

## Document information

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## Part 4 : Chapter IV - The Arbitral Award

1346-1347. – We shall consider in turn the concept and the classification of arbitral awards (Section I), the process of making an award (Section II), the form of the award (Section III) and its effects (Section IV).

### Section I – Concept and Classification of Arbitral Awards

1348. – The concept of the arbitral award has been the subject of considerable debate. The same is true of attempts to define the various types of award that exist. Awards are described as being final, preliminary, interim, interlocutory, or partial, but these terms are often used without sufficient precision. For example, the UNCITRAL Arbitration Rules state that “[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards,” without actually defining those terms (Art. 32(1)). Similarly, Article 2(iii) of the 1998 ICC Rules states that in those Rules “Award” includes *inter alia* “an interim, partial or final Award,” again without elaborating on the distinction. (1)

It is therefore not only the concept of the arbitral award which requires clarification (§ 1), but also the definition of the various categories of award (§ 2).

#### § 1. – The Concept of Arbitral Award

1349. – It is not always easy to identify an arbitral award. In some cases, the arbitrators themselves do not describe their decision as such. One arbitral tribunal will give its decision the title “Findings of the Amiable Compositeur,” (2) while another will describe a purely administrative measure as an award. (3) ▲▼

1350. – Defining an arbitral award is made more difficult by the fact that most instruments governing international arbitration themselves contain no such definition.

This is the case with many international arbitration laws, including French law. (4) The UNCITRAL Model Law does not give a definition of an arbitral award either, despite such a definition being considered during the drafting stages. The following definition was suggested:

‘award’ means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award. (5)

This text, however, was the subject of so much disagreement, particularly with regard to whether decisions by the arbitrators concerning the jurisdiction of the arbitral tribunal and procedural issues should be considered to be awards, (6) that it was eventually abandoned. The authors of the Model Law instead decided not to give a definition at all. (7) The ICC working group on interim and partial awards likewise found it impossible to reach a consensus on the issue. (8)

Even international conventions on the recognition and enforcement of arbitral awards fail to define the concept of an award. The 1958 New York Convention merely states that:

[t]he term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted (Art. I(2)). ▲▼

Similarly, the main institutional rules do not define what is meant by an award. At best, they simply describe the conditions governing the making of an award (9) and its form. (10)

1351. – Nevertheless, it is essential to identify precisely which of an arbitrator's decisions can be classified as awards and, in particular, to distinguish awards from procedural orders, from orders for provisional measures, and even from agreements between the parties. These distinctions have significant legal consequences, the main one being that only a genuine award can be the subject of an action to set it aside or to enforce it. (11) As a result, the deadlines laid down in such proceedings will only begin to elapse when a genuine award is made. Similarly, only genuine awards are covered by international conventions on the recognition and enforcement of arbitral awards. (12) The characterization of a decision as an award may also have an impact on the application of certain provisions of arbitration rules. For example, Article 27 of the ICC Rules states that an “award” must be submitted in draft form to the International Court of Arbitration for approval prior to being signed.

1352. – However, as with contracts, the characterization of a decision as an award does not depend on the terminology employed by the arbitrators. It is determined solely by the nature of the decision itself. The inclusion or omission of items such as the names of the arbitrators, the date and the arbitrators' signatures should be irrelevant in the characterization of an award. (13) Those formal aspects may, however, affect the validity of a document which, on the basis of its subject-matter, can be characterized as an award. (14)

1353. – An arbitral award can be defined (15) as a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings. (16)

P 737

Several aspects of this definition require further examination.▲▼

1354. – First, an award is made by the arbitrators. Decisions taken by an arbitral institution, rather than by arbitrators acting in proceedings that the institution administers, are not arbitral awards. Thus, for example, a decision by the ICC International Court of Arbitration rejecting a challenge against an arbitrator does not constitute an award against which an action to set aside can be brought. (17)

1355. – Second, an award resolves a dispute. Measures taken by arbitrators which do not decide the dispute either wholly or in part are not awards. This is true of orders for the hearing of witnesses and document production, for example, which are only procedural steps and as such are incapable of being the subject of an action to set aside. While acknowledging that principle, the Paris Court of Appeals has nevertheless adopted a broad understanding of what constitutes a dispute, holding that:

the reasoned decision by the arbitrator ... whereby, having examined the parties' conflicting arguments, he refused to stay the proceeding, is judicial in nature and constitutes an arbitral award against which an action to set aside can be brought. (18)

1356. – Third, an award is a binding decision. Decisions which only bind the parties on condition that they expressly accept them are not awards. Thus, the decision of an "arbitral tribunal of first instance" which "makes a draft award which is only to become an award if the parties accept it, failing which the dispute is to be submitted to a tribunal of second instance for a definitive award," could not be the subject of an immediate action to set it aside. (19) On that basis, the Paris Court of Appeals held in a 1995 case that "a principle exists whereby, in an arbitration involving two tiers of jurisdiction, an action to set aside can only be brought against the award made at second instance." (20) The same applies to recommendations made by the "neutral" in the various forms of Alternative Dispute Resolution in which the parties have stipulated that such recommendations will not be binding unless expressly accepted by them, directly or through a more sophisticated system of exchanging settlement offers.▲▼

P 738

1357. – Fourth, an award may be partial. (21) Decisions by the arbitrators on issues such as jurisdiction, the applicable law, the validity of a contract or the principle of liability are in our opinion genuine arbitral awards, despite the fact that they do not decide the entire dispute and may not lead to an immediate award of damages or other redress. However, the opposite view has found support in Switzerland. Certain leading Swiss authors consider that "decisions, and even substantive decisions, which do not rule on a claim, only constitute partial awards if they put an end to all or part of the arbitral proceedings." According to those authors, all decisions which "decide substantive issues, such as the validity of the main contract, the principle of liability as opposed to the level of damages, etc." do not constitute arbitral awards; they are simply "preparatory or interlocutory decisions" which cannot be the subject of an action to set aside independent of the subsequent award on the parties' claims on the merits. (22) That analysis is based on a narrow understanding of the concept of a claim which, according to these authors, covers a request for an award of damages or other redress but not for an initial finding as to liability. Along with other Swiss authors, (23) we disagree with this view. A decision on jurisdiction, the applicable law or the principle of liability, for example, is a final decision on one aspect of the dispute. It should therefore be considered as an award, against which an immediate action to set aside can be brought. We are not convinced, from a theoretical standpoint, that there is a compelling justification for deferring the possibility for the parties to bring an action to set aside once the arbitrators have made a decision which they present as being final, as far as that aspect of the dispute is concerned, and binding on the parties. From a practical standpoint, such deferral would also lead to unnecessary delay and expense. If, for instance, the award on the principle of liability is to be set aside, the parties have a clear interest in knowing the outcome as soon as possible, as that may save them all or part of the cost of an expert proceeding or lengthy hearings on the quantum of damages. This is the position taken by the French courts. (24) In Switzerland, the Federal Tribunal has held that, under the 1987 Private International Law Statute, an action to set aside can only be brought against awards regarding the constitution of the arbitral tribunal and its jurisdiction—even where the tribunal finds in favor of its jurisdiction—where it would cause irreparable harm not to accept the immediate action to set aside or where the award puts an end to the entire dispute. (25)

A peculiarity of ICSID arbitration should be noted in this respect. Contrary to the position generally adopted in other types of arbitrations, a decision by the arbitrators on jurisdiction is not considered by the Centre as being an award, and it cannot be the subject of an immediate action in annulment before an *ad hoc* committee unless it puts an end to the ▲▼ dispute. This explains why the 1984 decision on jurisdiction made in the *SOABI v. Senegal* (26) case, for example, was carefully entitled "decision" rather than "award," (27) although ICSID arbitrators have not always been as cautious. (28)

P 739

## § 2. – Different Categories of Award

1358. – The concepts of final award (A), partial award (B), award by default (C) and award by consent (D) each require explanation.

## A. – Final Awards and Interim Awards

1359. – The expression “final award” (“*sentence definitive*”) is used to mean very different things.

It sometimes refers to an award which includes a decision on the last aspect of a dispute and which, as a result, terminates the arbitrators' jurisdiction over that dispute as a whole. In that sense, “final” awards are distinguished from “interim,” “interlocutory,” or “partial” awards, none of which puts an end to the arbitrators' brief. That was the definition used by the working group preparing the UNCITRAL Model Law, although it is important to note that it was precisely the controversy over this terminology which led UNCITRAL to abandon its attempts to define the concept of an award. (29) Traces of the working group's definition can be found in the Model Law, which states in Article 32, paragraph 1 that a final award terminates the arbitral proceedings. Prior to 1998, Article 21 of the ICC Rules of Arbitration drew a distinction between “partial” and “definitive” awards. The 1998 rules simply refer to interim, partial and final awards, without defining those terms (Art 2(iii)). (30) Many English-speaking commentators also use the term “final” to describe an award deciding the last aspects of a dispute. (31) ▲▼

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P 740

The expression “final award” is also sometimes used to describe an award which puts an end to at least one aspect of the dispute. In that sense, a final award is distinguished from an interim award (or from a procedural order) which do not terminate any aspect of the dispute, nor the last stage of that dispute. Thus interpreted, a final award does not necessarily cover the entire dispute, nor the last stage of that dispute. An award on liability, for example, is a final award, despite the fact that it may also order expert proceedings to provide the arbitrators with an evaluation of the damage or loss, following which further hearings will take place. That approach can be seen in the Dutch Code of Civil Procedure, Article 1049 of which provides that “the arbitral tribunal may render a final award, a partial final award, or an interim award.” (32) The Belgian legislature followed suit, at first implicitly, then explicitly in its statute of May 19, 1998. Article 1699 of the Belgian Judicial Code now reads “[t]he arbitral tribunal takes a final decision or renders interlocutory decisions, through one or more awards.” A number of Swiss commentators appear to take the same position. (33) We believe this approach to be consistent with contractual practice, as it reflects what is meant by the words “final and binding,” which are often used in arbitration agreements to describe any award or awards to be rendered by the arbitral tribunal. Interestingly, this is also how the 1996 English Arbitration Act uses the same words. (34)

We consider the latter interpretation to be the better one: as discussed above, an award is a decision putting an end to all or part of the dispute; (35) it is therefore final with regard to the aspect or aspects of the dispute that it resolves. (36)

## B. – Partial Awards and Global Awards

1360. – The parties may decide that the arbitrators shall rule on a particular aspect of a dispute (such as jurisdiction, the governing law or liability) by making a separate award, referred to as a partial award. To avoid confusion, we suggest that partial awards should be contrasted with global awards, rather than with final awards. As discussed above, the term “final” refers to the impact of the award, whether partial or not, on the portion of the dispute resolved by the arbitrators. (37) ▲▼

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P 741

In the absence of an agreement between the parties on this matter, the arbitrators are responsible for deciding whether it is appropriate to decide by way of partial awards.

Some laws expressly give the arbitrators freedom to do so. In particular, Article 188 of the Swiss Private International Law Statute provides that “[u]nless the parties have agreed otherwise, the arbitral tribunal may make partial awards.” (38) The arbitrators are given the same option by Article 1049 of the Dutch Code of Civil Procedure, Article 1699 of the Belgian Judicial Code and Section 29 of the 1999 Swedish Arbitration Act. Similarly, English law provides that unless the parties agree otherwise the arbitration agreement is deemed to empower the arbitrators to make partial awards at their discretion. (39) Although the French New Code of Civil Procedure does not mention it explicitly, the same rule applies in French law.

Some arbitration rules also expressly refer to the arbitrators' power to render partial awards. (40)

1361. – The arbitrators' freedom to determine whether it is appropriate to make partial awards can only be exercised within the limits set forth by the parties themselves. For instance, in the *SOFIDIF* case, the Paris Court of Appeals interpreted the terms of reference as stipulating that the arbitrators were to rule by separate awards on jurisdiction and on the merits of the dispute. The Court concluded that the award, which had disregarded that provision, should be set aside under Article 1502 3° of the New Code of Civil Procedure on the grounds that the arbitrators had exceeded the limits of their brief. (41) The *Cour de cassation* overruled that decision on the grounds that the Court of Appeals could only reach that conclusion if the obligation to make separate awards resulted from an “express, precise clause of the terms of reference.” (42) Thus, under French international arbitration law, directions by the parties on this point, provided that they are sufficiently clear and precise, may lead an award to be set aside if they are disregarded by the arbitrators. (43) ▲▼

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P 742

1362. – In the absence of any stipulation by the parties, the arbitrators' decision as to whether it is appropriate to make partial awards will depend on the circumstances of the case. (44)

The usefulness of partial awards on jurisdiction will mainly depend on whether the issues of jurisdiction will be determined by the same facts as those determining the merits. If that is the case, it will be preferable to make a single award covering both jurisdiction and, assuming the arbitrators' jurisdiction is confirmed, the merits. If, on the other hand, jurisdiction appears to be a separate issue and the substantive issues to be resolved by the tribunal if it retains jurisdiction are complex, it will generally be appropriate to decide by way of a separate award. By stating that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award," the UNCITRAL Rules appear to encourage the use of partial awards on jurisdiction (Art. 21(4)), as does the Swiss Private International Law Statute, which provides in Article 186, paragraph 3, that "[t]he arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision." (45) The more cautious approach found in the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, which previously required the arbitrators to invoke "special reasons" in order to render a partial award in the absence of an agreement of the parties to that effect (Art. 27 of the 1988 Rules), is no longer found in the 1999 Rules (Art. 34).

The question of whether it is appropriate to make a separate award on the applicable law also depends on the circumstances of the dispute. If the governing law is determined in a separate award, the parties will not need to present their arguments on the merits in the light of each different law which might otherwise apply to the dispute, including general principles of law. (46) However, to do so may delay the outcome of the dispute and oblige the arbitrators to choose a governing law without being fully aware of the impact this decision may have on the merits. (47)

It is impossible to assess in the abstract when separate awards on liability and quantum of damages are appropriate. A partial award on liability may encourage a settlement and enable the arbitrators to determine more accurately the brief of any expert appointed to assist in the evaluation of damages. On the other hand, it may delay the outcome of the proceedings and bind the arbitrators before they are fully aware of all the facts of the case. In short, the decision depends entirely on the circumstances of each case.

#### C. – Default Awards

1363. – As discussed earlier, default by one of the parties does not bring the arbitral proceedings to an end. In order to satisfy the requirements of due process and equal treatment of the parties, it is sufficient for each party to be given an equal opportunity to present its case. (48) Default by a party does not therefore prevent the making of a valid award. There is no obligation on the arbitrators to simply accept the arguments of the party which is present or represented, nor indeed to increase the burden of proof on that party so as to compensate for the other's failure to participate, provided the defaulting party has been properly invited to attend. In other words, an award made following default proceedings is no different from one made following proceedings where all parties participate. In both cases, the rules of due process are satisfied. Thus, having established that the various documents submitted to the arbitral tribunal had invariably been sent to the defaulting party by means of two different couriers, a court was founded to reject an action to set aside brought against a default award, on the grounds that "the provisions of the [ICC] Rules adopted by the parties had been observed and no specific formal requirements were required to ensure that the proceedings complied with the rules of due process." (49)

#### D. – Consent Awards

1364. – In some cases, the parties succeed in reaching a settlement in the course of the proceedings. If they do so, they may simply formalize their agreement in a contract and terminate the arbitral proceedings. Alternatively, they may want their decision to be recorded by the arbitral tribunal in the form of an award. This is referred to as a consent award. In obtaining a consent award, the parties expect their settlement to benefit from the authority and effects attached to an award. Admittedly, in certain legal systems, (50) a settlement is *res judicata* in any event, so in that respect it gains nothing from being embodied in an award. However, the parties may seek a consent award in order to enjoy the recognition and enforcement procedures provided for in widely-ratified international conventions on arbitration. (51)

1365. – The first question that arises here is whether the arbitrators are obliged to make a consent award where the parties so request. Most modern arbitration laws, which promote the principle of party autonomy, will require them to do so. This is clearly the case in French law. A number of arbitration rules also expressly invite the arbitrators to record the agreement reached by the parties in a consent award. The 1998 ICC Rules provide, in Article 26 (Art. 17 of the previous Rules), that:

[i]f the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal ..., the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so.

Similar provisions appear in the 1998 LCIA Rules (Art. 26.8), the 1999 Stockholm Chamber of Commerce Rules (Art. 32(5)) and the Euro-Arab Chambers of Commerce Rules (Art. 24-1). In ICSID arbitration, the parties' settlement may give rise to an order recording the discontinuance of the proceedings. If the parties so request, the arbitral tribunal can incorporate the settlement in an award under Article 43 of the ICSID Rules.

1366. – The second question arising in connection with consent awards is whether, like ordinary awards, they benefit from the recognition and enforcement mechanisms provided for in international conventions and national legislation. Neither the 1958 New York Convention nor the 1961 European Convention expressly refers to consent awards. Nevertheless, in determining whether those conventions apply, one should, in our opinion, interpret those instruments in order to determine their scope rather than consider the position in the jurisdiction where the disputed award is made. (52)

The lack of case law on this issue (53) makes it difficult to take a firm view. (54) If an award is defined as being restricted to a decision whereby the arbitrators resolve all or part of a dispute, it seems doubtful that a decision which simply endorses the agreement of the parties could be considered to be an award. (55) However, the UNCITRAL Model Law provides a strong argument in favor of applying the ordinary regime for awards by stating in Article 30, paragraph 2 that a consent award “has the same status and effect as any other award on the merits of the case.” Thus, in countries which have adopted the Model Law, the issue will be resolved by simply applying the ordinary legal rules governing the recognition and enforcement of awards. It could be that the position of the Model Law will have a wider impact, as the adoption of the rule set out in Article 30, paragraph 2 reveals the existence of a consensus which is liable to support a similar interpretation of other international instruments.

