DEPT. OF STATE TREATIES IN FORCE—A

the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Article V(1)(e) of this Convention provides that recognition and enforcement of a foreign award may be refused if the award "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."[24]

The Paris Court of Appeals held that the award was not a French award, and thus that the court lacked jurisdiction to hear the challenge.[25] The court reasoned that the parties had the capacity to choose the procedural law applicable to the arbitration, and that they had used that capacity in selecting the ICC Rules, which in their 1975 version do not require reference to the national procedural law of the place of arbitration.[26] Neither the parties nor the arbitrators had decided that French law was to govern the proceedings;[27] Swedish law was applicable to the merits of the dispute, but this had no bearing on the question of *lex arbitri*.[28] The court noted that international arbitral awards, like foreign awards, may be challenged only at the time of enforcement and that the Swedish party had not sought to enforce the award in France.[29]

Ten months later, the same court faced a similar issue, in the case of *AKSA v. Norsolor*.[30] This time, however, the victorious party,

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LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 252 (1981).

24. New York Convention, *supra* note 23, art. V(1)(e).

25. *Götaverken, supra* note 20, [1980] REVUE DE L'ARBITRAGE at 533.

26. *Id.*, [1980] REVUE DE L'ARBITRAGE at 532. Article 11 of the pertinent ICC rule states that:

> The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied by the arbitration.

ICC RULES OF CONCILIATION & ARBITRATION art. 11 (copy on file at the offices of *Law & Policy in International Business*) [hereinafter cited as ICC RULES].

27. *Götaverken, supra* note 20, [1980] REVUE DE L'ARBITRAGE at 532.

28. *Id.* at 530-31.

29. *Id.* at 533.

30. AKSA v. Norsolor, Judgement of 9 December 1980, Cour d'Appel, Paris (1980) [hereinafter cited as AKSA]. The AKSA case has been published in [1981] REVUE DE L'ARBITRAGE 306. An English translation of the dispositive section of the opinion appears in 20 INT'L LEGAL MATERIALS 883, 888 (1981).

Norsolor, was a French company.[31] AKSA, a Turkish textile company, sought judicial review of an ICC denial in arbitration of a claim for restitution of part of the purchase price of materials ordered by Norsolor.[32] Like the underlying contract in the *Götaverken* case, the contract between the parties included an arbitration clause conferring jurisdiction on the ICC but failed to specify any procedural law to be applied other than the ICC rules.[33] In order to justify its challenge before the French court, AKSA argued that French procedural law was applicable because the arbitral proceedings had been completely localized in Paris. Despite the situs of the proceedings, and the fact that the defendant was—as the Swedish shipyard in *Götaverken* had not been—a French company, the Court of Appeals again held that the case concerned a non-French award subject to the remedies available for foreign awards and dismissed the case for lack of jurisdiction.[34]

In the wake of these decisions and the newly enacted provisions of the 1980 Decree, commentators urged legislative clarification of the role of French courts with respect to international commercial arbitration taking place in France.[35] They argued that a completely *laissez faire* approach symbolized by the *Götaverken* and *AKSA* decisions might impede the efficient operation of international

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31. AKSA, *supra* note 30, [1981] REVUE DE L'ARBITRAGE at 307.

32. *Id.*

33. *Id.* at 308.

34. *Id.* at 312.

35. One commentator urged the legislature to determine if the 1980 Decree's procedures for appealing an arbitral award apply to international arbitration. Fouchard, *Les Recours Contre les Sentences Non Françaises,* [1980] REVUE DE L'ARBITRAGE 693, 694 [hereinafter cited as Fouchard: *Les Recours*]. These specific appellate procedures are embodied in the 1980 Decree, *supra* note 2, arts. 1484, 1488, [1980] J.O., at 1240 (arts. 44, 48). For a general discussion of the 1980 Decree's procedures for appealing commercial arbitration awards, see Carbonneau, *supra* note 3, at 41-44.

