

**11th**

Edition

2017-2018

The  
Baker McKenzie  
**International  
Arbitration Yearbook**

France





## France

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### A. Legislation and rules

#### A.1 Legislation

France has enacted a new statute named “Justice of the 21st Century,” reforming many provisions of French legislation, among which a redrafting of the provisions of Article 2061 of the French Civil Code which defines the regime applicable to the validity and enforceability of arbitration clauses in the domestic legal order. The reform has introduced two main changes related to (i) the notion of acceptance of arbitration clauses and (ii) the unenforceability of arbitration clauses against consumers.

The new provisions of Article 2061 provide that an “*arbitration clause must be accepted by the party against whom it is opposed, unless the latter was subrogated in the rights and obligations of the party who initially accepted it.*”

The former requirement of validity in contracts entered between professionals, which was applicable under the previous version of Article 2061, is therefore now substituted with the notion of acceptance of the arbitration clause. This semantic shift means that, like any other contractual clauses, acceptance of the arbitration clause by the party against whom it is opposed is the criteria to be considered and verified. The new wording also implies that the validity of the arbitration clause as a matter of principle — regardless of whether it was entered into “*in the context of a professional activity,*” as provided by the former Article 2061 — is “*so significant that it is no longer useful to affirm it.*” From now on, judges and practitioners are therefore invited to verify that the arbitration clause was duly accepted by the parties to an agreement.

The scope of the arbitration clause in domestic law is thus extended; in other words, recourse to domestic arbitration is no longer limited to

commercial agreements and can now be stipulated in civil contracts and agreements which have a dual nature (civil and commercial). The parliamentary discussions that led to the adoption of the new Statute mention, as examples, various types of contracts for which the arbitrability of the disputes are now admitted by virtue of law: lease and insurance agreements, co-ownership regulations and joint ownership agreements and articles of associations of non-trading property companies may now be submitted to arbitration under the new regime of the revised Article 2061. More broadly, any contract entered into between two individuals can include an arbitration clause, provided this clause was accepted by the party to whom it is opposed. However, to be enforceable, it must be agreed as part of a professional activity.

Indeed, the second paragraph of the revised Article 2061 specifies that: *“When a party did not enter into the contract in the context of its professional activity, the clause is unenforceable against it.”*

Here again, the French legislature has replaced the notion of validity with the condition of enforceability of the arbitration clause. This change suggests that when the clause has not been agreed in the framework of a professional activity, namely a consumer contract, the professional cannot enforce the arbitration clause against a non-professional or a consumer. The overview of the amendment which led to the final adoption of the text confirms this interpretation. In particular, the amendment specifies that the arbitration clause should be optional for a consumer and that the consumer should have the choice, either to appear before the arbitrator, or before the national courts.

Therefore, the consumer will benefit from an “option of jurisdiction:” either by initiating arbitration proceedings, or filing a claim before the national courts. However, this option is available in domestic arbitration only, since the former Article 2061 has been considered by the French courts as inapplicable to international arbitration due to the restrictions it used to institute on the arbitrability of certain types of



agreements (consumer agreements, employment agreements, etc.), despite the fact that Article 2061 does not specifically distinguish between domestic and international arbitration.

The new wording of Article 2061 constitutes a substantial alignment in domestic arbitration of solutions that have been applied for a long time now in international arbitration. For instance, an arbitration clause in an international employment agreement is ruled as valid in principle but unenforceable against the employee, unless the employee opts for an arbitration proceeding to settle her/his dispute with the employer after the dispute arises. Some scholars believe that this solution can similarly be applied in domestic arbitration, thanks to the new wording of Article 2061.

This new Article 2061 of the Civil Code will apply to arbitration clauses entered into as from its entry into force, ie, 19 November 2016. Future French case law will provide an answer as to whether or not the new provision will apply domestically as liberally as the applicable rules in French international arbitration law.

## A.2 Institutions, rules and infrastructure

The ICC Rules of Arbitration have been amended with the aim of further increasing the efficiency of ICC arbitration procedures. The amended Rules entered into force on 1 March 2017.

The expedited procedure (or fast-track procedure) appears to be the most substantial innovation in the revised ICC Rules of Arbitration.

All ICC arbitrations with a disputed amount up to USD 2 million will automatically be governed by the fast-track procedure, unless the parties decide to opt out of this provision in their arbitration agreement. The accelerated procedure can also be used when the amount in dispute is above the USD 2 million limit if the parties reach a mutual agreement to follow this provision.