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P 745

## Section II – The Making of The Award

1367. – An arbitral award (56) is made by the arbitrators (§ 1) subject, in some cases, to approval by an arbitral institution (§ 2). The award must be made within any time-limit fixed by the parties or by law (§ 3).

### § 1. – Role of the Arbitrators

1368. – The role of the arbitrators is to resolve all of the disputed issues by one or more decisions, (57) and to express those decisions in a document which is subject to certain formal requirements, and which is known as the arbitral award. The process which enables the arbitrators to reach such a decision is referred to as the deliberations. Although one cannot go as far as to say that there can be no deliberations where the dispute is heard by a sole arbitrator, the regime governing the deliberations is of practical importance only where there is an arbitral tribunal comprising more than one member.

1369. – The requirement for deliberations is not always expressly set out in international arbitration statutes. For instance, no such requirement exists in French international arbitration law, and none of the grounds for setting aside an award listed in Article 1502 of the New Code of Civil Procedure refers directly to deliberations. Nevertheless, they do constitute a fundamental condition under French law, which will apply even where neither the parties nor their chosen arbitration rules make reference to them. It might be argued that the absence of proper deliberations constitutes a violation of due process justifying the setting aside of an award. However, this would run contrary to the principle of the arbitrators' independence, as it is only where the arbitrators are not independent of the parties that any unequal treatment of the party-appointed arbitrators in the conduct of the deliberations would amount to a breach of due process or equality of the parties. (58) It is therefore generally considered that the existence of proper deliberations is in itself a requirement of international procedural public policy, a breach of which will also constitute a ground for the setting aside of the award. (59)

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P 746

1370. – Similarly, international arbitration statutes generally give no further indication as to how deliberations are to be conducted. They must, however, satisfy certain conditions, which we shall now examine.

#### A. – The Decision-Making Process

1371. – Where the arbitral tribunal comprises more than one arbitrator, it is necessary to determine how its decisions are to be made in the event that the arbitrators are not unanimous.

Some arbitration rules simply state that in such circumstances the decision is to be taken by a majority of the arbitrators. That is the position taken in the UNCITRAL Arbitration Rules (Art. 31(1)), the AAA International Arbitration Rules (Art. 26) and the ICSID Rules (Art. 16(1)). The case law generated under the UNCITRAL Rules by the Iran-United States Claims Tribunal illustrates one of the difficulties which may arise when a majority is required. Where one arbitrator does not participate in the deliberations or takes a position which the other arbitrators consider to be unreasonable, in order to avoid delaying the award indefinitely, another arbitrator—generally a co-arbitrator—must accept the views of the third arbitrator—generally the chairman—which may lead the first arbitrator to endorse an award with which he is not in agreement. Some arbitrators have gone as far as stating in a separate opinion that they consider the result to be unsatisfactory but endorse it only in order to create a majority which complies with the requirements of the rules. (60)

Other rules have chosen to specify that where a majority cannot be obtained, the chairman of the arbitral tribunal can decide alone. That system was introduced by the ICC Rules of Arbitration in 1955, and is found today in Article 25, paragraph 1 of the 1998 Rules. (61) It has since been followed by the Euro-Arab Chambers of Commerce, (62) the LCIA Arbitration Rules

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P 747

(Art. 26.3) and the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Art. 30) among others. Article 46 of the International Arbitration Rules of the Zurich Chamber of Commerce adopts a similar approach, but restricts the chairman's discretion by stipulating that an award in favor of the winning party can be neither less than the lowest proposal made by the co-arbitrators, nor greater than their highest proposal.

These two different approaches are also found in arbitration legislation. The UNCITRAL Model Law (Art. 29), the Netherlands Code of Civil Procedure (Art. 1057), the 1996 English Arbitration Act (Sec. 22(1)) (63) and the new German law on arbitration (Art. 1052 ZPO) have followed the traditional position found in the UNCITRAL Arbitration Rules. In contrast, the 1987 Swiss Private International Law Statute (Art. 189, para. 2), the 1988 Spanish Arbitration Statute (Art. 34) and the 1999 Swedish Arbitration Act (Sec. 30, para. 2) have followed the ICC Rules in this respect and provide that if no majority is possible, the award can be made by the chairman alone.

Provisions enabling the chairman to reach a decision alone are intended to ensure that where the arbitrators have strongly differing views, the chairman need not side with one or other of the co-arbitrators so as to obtain a majority. Although the chairman is entitled to decide alone, he or she may prefer to opt for a compromise solution. In practice, there have been very few cases where the decision-making process might have failed but for a clause of this kind. In 1995, of the 203 awards submitted to the Court of Arbitration, none was made by the chairman alone under Article 19 of the ICC Rules (now Art. 25(1)). (64) In 1996, of the 217 awards submitted to the Court, only one was made by the chairman alone and in 1997, of the 227 awards submitted, just two were made by the chairman. (65) In 1998, of the 242 awards submitted, again only one was made by the chairman alone. Nevertheless, the very existence of the possibility for the chairman to decide alone will probably persuade the co-arbitrators to take a more reasonable attitude in certain cases.

▲ P 748 As French law is silent on this issue, it is not inconceivable that where the parties do not agree otherwise the French courts would accept such a practice, even where it is not ▲▼ expressly provided for in the applicable arbitration rules. This seems preferable to compelling the chairman of the arbitral tribunal to side with one of the co-arbitrators or to declare that, in the absence of a majority, no award can be made. Nonetheless, all of the arbitrators must have been given the opportunity to participate in the deliberations. (66)

#### B. – Methods of Communication Between the Arbitrators

1372. – Most modern laws contain no requirements as to the form of the deliberations. As stated by the French *Cour de cassation* in a decision of January 28, 1981, which remains valid following the reform of May 12, 1981, “no particular form is required for the deliberations of the arbitrators.” (67) By majority voting or by virtue of the powers of the chairman under the rules governing decision-making, (68) the arbitral tribunal is free to determine the conduct of the deliberations. (69) The arbitrators can thus meet to deliberate, or exchange questionnaires, (70) notes or draft awards, or communicate by telephone, fax or video-conference. (71) In this respect, the Swiss Federal Court has rightly ruled that an award made by circulating a draft among the arbitrators satisfied the requirement for deliberations. (72)

#### C. – Refusal of an Arbitrator to Participate in the Deliberations

▲ P 749 1373. – An arbitrator cannot obstruct the making of an award by simply refusing to participate in the deliberations. Just as compliance with the rules of due process only entails providing the parties with an opportunity to present their case even though they may choose not to do so, (73) the requirement for deliberations will be satisfied if each of the arbitrators is given an equal opportunity to take part, in a satisfactory manner, in the discussions among the arbitrators and in the drafting of the award. The French *Cour de cassation* has ▲▼ recognized that a party's right to a fair hearing, which was claimed to have been breached where no deliberations took place, was satisfied where the missing arbitrator was “given the opportunity to make comments on the proposed amendments to the initial draft of the award.” (74) The same solution is also embodied in certain modern arbitration statutes, such as the 1999 Swedish Arbitration Act (Sec. 30, para. 1). Article 26.2 of the LCIA Rules thus expresses a widely accepted rule in providing that where an arbitrator refuses to participate in the making of the award “having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator's failure to participate in the making of the award.” (75) The 1998 revision of the ICC Rules introduced, as a means of accelerating the procedure, Article 12, paragraph 5, pursuant to which:

[s]ubsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court ..., the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration.

The application of this provision, which raises certain difficulties concerning the principle of the equality of the parties, (76) should, in our view, remain the exception in practice. Nevertheless, Article 12, paragraph 5 is likely to dissuade arbitrators from resigning for the sole purpose of delaying the outcome of the arbitration. (77)

#### D. – Secrecy of Deliberations

1374. – Although, again, most laws do not explicitly require deliberations in international arbitration to be secret, (78) such secrecy is generally considered to be the rule. (79) This

means that views exchanged during the deliberations cannot be communicated to the parties. However, this does not prevent the arbitrators from indicating in their award that their decision was reached by a majority or unanimously. (80) Non-compliance with the requirement of secrecy could render the arbitrator in breach personally liable, (81) but would not invalidate the award. (82)

P 750

## § 2. – Role of the Arbitral Institution

1375. – In *ad hoc* arbitration, the award is the work of the arbitrators alone. However, where the parties have chosen to submit their dispute to institutional arbitration, the institution is sometimes responsible for reviewing a draft of the arbitrators' award. The purpose of that review is usually to enable the institution to maximize the chances of awards made under its supervision being enforced.

1376. – Most international arbitration laws are silent on this issue, and arbitral institutions are therefore free to determine how they review awards and, by adopting their arbitration rules, the parties confer contractual status on the involvement of the institution.

Under the heading “Scrutiny of the Award by the Court,” the ICC Rules provide, in Article 27 (Art. 21 of the previous Rules), that:

[b]efore signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form. (83)

The ICC International Court of Arbitration thus has the power to review the form of the award, and to draw the attention of the arbitrators to substantive issues which it considers to be problematic. This distinction between form and substance is sometimes delicate. Contrary to the view put forward by some authors, (84) the scrutiny by the International Court of Arbitration of the form of the award does not extend to ensuring compliance with the entire arbitral procedure. For example, it does not entail checking whether proper adversarial hearings took place on each disputed issue, unless the existence of a procedural flaw in that area is evident from simply reading the award. (85) In 1998, of the 242 draft awards submitted to the Court for scrutiny, 18 were returned to the arbitrators, 5 for reasons of form, 3 for reasons of substance, and 3 on both grounds; 62 awards were approved subject to modifications as to their form, after which the Court, through a smaller committee, reviewed compliance with the Court's decision. (86)

P 751

Some arbitration rules, such as those of the Euro-Arab Chambers of Commerce (Art. 24-4) or those of the *Chambre franco-allemande de commerce et d'industrie* (COFACI) (Art. 23), contain provisions similar to those of the ICC Rules. Others, such as the LCIA Rules or the AAA Rules, have no such system and leave the arbitrators solely responsible for both the form and the substance of the award.

1377. – The ICC being headquartered in Paris, the French courts have had the occasion to specify that as the review exercised by arbitral institutions is merely “administrative,” the institution need not state the reasons for any amendments it may require. (87) In the context of ICC arbitration, the French courts have also held that as the ICC International Court of Arbitration is not an “arbitrator of second instance,” it is not obliged to examine all the documents submitted to the arbitrators by the parties. (88)

1378. – Some authors have questioned both the benefit of submitting draft awards to an arbitral institution for approval and even the validity of awards made under such conditions. (89)

The difficulty is whether the draft award submitted by the arbitrators for review by the institution is in fact a true award which terminates the arbitrators' jurisdiction over the case and is *res judicata*. If that were the case, any subsequent intervention by the arbitral institution would infringe upon the independence of the arbitral tribunal and, because the award effectively terminates the arbitrators' mandate, (90) the institution would be powerless to alter it. However, because arbitration is based essentially on the principle of party autonomy, the award is not properly made until it is delivered in accordance with the conditions which the parties themselves have fixed by adopting the institution's arbitration rules. (91) Courts which have had to review the scrutiny of awards exercised by arbitral institutions—in practice, the ICC—have generally rejected the arguments of parties challenging the validity of an award solely on the grounds that it was rendered after scrutiny by an arbitral institution. (92) Likewise, an arbitral institution reviewing an award in accordance with the conditions contained in its arbitration rules cannot be accused of infringing upon the arbitrators' independence, which concerns the relationships between the arbitrators and the parties, or of failing to keep the deliberations secret, provided that the institution itself observes that secrecy. (93)

P 752

## § 3. – Time-Limits for Making the Award


1379. – The question of when the arbitral tribunal must make its award, which raises the issue of the duration of the arbitrators' functions, (94) depends on whether or not the parties have specified a time-limit for that purpose.

#### A. – Where the Parties Have Specified No Time-Limit

1380. – Where the parties have not set a deadline before which the arbitrators are to make their award, the next question is whether they have nevertheless chosen a mechanism for doing so.


##### 1° Where the Parties Have Chosen a Mechanism for Fixing a Deadline

1381. – Where the parties have not set a time-limit within which the arbitrators are to make their award, a mechanism for fixing that time-limit may be found in rules incorporated by reference in their arbitration agreement.

1382. – They may have adopted a procedural law specifying a deadline or designating the authority responsible for setting that deadline. For example, if French law is chosen to govern the proceedings, the six month period provided for in Article 1456, paragraph 1 of  the New Code of Civil Procedure will apply, (95) and can be extended, under paragraph 2 of the same Article, by the parties or by the courts. (96)


1383. – The parties may also have incorporated in their agreement arbitration rules containing provisions as to the deadline for making the award.

The French courts have firmly established the principle that time-limits and extensions fixed by a pre-designated third party—in practice, an arbitral institution—are binding on the parties just as if they had been established by the parties themselves. (97)

Arbitration rules vary considerably on this issue. For example, the ICC Rules of Arbitration fix a time-limit for rendering the award of six months from the signature or approval by the International Court of Arbitration of the terms of reference. (98) However, the International Court of Arbitration may “pursuant to a reasoned request from the arbitrator or if need be on its own initiative, extend this time-limit if it decides it is necessary to do so.” (99) The previous ICC Rules made the effectiveness of the terms of reference, and thus the point of departure of the six months time period, subject to payment of the advance on costs. This condition has been removed in the 1998 Rules and is replaced by the striking out of any claims made by the non-paying party. This allows the six-month period to run from the date of the last signature of the terms of reference or from that of the notification by the secretariat to the arbitral tribunal of the Court's approval of the terms of reference (Art. 24(1)). The decision to extend a deadline is made by the International Court of Arbitration. (100) The Court need not inform the parties of its intention to extend the deadline,  or even advise them of the date on which such extension may be decided. (101) Its decision is of an administrative nature, and no grounds need be given. (102) Where an excessive delay is attributable to the arbitrators, the International Court of Arbitration may resort to the provisions of the Rules concerning the replacement of arbitrators, which apply where the arbitrators fail to perform their duties within the stipulated time-limits. (103)

Conversely, the LCIA Rules, which are silent on this issue, and the AAA International Rules (Art. 24) leave the arbitrators and the arbitral institution in full control of the deadlines before which the award must be made, unless the parties have provided otherwise. In the case of *ad hoc* arbitration, the UNCITRAL Rules of course take a similar approach.

##### 2° Where the Parties Have Not Chosen a Mechanism for Fixing a Deadline

1384. – Where the parties have determined neither the deadline within which the arbitral tribunal must make its award, nor any mechanism for fixing that deadline, French international arbitration law imposes no limit on the period within which the arbitrators are to make their award. Even prior to the 1981 reform, it had been held that the old Article 1007 of the Code of Civil Procedure, which required the award to be rendered within the deadline fixed by the submission agreement or, in the absence of such a deadline, within three months, applied only to arbitrations governed by French procedural law and was not a requirement of international public policy. (104) That position was reinforced by the fact that the 1981 Decree remained silent on this point. (105) Thus, Article 1456, paragraph 1 of the New Code of Civil Procedure, which provides that “[i]f the arbitration agreement does not specify a time-limit, the arbitrators' mission shall last only six months from the day when the last arbitrator accepted his or her mission,” does not apply to international arbitration unless the parties have chosen French law to govern the procedure. (106) In the 1994 *Sonidep* case, the *Cour de cassation* confirmed that “in international arbitration, French law ... does not  require the arbitrators' powers to be confined, in the absence of a contractual deadline, within a statutory deadline.” (107)

This liberal approach has been followed in Dutch law, which underlines the arbitral tribunal's discretion on this issue (Art. 1048 of the Code of Civil Procedure), and by Swiss or Swedish law which, like French law, remain silent on the question. Other legal systems, such as those of Sweden prior to the 1999 Arbitration Act (108) and Belgium, (109) provide that even in international cases the arbitrators must make their award within six months, although they differ as to the starting-point for that time-limit. The UNCITRAL Model Law offers a more flexible approach, providing that where an arbitrator fails to complete his or her functions within a reasonable period of time and does not resign, and the parties do not agree to terminate his or her mandate, either party can ask the court responsible for the constitution of the arbitral tribunal to decide on the termination of that mandate (Art. 14). No recourse is available against such a decision.



## B. – Where the Parties Have Specified a Time-Limit

1385. – In both institutional and *ad hoc* arbitration, the parties are free to fix a precise deadline within which the arbitrators must make their award. Arbitration agreements sometimes contain express provisions to that effect. The benefit of such clauses depends on the circumstances, because the parties will often have difficulty in making a realistic assessment of the time required to resolve disputes which may arise between them. (110) The use of such clauses is justified where they are confined to particular issues capable of being quickly resolved by the arbitrators. (111) However, they are liable to become pathological where the chosen arbitral institution is unable to enforce them or, in the case of an *ad hoc* arbitration, where the seat of the arbitration prevents rapid, easy access to the courts for the purpose of constituting the arbitral tribunal. The main danger of such clauses stems from the time required to constitute the arbitral tribunal. Certain clauses stipulate that the period of time within which the award is to be made will begin to elapse at a date prior to the constitution of the arbitral tribunal. In that case, any party keen to obstruct the arbitration need only delay its appointment of an arbitrator in order to jeopardize the entire proceedings. (112) The only means of ensuring that such tactics do not prevent the arbitration from taking place is to obtain rapid support from the court responsible for assisting with the constitution of the arbitral tribunal.