Prior to the enactment of the 1980 Decree, France had no specific means by which to *appeal* an international commercial arbitration award. *See* Fouchard: *Les Recours, supra* at 694. Before passage of the 1981 Decree, Carbonneau believed that the French courts could "potentially" apply the 1980 Decree's provisions for appeal of domestic arbitration awards to international arbitration awards. Carbonneau, *supra* note 3, at 42. Fouchard believed that limiting the appeal of international commercial arbitration awards to the provisions of the 1980 Decree would be unduly restrictive, but observed that without reliance on these provisions, the French courts would have no other means to hear appeals of international awards. Fouchard: *Les Recours, supra* at 694.

arbitration.[36] Courts abroad, when faced with a request to enforce an award rendered in France, might less readily grant enforcement if it appeared that international arbitration in France was conducted with little or no judicial control. In fact, the foreign court might feel it necessary to supply its own control mechanism and the ensuing, more exacting, enforcement procedure might harm the system of transnational arbitration as embodied in the New York Convention.[37] Moreover, it was argued that it was in the interest of both fairness to the losing party and the efficient administration of transnational justice to enable a party having lost a defective arbitration to have the award set aside once and for all in the state where it was rendered, rather than be obliged to resist the award in each and every jurisdiction where the winning party might subsequently seek enforcement.[38] In point of fact, if one is to look for one single jurisdiction to control the award, it is difficult to contest the proposition that the courts of the country of arbitration are the best placed to do so. One of the present authors proposed that the courts of the place of arbitration should assume a role in international commercial arbitration as one designed to control the *bona fides* of the award on an international, rather than a national, level and function

> only as an instrument for the control of the conformity of the award to transnational minimum standards such as those embodied in the major international conventions. Unless the parties have agreed otherwise, [the judge at the place of arbitration] has no mission or capacity to apply his own national criteria to the award.[39]

The 1981 Decree will be examined in light of these *desiderata*.

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36. *See* Fouchard, [1980] JOURNAL DU DROIT INTERNATIONAL 660, 676 [hereinafter cited as Fouchard Note].

37. Fouchard argues that if a signatory to the New York Convention were to "relocalize" its control over enforcement of arbitral awards, the efficient operation of international arbitration under the convention could be impaired. *Id. See also* Jéantet, [1980] REVUE DE L'ARBITRAGE 524, 536-37.

38. Fouchard Note, *supra* note 36, at 676.

39. Paulsson: *Arbitration Unbound*, *supra* note 20, at 370.

THE SUBSTANCE OF THE DECREE

Scope of the Decree

The 1981 Decree on International Arbitration (1981 Decree), an English translation of which is annexed hereto, inserts two titles, Titles V and VI, into the sections of the Code of Civil Procedure dealing with arbitration. The Decree comprises only sixteen articles. Six articles (Articles 1492–1497, which together form Title V) relate to the arbitral procedure proper; the remaining ten (Articles 1498–1507, which together form Title VI) relate to the recognition, enforcement, and challenge of international arbitral awards. The provisions concerning arbitral procedure apply to any arbitration agreement concluded after the May 14th publication of the Decree; the provisions concerning the enforcement and challenge of awards apply to awards rendered after that date.[40]

The Decree defines "international arbitration" by a sparse economic standard: "arbitration is international if it implicates international commercial interests."[41] These are words of art, traceable to a 1930 Cour de Cassation pronouncement.[42] Subsequent caselaw has shed considerable light on what constitutes the "implication" of elements of international commerce.[43] As in the *AKSA* case, the fact that one party is French does not deprive the arbitration of its international character.[44]

The 1981 Decree's Rules Governing Arbitral Procedure

Most of the provisions of the 1981 Decree having to do with the

40. 1981 Decree, *supra* note 1, arts. 55, 56, [1981] J.O. at 1406.

41. *Id.* art. 1492, [1981] J.O. at 1402.

