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# THE INTERNATIONAL ARBITRATION REVIEW

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SEVENTH EDITION

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

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# EDITOR'S PREFACE

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International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**

Wilmer Cutler Pickering Hale and Dorr LLP  
New York  
June 2016

## Chapter 17

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# FRANCE

*Jean-Christophe Honlet, Barton Legum,  
Anne-Sophie Dufêtre and Annelise Lecompte<sup>1</sup>*

## I INTRODUCTION

The year 2015 and the beginning of 2016 were marked by two decisions long awaited by the arbitration community. The first deals with the *Tapie* affair, which culminated in a finding of fraud by one of the arbitrators in a much publicised case in France involving public funds, and the second is another decision of the Paris Court of Appeal in the *Tecnimont* case regarding disclosure obligations by arbitrators in an ICC context. Several other important decisions were rendered, but on more technical points, however.

## II THE YEAR IN REVIEW

### i Arbitration developments in local courts

#### *Notifications of awards*

The notification of awards was one of the subjects where the 2011 reform in France regarding international arbitration<sup>2</sup> brought some novelty. Pursuant to Article 1519 al 3 of the Code of Civil Procedure (CCP), introduced by that reform, parties to an international arbitration seated in France are now free to dispense with formalities regarding the ‘signification’ of awards, which normally involves recourse to an official process server. The parties can, however, agree upon the manner in which they should notify each other of an award. Pursuant to Articles 1519 al 1 and 2 CCP, an action to set aside an arbitral award must be brought before the court of appeal of the place where the award was made within one month from the date of notification of the award. Article 643 CCP gives parties located outside of France an additional two months to bring their action (i.e., three months in total). Some recent cases brought some useful precisions regarding the applicable legal regime.

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1 Jean-Christophe Honlet and Barton Legum are partners, Anne-Sophie Dufêtre is of counsel and Annelise Lecompte is an associate at Dentons.

2 Decree No. 2011-48 of 13 January 2011.

In 1981, the German companies ThyssenKrupp and Man entered into an agreement with the Republic of Iraq for the construction of an astronomical observatory. Following a dispute between the parties, an ICC arbitration was commenced by ThyssenKrupp and Man in 2013, in accordance with the arbitration clause contained in the contract. On 26 February 2007, the Republic of Iraq was ordered to pay damages to both claimants. On 14 June 2013, the Republic of Iraq filed an application to set aside the award. ThyssenKrupp and Man replied that the application should be held inadmissible because it had been filed too late under French law. In a decision rendered on 22 January 2015, the CME<sup>3</sup> of the Paris Court of Appeal declared the Republic of Iraq's action admissible.<sup>4</sup> ThyssenKrupp and Man appealed this decision. They first claimed that the parties expressly waived the obligation of notification by means of 'signification' of the award in the terms of reference signed at the outset of the ICC arbitration and in accordance with Article 28 of the 1998 ICC Rules. They added that the award was notified to the Republic of Iraq on 4 March 2007 as well as through diplomatic channels on 7 July 2008 and 10 August 2010. They also claimed that the notification act did not have to indicate the time limits and recourses available against an award as the parties had agreed to apply the 1998 ICC Rules. Consequently, the companies claimed that the Republic of Iraq's set aside proceedings were brought too late, as the Republic had seized the Paris Court of Appeal more than a month after the notification of the award, and thus contrary to Article 1519 CCP. Additionally, the two companies asserted that the set aside proceedings were not admissible as they were contrary to the former Article 1505 CCP,<sup>5</sup> and considered that the decision of the Berlin court declaring the award enforceable was valid pursuant to Articles 683 CCP et seq. on notification abroad.

The Paris Court of Appeal rendered its decision on 17 March 2015. The Court disagreed.<sup>6</sup> It first recalled that set aside proceedings against an award rendered in France were governed by the CCP. Then, the Court stated that the parties did not waive their obligation of notification by means of 'signification', either in the terms of reference or by submitting their dispute to the ICC. Article 28 of the 1998 ICC Rules only provides for the ICC's obligation to notify the award to the parties. Such provision only concerns the ICC and its obligations after the issuance of an award. Furthermore, the Court added that even if the new version of Article 1519 CCP provides for the possibility to waive the obligation to notify by means of 'signification', this Article only applies after 1 May 2011 and was not applicable at the date of the notification of the award (i.e., 4 March 2007). Importantly, in practice, the Court also considered that, according to Article 680 CCP, the act of notification to a party had to mention the existence of legal remedies and the time limit for their exercise, and that in the present case, the notifications through diplomatic channels of 7 July 2008 and 10 August 2010 did not provide for such mandatory notices. The Paris Court of Appeal therefore upheld the order rendered by the CME on 22 January 2015. The decision of the Court therefore confirmed that notification of an award in this case by an arbitral institution cannot be considered as a 'signification' under Article 1519 CCP. The Court also usefully

3 The CME is a judge designated to handle matters in the case before the main hearing.

4 CA Paris (CME), 22 January 2015, Case No. 13/12002.

5 According to former Article 1505 CCP, this action of setting aside an award was admissible as soon as the award had been rendered and ceased to be admissible if this right was not exercised within the month of service of the award declared enforceable.