1386. – Clauses in which the parties limit the duration of the arbitrators' mission raise two questions: the first concerns the possibility of extending the deadline, and the second concerns the arbitrators' failure to comply with it.

### 1° Extending the Deadline Fixed by the Parties

1387. – The deadline set by the parties for the delivery of the award can of course be extended by their mutual agreement, which may be express or implied. (113)

In the absence of such an agreement, can the deadline initially fixed by the parties nevertheless be extended? Of course, as they are bound by the parties' agreement, the arbitrators would create grounds on which their award could be set aside if they were to disregard a deadline fixed by the parties. This was established by the French *Cour de cassation* in its 1994 decision in the *Degrémont* case:

the principle that the time-limit fixed by the parties, either directly or by reference to arbitration rules, cannot be extended by the arbitrators themselves is a requirement of both domestic and international public policy, in that it is inherent in the contractual nature of arbitration. (114)

Where French law has been chosen to govern the procedure, the problem is resolved by Article 1456, paragraph 2 of the New Code of Civil Procedure, (115) which provides that:

[t]he contractual time-limit may be extended either by agreement of the parties or, at the request of either of them or of the arbitral tribunal, by the President of the *Tribunal de Grande Instance* or, [if the arbitration agreement has expressly referred to him as nominating authority,] by the President of the *Tribunal de Commerce*.

In the event that the law governing the procedure does not contain a similar provision, it is necessary to determine whether the courts can intervene. In France, it has been suggested that their jurisdiction should be based on Article 1493, paragraph 2, which confers jurisdiction on the President of the Paris Tribunal of First Instance to resolve difficulties with the constitution of the arbitral tribunal in international arbitrations held in France. (116) The intervention of the courts to extend unrealistic time-limits is appropriate, at least where the seat of the arbitration is located in France. However, strictly speaking, this is not a difficulty which concerns the constitution of the arbitral tribunal. In the absence of any statutory provision expressly allowing for such intervention, the courts have had to create such a rule themselves. They have done so by interpreting the intentions of the parties. In a case where neither the parties nor the arbitrators had chosen French law to govern the proceedings, the President of the Paris Tribunal of First Instance retained jurisdiction over a request for an extension of a time-limit on the grounds that the arbitrators had implicitly chosen French law to govern the procedure, which enabled him to base his decision on Article 1456 of the New Code of Civil Procedure. (117) The validity of that approach has been confirmed by several decisions concerning international arbitrations held in France but not expressly governed by French law: in each case, (118) the President of the Paris Tribunal of First Instance applied Article 1456, paragraph 2. That extensive application of Article 1456, paragraph 2 is both legitimate, as the arbitration has a connection with France, and appropriate, because the only consequence of such court intervention is to maintain the effectiveness of an arbitration agreement which has not provided a mechanism for extending the deadline for making the award. It has also been held that each of the arbitrators, acting alone, is entitled to apply for an extension, as they could incur personal liability by allowing the time-limit to expire. (119) This safety net for the parties under French law can prove to be invaluable. However, for it to be successful, the request for an extension must be made prior to the expiration of the deadline fixed by the parties, as the courts cannot resurrect proceedings once the deadline has passed. (120)

Since the 1996 reform, English law has shared the concerns found in French law, and allows the courts to intervene, where necessary, to extend the deadlines fixed by the parties. Under Section 50 of the 1996 Arbitration Act, the court may, if requested by a party or the arbitral tribunal, and after remedies available in the arbitration have been exhausted, extend the

deadline for making an award “if satisfied that a substantial injustice would otherwise be done.” This is different from French law (121) in that the court may extend a deadline that has expired (Sec. 50(4)). Similar provisions apply to extensions of deadlines fixed by the parties for the beginning of arbitral proceedings or of other dispute resolution procedures which must be exhausted before arbitral proceedings can begin (Sec. 12). These decisions can only be appealed with leave from the court (Secs. 12(6) and 50(5)).

## 2° Breach of the Time-Limit Fixed by the Parties

1388. – Under French law, an award made after the expiration of the deadline fixed by the parties for the making of the award may be set aside on the grounds that it was made on the basis of an expired agreement, under Article 1502 1° of the New Code of Civil Procedure. An award made abroad under the same circumstances could be refused enforcement in France on the same grounds. (122) Further, the making of an interim or partial award (123) does not cause the deadline for making subsequent awards to be suspended even where an action is pending to set aside the interim or partial award. (124)

In ICC arbitration, it is important to remember that the award is made not when the draft award is submitted by the arbitrators to the International Court of Arbitration, (125) but after the Court has approved the draft. The award must therefore be approved within the agreed time-limit. (126) However, this did not prevent the ICC, in a case which provides a perfect illustration ▲▼ of fast-track arbitration, from ensuring that an award was made within nine weeks of the request for arbitration, as required by the parties. (127)

## Section III – Form of The Award

1389. – As a general rule, an arbitral award will be in writing.

Some legal systems expressly require an award to be in writing. (128) This rule exists in French domestic arbitration law, (129) but it has been considered unnecessary to specifically require an award in writing in international arbitration. (130) Oral awards are thus not precluded, but they remain extremely rare, which is fortunate given the evidential difficulties which they are liable to create at the enforcement stage. (131)

Most institutional arbitration rules provide that the award must be made in writing. (132)

1390. – Most arbitration laws and rules also contain provisions concerning the language of the award (§ 1), the reasons for the award (§ 2), dissenting opinions (§ 3), and information which must appear in any award (§ 4). In some legal systems, there are certain formal requirements concerning the filing of the award (§ 5).

### § 1. – Language of the Award

1391. – In principle, the award is made in the language of the arbitral proceedings. (133) The parties could of course agree otherwise and ask for the award to be made in a different language. If and when enforcement is sought, the award may have to be translated into the ▲▼ language of the country where it is to be enforced, under Article IV, paragraph 2 of the 1958 New York Convention.

### § 2. – Reasons for the Award

1392. – Most recent statutes on international arbitration do require the arbitrators to state the reasons for their decision in their award. Such a requirement is found, for example, in the Belgian Judicial Code (Art. 1701(6)), in the Netherlands Code of Civil Procedure, except for awards by consent and awards in quality arbitrations (Art. 1057 (4)(e)), and in the German ZPO (new Article 1054(2) in force as of January 1, 1998). Even in the English tradition, which has long been in favor of not giving grounds for awards, the advantages of stating reasons are gaining recognition in international arbitration. (134) Both English case law (135) and the 1996 Arbitration Act (136) now reflect this trend. Thus, the position most often taken is that adopted in Article VIII of the 1961 European Convention:

[t]he parties shall be presumed to have agreed that reasons shall be given for the award unless they (a) either expressly agree that reasons shall not be given; or (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

The approach of the UNCITRAL Model Law is similar, allowing the parties to choose that no reasons be given, but presumes that, in the absence of any indication to the contrary, their intention was that the arbitrators should state the grounds for their award (Art. 31(2)).

Where the choice is left to the parties, their preference may be indicated in the arbitration agreement, or it may result from their choice of a procedural law (137) or of arbitration rules which require reasons to be given. (138) The additional provision in some rules that the grounds for the award need only be given where the parties do not provide otherwise is self-evident. Arbitration rules, by definition, are only binding because the parties have chosen to adopt them, and the parties can agree to depart from them as they see fit. ▲▼

1393. – Where the procedural law or arbitration rules which the parties may have chosen are silent as to whether reasons are to be given, as was the case with the ICC Rules in force prior to January 1, 1998, will there be a presumption in favor of or against requiring grounds to be

stated? (139) The French courts consider that unless the parties agree otherwise, grounds for the award should be given. Thus, in a case concerning an ICC arbitration held in France under the 1975 ICC Rules, the Paris Court of Appeals reviewed whether reasons for the award had been given because:

since it was not established that, in the absence of any indication in the ICC Rules, the parties or the arbitrators had intended to submit the dispute to a procedural law which does not oblige the arbitrators to state the grounds for the award, that obligation applied. (140)

This solution reflects the parties' expectations, particularly in ICC arbitration, where the scrutiny of the International Court of Arbitration over the draft award submitted by the arbitrators (141) has always implied that the reasons for their decision will be given. This is now explicitly stated in the 1998 Rules, Article 25(2) of which provides that "[t]he Award shall state the reasons upon which it is based."

As a result, virtually all international arbitral awards give reasons, with the exception of certain quality arbitrations. (142)

1394. – In French domestic arbitration, the grounds for the award must be stated. (143) No such requirement exists in French international arbitration law, and the parties therefore have the option of requiring the arbitrators to give reasons. The mere fact that an award contains no reasons does not cause it to violate the French notion of international public policy and make it incapable of being recognized or enforced in France. (144) ▲▼

P 762 ▲

The French courts would only censure the failure to give reasons if the law governing the proceedings required reasons to be given, (145) or if the failure to give reasons concealed a violation of due process. (146) In both such cases the award would be set aside or refused enforcement. (147)

1395. – Where the grounds for the award must be stated, that does not mean that they must be well-founded in fact or law. A court reviewing the award to ensure that reasons have been given will not of course review the substantive findings of the award. Thus, even grounds that are clearly wrong will satisfy the requirement that the arbitrators state the reasons for their award. (148) However, the French *Cour de cassation* has held that giving contradictory reasons could be considered as amounting to giving no reasons at all. (149) Nevertheless, a contradiction in the grounds for an award will only be contrary to international public policy if it is "established that the ... arbitral proceedings were governed by a law requiring that grounds be stated." (150)

The Belgian Courts, on the other hand, have ruled that the potential contradiction between two reasons in the award could not be reviewed by the courts, as it pertained to the merits ▲▼ of the dispute. (151) This solution is, in our view, preferable to that accepted in French law, although it would still be extremely rare for the French courts to set aside an award on the basis of the existence of contradictory reasons in the award. (152)

P 763 ▲

### § 3. – Dissenting Opinions

1396. – Where an award is made by a majority of the arbitrators, an arbitrator in the minority may want to express his or her views as to what the outcome of the dispute should have been, in a document intended for the parties and generally referred to as a dissenting or minority opinion. (153)

In international arbitration, several issues surrounding dissenting opinions need to be distinguished: their admissibility (A), their usefulness (B) and the applicable legal regime (C).

#### A. – Admissibility of Dissenting Opinions

1397. – Influenced by the practice followed by their courts, lawyers trained in common law systems generally consider the issuance of dissenting opinions to be normal practice. (154)

▲ Authors of the civil law tradition, on the other hand, tend to consider dissenting opinions to be inappropriate, if not unlawful. (155) ▲▼

P 764 ▲

1398. – Some civil law commentators (156) have argued that dissenting opinions are prohibited in so far as they constitute a breach of the secrecy of the deliberations provided for in certain domestic arbitration statutes. (157) This argument is unconvincing. First, such domestic arbitration provisions apply only where the parties have expressly chosen them to govern the procedure. Even in that case, a breach of the secrecy of the deliberations may not be considered a ground on which the award can be set aside. For instance, it is the case neither in French domestic law (158) nor, pursuant to Articles 1502 and 1504 of the New Code of Civil Procedure, in French international arbitration law. Second, and more importantly, expressing a dissenting opinion does not necessarily entail breaching the secrecy of the deliberations, provided that the dissenting arbitrator does not reveal the views expressed individually by the other arbitrators. (159)

This latter view represents the dominant trend in civil law jurisdictions which, without actually encouraging dissenting opinions, generally do not consider them to be unlawful. (160) A number of civil law commentators share that view. (161) However, given the controversy which arose during the drafting stage, the authors of the UNCITRAL Model Law preferred to avoid expressly taking sides on this issue. (162) ▲▼

P 765 ▲

#### B. – Usefulness of Dissenting Opinions

1399. – It is sometimes argued, in support of dissenting opinions, that the open criticism of

flaws allegedly affecting the arbitral proceedings, or the public expression of differing views on a particular issue, tends to strengthen the legitimacy of the arbitral proceedings and to lead to more thorough reasoning on the part of the majority. (163) It is also suggested that dissenting opinions give some arbitrators or parties cosmetic satisfaction. Rightly or wrongly, dissenting opinions are often felt to be particularly useful in arbitrations where one or more of the parties is a government. (164) For example, the 1965 ICSID Convention specifically allows for dissenting opinions (Art. 48(4)).

1400. – Against dissenting opinions it has been argued that they provide an arbitrator with an easy alternative: instead of pursuing the deliberations so as to reach a unanimous award, arbitrators may prefer not to do so if, by means of a dissenting opinion, they can demonstrate to the party that appointed them that they “defended its interests.” Also, dissenting opinions are sometimes thought to encourage bias, as they reveal the views of party-appointed arbitrators. Above all, they are felt to weaken the authority of the award. (165) In many cases, a dissenting opinion is intended by its author as a critique of the majority decision, setting the scene for an action to set the award aside. For example, the dissenting opinion issued by the minority arbitrator in the *Klöckner* case (166) was the basis of the subsequent setting aside of the award by an *ad hoc* committee. (167) However, the practice of issuing dissenting opinions is successfully implemented in the vast majority of cases, and should not be prohibited solely because it is liable to be abused. Besides, such a prohibition would be futile in that the only remedy would be the personal liability of the dissenting arbitrator, as opposed to any effect on the award itself. Indeed, it would be paradoxical, to say the least, if the attitude of the arbitrator representing the minority view were to affect the validity of the award to which he or she is opposed.

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P 766 1401. – Although it would be unfortunate for dissenting opinions to become common practice, one should not, on the other hand, overestimate their importance. In particular, it ▲▼ would not be appropriate to give too much consideration to the dissenting arbitrator's views on the merits of the dispute in an action to set aside the award rendered by the majority.

Those who believe in the effectiveness of professional codes of ethics suggest that the practice of giving dissenting opinions should be regulated only by ethical rules of conduct drawn up for use by arbitrators. (168)

1402. – The various institutional arbitration rules deal with dissenting opinions in different ways.

The UNCITRAL Model Law does not take sides on the issue. Neither do the Rules of the LCIA (Art. 26), the AAA (Art. 27 of the International Arbitration Rules) or the Euro-Arab Chambers of Commerce. This does not amount to a rejection of the practice of issuing dissenting opinions. It simply leaves the issue to be resolved either by the law governing the arbitral proceedings, by custom, or by the arbitration agreement.

Article 47, paragraph 3 of the ICSID Rules, which reproduces Article 48, paragraph 4 of the Washington Convention, provides that “[a]ny member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.” (169) The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce likewise allow for dissenting opinions (Art. 32(4) of the 1999 Rules). By contrast, the arbitration rules of the Franco-German Chamber of Commerce and Industry (COFACI) expressly prohibit arbitrators from giving dissenting opinions (Art. 21.4).

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P 767 The ICC Rules of Arbitration have evolved on this point. In the version in force prior to January 1, 1998, the Internal Rules of the International Court of Arbitration, which formed an annex to the ICC Rules, provided in Article 17 that the Court “pays particular attention to the respect of ... the mandatory rules of the place of arbitration, notably with regard to ... the admissibility of dissenting opinions.” Since January 1, 1998, Article 6 of the Internal Rules has replaced the previous Article 17, and maintains the earlier rule, but without referring to the particular case of dissenting opinions. This reflects the fact that the ICC Rules are not hostile to the principle of dissenting opinions, and no longer even underline the fact that, in certain legal systems, such opinions can jeopardize the validity of the award. In principle, if a dissenting opinion has been prepared, it is submitted to the Court in draft form together with the draft award made by the majority, and the Court will then decide, on the basis of the requirements of the applicable law, whether to send the dissenting ▲▼ opinion to the parties. (170) In practice, the Court cannot prevent an arbitrator from sending a dissenting opinion directly to the parties, although any court reviewing the award would not then consider the dissenting opinion as forming part of the award. (171) In 1998, of the 242 awards submitted to the International Court of Arbitration, 15 were accompanied by a dissenting opinion. (172)

### C. – The Legal Regime Governing Dissenting Opinions

1403. – A dissenting opinion can only be issued when the majority has already made the decision which constitutes the award. Until then, any document issued by the minority arbitrator can only be treated as part of the deliberations. However, once the majority decision has been reached, it is preferable for the author of the dissenting opinion to communicate a draft to the other arbitrators so as to enable them to discuss the arguments put forward in it. The award made by the majority could then be issued after the dissenting opinion, or at least, after the draft dissenting opinion. (173) Admittedly, unlike a judge issuing a separate opinion within a permanent court such as the International Court of Justice, the dissenting arbitrator will generally be less inclined to follow such a procedure. (174)

1404. – As regards the legal nature of a dissenting opinion, authors generally conclude from the fact that the award is rendered by a majority that the dissenting opinion is not part of the award. (175) That analysis is correct, except where the arbitration rules chosen by the parties or the law applicable to the procedure provide otherwise. In ICC arbitration, the dissenting opinion is not examined by the International Court of Arbitration under Article 27 of the Rules (Art. 21 of the previous Rules), as the Court takes the dissenting opinion into account for purposes of information only. (176) In other words, the dissenting opinion does not form part of the award. (177) In any event, the issue is of little consequence in practice, as the dissenting opinion will, in proceedings reviewing the award, have no effect on the award's validity or enforceability. (178) On the other hand, it is preferable for the dissenting opinion to accompany the award when the latter is communicated to the parties, or if it is filed with a court or even published. (179) However, it will not be considered unlawful to disregard the dissenting opinion. As the Swiss Federal Tribunal rightly observed,

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P 768

the dissenting opinion is not part of the award. Unless the arbitration agreement so provides or the majority agrees otherwise, the minority arbitrator cannot require it to be attached to the award or communicated to the parties together with the award .... The dissenting opinion is separate from the award; it affects neither the reasons nor the result. Consequently, any procedural flaws with regard to its drafting or communication will have no effect on the award. (180)

1405. – In an action to set aside or resist enforcement of the award, a dissenting opinion, regardless of whether or not it was permitted by the arbitration rules or by the law of the seat, has no authority except as an element of fact. Thus, if the dissenting arbitrator states that a procedural breach was committed—for example, that a document was sent by one party to the arbitral tribunal but was not communicated to the other party—that is simply a fact which a court may take into consideration as evidence, but to which it is not obliged to attribute special importance. Both the dissenting arbitrator's assessment of the facts of the case and the legal reasoning used have no particular authority. In this respect, the minority opinion will not affect the outcome of an action against the award made by the majority, especially where, as is usually the case, no review of the merits can take place in the context of that action.