42. Mardele v. Muller et Cie, Judgment of 19 February 1930, Cass. civ., [1933] Recueil Sirey Général, des Lois et des Arrêts, Sirey Jurisprudence I [S. Jur. I] 41. The court stated: "[Elle] repose moins-peut-être sur un critère d'ordre juridique que sur une notion économique: 'L'intérêt de commerce international'. " ("[Whether the court applies domestic or international principles of arbitration] depends less on judicial criteria than on the economic notion of 'international commercial interests'. "). *Id.*

43. Fouchard, *Quand Un Arbitrage Est-il International?*, [1970] REVUE DE L'ARBITRAGE 59, 71–74.

44. *Id.* at 73. It is interesting to compare the French notion to the recently enacted British definition of an international arbitration agreement. Under the British definition, at least one of the parties must be a non-British resident. *See* Park, *supra* note 4, at 98.

arbitral procedure proper are not of immediate general interest. However, the articles concerning the parties' choice of arbitrators, procedural law, as well as the issue of whether certain principles may override the law applicable to the arbitration, deserve some comment.

First, the 1981 Decree gives the parties freedom to define arbitral procedure.[45] The agreement to arbitrate may stipulate the rules to be followed in the arbitration proceeding, as well as the procedural law—if any—to which the arbitration is to be subjected.[46] The parties may stipulate that the procedural law of the arbitration[47] be non-French, or even "non-national." In the event that the parties have not agreed on these points, the arbitral tribunal shall be free to fix the procedural law itself, or to refer to any law or body of arbitral rules. As a result, the Decree allows for the possibility of an arbitration proceeding that is essentially "non-national."[48]

Since under the 1981 Decree, French courts have a clearly defined role in the review of international arbitrations taking place in France, such awards cannot be considered "floating," or "outside the law," an argument that has been used to resist enforcement abroad.[49] Moreover, even if the arbitration is subject to French procedural law, the general French arbitration law nevertheless is subordinated to the parties' freedom to select their own method of constituting the arbitral tribunal. The parties may exercise their power of constituting the tribunal by referring to an institution such as the ICC, and by selecting their own rules of procedure.[50]

Second, the Decree gives the parties the right to choose the substantive law applicable to the merits of the dispute, and if no choice is made the arbitral tribunal may apply whatever law it deems "appropriate," provided that it shall always take into account trade usages.[51] This provision comports with Article 13(3) of the 1975

45. 1981 Decree, *supra* note 1, art. 1494, [1981] J.O. at 1402.

46. *Id.*

47. Paulsson: *Arbitration Unbound*, *supra* note 20, at 375-76. For the distinction between the concepts of (a) the law of arbitration, *i.e.*, the *lex arbitri*, that gives obligatory force to the proceedings, (b) rules of procedure for the arbitration, and (c) the conflict of laws principles to find the law(s) governing the validity and interpretation of the contract, *see generally id.* at 360-64.

48. *Id.* at 375-76.

49. *Id.*

50. 1981 Decree, *supra* note 1, art. 1493, [1981] J.O. at 1402.

51. *Id.* art. 1496.

ICC Arbitration Rules.[52] Moreover, this provision constitutes a singular legislative repudiation of the notion that the applicable substantive law must be chosen by reference to the choice of law principles of the place of arbitration.[53]

Third, the Decree as promulgated omits an earlier proposal that would have explicitly mandated certain arbitral principles irrespective of the applicable law. These arbitral principles, developed from a series of French court decisions, held that an international arbitration clause is valid even if the arbitration clause relates to a future dispute,[54] or if a signatory to the contract was a state or state organ.[55] Moreover, the proposal suggested that the Decree adopt the principle that an international arbitration clause is valid notwithstanding the fact that the underlying contract is void under French law[56] or violative of French public policy.[57] None of these principles are specifically embodied in the articles of the 1981 Decree. Instead, the proposal suggesting them found its way into the

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52. ICC RULES, *supra* note 26.

53. 1981 Decree, *supra* note 1, arts. 1494, 1496; *see* notes 45-48 *supra* and accompanying text.