Faster, as its name indicates, and more cost-efficient; this procedure does not lack audacity. The arbitrator is to issue the award within six

months of the date of signature of the terms of reference or of the notification being sent to the arbitral tribunal of the approval of the terms of reference by the Court (this mechanism is designed to prevent dilatory tactics from parties to delay the beginning of the proceedings by deliberately refraining from signing the terms of reference). The six-month time limit can be extended by the ICC International Court of Arbitration (the “ICC Court”) only if it considers such extension is justified. The fast-track procedure costs are approximately 20% less than the standard procedure.

Finally, the ICC Court is empowered, notwithstanding the terms of the arbitration clause agreed upon by the parties, to appoint a sole arbitrator. Moreover, after the constitution of the arbitral tribunal, the parties cannot make any additional claims unless expressly allowed by the tribunal itself. In addition, the arbitral tribunal can adopt any procedural measures it considers appropriate and decide to issue the award based on documents submitted by the parties, without a hearing. When a hearing is held, the tribunal can conduct it through audio or video-conference.

A few other provisions were also introduced concerning the standard procedure. For instance, the time limit for setting the terms of reference is now reduced from two to one month. In addition, after the signature of the terms of reference or the Court’s approval, no additional request can be formed.

Last but not least, registration fees of the arbitration, which are to be paid by a party filing a request for arbitration, have been increased to USD 5,000.

## **B. Cases**

### **B.1 The arbitrator has no duty to submit his/her prior motivation to the discussion of the parties**

In a decision dated 10 January 2017, the Court of Appeal of Paris had to examine a request for the setting-aside of an arbitral award where one of the parties alleged that the arbitrator had wrongly ruled,



without prior discussion, that its submission was neither motivated nor detailed, whereas in that party's opinion, the claim was supported by invoices. The question arising from this issue was whether or not the arbitrator had a duty to invite the parties to specify their claims. The Court of Appeal of Paris responded negatively. It determined that it is the responsibility of the parties to prove their allegations and the duty of the arbitrator to evaluate whether such allegations are well-founded: "*The principle of a fair hearing only gives the opportunity to the parties to expose their allegations in fact and in law and the chance to discuss the opposite parties' allegations in order to be sure that all grounds of the arbitral decision have been discussed by the parties. The Arbitrator has thus no obligation to submit beforehand his/her motivation to a contradictory discussion between parties.*"<sup>1</sup>

## B.2 Terms of reference: a key document to which the parties to an arbitration procedure must pay particular attention

In a decision dated 15 June 2017, the French *Cour de cassation* held that an acknowledgment of the validity of the arbitral tribunal's constitution in the terms of reference amounts to a renunciation to invoke the tribunal's lack of independence and impartiality.<sup>2</sup>

In this case, the chair of the tribunal did not disclose any element in his declaration likely to raise reasonable doubt as to his independence and impartiality. However, one of the parties to the arbitration proceedings, the Republic of Equatorial Guinea, was informed by the opposite party that the chair was appointed several years ago in an arbitration procedure, without any link to the present one, but involving the opponent's parent company. Despite this information, the Republic of Equatorial Guinea did not put forward any objection to the declaration of independence and impartiality of the chair. Moreover, it recognized the validity of the arbitral tribunal's

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<sup>1</sup> Court of Appeal of Paris, Division 1, Chamber 1., 10 January 2017, No. 14/21345.

<sup>2</sup> *Cour de cassation*, 1st Civil Chamber, 15 June 2017, No. 16-17.108.

constitution in the terms of reference signed after having been informed of the chair's above-mentioned designation.

It was only during a procedural ruling, which seemed partial in the Republic of Equatorial Guinea's eyes, that the latter decided to invoke for the first time the lack of independence and impartiality of the chair. It then filed a request to set aside the arbitral award on the same grounds. The Court of Appeal dismissed the argument and the *Cour de cassation* confirmed this decision.

Indeed, and according to the *Cour de cassation's* reasoning, the Republic of Equatorial Guinea, notwithstanding the information given by the opposite party (information that was also easily and publicly accessible), acknowledged the valid constitution of the arbitral tribunal in the terms of reference and put forward no objection against the arbitrators. Therefore, the Republic of Equatorial Guinea was found to have waived its right to raise any argument based on lack of independence and impartiality, leading to a dismissal of its action to set aside the arbitral award on the ground of the invalidity of the arbitral tribunal's constitution.