#### § 4. – Information Which Must Appear in the Award

1406. – Failing agreement between the parties, some legal systems leave it to the arbitrators or, in practice, to the applicable arbitration rules to decide what information must be included in the award. This is the case in French law on international arbitration. In French domestic arbitration,

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P 769

[t]he arbitral award shall indicate:

- the names of the arbitrators who made it;
- its date;
- the place where it was made;
- the last names, first names or denomination of the parties, as well as their domicile or corporate headquarters;
- if applicable, the names of the counsel or other persons who represented or assisted the parties.

(181) The award must be signed by all the arbitrators or, “if a minority among them refuses to sign it, the others shall mention the fact.” (182) Although French international arbitration law makes no reference to those provisions, the parties may nevertheless choose to apply them by having French law govern the procedure. In any case, the requirements contained in those provisions are generally observed in international arbitration practice. Some of them, such as the identification of the parties and the arbitrators, as well as the signature of the award by a majority of the latter, are matters of common sense. To disregard them could create difficulties in enforcing the award, if only on a practical level. (183) However, it is important to note that if one or other of those items were omitted, that alone would not invalidate an award made in France in an international arbitration. (184) In a domestic arbitration, an action against the award based on the claim that the name of one of the parties was incomplete and hence incorrect was held to be inadmissible, as such a case was not provided for by Article 1484 of the New Code of Civil Procedure. (185) The same would necessarily apply in French international arbitration law.

Some legal systems do explicitly require that similar details be included in international arbitral awards, although they do not provide that the failure to do so will constitute a ground on which the award can be set aside. (186)

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P 770

1407. – Where the procedural law is silent on this question, arbitral institutions will have a free rein. The rules of most institutions contain provisions concerning the date and the signature of the award, and the place where it was made. (187)

##### A. – Date of the Award

1408. – Arbitration rules and legislation do not always contain an explicit requirement that the date of the award be specified. (188) However, the date is particularly important because “[o]nce it is made, the arbitral award is *res judicata* in relation to the dispute it resolves.” (189)

## B. – Signature of the Arbitrators

1409. – Where the decision is not unanimous, one or more of the arbitrators may refuse to sign the award. As they could hardly allow such a refusal to obstruct the arbitration, all institutional arbitration rules enable the majority to overcome that difficulty, subject to certain conditions. The UNCITRAL Rules (Art. 32(4)), the LCIA Rules (Art. 26.4 of the 1998 Rules), and the AAA International Rules (Art. 26(1) of the 1997 Rules) provide that in such cases the reason for the arbitrator's failure to sign should be stated in the award. Under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the award must contain the confirmation by the remaining arbitrators that the arbitrator whose signature is missing took part in the deliberations. (190) In French international arbitration law, the signatures of a majority of the arbitrators is sufficient, although the requirements discussed above reflect good practice and should be systematically followed. Some legal systems have taken a less formal approach: Swiss law, for example, provides that "[t]he signature of the presiding arbitrator shall suffice." (191) Such a position would only be acceptable in French law if agreed by the parties, directly or by reference to arbitration rules. ▲▼

As held by the Paris Court of Appeals in a 1997 decision regarding an award made under the ICC Rules, the fact that the arbitrators did not sign the award on the same day is not a ground for setting aside the award or refusing to enforce it. (192)

## C. – Place Where the Award is Made

1410. – In international arbitration, the place where the award is made must be mentioned in the award only if the parties have specified, either directly or by reference to arbitration rules, that it should be included. This raises a question as to whether the award should necessarily be made at the place of the seat of the arbitration. Some commentators consider that it should, suggesting that if the award were to be made elsewhere, the seat of the arbitration might move as a result. This would have a number of consequences, particularly with regard to the law applicable to the proceedings, access to the courts for an action to set aside, and the applicability of the 1958 New York Convention. (193) In fact, however, the seat of the arbitration depends on the choice made by the parties or, in the absence of such a choice, by the arbitral institution or the arbitrators. It cannot depend on the place where, perhaps for reasons of convenience, the award is made. (194) The real issue is whether the arbitrators are required, given that a particular place has been fixed as the seat of the arbitration, to make the award in that place, and if so, what would be the consequences of their making the award elsewhere. In legal systems which do not specifically address this point, such as French law, the most liberal approach should be adopted. The arbitrators will only be obliged to make the award in a specific place if that is the intention of the parties. That will be the case in particular where the arbitration rules chosen by the parties provide for the award to be made in a certain place. For example, Article 16, paragraph 4 of the UNCITRAL Arbitration Rules, adopted in 1976, provides that the award must be made at the place of the seat of the arbitration. By contrast, the ICC Rules of Arbitration state that "the arbitral award shall be deemed to be made at the place of the arbitration proceedings" as fixed by the parties or by the Court (Art. 25(3), replacing Art. 22 of the previous Rules), it being specified that the arbitral tribunal "may deliberate at any location it considers appropriate" (Art. 14(3)). The trend in recent arbitration rules is to follow this approach. For example, the 1999 version of the Arbitration Rules of the ▲▼ Arbitration Institute of the Stockholm Chamber of Commerce has been modified to that effect (Art. 32(1), replacing Art. 28(1) of the 1988 Rules). The UNCITRAL Model Law contains a similar provision. (195)



## § 5. – Recipients of the Award

1411. – The award is communicated to the parties directly by the arbitrators or, if the arbitration rules so provide, via the arbitral institution. (196)

In France, there is no requirement that the award be filed with any judicial authority, unlike in Switzerland, for example, in the case of arbitrations governed by the 1969 *Concordat*. (197) in Belgium (Art. 1702, para. 2 of the Judicial Code), and in the Netherlands (Art. 1058 of the Code of Civil Procedure (198)). It is only when the recognition or enforcement of an award is sought in France that it becomes necessary to establish the existence of the award by producing the original award or a certified copy (Art. 1499 of the New Code of Civil Procedure). However, in practice, it is not unusual for a copy of the award to be filed with the clerk of the Tribunal of First Instance. (199)

1412. – It is generally considered that the arbitral award, like the existence of the arbitral proceedings, is confidential. The confidentiality of both the proceedings and the award is of course one of the attractions of arbitration in the eyes of arbitration users. It is expressly endorsed by the UNCITRAL Arbitration Rules, which provide that "[t]he award may be made public only with the consent of both parties." (200) The 1965 ICSID Convention and the ICSID Arbitration Rules likewise prohibit the Centre from publishing the award without the consent of the parties. (201) Some arbitral awards refer to the principle of confidentiality, occasionally adding qualifications. (202) The principle is not threatened by the fact that anonymous extracts from awards may be published, as is the case in the *Yearbook* ▲▼ *Commercial Arbitration* and the *Journal du Droit International*, particularly for ICC and ICSID awards. (203)

On the other hand, the award will become public if court proceedings are initiated concerning its validity or enforcement. In addition, the only remedy available where a party breaches confidentiality will be damages. That involves establishing not only the source and unlawful



nature of the disclosure, but also the existence of resulting loss, which will never be easy. (204) Nevertheless, the principle remains intact. It was reiterated in a 1986 decision by the Paris Court of Appeals in a case where an action to set aside an award made in England was brought before the French courts, which clearly had no jurisdiction, so as to allow “a public debate on facts which should have remained confidential” to take place. That breach of confidentiality led to a substantial award of damages against the party at fault, and the Court observed that “it is inherent in the nature of arbitral proceedings that the utmost confidentiality should be maintained in resolving private disputes as both parties had agreed.” (205) The principle of confidentiality was enforced in even harsher terms on September 10, 1998 by the Stockholm City Court in the *Bulbank* matter. In this case, the attorneys of the party which obtained a favorable award on jurisdiction from an arbitral tribunal sitting in Stockholm published the award without the consent of the other side. The other party demanded that the arbitration proceedings be discontinued because of that publication. The arbitral tribunal rejected the argument and went on to make an award on the merits. This award was held invalid by the Stockholm City Court on the grounds of the breach of confidentiality which occurred in the proceedings. This decision was unquestionably too severe and has been rightly reversed by the Svea Court of Appeals on  P 774  March 30, 1999. (206) The incident nevertheless shows that the confidentiality of the arbitral process is not to be taken lightly.

## Section IV – Immediate Effects of the Award



1413. – The making of the arbitral award has a number of immediate effects. It terminates the arbitrators' jurisdiction over the dispute which they have resolved (§ 1) and marks the point in time from which the award is *res judicata* with regard to that dispute (§ 2). From that time onwards, the award can be voluntarily performed by the parties. However, to obtain recognition or enforcement of the award, a number of formalities must be satisfied. These will be addressed as part of our examination of actions to enforce and set aside arbitral awards. (207)

### § 1. – Termination of the Arbitrators' Jurisdiction

1414. – Certain recent statutes on international arbitration contain provisions empowering the arbitrators to interpret the award, correct clerical errors, issue an additional award on claims which may have been omitted, and sometimes modify or cancel an award obtained by fraud. Provisions on some or all of these issues are found in the UNCITRAL Model Law (Art. 33), the 1986 Netherlands Arbitration Act (Arts. 1060 and 1061 of the Code of Civil Procedure), the 1996 English Arbitration Act (Sec. 57), the 1997 German arbitration statute (Art. 1058 of the ZPO), the 1998 Belgian arbitration statute (new Art. 1702 bis of the Judicial Code) and the 1999 Swedish Arbitration Act (Sec. 32). Other legal systems, including French international arbitration law, (208) are silent, leaving these questions to the parties who are free to select an appropriate procedural law or arbitration rules. (209)

Even where not provided for in the applicable procedural law, an arbitral award should certainly be considered as ending the arbitrators' jurisdiction over the dispute it resolves.  P 775  That results from the nature of the agreement between the parties and the arbitral tribunal to resolve the dispute. (210) On the other hand, the absence of provisions of French law applicable to international arbitration is particularly unfortunate when a question arises as to the exceptions that can be made to the principle that the award terminates the arbitrators' jurisdiction. There is an equally great need in international arbitration to provide the parties with a mechanism enabling them to obtain the interpretation of the award (A), to correct clerical errors (B), or even to have the award extended to cover issues which the arbitrators have failed to address (C). The same is true of the possibility of requesting that the arbitrators withdraw an award obtained by fraud (D).

#### A. – Interpretation of the Award

1415. – The interpretation of an arbitral award is only really helpful where the ruling, which is generally presented in the form of an order, is so ambiguous that the parties could legitimately disagree as to its meaning. By contrast, any obscurity or ambiguity in the grounds for the decision does not warrant a request for interpretation of the award. It is probably for that reason that institutional arbitration rules have traditionally considered it unnecessary to provide for the possibility of asking the arbitral tribunal to interpret their award. However, in 1976, the UNCITRAL Rules so provided at Article 35. This provision sets out the relevant time-limits (thirty days from receipt of the award within which to submit the request, and forty-five days from receipt of the request to reply) and indicates that the party submitting the request must notify the other party. Once the interpretation has been given, it forms part of the award. (211) The same system is now also provided for at Article 30 of the AAA International Arbitration Rules, although the deadline for the arbitrators' reply is reduced to thirty days. A similar mechanism exists in ICSID arbitration, (212) but the request is not subject to a deadline, and if the request cannot be submitted to the initial arbitral tribunal, it is even possible to constitute a new tribunal for that purpose. (213) Similarly, and in contrast to the previous Rules, the revised ICC Rules which entered into force on January 1, 1998 allow the parties to seek the interpretation of an award within 30 days of it being made  P 776  (Art. 29). (214) In contrast, the LCIA rules allow corrections of the award, but not its interpretation. (215)

Arbitration statutes now provide for the possibility of having the award interpreted by the arbitral tribunal. The UNCITRAL Model Law was the first to do so (Art. 33), (216) followed by the Belgian and the Swedish legislatures in 1998 and 1999 respectively. (217) The 1996 English

Arbitration Act, like the LCIA Rules, only provides for the correction and not for the interpretation of the awards. (218)

#### B. – Correcting Clerical Errors

1416. – In the absence of any corrective mechanism, the presence of a clerical error in the arbitrators' ruling can create serious problems. One need only consider the example of an error in calculating the total award of damages to appreciate the absurdity of the situation where a party is definitively ordered by the award to pay a sum higher or lower than that intended by the arbitral tribunal. (219)

As a result, arbitration rules generally contain provisions enabling the arbitral tribunal itself, subject to certain time-limits and to compliance with the requirements of due process, to correct any clerical errors which arise. (220) One of the weaknesses of the ICC Rules of Arbitration prior to their 1998 revision lay in their failure to provide for such a mechanism, as the scrutiny of awards by the International Court of Arbitration does not always prevent clerical errors from appearing in the final award. Admittedly, the courts were sometimes able to correct an error during proceedings to set aside or enforce an award, (221) but these were only indirect remedies. Happily, the 1998 ICC Rules do now provide, at Article 29, for the correction of the award, which can be requested by a party or be carried out by the arbitral tribunal on its own initiative. In the latter case, the correction must be submitted for approval <sup>P 777</sup> to the ICC International Court of Arbitration within thirty days of the award. In the former case, the party's request must be made within thirty days of the award, with the tribunal reaching a decision after rapidly obtaining comments from the other party. Correction is only possible with respect to a "clerical, computational or typographical error or any errors of similar nature contained in an Award"(Art. 29(1)). This means that where the arbitration rules or the procedural law allow the arbitrators to correct clerical errors, (222) that remedy cannot be used to alter the meaning of the decision. (223)

In the absence of any similar statutory provision, the courts in certain jurisdictions have held that arbitrators are entitled to rectify their award where there is a clerical error. (224) However, more recent arbitration statutes often explicitly allow for the correction of errors where the parties have not so agreed. This is the case of the UNCITRAL Model Law, (225) the 1994 Italian arbitration statute, (226) the 1996 English Arbitration Act, (227) the 1998 Belgian arbitration statute and the 1999 Swedish Arbitration Act, (228) as well as French law on domestic arbitration. (229)

#### C. – Additional Awards

1417. – In some cases, the arbitral tribunal fails to decide one of the heads of claim. This situation is not to be confused with that where the tribunal does not respond to all the allegations, or even all the arguments put forward by the parties. A failure to decide on certain heads of claim is sometimes easy to remedy, where the procedural law (230) or the arbitration rules allow a party to seek an additional award from the arbitral tribunal in such circumstances. Such a mechanism is found in Belgian law (Art. 1708 of the Judicial Code), the UNCITRAL Model Law (Art. 33(3)), the 1986 Netherlands Arbitration Act (Art. 1061 of the Code of Civil Procedure), the 1994 Italian arbitration statute (Art. 826 of the Code of Civil Procedure), <sup>P 778</sup> the 1996 English Arbitration Act (Sec. 57(3)(b)), the 1997 German Act (Art. 1058(1)(3) of the ZPO) and the 1999 Swedish Arbitration Act (Sec. 32).▲▼

In addition, the UNCITRAL Arbitration Rules (Art. 37), the AAA International Arbitration Rules (Art. 30(1)), the LCIA Rules (Art. 27.3) and the ICSID Rules (231) all contain provisions to that effect. This is not the case of the 1998 ICC Rules, where the issue was discussed at the drafting stage and the proposal was ultimately rejected. (232)

Where there is no mechanism enabling the arbitrators to make an additional award, their failure to decide one of the heads of claim will be a ground on which the award may be set aside. (233)

#### D. – Withdrawal of an Award Obtained by Fraud

1418. – Until 1981, the French courts were able to correct an award made in France and obtained by fraud. There has been considerable discussion as to whether such an action is still available in the absence of a specific statutory provision to that effect. The possibility of fraud, through the submission of false documents or otherwise, seemed so serious that many commentators were of the view that such an action should remain available. (234)

Doubtless wishing to avoid directly conflicting with the objectives of the French legislation enacted in 1981, the French courts will allow a defrauded party to seek redress from the arbitral tribunal itself, provided that the latter is still constituted or "can be reconvened." (235) This cumbersome solution, which entails reconvening the arbitral tribunal within an undetermined period following the making of the award, has rightly been the subject of some criticism. (236) We shall consider the issue in more detail when examining the actions which lie against arbitral awards. (237)

#### § 2. – Res Judicata

1419. – Certain legal systems specify that, once rendered, an arbitral award is *res judicata*. This is the case for instance in Belgium (Art. 1703 of the Judicial Code) or in the Netherlands (Art. 1059 of the Code of Civil Procedure). Similarly, the German Statute of December 22, 1997, unlike <sup>P 779</sup>



the UNCITRAL Model Law on which it is largely based, provides, in Article 1055 of the ZPO, that “[t]he arbitral award has the same effect between the parties as a final and binding court judgment.”