54. Even before French law generally recognized the validity of agreements to arbitrate future disputes, the French courts had deemed an agreement to arbitrate future disputes valid if the contract was governed by foreign law. *See* Bernard et Lowagie Testelin v. Société la Général Mercantil Co., Judgment of 21 June 1904, [1906] Recueil Sirey Général, des Lois et des Arrêts 22, 23.

55. The French domestic rule prohibiting submission of disputes to arbitration by the state or state organs was held inapplicable to international agreements in Trésor Public v. Galakis, Judgment of 2 May 1966, [1966] *Bulletin des Arrêts de la Cour de Cassation (Chambres Civiles)* Part I, at 199; [1966] D.S. Jur. 575-76, [1966] REVUE DE L'ARBITRAGE 99-100. *See* Batiffol, *Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties*, 7 COLUM. J. TRANSNAT'L L. 32, 33-34 (1968) [hereinafter cited as Batiffol].

56. *See* note 19 *supra*. For domestic arbitration, French courts have tended to consider arbitration clauses null where the principal contract is invalid. *See* Carbonneau, *supra* note 3, at 31. Article 1466 of the 1980 Decree, *supra* note 2, [1980] J.O. at 1239 (art. 26) grants the arbitrator in domestic cases discretion to continue the arbitration even where the principal contract is void under French domestic law, thereby arguably altering the previous rule of the French judicial section. The Prime Minister's Report suggests that Article 1466's rule applies in the interpretation of the 1981 Decree.

57. Société Impex v. Sociétés P.A.Z., Judgment of 18 May 1971, Cass. civ. 1re., [1972] D.S. Jur. 37, *reprinted in* [1972] JOURNAL DU DROIT INTERNATIONAL 62 [hereinafter cited as *Impex*]. For a discussion in English of the *Impex* case, see G. DELAUME, TRANSNATIONAL CONTRACTS APPLICABLE LAW AND SETTLEMENT OF DISPUTES § 13.04, at 27-29 (1980) [hereinafter cited as G. DELAUME].

official Report to the Prime Minister submitted with the Decree,[58] which is highly authoritative for subsequent questions of interpretation. The Report states:

> The new provisions regarding international arbitration relate only to procedural matters and in no way disturb the procedural principles, by now well established by the Cour de Cassation, that apply to international arbitration; these principles concern in particular the scope of the international arbitration clause, which, it has been held, cannot be resisted on the grounds that the principal contract is void, that the arbitration clause relates to a dispute not yet risen, that the clause was signed by a state or a public-law legal entity or that the rules to be applied in deciding the dispute were of a public-policy character.[59]

All of the elements of the earlier proposal are reflected here, yet it is not directly stated that these principles must be applied "irrespective of the applicable law." It is established French doctrine, however—based on the overriding French understanding of the exigencies of the international arbitral process—that certain international arbitral principles are not subject to variation according to the applicable law.[60] There is no reason to expect, therefore, that the case-law will change on these points. It is a rule of French constitutional law that although the law of procedure may be modified by decree, substantive law should be amended only by acts of the legislature. It is generally believed that this rule may account for the relegation of these arbitral principles to the Report on the 1981 Decree to the Prime Minister. Since the 1981 Decree does not explicitly impose these four principles, however laudable they may be, arbitrators are left free to reach their own conclusions as to what fundamental norms of international commercial relations should override the particularities of otherwise applicable law.[61]

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58. *Rapport à Monsieur le Premier Ministre*, 55 LA SEMAINE JURIDIQUE No. 55 (3 June 1981) (Supp.) (unnumbered pages).

59. *Id.* Livre IV.

60. Batiffol, *supra* note 55, at 43-44. *See* notes 54-57 and accompanying text.

61. See Batiffol, *supra* note 55, at 39-47, for a particularly careful analysis of the interplay of French law and international commercial arbitration prior to the 1981 Decree.