6 CA Paris, 17 March 2015, Case No. 13/12002.

recalled that such ‘signification’ had to mention the mandatory notices provided for in Article 680 CCP – that is, the time limits for an application to set aside, as well as the manner in which such an action may be brought.

In a decision rendered on 26 May 2015,<sup>7</sup> the Paris Court of Appeal had to deal with a similar issue following an award rendered in Paris on 6 May 2014 ordering a Dubai company, Midex, to pay damages to an American company, Aero Ventures. The ICC Secretariat had notified Midex of the award on 12 May 2014. Midex filed an application to set aside the award on 24 October 2014. Aero Ventures asserted that it was too late for Midex to file such application because the time limit under the CCP had expired.<sup>8</sup> The Paris Court of Appeal recalled that the parties can chose the rules governing the arbitration proceedings, but that the set aside proceedings against an award are governed by the CCP. The Court also stated that the parties have the possibility to waive the obligation of notification of the award by means of ‘signification’, but that such waiver has to be explicit and unequivocal. The Court reiterated that such waiver cannot be assumed from the simple fact that the parties agreed to submit their dispute to the ICC Rules. It also recalled that the party being notified had to know the time period in which a recourse may be made, which the ICC Secretariat does not do.<sup>9</sup>

### *Independence and impartiality of arbitrators – disclosure obligations*

Pursuant to Article 1520-2 CPP, an award rendered in France in a matter of international arbitration may be set aside when the arbitral tribunal is not properly constituted. This provision, and the question of arbitrators’ independence and impartiality, are at the heart of the *Tecnimont* case, which has already given rise to several important decisions of the French courts over the past few years. As recalled in last year’s edition,<sup>10</sup> this case concerned an award rendered by an ICC arbitral tribunal in a construction dispute between an Italian company, Tecnimont, and a Greek company, Avax. In 2007, Avax decided to challenge before the Paris Court of Appeal a partial award rendered by the arbitral tribunal based on the alleged lack of independence and impartiality of the chair of the arbitral tribunal. Avax based its challenge on the fact that it had allegedly obtained during the arbitration new information on the chair and links existing between his firm and one of the parties. The chair was of counsel in a large international law firm in Paris. This challenge gave rise to an enduring judicial battle before French courts.

At the heart of the case was the fact that, in July 2007, Avax’s counsel had asked for certain information from the chair regarding the relationships between the chair’s law firm and Tecnimont. This followed a May 2007 symposium sponsored by the chair’s law firm in

7 CA Paris, 26 May 2015, Case No. 14/21345.

8 Pursuant to Article 1519 CPC, the time limit for bringing an action to set aside an award before the French court at the place of arbitration is one month following notification of the award, which notification must be made by way of ‘signification’ (i.e., through a bailiff, unless otherwise agreed). Pursuant to Article 643 CPC, such one month period is extended by another two months (i.e., three months in total) for parties located outside of France.

9 This is because the ICC Secretariat is concerned with informing the parties regarding the award rendered, not with what kind of recourse a party may bring against the award at the place of arbitration and in what time frame.

10 *The International Arbitration Review*, Sixth Edition, 2015, pp. 251–2.



which partners of that law firm and a senior business executive of Tecnimont participated. At the end of July 2007, the chair provided additional information. A challenge against the chair was filed by Avax before the ICC Court of Arbitration in September 2007 and was rejected by the ICC Court. The challenge had been filed more than one month after the July 2007 letter from the chair. However, Article 11 of the then-applicable ICC Rules of Arbitration provided that the challenge had to be filed within one month. The fundamental question was therefore whether Article 11 of the ICC Rules should deploy its full effect in the circumstances – and, in this connection, whether there were facts posterior to the chair’s letter of July 2007 that could be credibly alleged by Tecnimont in support of its request challenging the chair, rendering it timely<sup>11</sup> – or whether, regardless of the ICC Rules of Arbitration (as per the parties’ agreement), the question of the chair’s alleged lack of independence and impartiality could be reopened at the annulment stage.