In France, Article 1476 of the New Code of Civil Procedure stipulates that “[o]nce it is made, the arbitral award is *res judicata* in relation to the dispute it resolves.” This provision applies to “awards made abroad or made in international arbitration” as a result of the cross-reference in Article 1500 of the same Code.

This means that once an award has been made, the same dispute between the same parties cannot be submitted to the courts. Before the award is made, the courts are obliged to decline jurisdiction where they find that an arbitration agreement exists. (238) Only if the resulting award were to be set aside or refused recognition or enforcement on the grounds that the arbitrator had ruled “in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired” (Art. 1502 1° of the New Code of Civil Procedure) would it be possible to submit the same dispute to the French courts, provided of course that they have international jurisdiction to hear the case. (239)

Although in 1981 the French legislature may have sought to attribute a leading role in international arbitration to party autonomy, it could not have overlooked the need to establish a rule confirming the *res judicata* effect of arbitral awards. This rule is primarily directed at the French courts, which must hold inadmissible any action seeking resolution of a dispute which has already been decided by arbitration. Neither the intentions of the parties nor arbitration rules can provide otherwise, as the issue concerns the functioning of the French judicial system.

As a corollary of the fact that an arbitral award is *res judicata*, the French courts consider that, as soon as it is made, it

constitutes a title in respect of which protective measures can be sought, the only effect of the suspensive nature of an action to set it aside (240) being to prevent its enforcement—subject to the possibility of requesting provisional enforcement from the court hearing the action to set the award aside. (241)

P 780

## References

- 1) See YVES DERAÏNS AND ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 36 *et seq.* (1998).
- 2) See CA Paris, 1e Ch., Sec. Supp., Jan. 13, 1987, T.F.E. v. L'Haridon, No. 86.4496, unpublished.
- 3) See, e.g., December 23, 1982 Partial Award in ICC Case No. 3896, Framatome S.A. v. Atomic Energy Organization of Iran (AEOI), 110 J.D.I. 914 (1983), and observations by S. Jarvin; for an English translation, see X Y.B. COM. ARB. 47 (1985).
- 4) On this issue, generally, see IBRAHIM NAGUIB SAAD, LA SENTENCE ARBITRALE ( ESSAI D'UNE DÉFINITION EN DROIT FRANÇAIS ET EN DROIT ÉGYPTIEN) (Thesis, University of Paris (France), 1969); Yves Derains, *La sentence arbitrale*, in FONDATION POUR L'ÉTUDE DU DROIT ET DES USAGES DU COMMERCE INTERNATIONAL, DROIT ET PRATIQUE DE L'ARBITRAGE INTERNATIONAL EN FRANCE 69 (Y. Derains ed., 1984).
- 5) See *United Nations Commission on International Trade Law, Seventeenth Session, New York, 25 June – 13 July 1984, Report of the Working Group on International Contract Practices on the Work of its Seventh Session (New York, 6-17 February 1984)*, UN Doc. A/CN.9/246, Mar. 6, 1984, ¶ 192.
- 6) On this issue, see *infra* para. 1357.
- 7) On this issue, see François Knoepfler and Philippe Schweizer, *Making of Awards and Termination of Proceedings*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 160 (1989); HOWARD M. HOLTZMANN AND JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION – LEGISLATIVE HISTORY AND COMMENTARY 154 (1989).
- 8) See Martin Hunter, *Final Report on Interim and Partial Awards*, ICC BULLETIN, Vol. 1, No. 2, at 26, 27 (1990).
- 9) See *infra* paras. 1367 *et seq.*
- 10) See *infra* paras. 1389 *et seq.*
- 11) See, e.g., CA Paris, Feb. 18, 1986, *Péchiney v. Marlio*, 1990 REV. ARB. 727, and observations by C. Jarrosson.
- 12) See, e.g., CA Paris, Nov. 21, 1991, *Foroughi v. Eshragh*, 1992 REV. ARB. 494, and M.-C. Rondeau-Rivier's note; Supreme Court of Queensland, Oct. 29, 1993, *Resort Condominiums Int'l Inc. v. Bolwell*, in which the court refused to treat as an award covered by the New York Convention an order to adopt a certain form of conduct during the arbitral proceedings (9 INT'L ARB. REP. A1 (Apr. 1994)); see also the commentary by Michael Pryles, *Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell*, 10 ARB. INT'L 385 (1994).
- 13) But see the unsatisfactory decisions on this point of the Paris Court of Appeals which has refused to characterize as awards documents which do not comply with certain requirements of form, when that should only lead the court to set such awards aside (CA Paris, Feb. 18, 1986, *Péchiney*, *supra* note 11; CA Paris, Nov. 21, 1991, *Foroughi*, *supra* note 12).

- 14) See *infra* para. 1406.
- 15) This definition is taken almost verbatim from the reasoning given in CA Paris, Mar. 25, 1994, *Sardisud v. Technip*, 1994 REV. ARB. 391, and C. Jarrosson's note.
- 16) On this last point see, in the context of the discussion of the 1987 Swiss Private International Law Statute, PIERRE LALIVE, JEAN - FRANÇOIS POUDRET, CLAUDE REYMOND, *LE NOUVEAU DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE* 405-06 (1989).
- 17) CA Paris, Jan. 15, 1985, *Opinter France v. Dacomex*, 1986 REV. ARB. 87, and E. Mezger's note, *aff'd*, Cass. 2e civ., Oct. 7, 1987, 1987 REV. ARB. 479, and E. Mezger's note.
- 18) CA Paris, July 7, 1987, *Pia Investments Ltd. v. Cassia*, 1988 REV. ARB. 649, and E. Mezger's note. See also the case law cited *supra* para. 1226, note 43.
- 19) See Cass. 1e civ., June 1, 1987, *Société Commerciale de Produits Agricoles v. Société Coopérative de la Roche Clermault*, No. 86-11.457, unpublished, in a case where the appealing party unsuccessfully argued only that there had been a breach of due process in the commencement of the second-tier arbitral proceedings. See also CA Paris, Oct. 24, 1991, *Sicopag v. Ets. Louis Laprade*, 1992 REV. ARB. 494, and M.-C. Rondeau-Rivier's note.
- 20) CA Paris, July 7, 1995, *Corelf v. Worldwide*, 1996 REV. ARB. 270, and E. Loquin's note, which concerns the Rules of the Paris Maritime Arbitration Chamber, which provide for two arbitral instances where the amount in dispute exceeds a certain level, and specify that "where the dispute is heard by the higher instance, the award made by that instance will be considered the only award made in the proceeding."
- 21) On the concept of partial awards, see *infra* paras. 1360 *et seq.*
- 22) LALIVE, POUDRET, REYMOND, *supra* note 16, at 406-07.
- 23) See, e.g., ANDREAS BUCHER, PIERRE - YVES TSCHANZ, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 129 (1988); Marc Blessing, *The New International Arbitration Law in Switzerland – A Significant Step Towards Liberalism*, 5 J. INT'L ARB. 9, 65 (June 1988).
- 24) CA Paris, Mar. 25, 1994, *Sardisud*, *supra* note 15.
- 25) Fed. Trib., Oct. 3, 1989, *M.G. v. P.G.*, 1990 BULL. ASA 44; Fed. Trib., Feb. 6, 1990, *Deutsche Babcock AG v. House of Trade and Contracting Co.*, 1990 BULL. ASA 163, and the critical commentary by Jean-François Poudret, *La recevabilité du recours au tribunal fédéral contre la sentence partielle de l'art. 188 LDIP*, 1990 [ SW. ] JOURN. TRIB. 354.
- 26) Decision of Aug. 1, 1984, by A. Broches, president, K. M'Baye and H. van Houtte, arbitrators, in ICSID Case No. ARB/82/1, *Société Ouest Africaine des Bétons Industriels v. State of Senegal*, 113 J.D.I. 221 (1986), and observations by E. Gaillard; see also 117 J.D.I. 211 (1990); 6 ICSID REV. – FOREIGN INV. L.J. 217 (1991).
- 27) On this issue, generally, see E. Gaillard, observations following the May 16, 1986 decision of the *Ad hoc* Committee in ICSID Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, 114 J.D.I. 174, 185-86 (1987).
- 28) See, for example, the September 25, 1983 "Award" on Jurisdiction in Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, 23 I.L.M. 351 (1984); X Y.B. COM. ARB. 61 (1985); 1 ICSID REP. 389 (1993); for a French translation, see 1985 REV. ARB. 259; 113 J.D.I. 201 (1986), and observations by E. Gaillard.
- 29) See *supra* para. 1350 and HOLTZMANN AND NEUHAUS, *supra* note 7, at 867.
- 30) See DERAIS AND SCHWARTZ, *supra* note 1, at 36.
- 31) See, e.g., MICHAEL J. MUSTILL, STEWART C. BOYD, *COMMERCIAL ARBITRATION* 24 (2d ed. 1989); ALAN REDFERN AND MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 356-57 (2d ed. 1991); W. LAURENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 321 (2d ed. 1990); RUSSELL ON ARBITRATION ¶ 6.003 (D. Sutton, J. Kendall, J. Gill eds., 21st ed. 1997).
- 32) See also the commentary on this provision in PIETER SANDERS, ALBERT JAN VAN DEN BERG, *THE NETHERLANDS ARBITRATION ACT 1986*, at 28 (1987).
- 33) See LALIVE, POUDRET, REYMOND, *supra* note 16, at 412. *But see* Fed. Trib., Oct. 3, 1989, *supra* note 25, at 48.
- 34) See Sec. 58(1) of the 1996 English Arbitration Act; RUSSELL ON ARBITRATION, *supra* note 31, ¶ 6.006.
- 35) See *supra* paras. 1355 and 1357.
- 36) On the distinction between the definitive nature of an award and the fact that it is made "in the last resort," which must be specified in French domestic arbitration in order to avoid an appeal before the courts, see *infra* para. 1597.
- 37) See *supra* para. 1359. See the "Partial Final Arbitral Award" made under the auspices of the Geneva Chamber of Commerce and Industry on March 7, 1996, *L. Ltd. v. The Foreign Trade Association of the Republic of U.*, 1997 BULL. ASA 494.
- 38) The Swiss *Concordat* already contained this rule at Article 32.
- 39) Sec. 47 of the 1996 English Arbitration Act ("Awards on different issues"). For a comparative law analysis, see MAURO RUBINO - SAMMARTANO, *INTERNATIONAL ARBITRATION LAW* 405 *et seq.* (1990).
- 40) See, e.g., Art. 2(iii) of the 1998 ICC Arbitration Rules (Art. 21 of the previous Rules); Art. 26.7 of the 1998 LCIA Rules; Art. 32(1) of the UNCITRAL Arbitration Rules; Art. 27(7) of the 1997 AAA International Arbitration Rules; Art. 34 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
- 41) CA Paris, Dec. 19, 1986, *O.I.A.E.T.I. v. SOFIDIF*, 1987 REV. ARB. 359, and the commentary by Emmanuel Gaillard, *L'affaire SOFIDIF ou les difficultés de l'arbitrage multipartite (à propos de l'arrêt rendu par la Cour d'appel de Paris le 19 décembre 1986)*, *id.* at 275.
- 42) Cass. 1e civ., Mar. 8, 1988, *Sofidif v. O.I.A.E.T.I.*, 1988 Bull. Civ. I, No. 64; 1989 REV. ARB. 481, and C. Jarrosson's note; for an English translation, see 3 INT'L ARB. REP. B1 (Mar. 1988).
- 43) See *supra* para. 1236.

- 44) On this issue, see ICC Awards No. 3790 (1983), French contractor v. Libyan employer, 110 J.D.I. 910 (1983), and observations by S. Jarvin; for an English translation, see XI Y.B. COM. ARB. 119 (1986); No. 5639 (1987), Bank v. African owner, 114 J.D.I. 1054 (1987), and observations by S. Jarvin; No. 5073 (1986), U.S. exporter v. Argentine distributor, XIII Y.B. COM. ARB. 53 (1988); the February 5, 1988 Partial Award on Liability by J. Stevenson, president, I. Brownlie and B. Cremades, arbitrators, Wintershall A.G. v. Government of Qatar, 28 I.L.M. 795 (1989); XV Y.B. COM. ARB. 30 (1990).
- 45) However, once a partial award on jurisdiction is made, the party which wants to contest it in an action to set aside must bring this action without delay; see Swiss Fed. Trib., Apr. 19, 1994, Les Emirats Arabes Unis v. Westland Helicopters Ltd., 1994 BULL. ASA 404, 406 and the references cited therein. See also *supra* para. 1357. In Austria, see, in favor of a partial award on certain substantive issues being subject to an immediate action to set aside, Austrian *Oberster Gerichtshof*, June 25, 1992, S Establishment for Commerce v. H Corporation, XXII Y.B. COM. ARB. 619 (1997).
- 46) See *infra* paras. 1594 *et seq.*
- 47) For an example of a partial award on the applicable law, see ICC Award No. 3267 (1979), Mexican construction company v. Belgian company (member of a consortium), VII Y.B. COM. ARB. 96 (1982); for a French translation, see 107 J.D.I. 961 (1980), and observations by Y. Derains; for an example of a refusal to rule on the applicable law in a partial award, see the letter of the chairman of the arbitral tribunal in ICC Case No. 6465, 121 J.D.I. 1088 (1994), and observations by D. Hascher, especially at 1092-93.
- 48) On this issue, generally, see *supra* para. 1224.
- 49) CA Paris, Mar. 24, 1995, Bin Saud Bin Abdel Aziz v. Crédit Industriel et Commercial de Paris, 1996 REV. ARB. 259, and J.-M. Talau's note.
- 50) See, for example, in France, Article 2052, paragraph 1 of the Civil Code.
- 51) On these conventions, see *infra* paras. 1663 *et seq.*
- 52) But see ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 50 (1981), for the view that a consent award may be covered by the New York Convention if considered to be an award in the country in which it was made.
- 53) Consent awards themselves are rarely published. But see the interesting case of a partial award recording the agreement of the parties on the law governing the merits of a dispute, ICC Award No. 4761 (1984), Italian consortium v. Libyan company, 113 J.D.I. 1137 (1986), and observations by S. Jarvin. Given its subject-matter, the contractual nature of this consent award is particularly clear. In fact, the award is simply a formal means of documenting the choice of law agreed by the parties.
- 54) On this issue, see MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL 808-09 (2d ed. 1990); RUBINO - SAMMARTANO, *supra* note 39, at 438; Richard H. Kreindler, *Settlement Agreements and Arbitration in the Context of the ICC Rules*, ICC BULLETIN, Vol. 9, No. 2, at 22 (1998) and, in the context of Article 34 of the Swiss *Concordat*, which explicitly allows an arbitral tribunal to record, in an award, the agreement bringing a dispute to an end, see PIERRE JOLIDON, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE 485-87 (1984) and LALIVE, POUURET, REYMOND, *supra* note 16, at 192-93.
- 55) On this definition, see *supra* paras. 1353 *et seq.*
- 56) On awards in ICC arbitration, see Marcel Fontaine, *The ICC Arbitral Process – Part IV: The Award – Drafting the Award – A Perspective from a Civil Law Jurist*, ICC BULLETIN, Vol. 5, No. 1, at 30 (1994), Humphrey Lloyd, *Writing Awards – A Common Lawyer's Perspective*, *id.* at 38.
- 57) For an example of an invitation made by the arbitrators to the parties to negotiate, see the June 7, 1988 Order in ICC Case No. 5282, 121 J.D.I. 1086 (1994), and observations by D. Hascher.
- 58) On the relationships between these two principles, see *infra* para. 1638.
- 59) See DE BOISSÉSON, *supra* note 54, at 800; P. Fouchard, note following Cass. 2e civ., Jan. 28, 1981, *Industrija Motora Rakovica v. Lynx Machinery Ltd.*, 1982 REV. ARB. 425. Compare, in French domestic arbitration, with CA Paris, Apr. 5, 1973, *Le Parisien Libéré v. Ancelot*, 1974 REV. ARB. 17, and G. Flécheux's note.
- 60) See, e.g., H. Holtzmann's opinion in the June 14, 1983 Award of the Iran-U.S. Claims Tribunal in *Economy Forms Corp. v. Iran*, Award No. 55-165-1, 3 Iran-U.S. Cl. Trib. Rep. 42, 55, and the observations by D. Hascher, 121 J.D.I. 1084 (1994). On this issue, generally, see Stephen M. Schwebel, *The Majority Vote of an International Arbitral Tribunal*, in ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 671 (1993); Karl-Heinz Böckstiegel, *Experiences as an Arbitrator Using the UNCITRAL Arbitration Rules*, *id.* at 423, 428.
- 61) On Article 25(1) of the 1998 Rules, see DERAIS AND SCHWARTZ, *supra* note 1, at 284 *et seq.*
- 62) See, e.g., Art. 24-2 of the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce.
- 63) See also Section 16 of the 1929 Swedish Arbitration Act, in force until April 1, 1999.