The 1981 Decree's Rules for the Recognition, Execution, and Challenge of International Awards

The 1981 Decree strikes a remarkably satisfactory balance between the potentially conflicting goals of arbitrator autonomy and judicial guarantees of the integrity of an award.[62] On the one hand, the Decree provides that international arbitral awards rendered in France may indeed be set aside by French courts.[63] Thus, the possibility of judicial control at the place of arbitration will always exist, thereby dissipating whatever doubts may have been raised by the *Götaverken* and *AKSA* cases. On the other hand, the Decree carefully limits the grounds on which arbitral awards may be set aside.[64] The Decree allows the French judge to ensure observance of minimum standards for international enforceability of an award without applying additional criteria that may be appropriate only to domestic arbitration. The only grounds under which an international award rendered in France may be set aside are:

> 1st if the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;
> 2nd if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
> 3rd if the arbitrator violated the terms of his mission;
> 4th if due process was not respected;
> 5th if the recognition or enforcement would be contrary to international public policy (*ordre public international*).[65]

French case-law had already established that international arbitral awards were not to be set aside for failure to respect such domestic criteria as the legal time limit for rendering the award,[66] or the need for physical meetings of the arbitrators.[67] The 1981 Decree reaffirms

62. *See* notes 11-12 *supra* and accompanying text.

63. 1981 Decree, *supra* note 1, art. 1504, [1981] J.O. at 1403.

64. *Id.* arts. 1502, 1504.

65. *Id.* art. 1502.

66. Société Bruynzeel Deurenfabrieck N.V. v. Ministre d'État aux Affaires Étrangères de la République Malgache, Judgment of 30 June 1976, Cass. civ. 1re., [1976] BULL. CIV. I 198, [1977] REVUE DE L'ARBITRAGE 137. For a discussion and analysis of the *Bruynzeel* case in English, see G. DELAUME, *supra* note 57, §13.16, at 121.

67. Industrija Motora Rakovica (I.M.R.) v. Lynx Machinery Ltd., Judgment of 22 Dec. 1978, Cour d'Appel, Paris, Cass. civ 1re, [1979] REVUE DE L'ARBITRAGE 266, 269.

these principles and further makes it clear that the promulgation of the 1980 Decree reforming domestic arbitration does not mean that all of the criteria set forth therein are to be applied to international awards.[68] This is notably true with respect to domestic requirements, such as the rendering of the award on the basis of a reasoned opinion, which are not required of an international award under the 1981 Decree and which, moreover, would not be required under the international minimum standards of the New York Convention.[69]

Under the 1981 Decree, an international award rendered outside France may not be attacked in the courts of France unless its judicial recognition (normally obtained by way of *exequatur*) has been granted by a French court.[70] A grant of *exequatur* must be appealed within thirty days of the appealing party's notification.[71]

On the other hand, an award rendered in France, although classified as international, may be attacked, even though no *exequatur* has been sought, by means of a motion to set the award

68. 1981 Decree, *supra* note 1, art. 1502, [1981] J.O. at 1403. *See* note 35 *supra*.

69. Carbonneau in particular had been concerned about the application of Article 44 of the 1980 Decree to international awards. Article 44 provides, *inter alia*, that an arbitral award can be set aside if the award is not rendered on the basis of a reasoned opinion, or does not contain the names of the arbitrators and the date of the award. Carbonneau, *supra* note 3, at 46; *see* 1980 Decree, *supra* note 2, art. 44, [1980] J.O. 1240. Noting that such requirements are not present in Article V of the New York Convention, Carbonneau raised the possibility that enforcement of awards governed by the New York Convention "could be challenged [in France] upon grounds not expressly contemplated by the Convention." Carbonneau, *supra* note 3, at 46; *see* New York Convention, *supra* note 23, art. V, 21 U.S.T. at 2520.