### B.3 Arbitrators' fees and solidarity

In a decision rendered on 1 February 2017,<sup>3</sup> the French *Cour de cassation* upheld a judgment of the Court of Appeal of Paris that ordered a party to pay the outstanding amount of the arbitrators' fees which were due pursuant to an arbitral award rendered under the aegis of the Common Court of Justice and Arbitration of the African Organization for the Harmonization in Africa of Business Law. In reaching this decision, the Court of Appeal of Paris determined that there is a common obligation of the parties to an international arbitration to proceed with the payment of the arbitrator's fees due by virtue of the non-written arbitration contract entered into between the arbitrators and the parties when commencing the arbitration procedure. Both parties to an arbitration are severally liable for these

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<sup>3</sup> *Cour de cassation*, 1st civil chamber, 1 February 2017, No. 15-25687.



fees and such solidarity is in conformity with the custom of international commercial arbitration. The defaulting party criticized this recourse to the notion of custom of international arbitration and alleged that the Court of Appeal failed to identify an applicable law or a contractual provision. The *Cour de cassation* approved the decision of the lower court; it ruled that since the Court of Appeal had underlined the international aspect of the arbitration, it did not have to refer to a national statute to deduce from the arbitration contract the solidarity of the parties in the payment of the arbitrators' fees. Such solidarity is a necessary implied duty for the parties to every international arbitration.

### C. Funding in international arbitration

After its first appearance in the 1990s in common law jurisdictions, third-party funding started making its way through in the French legal market and judicial system from 2000, mainly, but not only, in international arbitration matters. Alongside well-established Anglo-Saxon funders, several specialized French third-party funders have invested in the French market, some of them being more specifically oriented to domestic litigation, others entirely dedicated to the funding of arbitration proceedings.

However, as of today there is no legal provision or regulation under French law that specifically addresses the practice of third-party funding, nor is there a definition of the regime applicable to such contracts.

To start with, some uncertainty had arisen as to the validity of this particular type of contract, especially in light of a strong rule of public order according to which banking and financial institutions have sole monopoly in France to act as credit institutions and provide financing and money lending (Article L. 511-5 of the French Monetary and Financial Code). The issue was whether or not third-party funders were actually exercising credit operations covered by such a monopoly.

Three considerations have led to a negative response to this fundamental question: (i) there is no reimbursement of the funds made available for the payment of the legal fees by the third-party funder; (ii) the third-party funder does not get any payment through a credit operation based on the funds made available, in other words, the third party does not apply a credit rate on those funds to earn its part of fees or wages, as a lender would typically do in a banking operation; and (iii) the funding operation is, by its very nature, a speculative operation, contrary to a credit operation, as the third-party funder speculates on the outcome of the dispute. For these reasons, third-party funding agreements are generally considered to be agreements falling under the category of aleatory contracts which are valid as such under Article 1964 of the French Civil Code.

There are very few court decisions in relation to third-party funding. It appears, however, that French courts have been hesitant as to how to characterize third-party agreements. One of the earliest decisions, rendered on 1 June 2006 by the Court of Appeal of Versailles, ruled that a third-party funding agreement was a *sui generis* contract in which the parties have freely determined a contractual regime applicable to their relationship and was upheld as a valid and binding contract in the French legal order.

A later decision of the French *Cour de cassation* dated 23 November 2011 leaned towards a more classical characterization of a third-party funding agreement as a services contract through which the third-party funder provides assistance to its client, which is not exclusively financial but also legal, in helping the client to handle the dispute and the resolution process.<sup>4</sup> However, the *Cour de cassation* noted that, irrespective of the uncertainty of the outcome of the dispute — and thus of the fees earned by the third-party funder — these types of contract are subject to the judge's power of revision of the price. In other words, if the price agreed between the third-party funder and the client is imbalanced and excessive in such a way that the third-party

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<sup>4</sup> *Cour de cassation*, Civil Chamber, 23 November 2011, No. 10-16770.



funder would get a substantial fixed-fee payment guaranteed irrespective of the risk undertaken, the French judge would be entitled to reduce the agreed price.

In any event, and despite the lack of specific provisions that apply to third-party funding activities, the existing legislation proved to be sufficient to provide a legal regime applicable to third-party funding agreements, and to conclude that third-party funding is a valid and acceptable (and accepted) mechanism under the French legal system.

At EU level, the Commission issued a Recommendation dated 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under Union Law. It provides guidance as to how to address and prevent possible abuses of third-party funders proposing to finance collective redress litigation. The European Commission notably recommends certain best practices to member states, mainly: (i) the plaintiff should be invited to disclose the origin of the funds used to finance the litigation; (ii) there should be a stay of the procedure if a conflict of interest is identified, or the third-party funder lacks the financial resources to finance the litigation, or if the financed party is no longer supported and lacks financial resources to face a possible loss as a result of the litigation; and (iii) to prevent and prohibit any influence of the third-party funders in the litigation and its outcome, including in case of settlement.

Even though the Recommendation does not cover international arbitration proceedings, it may serve as guidance as most of the issues addressed are issues that are debated by arbitration practitioners and for which concerns have been raised.