- 64) On the mechanism contained in Article 19 of the previous ICC Rules, see CRAIG, PARK, PAULSSON, *supra* note 31, at 329. For an example of an award made following such a procedure, see ICC Award No. 1703 (1973), by G. Lagergren, chairman, with the dissenting opinions by S. Efron and A. El Shalakany, arbitrators, Société Générale de l'Industrie du Papier "RAKTA" v. Parsons and Whittemore Overseas Co., Inc., *reprinted in* J. GILLIS WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE, Vol. V, at 361 (1979); ICC Award No. 3881 (1984), Swiss and German (FRG) companies v. Syrian state-owned company, 113 J.D.I. 1096 (1996), and observations by S. Jarvin. See also DERAIS AND SCHWARTZ, *supra* note 1, at 284 *et seq.*
- 65) See Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1995 Overview*, ICC BULLETIN, Vol. 7, No. 1, at 14 (1996); Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1996 Overview*, ICC BULLETIN, Vol. 8, No. 1, at 17 (1997); Dominique Hascher, *The Application of the Rules by the Court – 1997 Overview*, ICC BULLETIN, Vol. 9, No. 1, at 12, 13 (1998); Fabien Gélinas, *The Application of the Rules by the Court – 1998 Overview*, ICC BULLETIN, Vol. 10, No. 1 (1999).
- 66) See *supra* para. 1369.
- 67) Cass. 2e civ., Jan. 28, 1981, *Industrija Motora Rakovica*, *supra* note 59, upholding CA Paris, Dec. 22, 1978, 1979 REV. ARB. 266, and J. Viatte's note.
- 68) See *supra* para. 1371.
- 69) See Claude Reymond, *The President of the Arbitral Tribunal*, 9 ICSID REV. – FOREIGN INV. L.J. 1, 12 *et seq.* (1994), and for a French version, in ETUDES OFFERTES À PIERRE BELLET 467, especially at 477 *et seq.* (1991); D. Hascher, observations following the questionnaire to co-arbitrators issued by the chairman of the arbitral tribunal in ICC Case No. 5082, 121 J.D.I. 1081, 1083 (1994).
- 70) For an example of a questionnaire drawn up by the chairman of an ICC arbitral tribunal, see 121 J.D.I. 1081 (1994), and observations by D. Hascher.
- 71) Compare with Article 837 of the Italian Code of Civil Procedure (Law No. 25 of Jan. 5, 1994) which provides that "[t]he award shall be made by a majority of the votes of the arbitrators *meeting in person or in video conference*, unless the parties have provided otherwise, and shall be subsequently set forth in writing" (emphasis added).
- 72) Oct. 23, 1985, SEFRI S.A. v. Komgrap, ATF 111 la 336; 1986 BULL. ASA 77.
- 73) See *supra* para. 1224.
- 74) Cass. 2e civ., Jan. 28, 1981, *Industrija Motora Rakovica*, *supra* note 59.
- 75) On this issue, generally, see Emmanuel Gaillard, *Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international*, 1990 REV. ARB. 759.
- 76) On the issue, see Emmanuel Gaillard, *When an Arbitrator Withdraws*, N.Y.L.J., June 4, 1998, at 3, and *supra* para. 1136.
- 77) See Andreas Reiner, *Le Règlement d'arbitrage de la CCI, version 1998*, 1998 REV. ARB. 25, 62 *et seq.*; DERAIS AND SCHWARTZ, *supra* note 1, at 193 *et seq.*
- 78) Compare, in French domestic arbitration, with Article 1469 of the New Code of Civil Procedure.
- 79) See DE BOISSÉSON, *supra* note 54, at 802; *comp. with* JEAN ROBERT, L' ARBITRAGE – DROIT INTERNE – DROIT INTERNATIONAL PRIVÉ 310 (5th ed. 1983), whose remarks in this respect were not included in the 6th edition published in 1993.
- 80) See LALIVE, POUURET, REYMOND, *supra* note 16, at 414. On dissenting opinions, see *infra* paras. 1396 *et seq.* and on the confidentiality of the award, see *infra* para. 1412. See also, on the limits to the confidentiality of the deliberations that may result from the review of arbitral awards by the courts, Mary T. Reilly, *The Court's Power to Invade the Arbitrators' Deliberation Chamber*, 9 J. INT'L. ARB. 27 (Sept. 1992) and on this issue, generally, Jean-Denis Bredin, *Le secret du délibéré arbitral*, in ETUDES OFFERTES À PIERRE BELLET 71 (1991).
- 81) On arbitrators' liability, see *supra* paras. 1074 *et seq.*
- 82) On the grounds for challenging the award, see *infra* para. 1603.
- 83) On the exercise of this scrutiny in practice, see especially Alain Prujiner, *La gestion des arbitrages commerciaux internationaux: l'exemple de la Cour d'arbitrage de la CCI*, 115 J.D.I. 663, 708 (1988); CRAIG, PARK, PAULSSON, *supra* note 31, at 341 *et seq.*; David T. McGovern, *The ICC Arbitral Process – Part VI: Scrutiny of the Award by the ICC Court*, ICC BULLETIN, Vol. 5, No. 1, at 46 (1994); DERAIS AND SCHWARTZ, *supra* note 1, at 289 *et seq.*
- 84) See CRAIG, PARK, PAULSSON, *supra* note 31, at 343; ANTOINE KASSIS, RÉFLEXIONS SUR LE RÈGLEMENT D'ARBITRAGE DE LA CHAMBRE DE COMMERCE INTERNATIONALE – LES DÉVIATIONS DE L'ARBITRAGE INSTITUTIONNEL 69 (1988).
- 85) See also Eric Loquin, *L'examen du projet de sentence par l'institution et la sentence au deuxième degré – Réflexions sur la nature et la validité de l'intervention de l'institution arbitrale sur la sentence*, 1990 REV. ARB. 427.
- 86) Gélinas, *supra* note 65.
- 87) CA Paris, Jan. 22, 1982, *Appareils Dragon v. Construiport*, 1982 REV. ARB. 91, 2d decision, and E. Mezger's note.
- 88) CA Paris, Apr. 20, 1972, *Schutte Lanz v. Gallais*, 1973 REV. ARB. 84, and E. Loquin's note; Cass. 2e civ., Jan. 23, 1974, *Schutte Lanz v. Gallais*, 1974 REV. ARB. 296, and E. Loquin's note.
- 89) See KASSIS, *supra* note 84, ¶¶ 76 *et seq.*; PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT, Vol. I, 480-83 (1975).
- 90) See *infra* para. 1414.
- 91) See Loquin, *supra* note 85, at 443.

- 92) See Superior Court of the Zurich Canton, June 29, 1979, *Banque Yougoslave de l'Agriculture v. Robin International Inc.*, unpublished, cited by CRAIG, PARK, PAULSSON, *supra* note 31, at 348. Compare with *Bank Mellat v. GAA Development and Construction Co.*, [1988] 2 Lloyd's Rep. 44 (Q.B. (Com. Ct.) 1988), which rejected a challenge based on alleged "misconduct" in that the arbitrators failed to meet to discuss the comments of the arbitral institution. But see, for a case where the award was set aside, the March 10, 1976 decision of the Supreme Court of Turkey discussed in KASSIS, *supra* note 84, at 121.
- 93) For a rebuttal of this argument which is sometimes raised with respect to the institutional review of awards, see also Loquin, *supra* note 85, at 455 *et seq.*; P. Fouchard, 1990 REV. ARB. 527 (reviewing ANTOINE KASSIS, *RÉFLEXIONS SUR LE RÈGLEMENT D'ARBITRAGE DE LA CHAMBRE DE COMMERCE INTERNATIONALE – LES DÉVIATIONS DE L'ARBITRAGE INSTITUTIONNEL* (1988)).
- 94) On this issue, generally, in French domestic arbitration law, see Philippe Grandjean, *La durée de la mission des arbitres*, 1995 REV. ARB. 39; Eric Loquin, *Arbitrage – Compétence arbitrale – Etendue*, J.-CL. PROC. CIV., Fasc. 1032, ¶¶ 48 *et seq.* (1994).
- 95) On the date on which this period commences, which requires the arbitrators' brief to have been defined, see CA Paris, July 4, 1991, *Etude Rochechouart Immobilier v. Banque Vernes*, 1992 REV. ARB. 626, and observations by J. Pellerin.
- 96) For a discussion of the effectiveness of this provision, despite the ambiguities in certain aspects of the decision of Cass. 1e civ., June 15, 1994, *Communauté urbaine de Casablanca v. Degrémont*, 1995 REV. ARB. 88, 2d decision, see E. Gaillard's note following that decision, especially at 97.
- 97) See, on the fixing of deadlines by the ICC International Court of Arbitration, CA Paris, Jan. 22, 1982, *Appareils Dragon*, *supra* note 87; on the extension of a contractual deadline granted by the ICC International Court of Arbitration, Cass. 1e civ., June 16, 1976, *Krebs v. Milton Stern*, 104 J.D.I. 671 (1977), and P. Fouchard's note; 1977 REV. ARB. 269, and E. Mezger's note; 1978 REV. CRIT. DIP 767; Dalloz, Jur. 310 (1978), and J. Robert's note. See also CA Paris, Feb. 28, 1980, *Financière MOCUPIA v. INVEKO France*, 1980 REV. ARB. 538, and E. Loquin's note. On the fact that, in institutional arbitration, the provisions of the institution's rules regarding the deadline for making the award prevail over those of Article 1456 of the French New Code of Civil Procedure, see ICC Award No. 2730 (1982), *Two Yugoslavian companies v. Dutch and Swiss group companies*, 111 J.D.I. 914 (1984), and observations by Y. Derains. On the other hand, if the institution's rules give the institution, rather than the arbitrators, the power to extend deadlines, the arbitrators would be exceeding their powers were they themselves to rule on that question (see CA Versailles, Jan. 24, 1992, *Degrémont v. Communauté urbaine de Casablanca*, 1992 REV. ARB. 626, and observations by J. Pellerin).
- 98) Art. 24(1) of the 1998 Rules, replacing Art. 18(1) of the previous Rules. On the terms of reference, see *supra* paras. 1228 *et seq.*
- 99) Art. 24(2) of the 1998 Rules, replacing Art. 18(2) of the previous Rules.
- 100) CA Paris, Dec. 3, 1981, *Comptoirs Industriels Réunis Blachère et Cie. v. Société de Développement Viticole (SODEVI)*, 1982 REV. ARB. 91, and E. Mezger's note; CA Paris, Mar. 24, 1995, *Bin Saud Bin Abdel Aziz*, *supra* note 49.
- 101) Cass. 2e civ., June 8, 1983, *Appareils Dragon v. Empresa central de abastecimientos y ventas de equipos*, 1987 REV. ARB. 309, and the commentary by Philippe Fouchard, *Les institutions permanentes d'arbitrage devant le juge étatique (A propos d'une jurisprudence récente)*, *id.* at 225; CA Paris, May 19, 1998, *Torno SpA v. Kumagai Gumi Co. Ltd.*, 13 INT'L ARB. REP. El (July 1998).
- 102) CA Paris, Jan. 22, 1982, *Appareils Dragon*, *supra* note 87. On the rules governing administrative decisions made by arbitral institutions, see *supra* para. 32; CA Paris, May 17, 1983, *Techni Import Professionnel (T.I.P.) v. Electro Scientific Industries (E.S.I.)*, 1987 REV. ARB. 309, and the commentary by Fouchard, *supra* note 101.
- 103) See Art. 12(2) of the 1998 Rules, replacing Art. 2(11) of the previous Rules.
- 104) Cass. 1e civ., June 30, 1976, *Bruynzeel Deurenfabrik N.V. v. Ministre d'Etat aux Affaires Etrangères de la République Malgache*, 104 J.D.I. 114 (1977), and B. Oppetit's note; 1977 REV. ARB. 317, and J. Rubellin-Devichi's note; Gaz. Pal., Jur. 70 (1977), and J. Viatte's note.
- 105) See, e.g., Philippe Fouchard, *La coopération du Président du Tribunal de grande instance à l'arbitrage*, 1985 REV. ARB. 5, 45.
- 106) On this issue, see *supra* para. 1346.
- 107) Cass. 1e civ., June 15, 1994, *Sonidep v. Sigmoil*, 1995 REV. ARB. 88, 1st decision, and E. Gaillard's note.
- 108) Sec. 18, para. 2, of the 1929 Arbitration Act, which applied until April 1, 1999.
- 109) Article 1698, paragraph 2, of the Judicial Code, which provides for a flexible approach to the application of the deadline, subject to review by the courts.
- 110) On this issue, see also P. Fouchard, note following CA Paris, Jan. 17, 1984, *Bloc'h et Fils v. Delatrae Mockfjaerd*, 1984 REV. ARB. 498, where the parties had agreed a period of ten days from the appointment of the arbitrators for the making of the award.
- 111) On fast-track arbitration, see *supra* para. 1248 and the references cited therein.
- 112) A pathological clause occasionally found in practice provides for the period of time for the rendering of the award to run from the date of the arbitration clause.

- 113)** For an example of the courts finding an implicit agreement between the parties to extend such a deadline, see TGI Paris, réf., May 21, 1984, *Vivent v. Reflets de Paris*, 1985 REV. ARB. 165, and the commentary by Fouchard, *supra* note 105, at 5; CA Paris, June 26, 1987, *Entreprise Guy Broussail v. Marbrerie du Bel Air*, 1990 REV. ARB. 905, and observations by B. Moreau; CA Paris, June 8, 1990, *Lucas v. Perez Arroyo*, 1992 REV. ARB. 625, 2d decision, and observations by J. Pellerin; CA Paris, Jan. 17, 1992, *Armand Colin v. Diffusion du Livre scolaire Dilco*, 1992 REV. ARB. 625, and observations by J. Pellerin; CA Paris, Feb. 9, 1995, *Marchand v. Sogea Atlantique*, which requires that a tacit extension result from "positive" and unequivocal acts (1996 REV. ARB. 137, and observations by J. Pellerin); CA Paris, May 19, 1998, *Torno*, *supra* note 101, which, more satisfactorily, holds that participation without reservation in the arbitration after the expiration of the deadline is sufficient.
- 114)** Cass. 1e civ., June 15, 1994, *Communauté urbaine de Casablanca v. Degrémont*, 1995 REV. ARB. 88, 2d decision, and E. Gaillard's note; 1994 REV. CRIT. DIP 681, and D. Cohen's note. *See also* CA Paris, Sept. 22, 1995, *Dubois et Vanderwalle v. Boots Frites BV*, where the same grounds were used to justify the refusal to enforce an award made outside France after the expiry of the three month deadline contained in the arbitration clause (1996 REV. ARB. 100, and E. Gaillard's note).
- 115)** On the extension provided for in this Article and its application by the courts, see Grandjean, *supra* note 94. On the application of Article 1456, paragraph 2, to an international arbitration governed by French procedural law, see TGI Paris, réf., June 3, 1988, *Tribunal arbitral v. Bachmann*, 1994 REV. ARB. 538, 2d decision, and observations by P. Fouchard; *see also supra* para. 877.
- 116)** *See* DE BOISSÉSON, *supra* note 54, at 776.
- 117)** TGI Paris, réf., Apr. 3, 1985, *Application des gaz v. Wonder Corp. of America*, 1985 REV. ARB. 170, and the commentary by Fouchard, *supra* note 105. *See also* TGI Paris, réf., May 9, and June 19, 1984, *Font Laugière Chimie (Manufactures Jacques Dugniolles) v. Moaco*, 1985 REV. ARB. 161, and the commentary by Fouchard, *supra* note 105, at 45 *et seq.*
- 118)** TGI Paris, réf., Jan. 12, 1988, *Omnium de Travaux v. République de Guinée*, May 10, 1990 and Oct. 30, 1990, *European Country Hotels Ltd. v. Consorts Legrand*, July 6, 1990, *Iridelco International Corp. v. Ets. Marcel Sebin*, 1994 REV. ARB. 538, and observations by P. Fouchard; *see also supra* para. 866.
- 119)** TGI Paris, réf., Nov. 29, 1989, *Omnium de Travaux v. République de Guinée*, 1990 REV. ARB. 525, and the commentary by Charles Jarrosson, *Le rôle respectif de l'institution, de l'arbitre et des parties dans l'instance arbitrale*, *id.* at 381.
- 120)** TGI Paris, réf., Apr. 3, 1985, *Application des gaz*, *supra* note 117.
- 121)** *See supra* note 120.
- 122)** *See* CA Paris, Jan. 17, 1984, *Bloc'h et Fils*, *supra* note 110; CA Paris, Sept. 22, 1995, *Dubois et Vanderwalle*, *supra* note 114. *See also*, in French domestic arbitration, Cass. 2e civ., May 14, 1997, *Sofiger v. Touchais*, 1998 REV. ARB. 703, and observations by Y. Derains. On the consequences on that part of the proceedings held prior to the expiration of the specified time period, *see*, in French domestic arbitration, Cass. 2e civ., May 18, 1989, *S.a.r.l. Hostin Armes Blanches v. Prieur Sports*, 1990 REV. ARB. 903, and observations by B. Moreau.
- 123)** On these concepts, *see supra* paras. 1359 and 1360.
- 124)** *See*, in French domestic arbitration law, Cass. 2e civ., Apr. 5, 1994, *S.a.r.l. Hostin Armes Blanches v. Prieur Sports*, 1995 REV. ARB. 85, and C. Jarrosson's note; Dalloz, Jur. 363 (1994), and Y. Chartier's note; 1994 RTD COM. 477, and observations by J.-C. Dubarry and E. Loquin; CA Paris, Nov. 10, 1995, *Verbiese v. SEE*, 1997 REV. ARB. 596, and observations by J. Pellerin.
- 125)** *See supra* para. 1376.
- 126)** *See* Cass. 2e civ., Apr. 27, 1981, *Ripolin Georget Freitag v. Henry Clark & Sons*, 1983 REV. ARB. 105, and observations by T. Bernard. *Comp. with* TGI Paris, May 6, 1976, *Clark & Sons Ltd. v. Ripolin Georget*, 1977 REV. ARB. 292, and P. Level's note.
- 127)** *See supra* para. 1248.
- 128)** *See, e.g.*, Art. 1057(2) of the Netherlands Code of Civil Procedure; Art. 1701(4) of the Belgian Judicial Code; Art. 1054(1) of the German ZPO; Art. 31(1) of the UNCITRAL Model Law; Sec. 31 of the 1999 Swedish Arbitration Act. *See also* Art. 48(2) of the 1965 Washington Convention. On the requirement for notarization under Spanish law before the 1988 reform, *see* Spanish *Tribunal Supremo*, Mar. 28, 1994, *ABC v. C. Española, SA*, 1994 REV. ARB. 749, and F. Mantilla-Serrano's note.
- 129)** Art. 1471 of the New Code of Civil Procedure.
- 130)** *Comp. with* Art. 189, para. 2 of the Swiss Private International Law Statute; Section 52 of the 1996 English Arbitration Act, which requires the award to be in writing unless the parties agree otherwise.
- 131)** *See*, for example, in France, Article 1498 of the New Code of Civil Procedure, which requires that the existence of the award be established by the party invoking it.
- 132)** *See, e.g.*, Art. 32(2) of the UNCITRAL Arbitration Rules; Art. 26.1 of the 1998 LCIA Arbitration Rules; Art. 27(1) of the 1997 AAA International Arbitration Rules. Compare with Articles 24 *et seq.* of the 1998 ICC Arbitration Rules (Arts. 21 *et seq.* of the previous Rules) where the same principle is implicit. *See* DERAINS AND SCHWARTZ, *supra* note 1, at 281 *et seq.* *See also* Article 32 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
- 133)** On this issue, *see supra* para. 1244.
- 134)** *See, e.g.*, Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 ARB. INT'L 141 (1988).