The New York Convention does permit an international arbitral award to be overturned if the subject matter of the award is violative of the arbitrating country's law or public policy. *Id.*, art. V 2(a)-(b); *see also* Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269, 270. These grounds for refusing to enforce an international commercial arbitration award are not present in the 1981 Decree. *See* note 65 *supra* and accompanying text. Given prior French case law and the influence of the Report to the Prime Minister, *see* notes 19-35 & 58-59 and accompanying text, it seems that the 1981 Decree will provide a more stringent test for appealing an international commercial arbitration award than the New York Convention.

70. 1981 Decree, *supra* note 1, art. 1502, 1981 [J.O.] at 1403.

71. *Id.* art. 1503. The normal procedure for obtaining judicial recognition of an arbitral award in France, as set out in arts. 1476-1479 of the Nouveau Code de Procédure Civile, is to make an *ex parte* request for *exequatur* to the *tribunal de grande instance* of appropriate jurisdiction. These provisions are incorporated into the 1981 Decree, *supra* note 1, arts. 1476-1479, [1981] J.O. at 1401.

aside—*recours en annulation*[72] to the appropriate court of appeals (if *exequatur* has in fact been granted, the action to set aside the award is deemed to encompass an appeal of the *exequatur* order).[73] Thus, the losing party has the opportunity to seek to have the award set aside once and for all in the country where it was rendered (*i.e.*, France).

Where the losing party does not voluntarily comply with the award, the party wishing to enforce an international award rendered in France has a choice. One possibility would be to establish that the award is not voidable in France. This would be done by seeking judicial recognition *exequatur* for the sole purpose of triggering the thirty day period for challenge.[74] Such a step has the disadvantage of inviting litigation. Furthermore, execution of the award is suspended during not only the thirty day period, but also for the duration of any challenge action that might be brought.[75] The fact that such execution is suspended may have adverse effects on execution attempts abroad under the Article V(1)(e) of the New York Convention.[76]

The alternative would be simply to seek execution abroad without approaching the French courts for confirmation of the award by *exequatur*. The disadvantage of this approach is that the award remains potentially subject to a *recours en annulation*, an action to set an award aside, in France.[77] One may expect, however, that in most cases this will not be a practical concern and that seeking *exequatur* only for the purposes of triggering the thirty day period will be the exception rather than the rule.[78]

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72. 1981 Decree, *supra* note 1, art. 1504, [1981] J.O. at 1403.

73. *Id.*

74. In seeking judicial recognition of an international commercial arbitration award in France, a party triggers the provisions of Articles 1501-1503, which provide for challenges to judicial recognition orders. *Id.* arts. 1501-1503, [1981] J.O. at 1402-04.

75. *Id.* art. 1506, [1981] J.O. at 1403.

76. *See* note 24 and accompanying text.

77. *See* note 72 *supra* and accompanying text.

78. It should not be forgotten that, under the New York Convention, enforcement jurisdictions are not obliged, but rather are merely permitted, to refuse or suspend enforcement of foreign awards on the grounds that they have been set aside, suspended, or challenged abroad. *See* note 24 *supra* and accompanying text. For a unique example of a national supreme court declaring an award rendered in France to be enforceable in Sweden irrespective of the fact that an action in France to set aside the award had the effect of suspending execution of the award in France, see General National Maritime Transport Co. v. Götaverken Arendal Aktiebolag, Judgment of August 13, 1979, Sup. Ct., Sweden. (slip op.), *reprinted in* [1980] REVUE DE L'ARBITRAGE 555; *translation reprinted in* Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 244 (1981).