Following a first decision of the Paris Court of Appeal,<sup>12</sup> the case moved up to the Court of Cassation,<sup>13</sup> which remanded the case to the Reims Court of Appeal. Following the decision by this second court of appeal,<sup>14</sup> which had annulled the award for lack of impartiality of the chair, the case came back again before the Court of Cassation. On 25 June 2014, the Court of Cassation decided to quash the decision rendered by the Reims Court of Appeal, and to remand the case to the Paris Court of Appeal. On 12 April 2016, the Paris Court of Appeal rendered a new decision.<sup>15</sup> The Court found that the information concerning the relationship between the chair’s firm and the company did not significantly increase doubts regarding the independence and impartiality of the arbitrator that could have resulted from the contemporaneous elements available to Avax before its September 2007 challenge of the arbitrator. Consequently, the Court held that the challenge based on the arbitrator’s independence and impartiality should be dismissed and, implicitly but necessarily, that Article 11 of the ICC Rules was to be applied in accordance with its terms.

In another case, between the Republic of Equatorial Guinea and a French telecommunication company, Orange, the Paris Court of Appeal confirmed the strict application of the ICC Rules in these matters. In a decision rendered on 22 September 2015,<sup>16</sup> the Court decided not to set aside an award on the ground that the arbitral tribunal had been unlawfully constituted. In this case, the chair of the arbitral tribunal had not mentioned the fact that he had sat as an arbitrator in a previous arbitration involving Orange. He also had omitted to mention that in that arbitration, an award had been granted by the tribunal in favor of Orange, and that one of the arbitrators reported in a dissenting opinion the partiality of the arbitral tribunal. The Republic of Equatorial Guinea subsequently challenged the chair. The International Court of Arbitration of the ICC dismissed the challenge. After the arbitral tribunal rendered its award, the Republic of Equatorial Guinea launched set-aside proceedings before the French courts. The Paris Court of Appeal denied the challenge against

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11 The ICC Court on the challenge did not include reasons, as was the practice of the Court at the time. The parties were therefore left to speculate as to whether it was dismissed as untimely or on its merits.

12 CA Paris, 12 February 2009, Case No. 07/22164.

13 Civ 1, 4 November 2010, Case No. 09-12716.

14 CA Reims, 2 November 2011, Case No. 10/02888.

15 CA Paris, 12 April 2016, Case No. 14/14884.

16 CA Paris, 22 September 2015, Case No. 14/17200.

the award based on Article 1520-2 CCP. The Court held that, in the course of the arbitration proceedings, the Republic of Equatorial Guinea had received enough information on the arbitrator in a letter sent by the other party. According to the Court, even if such information had been insufficient for the Republic of Equatorial Guinea to fully understand the involvement of the arbitrator in the former arbitration, additional information could have been easily accessible within one month from the receipt of the letter. The Court added that because the Republic of Equatorial Guinea did not raise the issue in a timely manner during the arbitral proceedings, it was later barred from raising that issue before French courts.

### *Due process*

Pursuant to Article 1520-4 CCP, French courts may annul awards rendered in France in international arbitration when arbitral tribunals have breached the adversarial principle during arbitration proceedings. Deciding on the applicable interest rate and on when interest starts to run, without giving the parties a chance to comment on these issues, may be considered as a breach of the adversarial principle by French courts. On 22 September 2015, the Paris Court of Appeal annulled an award on this ground.<sup>17</sup> In this case, discussed above and involving the Republic of Equatorial Guinea and Orange, the arbitral tribunal had issued its award on 8 July 2014. The arbitral tribunal found that the Republic of Equatorial Guinea had breached its obligations and ordered it to pay damages plus interest. The Paris Court of Appeal partially annulled the award on the issue of the interest granted. The Court decided that the interest rate and the date when interest started to run were not mentioned in the claimant's submissions, and the respondent was not given a chance to comment on these issues. Consequently, the Court held that by granting interest without giving the parties a chance to comment on its modalities, the arbitral tribunal breached the adversarial principle.

As mentioned in the fifth edition of this publication, in a decision rendered on 2 April 2013,<sup>18</sup> the Paris Court of Appeal partially annulled an award for lack of due process based on the fact that the arbitral tribunal (under the chairship of a native German speaker) relied on exhibits drafted in German that were only partly translated into French, the language of the arbitration. In March 2015, the Court of Cassation confirmed the decision.<sup>19</sup> This is a matter of importance in a number of cases. Translations made by a native speaker within the tribunal, if not submitted for the parties' comments before the rendering of the award, may therefore constitute a breach of the adversarial principle and jeopardise the award in full or in part.