- 135)** See Johan Steyn, *England*, VIII Y.B. COM. ARB. 3, 23 (1983).
- 136)** See Sec. 52(4).
- 137)** See, for example, in a case where the parties chose French law to govern the proceedings, CA Paris, May 15, 1997, *Sermi et Hennion v. Ortec*, 1998 REV. ARB. 558, and P. Fouchard's note.
- 138)** See, e.g., Art. 32(3) of the UNCITRAL Arbitration Rules; Art. 32(1) of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Art. 26.1 of the 1998 LCIA Arbitration Rules; Art. 27(2) of the 1997 AAA International Arbitration Rules; Art. 25(2) of the 1998 ICC Rules. In ICSID arbitration, the Washington Convention specifies itself that reasons must be given (Art. 48(3)); see also Art. 47 of the ICSID Rules.
- 139)** For a commentary in favor of the adoption of a legislative provision on this question, see Eric Loquin, *Perspectives pour une réforme des voies de recours*, 1992 REV. ARB. 321, 340.
- 140)** CA Paris, June 16, 1988, *Swiss Oil v. Petrogab*, 1989 REV. ARB. 309, and C. Jarrosson's approving note; for an English translation, see XVI Y.B. COM. ARB. 133 (1991); CA Paris, Mar. 30, 1995, *Fabre v. Espitalier*, 1996 REV. ARB. 131, and observations by J. Pellerin; CA Paris, June 20, 1996, *PARIS v. Razel*, 1996 REV. ARB. 657, and observations by D. Bureau.
- 141)** See *supra* para. 1376.
- 142)** See *supra* para. 1392.
- 143)** Art. 1471 of the New Code of Civil Procedure.
- 144)** Cass. 1e civ., Nov. 22, 1966, *Gerstlé v. Merry Hull*, JCP, Ed. G., Pt. II, No. 15,318 (1968), and observations by H. Motulsky; 94 J.D.I. 631 (1967), and B. Goldman's note; 1967 REV. CRIT. DIP 372, and P. Francescakis' note; CA Paris, Mar. 25, 1983, *Sorvia v. Weinstein International Disc Corp.*, 1984 REV. ARB. 363, and J. Robert's note; CA Paris, Jan. 22, 1988, *C.F.I.D. v. Ets. A. Arnaud*, 1989 REV. ARB. 251, and Y. Derains' note; CA Paris, Nov. 29, 1990, *Payart v. Morgan Crucible Co.*, 1991 REV. ARB. 659, 1st decision, and observations by J. Pellerin; 118 J.D.I. 414 (1991), and P. Kahn's note; CA Paris, June 28, 1991, *KFTCIC v. Icori Estero*, 1992 REV. ARB. 568, and P. Bellet's note, especially at 571; for an English translation, see 6 INT'L ARB. REP. EL (Aug. 1991); CA Paris, Mar. 26, 1992, *Société nigérienne des produits pétroliers (SONIDEP) v. Sigmoid Resources N.V.*, Dalloz, IR 161 and 169 (1992); CA Paris, May 10, 1994, *Sheikh Mahfouz Salem Bin Mahfouz v. Al Tayar*, 1996 REV. ARB. 66, and C. Jarrosson's note.
- 145)** Cass. 1e civ., Nov. 22, 1966, *Gerstlé*, *supra* note 144; CA Paris, June 28, 1988, *Total Chine v. E.M.H.*, which sets aside an award for the failure to give reasons where the parties had chosen French law to govern the procedure and where the Court made the somewhat superfluous finding that the parties had specified in their arbitration clause that reasons were to be given in the award (1989 REV. ARB. 328, and J. Pellerin's note).
- 146)** CA Paris, Apr. 28, 1976, *Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV)*, 1977 REV. ARB. 151, and M. Boitard's note; CA Paris, July 11, 1978, *Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV)*, 1979 REV. ARB. 258, and M. Boitard's note; Cass. 1e civ., Mar. 18, 1980, *Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV)*, 1980 Bull. Civ. I, No. 87; 1980 REV. ARB. 496, and E. Mezger's note; 107 J.D.I. 874 (1980), and E. Loquin's note.
- 147)** See, even before the 1987 Swiss Private International Law Statute, Fed. Trib., Dec. 12, 1975, *Provenda S.A. v. Alimenta S.A.*, 1977 REV. ARB. 195.
- 148)** Cass. 1e civ., Jan. 22, 1975, *Krebs v. Milton Stern*, 1975 REV. ARB. 309, and E. Mezger's note; CA Paris, Feb. 28, 1992, *Freyssinet International v. Renardet*, 1992 REV. ARB. 649, and observations by D. Cohen.
- 149)** See, e.g., Cass. 1e civ., Dec. 11, 1979, *Elettronica v. Thomson-C.S.F.*, 1982 REV. ARB. 419, and the commentary by Jean Robert, *La dénaturation par l'arbitre – Réalités et perspectives*, *id.* at 405. *But see* Cass. 1e civ., Feb. 28, 1995, *Société Générale pour l'Industrie v. Ewbank*, 1995 REV. ARB. 597, and D. Bureau's note; 1996 RTD COM. 446, and observations by J.-C. Dubarry and E. Loquin; Cass. 2e civ., Oct. 25, 1995, *GIE commerçants réunis indépendants v. Multimob*, 1996 REV. ARB. 127, and observations by J. Pellerin; CA Paris, June 20, 1996, *Paris*, *supra* note 140; CA Paris, Dec. 11, 1997, *Cubana v. Consavio International Ltd.*, 1999 REV. ARB. 124, and observations by D. Bureau; CA Paris, Mar. 5, 1998, *Forasol v. CISTM*, 1999 REV. ARB. 86, and E. Gaillard's note; CA Paris, 1e Ch., Sec. C, Apr. 2, 1998, *Compagnie Française d'Etudes et de Construction TECHNIP v. Entreprise Nationale des Engrais et des Produits Phytosanitaires dite ASMIDAL (Algérie)*, No. 97/6929, unpublished; CA Paris, 1e Ch., Sec. C, Jan. 19, 1999, *CIC International Ltd. v. Ministre de la Défense de la République Fédérale d'Allemagne*, No. 1998/03375, unpublished.
- 150)** CA Paris, May 6, 1988, *Unijet S.A. v. S.A.R.L. International Business Relations Ltd. (I.B.R.)*, 1989 REV. ARB. 83, and E. Loquin's note. On this issue, generally, see Jean-Louis Delvolvé, *Essai sur la motivation des sentences arbitrales*, 1989 REV. ARB. 149.
- 151)** CA Brussels, Jan. 24, 1997, *Compagnie Inter-Arabe de Garantie des Investissements (CIAGI) v. Banque Arabe et Internationale d'Investissement (BAII)*, 1998 REV. ARB. 181, and J. Linsmeau's note, especially at 198; 1997 BULL. ASA 334; XXII Y.B. COM. ARB. 643 (1997) (*upholding* Brussels Tribunal of First Instance, Jan. 25, 1996, 1997 [BELG.] JOURN. TRIB. 6, and G. Block's note), *aff'd*, Belgian *Cour de cassation*, June 5, 1998, *CIAGI v. BAI*, 1998 BULL. ASA 719, with an introductory note by G. Block at 715; 1998 REV. ARB. 715, and J. Linsmeau's note.
- 152)** E. Gaillard, note following CA Paris, Mar. 5, 1998, *Forasol*, *supra* note 149.
- 153)** A dissenting opinion should be distinguished from a separate or distinct opinion, by which an arbitrator expresses agreement with the decision of the majority, but gives different reasons. Such an opinion is less frequently encountered in arbitration than in certain national courts.

- 154) But see REDFERN AND HUNTER, *supra* note 31, at 398, who appear to attach substantial importance to the difficulties to which they believe dissenting opinions may give rise in continental legal systems. See also *infra* paras. 1403 *et seq.*
- 155) See, for example, for a disapproving analysis of dissenting opinions in French international arbitration, ROBERT, *supra* note 79, at 310; these remarks were not included in the 6th edition of 1993; Bredin, *supra* note 80, at 79. See also the reservations expressed by DE BOISSÉSON, *supra* note 54, at 802.
- 156) ROBERT, *supra* note 79, at 310. See also, in French domestic arbitration law, C. Jarrosson, note following CA Paris, Oct. 15, 1991, *Affichage Giraudy v. Consorts Judlin*, 1991 REV. ARB. 643, 648. This argument was raised before the Paris Court of Appeals, although for procedural reasons the court was not required to decide the issue (see CA Paris, July 7, 1994, *Uzinexportimport Romanian Co. v. Attock Cement Co.*, 1995 REV. ARB. 107, and S. Jarvin's note; for an English translation, see 10 INT'L ARB. REP. D1 (Feb. 1995)).
- 157) See, e.g., Art. 1469 of the French New Code of Civil Procedure.
- 158) CA Paris, Mar. 19, 1981, *Barre v. Les Solidaires*, 1982 REV. ARB. 84, and J. Viatte's note.
- 159) See the views of Claude Reymond, in LALIVE, POUURET, REYMOND, *supra* note 16, at 416-17. As the opinions of the authors of that publication diverge on this question, the views at 416-17 can be attributed to Claude Reymond alone. Article 945 of Quebec's Code of Civil Procedure specifies that the confidentiality of the deliberations does not exclude dissenting or separate opinions. On the freedom for the arbitrators to express minority opinions unless the parties agree otherwise, see Derains, *supra* note 4, at 73 *et seq.*
- 160) See, for example, Article 33, paragraph 1 of Spanish Law 36/1988 on Arbitration of December 5, 1988, which states that arbitrators may give dissenting opinions.
- 161) See, in Swiss law, Reymond, *supra* note 159; BUCHER AND TSCHANZ, *supra* note 23, ¶ 262; Laurent Levy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 ARB. INT'L 35 (1989); Jacques Werner, *Dissenting Opinions – Beyond Fears*, 9 J. INT'L ARB. 23 (Dec. 1992); P. Schweizer, note following Swiss Fed. Trib., May 11, 1992, *D. v. A.*, 1994 REV. SUISSE DR. INT. ET DR. EUR. 117, 126; in Italian law, RUBINO - SAMMARTANO, *supra* note 39, at 429; in Dutch law, SANDERS AND VAN DEN BERG, *supra* note 32, at 86. For an example of a separate opinion in an *ad hoc* arbitration with its seat in The Hague, see the February 5, 1988 Partial Award on Liability, *Wintershall*, *supra* note 44; for a dissenting opinion in an *ad hoc* arbitration with its seat in Paris, see the December 29, 1993 Award by D.G. Wright, president, P. Mayer and C. Molineaux, arbitrators (C. Molineaux dissenting), *Icori Estero S.p.A. v. Kuwait Foreign Trading Contracting & Investment Co.*, 9 INT'L ARB. REP. A1 (Dec. 1994); for a dissenting opinion of the chairman of an arbitral tribunal in an award made in Switzerland, see the Interim Award in ICC Case No. 3879 (Mar. 5, 1984), by E. Bucher, chairman, P. Bellet and N. Mangård, arbitrators, *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, 112 J.D.I. 232 (1985); 1989 REV. ARB. 547; for an English translation, see 23 I.L.M. 1071 (1984); XI Y.B. COM. ARB. 127 (1986).
- 162) See HOLTZMANN AND NEUHAUS, *supra* note 7, at 837. Article 1054 of the ZPO, which entered into force on January 1, 1998, is also silent on the point. On the fact that dissenting opinions are uncommon in Germany, see OTTOARNDT GLOSSNER, *COMMERCIAL ARBITRATION IN THE FEDERAL REPUBLIC OF GERMANY* 18 (1984).
- 163) See, for example, the book review by Laurent Lévy and William W. Park, *The French Law of Arbitration by Jean Robert and Thomas E. Carbonneau*, 2 ARB. INT'L 266 (1986); Levy, *supra* note 161, at 39.
- 164) See, e.g., Levy, *supra* note 161, at 38.
- 165) See, e.g., DE BOISSÉSON, *supra* note 54, at 802.
- 166) Award of October 21, 1983 by E. Jimenez de Arechaga, president, W.D. Rogers and D. Schmidt, arbitrators (D. Schmidt dissenting), in ICSID Case No. ARB/81/2, *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, 111 J.D.I. 409 (1984), and observations by E. Gaillard; the dissenting opinion by M.-D. Schmidt appears at 441; for an English translation, see 1 J. INT'L ARB. 145 and 332 (1984); X Y.B. COM. ARB. 71 (1985); 2 ICSID REP. 9 and 77 (1994).
- 167) See the *Ad hoc* Committee Decision of May 3, 1985, by P. Lalive, president, A.-L. Cocheri and I. Seidl-Hohenveldern, arbitrators, 114 J.D.I. 163 (1987), and observations by E. Gaillard at 184; for an English translation, see 1 ICSID REV. – FOREIGN INV. L.J. 89 (1986); XI Y.B. COM. ARB. 162 (1986); 2 ICSID REP. 95 (1994).
- 168) See, for example, Levy, *supra* note 161, at 42, and the draft of the International Bar Association's Code of Ethics for International Arbitrators, which provides that the dissenting arbitrator “should not breach the confidentiality of the deliberations” of the tribunal but that he or she “retains the right ... to draw the attention of the parties to any fundamental procedural irregularity” (cited by Levy, *id.*). See also Canon VI of the Code of Ethics for Arbitrators in Commercial Disputes, jointly adopted by the AAA and the American Bar Association in 1977 (X Y.B. COM. ARB. 132 (1985), with an introductory note by Howard M. Holtzmann at 131).
- 169) For an example of an award stated to have been made “unanimously,” but which was accompanied by two individual opinions, see the Award dated February 21, 1997 in ICSID Case No. ARB/93/1, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, 125 J.D.I. 243 (1998), and observations by E. Gaillard; for an English translation, see XXII Y.B. COM. ARB. 60 (1997); 36 I.L.M. 1531 (1997); 12 INT'L ARB. REP. A1 (Apr. 1997).