An important distinction between domestic and international arbitration is that, although awards of both types may be rejected on grounds of public policy (*ordre public*), international awards may be challenged only if there is shown to be a violation of international, as opposed to internal, public policy.[79] Both concepts are creatures of French courts; the distinction is between French public policy applicable to an international dispute, and French public policy applicable in a domestic context. The demands of international public policy are fewer than those of domestic public policy, the rationale being that the French courts should intervene less frequently when international, as opposed to purely French, interests are involved.[80] That domestic public policy, unless it coincides with international public policy, is never to interfere with international arbitral proceedings taking place in France, should be of vital interest to those concerned with the efficiency of the transnational arbitral process. This means, notably, that an international commercial dispute may be arbitrable even though the principal contract from which it arises violates French internal public policy.[81]

Conclusion: The Practical Impact of the Decree

The 1981 Decree on International Arbitration will make France an even more attractive place for international commercial arbitration. Principles followed in prior caselaw that had been favorable to the institution of arbitration are now reflected in a single coherent text. At the same time, the Decree should quiet the criticisms that a possibly anarchic situation existed in France following the *Götaverken* and *AKSA* decisions of 1980. French courts will hear challenges to all awards rendered in France. Moreover, they will intervene, if re-

The Swedish action for execution was brought by the beneficiary of an ICC arbitration award; the losing party brought an action in France to overturn the ICC award. For a discussion of the outcome of the *Götaverken* case in France, see notes 22-29 and accompanying text.

79. 1981 Decree, *supra* note 1, art. 1502, [1981] J.O. at 1403.

80. Batiffol and Lagarde caution against making too literal a distinction between "domestic" and "international" public policy. They find the operative distinction between "international" and "domestic" public policy to be *ordre public* from a choice of law perspective as opposed to *ordre public* in the application of domestic substantive law. *See* H. Batiffol & P. Lagarde, Droit International Prive, § 366 at 434-35 (5th ed., 1970).

81. *See* note 57 *supra* and accompanying text. Even if the French public policy at issue allocates risks in a manner that frustrates performance of the contract, the international commercial dispute may be arbitrable. *See Impex, supra* note 57, [1972] Journal du Droit International at 64.

quested, to help constitute the arbitral tribunal in conformity with the parties' agreement.[82]

Most important, the French courts' control of the integrity of international awards rendered in France will not extend beyond basic requirements that are entirely consistent with those reflected in the New York Convention. Indeed, it may be that the grounds on which international arbitral awards may be challenged in France are somewhat more restricted than those defined in the Convention.[83] Parties or arbitrators need therefore worry less about the possibility of running afoul of unexpected local procedural norms. Thus, France has not only contributed to its own usefulness as a seat of international arbitration but has also set an example for the harmonization of the international arbitral system.

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82. 1981 Decree, *supra* note 1, art. 1493, [1981] J.O. at 1402. This article also authorizes the French courts, if requested by the parties, to help constitute the arbitral tribunal in arbitral proceedings conducted abroad if the parties have provided that French procedural law applies to the arbitration—a rather unusual situation.

83. For a discussion of how the 1981 Decree may authorize fewer grounds for appeal of an international arbitral award than the New York Convention, see note 69 *supra*.

ANNEX

DECREE ON INTERNATIONAL ARBITRATION OF MAY 12, 1981

This Decree, published in the JOURNAL OFFICIEL of the French Republic on May 14, 1981, at pp. 1402-03, adds two titles to the Section of the New Code of Civil Procédure (Section IV) dealing with arbitration.

This translation and annotations are by the authors.

TITLE V

INTERNATIONAL ARBITRATION

ARTICLE 1492

Arbitration is international if it implicates international commercial interests.

ARTICLE 1493

The arbitration agreement may, directly or by reference to a set of arbitration rules, appoint one or more arbitrators or provide the manner for their appointment.

If any difficulty arises in the constitution of the arbitral tribunal with respect to an arbitration taking place in France, or to one for which the parties provided have agreed that French procedural law should apply, either party may, in the absence of a clause to the contrary, apply to the President of the Tribunal de Grande Instance of Paris in the manner set forth in Article 1457.[84]

ARTICLE 1494

The arbitration agreement may, directly or by reference to a set of arbitration rules, define the procedure to be followed in the arbitral proceedings; it may also subject them to a given procedural law.

If the agreement is silent, the arbitrator, either directly or by reference to a law or a set of arbitration rules, shall establish such rules of procedure as may be necessary.