From the lawyers' perspective, third-party funding raises the question of confidentiality. French lawyers are bound by strict ethics rules under which they are absolutely forbidden to communicate any information related to their clients — their existence, the nature of a dispute or the status of a procedure — which conflicts with the third-party funder's will and interest to be closely informed of the

proceedings it finances. Indeed, third-party agreements typically contain clauses making it a duty for the financed party to provide information on the dispute on a regular basis (generally monthly). French lawyers shall not, under any circumstances, defer to any request to that end, even if they are instructed to do so by their clients. Therefore, it would be the client's responsibility to provide the information she/he wishes to the funder who remains a third party to the lawyer-client relationship.

Secondly, third-party funding also raises the issue of conflict of interests. Third-party funders may have an influence over the conduct of the proceedings, especially if a settlement is contemplated. Here again, ethics rules governing French lawyers' activities are very strict and would not allow any interference by a third-party funder. The lawyer would be expected to receive his/her instructions from their client exclusively.

On 21 February 2017, the *Conseil de l'Ordre*, the executive organ of the Paris Bar Association, adopted a resolution specifying that a lawyer representing a funded party can only give legal advice to his/her client. The lawyer cannot advise the third-party funder in any way even if their client insists. The lawyer must only receive instructions from the funded party and avoid communicating any information concerning the case to the third-party funder, or meeting with the third-party funder without their client.

Concerning payment of a lawyer through a third-party agreement, the Paris Bar Association advises that payment made to a lawyer pursuant to a third-party funding agreement should be implemented through CARPA (*Caisse des Règlements Pécuniaires des Avocats*), a financial institution that ensures secured and transparent payment made to or through lawyers.

Also, the Bar Association of Paris recommends that French lawyers encourage their funded clients to disclose to arbitrators the existence of a third-party funding agreement.



In this respect, disclosure of the existence of the third-party funding agreement in the course of an arbitration proceeding is a difficult issue.

From a strict legal standpoint, under French law, the duty to disclose only lies upon the arbitrators as per Article 1456 of the French Code of Civil Procedure. Therefore, an arbitrator that has been consulted by a third-party funder to provide a legal opinion would be under an obligation to disclose such a link, whereas a party having recourse to a third party would not have any such legal duty.

Similarly, the general duty of loyalty in conducting the arbitration proceedings provided for in Article 1464 of the French Code of Civil Procedure should lead a party who is aware of the existence of a potential conflict of interest involving a third-party funder to disclose the existence of the third-party funding agreement.

It is true that there are some obvious advantages of disclosure: ensuring the absence of conflicts of interest and securing the arbitral award, given the current legal uncertainty as to the legal regime applicable to third-party funding. On the other hand, disclosing this type of financing mechanism may be damaging: it could be viewed as adversely affecting the business confidentiality of the funded party but, most importantly, it could be viewed as a hint of the impecuniosity of the funded party, leading the adverse party to try to obtain guarantees. This was the situation in an ICC arbitration case having its seat in Paris which led to a procedural order rendered on 3 August 2012 where the arbitral tribunal granted the claimant security as a guarantee that would cover the arbitration costs in case the defendant lost the case and would have to bear the costs. The plaintiff discovered the existence of the third-party funding agreement — seemingly by coincidence — and noted the existence of a provision in the agreement that would exclude payment by the funder to the funded party of the arbitration costs if the funded party lost. The claimant alleged that through this financing mechanism, the defendant could pursue the arbitration proceedings without bearing any risks as to the

arbitration costs, since the defendant was a Cyprus company with no assets and no published financial documents, which made it likely that, should the defendant lose, it would fall into bankruptcy and be protected from any liability and payment that may arise from the arbitral award. The arbitral tribunal examined the provisions of the third-party funding agreement very closely and determined that “[t]he third-party funding mechanism at hand makes it possible for the Funder to secure a comfortable share of the proceeds for itself in case the litigation is successful while (i) taking no risk whatsoever with regard to the costs that may have to be paid to the other party as a consequence of an unsuccessful litigation; and (ii) retaining the possibility of walking out at any time by simply pulling the “plug” on X should it appear pursuant to the monthly reports that the case is going less well for the [funded party] than had been anticipated.”<sup>5</sup> The arbitral tribunal then reached the conclusion that a security for costs should be granted.

Beyond the confidentiality and disclosure issues already briefly discussed above, this case offers a warning as to the possible consequences of third-party funding that may arise in an arbitration case, as well as a lesson and a reminder of the fact that having recourse to third-party funding involves entering into a contract, the provisions of which need to be very carefully drafted and reviewed.

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<sup>5</sup> Procedural Order - security for costs, dated 3 August 2012 reported in Ph. Pinsolle, *Cahiers de l'arbitrage* No. 2, 1 April 2013.