- 170)** On the procedure followed by the ICC, see CRAIG, PARK, PAULSSON, *supra* note 31, at 332 *et seq.*; D. Hascher, observations following the questionnaire in ICC Case No. 5082, *supra* note 69, at 1085; Martin Hunter, *Final Report on Dissenting and Separate Opinions*, ICC BULLETIN, Vol. 2, No. 1, at 32 (1991); DERAIS AND SCHWARTZ, *supra* note 1, at 285-86.
- 171)** See *infra* para. 1404.
- 172)** See Gélinas, *supra* note 65. The number of dissenting opinions in previous years was 20 in 1994 (of 182 awards) (see Dominique Hascher, *Scrutiny of Draft Awards by the Court: 1994 Overview*, ICC BULLETIN, Vol. 6, No. 1, at 51 (1995)); 12 in 1995 (of 203 awards) (see Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1995 Overview*, ICC BULLETIN, Vol. 7, No. 1, at 14 (1996)); 19 in 1996 (of 217 awards) (see Dominique Hascher, *Scrutiny of Draft Awards by the Court – 1996 Overview*, ICC BULLETIN, Vol. 8, No. 1, at 17 (1997)); 3 in 1997 (of the 227 awards) (see Dominique Hascher, *The Application of the Rules by the Court – 1997 Overview*, ICC BULLETIN, Vol. 9, No. 1, at 12 (1998)).
- 173)** See Reymond, *supra* note 161, at 417.
- 174)** For an example, see the response by the president of the arbitral tribunal to a dissenting opinion in ICSID Case No. ARB/82/1, *Société Ouest Africaine des Bétons Industriels v. State of Senegal*, 117 J.D.I. 209 (1990); 6 ICSID REV. – FOREIGN INV. L.J. 289 (1991).
- 175)** See, e.g., ROBERT, *supra* note 79; DE BOISSÉSON, *supra* note 54, at 801; Reymond, *supra* note 161, at 417.
- 176)** Hascher, *supra* note 65.
- 177)** See the October 17, 1980 decision of the Geneva Court of Justice, unpublished, cited by Levy, *supra* note 161, at 40.
- 178)** See Levy, *supra* note 161, at 40.
- 179)** On the confidentiality of awards, see *infra* para. 1412.
- 180)** Fed. Trib., May 11, 1992, D. v. A., 1992 BULL. ASA 381, 386; 1994 REV. SUISSE DR. INT. ET DR. EUR. 117, and the commentary by P. Schweizer.
- 181)** Art. 1472 of the French New Code of Civil Procedure. On the refusal, in French domestic arbitration law, to set aside an award that did not specify a party's forename, see CA Paris, June 28, 1991, *Boumeddane v. Jardin*, 1992 REV. ARB. 633, and observations by J. Pellerin.
- 182)** Art. 1473 of the French New Code of Civil Procedure. On the setting aside, in French domestic arbitration law, of an award which did not include an arbitrator's signature and did not refer to his refusal to sign, see CA Paris, Oct. 27, 1988, *Proux v. Guerton*, 1990 REV. ARB. 908, and observations by B. Moreau. Compare with CA Paris, July 5, 1990, *Uni-Inter v. Maillard*, which held a statement that the arbitrators were deciding by majority vote to be sufficient (1991 REV. ARB. 359, and observations by B. Moreau) and CA Paris, October 15, 1991, *Affichage Giraudy*, *supra* note 156, which held that it was not necessary to give the reasons for an arbitrator's refusal to sign an award for the requirements of Article 1473 to be satisfied.
- 183)** On the case law which wrongly refuses to characterize as awards documents where certain formal requirements are not complied with, see *supra* para. 1352.
- 184)** See Articles 1502 and 1504 of the French New Code of Civil Procedure, which differ on this point from the French domestic law provisions at Article 1484 5°.
- 185)** CA Paris, Mar. 22, 1985, *Ets. Crucke v. Frahuil*, 1987 REV. ARB. 78, and observations by B. Moreau.
- 186)** See Arts. 1057 and 1065 of the Netherlands Code of Civil Procedure; Sec. 52 of the 1996 English Arbitration Act.
- 187)** See, e.g., Art. 32 of the UNCITRAL Arbitration Rules; Art. 25(3) of the 1998 ICC Arbitration Rules (Art. 22 of the previous Rules); Art. 32(1) of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Art. 27 of the 1997 AAA International Arbitration Rules; Art. 26 of the 1998 LCIA Arbitration Rules.
- 188)** For such a requirement, see, for example, Section 52(5) of the 1996 English Arbitration Act.
- 189)** See the reference in Article 1500 of the New Code of Civil Procedure to Article 1476 of the same Code. On this issue, generally, see *infra* para. 1419.
- 190)** Art. 32(1) of the 1999 Rules. The International Arbitration Rules of the AAA, as revised in 1997, remove the requirement that arbitrators attach a declaration to their award stating that a colleague who did not sign was given the opportunity to do so (Art. 28(3) of the 1993 Rules).
- 191)** Art. 189, para. 2, *in fine* of the Swiss Private International Law Statute. This is also possible under the 1999 Swedish Arbitration Act if the parties have so agreed (Sec. 32, para. 1).
- 192)** CA Paris, June 17, 1997, *Eiffage v. Butec*, 1997 REV. ARB. 583, and observations by D. Bureau.
- 193)** See, e.g., REDFERN AND HUNTER, *supra* note 31, at 304.
- 194)** See CA Versailles, 1e Ch., 1e Sec., Jan. 14, 1987, *Chimimportexport v. Tournant Thierry*, No. 7298/85, unpublished. In this case, the award contained the words “done in Brussels,” although the parties had agreed on a seat in Paris. The award was treated as having been made in France for the purposes of actions to set aside. See also CA Paris, Sept. 22, 1995, *Dubois et Vanderwalle*, *supra* note 114, which held the fact that the award was signed by an arbitrator in France to be of no consequence, and determined the seat of the arbitration on the basis, in particular, of the organization responsible for appointing the arbitrators; CA Paris, Oct. 28, 1997, *Procédés de préfabrication pour le béton v. Libye*, 1998 REV. ARB. 399, and B. Leurent's note; in French domestic arbitration, see CA Paris, Jan. 11, 1996, *Algotherm v. DEP*, 1996 REV. ARB. 100, and E. Gaillard's note. On this issue, generally, see *infra* para. 1590, and on the uncertainties of English law on this point prior to the 1996 reform, see *infra* para. 1593.

- 195) See Art. 31(3), *in fine*. See also Art. 1693, paragraph 1, *in fine* of the Belgian Judicial Code (Law of May 19, 1998).
- 196) See, e.g., Art. 28(1) of the 1998 ICC Arbitration Rules (Art. 23(1) of the previous Rules); Art. 26.5 of the 1998 LCIA Arbitration Rules; Art. 27(5) of the 1997 AAA International Arbitration Rules; Art. 48 of the ICSID Arbitration Rules.
- 197) Art. 35, paras. 1 and 5; under the Swiss Private International Law Statute, filing the award with the court is optional (Art. 193, para. 1).
- 198) On the fact that, in the Netherlands, the deposit of an award is not a condition precedent to a request for enforcement or an application to set aside, see SANDERS AND VAN DEN BERG, *supra* note 32.
- 199) On the reasons for the filing of these awards in the absence of an application for enforcement, see SOPHIE CRÉPIN, LES SENTENCES ARBITRALES DEVANT LE JUGE FRANÇAIS ¶¶ 138 *et seq.* (1995).
- 200) Art. 32(5). *Comp. with* Art. 27(4) of the 1997 AAA International Arbitration Rules.
- 201) See Art. 48(5) of the Convention and Art. 48(4) of the Arbitration Rules.
- 202) See, e.g., ICC Award No. 6931 (Geneva, 1992), which, while refusing to grant the party's request in the case being heard, did not rule out the possibility of publishing the award by way of compensation for defamation or passing-off (Austrian party v. French party, 121 J.D.I. 1064 (1994), and observations by Y. Derains).
- 203) On the gradual establishment of arbitral case law, see *supra* paras. 371 *et seq.*
- 204) See the December 9, 1983 Decision Regarding Provisional Measures in ICSID Case No. ARB/81/1, Amco Asia Corp. v. Republic of Indonesia, where the confidentiality issue was decided by an ICSID arbitral tribunal composed of B. Goldman, president, E. Rubin and I. Foighel, arbitrators (24 I.L.M. 365 (1985); XI Y.B. COM. ARB. 159 (1986); 1 ICSID REP. 410 (1993)).
- 205) CA Paris, Feb. 18, 1986, Aïta v. Ojeh, 1986 REV. ARB. 583, and G. Flécheux's note; Dalloz, Jur. 339 (1987). On this issue, generally, see Emmanuel Gaillard, *Le principe de confidentialité de l'arbitrage commercial international*, Dalloz, Chron. 153 (1987); Jean-Louis Delvolvé, *Vraies et fausses confidences ou les petits et les grands secrets de l'arbitrage*, 1996 REV. ARB. 373. See also Jan A.S. Paulsson and Nigel Rawding, *The Trouble with Confidentiality*, ICC BULLETIN, Vol. 5, No. 1, at 48 (1994). On the limits of confidentiality, see in Australian law, High Court of Australia, Apr. 7, 1995, Esso Australia Resources Ltd. v. Plowman, 10 INT'L ARB. REP. A1 (May 1995), and the commentary by Marcus S. Jacobs, *Arbitration Confidentiality in Australia*, 10 INT'L ARB. REP. 21 (July 1995); 11 ARB. INT'L 235 (1995); 6 WORLD ARB. & MED. REP. 133 (1995); XXI Y.B. COM. ARB. 137 (1996); for a French translation, see 1996 REV. ARB. 539, and D. Kapelink-Klinger's note; see also Edouard Bertrand, *Confidentialité de l'arbitrage: évolution ou mutation après l'affaire Esso/BHP v Plowman/The Confidentiality of Arbitration: Evolution or Mutation Following Esso/BHP vs. Plowman*, 1996 INT'L BUS. L.J. 169. But see, in England, Ali Shipping Corp. v. Shipyard Trogir, [1998] 2 All E.R. 136; [1999] 1 W.L.R. 314; [1998] 1 Lloyd's Rep. 711 (C.A. 1997); for a French translation, see 1998 REV. ARB. 579, and L. Burger's note; see also Peter Sheridan, *Privacy and Confidentiality – Recent Developments: The Divergence Between English and Australian Law Confirmed*, 1 INT'L ARB. L. REV. 171 (1998). On the question of whether documents obtained in an arbitration proceeding, or the award itself, can be used in a related court proceeding, see, in English law, Hassneh Insurance Co. of Israel v. Stuart J. Mew, [1993] 2 Lloyd's Rep. 243; XIX Y.B. COM. ARB. 223 (1994) (High Ct., Q.B. (Com. Ct.) 1992); on this issue, generally, see 11 ARB. INT'L 231 (1995) (Special issue on the Confidentiality of International Commercial Arbitration).
- 206) Svea Ct. of App., Mar. 30, 1999, A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd., 14 INT'L ARB. REP. A1 (Apr. 1999). On the City Court decision, see Constantine Partasides, *Bad News from Stockholm: Bulbank and Confidentiality Ad Absurdum*, 13 INT'L ARB. REP. 20 (Dec. 1998).
- 207) On this issue, see *infra* paras. 1560 *et seq.*
- 208) Article 1475 of the New Code of Civil Procedure provides that in French domestic arbitration “the award brings an end to the arbitrator's jurisdiction over the dispute it resolves” but that “the arbitrator has the power to interpret the award, to rectify clerical errors and omissions affecting it and to complete it, where he or she has failed to rule on a claim”. For an illustration, see CA Paris, Apr. 18, 1991, Letierce v. Stolz, 1992 REV. ARB. 631, and observations by J. Pellerin. In international arbitration, Article 1500 of the New Code of Civil Procedure makes no reference to Article 1475.
- 209) On this issue, generally, see Nathalie Garnier, *Interpréter, rectifier et compléter les sentences arbitrales internationales*, 1995 REV. ARB. 565; David D. Caron and Lucy F. Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 ARB. INT'L 429 (1995); Andrew N. Vollmer and Angela J. Bedford, *Post-Award Arbitral Proceedings*, 15 J. INT'L ARB. 37 (Mar. 1998).
- 210) In Swiss law, see Fed. Trib., Nov. 1, 1996, P.v. A., 1997 BULL. ASA 116.
- 211) For an example of the application of this principle, see the May 31, 1988 *ad hoc* Award, Wintershall A.G. v. Government of Qatar, 28 I.L.M. 795 (1989); XV Y.B. COM. ARB. 30 (1990), especially ¶ 89 at 57.
- 212) See Art. 50 of the Washington Convention; Arts. 50 and 51 of the ICSID Arbitration Rules.

- 213) Art. 50(2) of the Washington Convention. On the issue of the interpretation of awards, generally, see Jean-François Poudret, *L'interprétation des sentences arbitrales (étude de droit suisse et de droit comparé)*, in RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 269 (1984); Roger Perrot, *L'interprétation des sentences arbitrales*, 1969 REV. ARB. 7; Robert D.A. Knutson, *The Interpretation of Arbitral Awards – When is a Final Award not Final?*, 11 J. INT'L ARB. 99 (June 1994); Pierre-Yves Gunter, *L'interprétation de la Sentence: examen de quelques questions à la lumière d'un cas réel*, 1996 BULL. ASA 574. For an example of interpretation performed by a second arbitral tribunal, see ICC Award No. 6233 (1992), *Owner of company registered in Lebanon v. African state*, XX Y.B. COM. ARB. 58 (1995).
- 214) DERAINS AND SCHWARTZ, *supra* note 1, at 298 *et seq.*
- 215) *See infra* para. 1416.
- 216) For its implementation in German law, see Article 1058 of the ZPO.
- 217) New Article 1702 bis, paragraph 1(b) of the Belgian Judicial Code (Law of May 19, 1998); Sec. 32 of the 1999 Swedish Arbitration Act.
- 218) *See infra* para. 1416.
- 219) For an example of a clerical error, which was easily corrected in a system that so permitted, see the October 17, 1990 Decision on Supplemental Decisions and Rectification in ICSID Case No. ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia* (5 INT'L ARB. REP. D1 (Nov. 1990); XVII Y.B. COM. ARB. 73 (1992); 1 ICSID REP. 569 (1993)), which constituted a rectification of the June 5, 1990 ICSID Award on the merits (5 INT'L ARB. REP. D4 (Nov. 1990); XVII Y.B. COM. ARB. 73 (1992); 1 ICSID REP. 569 (1993); for a French translation, see 118 J.D.I. 172, 181 (1991), and observations by E. Gaillard).
- 220) *See, e.g.*, Art. 36 of the UNCITRAL Arbitration Rules; Art. 30 of the 1997 AAA International Arbitration Rules; Art. 27 of the 1998 LCIA Arbitration Rules; Art. 37 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. *See also* Art. 49(2) of the Washington Convention and Art. 49 of the ICSID Arbitration Rules.
- 221) *See, e.g.*, CA Paris, Feb. 2, 1978, *Elettronica v. Thomson-C.S.F.*, 1978 REV. ARB. 501, and P. Roland-Lévy's note, *aff'd*, Cass. 1e civ., Dec. 11, 1979, *supra* note 149.
- 222) *See* Cass. 1e civ., June 16, 1976, *Krebs*, *supra* note 97.
- 223) On Article 29 of the ICC Rules, see DERAINS AND SCHWARTZ, *supra* note 1, at 298 *et seq.*
- 224) *See, for example*, in the United States, *Danella Constr. Corp. v. MCI Telecommunications Corp.*, 993 F.2d 876 (3d Cir. 1993); 8 INT'L ARB. REP. D1 (Oct. 1993).
- 225) Article 33 and, in German law, Article 1058 of the ZPO.
- 226) Art. 826 of the Code of Civil Procedure (Law of Jan. 5, 1994).
- 227) Sec. 57 of the English Arbitration Act 1996.
- 228) *See* Article 1702 bis, paragraph 1(a) of the Belgian Judicial Code (Law of May 19, 1998), which also allows the parties to apply to the enforcement court to have the award rectified where the arbitral tribunal cannot be reconstituted (Art. 1702 bis, paragraph 5) and Section 32 of the 1999 Swedish Arbitration Act.
- 229) Art. 1475, paragraph 2 of the New Code of Civil Procedure, referring to Article 461 of the same Code, which deals with the correction of clerical mistakes in court decisions. *See* JEAN ROBERT, *L'ARBITRAGE – DROIT INTERNE – DROIT INTERNATIONAL PRIVÉ* ¶ 211 (6th ed. 1993).
- 230) *See supra* para. 1414.
- 231) Article 49, which implements Article 49, paragraph 2 of the Washington Convention.
- 232) On the modifications made concerning the interpretation of the award and rectification of clerical errors, *see supra* paras. 1415 and 1416.
- 233) In French law, this would be the case under Articles 1502 3° and 1504 of the New Code of Civil Procedure. On this issue, *see infra* para. 1628.
- 234) *See* the authors cited *infra* para. 1599.
- 235) Cass. 1e civ., May 25, 1992, *Fougerolle v. Procofrance*, 119 J.D.I. 974 (1992), and E. Loquin's note; 1992 REV. CRIT. DIP 699, and B. Oppetit's note; 1993 REV. ARB. 91, and the commentary by Matthieu de Boissésou, *L'arbitrage et la fraude (à propos de l'arrêt Fougerolle, rendu par la Cour de cassation le 25 mai 1992)*, *id.* at 3; for an English translation, *see* XIX Y.B. COM. ARB. 205 (1994).
- 236) *See* E. Loquin, note following Cass. 1e civ., May 25, 1992, *Fougerolle*, 119 J.D.I. 974, 978 (1992).
- 237) *See infra* para. 1599.
- 238) *See supra* paras. 661 *et seq.*
- 239) Compare, on the conditions governing the *res judicata* effect of foreign awards, the distinctions discussed by ROBERT, *supra* note 79, at 355. These observations are not included in the 6th edition of 1993.
- 240) *See infra* para. 1591.
- 241) CA Paris, July 9, 1992, *Norbert Beyrard France v. République de Côte d'Ivoire*, 1994 REV. ARB. 133, and P. Théry's note.

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