ARTICLE 1495

Whenever international arbitration is subject to French law,[85] the dispositions of Titles I, II, and III[86] of the present section shall apply only in the absence of agreement between the parties, and subject to Articles 1493 and 1494.

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84. Article 1457 relates to the jurisdiction of the judge to appoint arbitrators and the circumstances under which such appointments may be challenged.

85. The context makes clear that this refers to the *lex arbitri* (the law governing the proceedings) rather than the substantive law of the contract.

86. Titles I-III set forth the rules applicable to domestic arbitration, and relate respectively to the arbitration agreement, the proceedings, and the award.

ARTICLE 1496

The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to rules he deems appropriate.

In all cases he shall take into account trade usages.

ARTICLE 1497

The arbitrator shall decide as "amiable compositeur" if the parties' agreement conferred this authority upon him.

TITLE VI

RECOGNITION, ENFORCEMENT OF, AND MEANS OF RECOURSE AGAINST ARBITRAL AWARDS RENDERED ABROAD OR IN INTERNATIONAL ARBITRATION

CHAPTER I

Recognition and Enforcement of Arbitral Awards Rendered Abroad or in International Arbitration

ARTICLE 1498

Arbitral awards shall be recognized in France if their existence is proven by the party relying thereupon and if such recognition is not manifestly contrary to international public policy (*ordre public*).

Subject to the same conditions, such awards shall be judicially declared to have executory force in France.

ARTICLE 1499

The existence of an arbitral award must be established by the production of its original text together with the arbitration agreement or by copies of said documents accompanied by proof of authenticity.

If said documents are not in the French language, the party shall produce a translation certified by a translator on the list of court-appointed experts.

ARTICLE 1500

The provisions of Articles 1476 through 1479[87] are applicable.

CHAPTER II

Means of Recourse Against Arbitral Awards Rendered Abroad or in International Arbitration

ARTICLE 1501

A decision that refuses recognition or enforcement of an award may be appealed.

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87. Articles 1476 through 1479 set forth the general procedure (as opposed to substantive grounds for challenge) for recognition and enforcement of arbitral awards by French courts.

ARTICLE 1502

An appeal against a decision granting recognition or enforcement may be brought only in the following cases:

1st If the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;

2nd If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;

3rd If the arbitrator decided in a manner incompatible with the mission conferred upon him;

4th If due process (literally: the principle of an adversarial process) was not respected;

5th If recognition or enforcement would be contrary to international public policy (*ordre public*).

ARTICLE 1503

The appeal defined in Articles 1501 and 1502 shall be made to the Court of Appeal of the jurisdiction of the judge having rendered the decision. It may be brought within one month of official notification of the judge's decision.

ARTICLE 1504

An arbitral award rendered in France in international arbitral proceedings is subject to an action to set aside on the grounds set forth in Article 1502.

An order to enforce such an award may not be appealed in any manner. However, the action to set aside encompasses *ipso facto*, within the limits of the terms of the action of which the Court of Appeal has been seized, appeals against the decision of the enforcement judge having issued such an order, or having declined jurisdiction.

ARTICLE 1505

Actions to set aside as defined in Article 1504 shall be brought before the Court of Appeal having jurisdiction in the place where the award was rendered. Such action may be heard as soon as the award has been rendered; it is barred if it has not been brought within the month following official notification of [judicial] declaration of the award's executory force.

ARTICLE 1506

Enforcement of the arbitral award is suspended during the time limit for exercising the means of recourse defined in Articles 1501, 1502, and 1504. The pendency of such an action brought within the time limit also has a suspensive effect.

ARTICLE 1507

The provisions of Title IV[88] of the present volume, with the exception of those of the first paragraph of Article 1487[89] and of Article 1490,[90] are not applicable to the means of recourse.

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88. Title IV sets forth the legal framework for challenge of a domestic arbitral award.

89. Article 1487 makes clear that normal appellate procedure will be applicable to any action challenging an award.

90. Article 1490 provides that the dismissal of a challenge automatically includes recognition of the award.