### *State immunity from execution*

French law recognises immunity from execution as a defence to enforcement of an award against a state. The state can waive this immunity. In 2011, the Court of Cassation specified that such waiver had to be 'express and special'.<sup>20</sup> In 2013, it held that a waiver of sovereign immunity from execution would be recognised as effective in France if the specific assets or categories of assets for which the waiver was granted were expressly set

17 CA Paris, 22 September 2015, Case No. 14/17200.

18 CA Paris, 2 April 2013, Case No. 11/18244.

19 Civ 1, 18 March 2015, Case No. 13-22391.

20 Civ 1, 28 September 2011, Case No. 09-72057.

out in the contract, a fairly extreme position.<sup>21</sup> In a decision rendered on 13 May 2015,<sup>22</sup> the Court of Cassation adopted a less stringent approach. In this case between a Congolese company (Commisimpex) and the Republic of the Congo, an award was rendered on 3 December 2000 in favour of Commisimpex. Commisimpex attempted to seize bank accounts of the state held in Paris in relation to diplomatic assets of the state. The Court of Cassation first recalled that the Republic of Congo had permanently and irrevocably waived its immunity from jurisdiction and execution. Then, invoking international customary law, the Court concluded that the waiver by the state was valid. Under the current case law, a waiver of immunity from execution by a state therefore only has to be express, and no other conditions have to be fulfilled, even for the seizure of diplomatic assets. Whether that approach will stand remains to be seen. At the time of writing, some draft legislation is contemplated that would significantly reinforce state immunity from execution.

### *Arbitrators' liability*

An interesting question was brought before the French courts concerning the amount of damages that could be recovered by the parties to an arbitration following the annulment of the award. In a decision of 31 March 2015,<sup>23</sup> the Paris Court of Appeal ruled that three arbitrators who had rendered a subsequently annulled award were liable and had to reimburse their fees following the annulment of the award. The Court based its decision on the fact that the arbitrators had not rendered the award within the allocated time period. This decision is logical, given that the time limit to render an award is mandatory for arbitrators under French international arbitration law. However, holding arbitrators liable for damages will depend on the grounds for the annulment of the award, which requires a case-by-case assessment. The Court refused, however, to hold the arbitrators liable for counsel fees spent in the arbitration, holding that such fees in the end proved useful in the parties' decision to settle the merits of the case.

### *International arbitration and French administrative courts*

On 17 May 2010,<sup>24</sup> the *Tribunal des Conflits*<sup>25</sup> rendered an important decision on jurisdictional issues stemming from the separation of the administrative and judicial courts, since there are two parallel systems in France. In this case, the *Tribunal des Conflits* reached the decision that when a contract was administrative in nature and at the same time involved the interest of international trade (i.e., was capable of international arbitration in French international arbitration law parlance), any challenge against an award made under such contract should fall under the jurisdiction of judicial courts, except in certain cases that should be brought before administrative courts. In the fifth edition of this publication,<sup>26</sup> we discussed that decision, and also mentioned the *Ryanair* case where the Council of State (the highest French court for administrative matters) held on 19 April 2013 that a challenge against an award

21 Civ 1, 28 March 2013, Case 11-13323.

22 Civ 1, 13 May 2015, Case 13-17751.

23 CA Paris, 31 March 2015, Case No. 14/05436.

24 *Tribunal des Conflits*, 17 May 2010, Case No. 10-03754.

25 The *Tribunal des Conflits* is a French court that decides which among the judicial or administrative courts have jurisdiction to hear any given case.

26 *The International Arbitration Review*, Fifth Edition, 2014, pp. 248–9.

rendered in France in a dispute arising from a contract concluded between a French public entity and a foreign private party had to be brought before the French administrative courts.<sup>27</sup> However, the decision would not be the same for awards rendered outside of France. In such case, administrative courts could not hear the challenge against the award; instead, the judicial courts would have jurisdiction. The Paris Court of Appeal had confirmed this approach in a decision of 10 September 2013 on the basis of the principle of separation between administrative and judicial courts.<sup>28</sup> However, the Court of Cassation quashed this decision on 8 July 2015.<sup>29</sup>

It is necessary to briefly recall the facts of the case. In 2008, two contracts had been concluded between two Irish companies, Ryanair and Airport marketing services on the one hand, and the SMAC (a French public entity) on the other. The contracts contained an arbitration clause mentioning London as the seat of arbitration and the LCIA Rules as the applicable arbitration rules. A dispute arose between the parties. The two companies started arbitration under the LCIA Rules. A sole arbitrator rendered an award on 22 July 2011 retaining its jurisdiction but refusing to issue a stay of proceedings for the French administrative court to render its decision. A second award on the merits was rendered on 18 June 2012. This award obtained confirmation (*exequatur*) in France. On 10 September 2013, the Paris Court of Appeal quashed the *exequatur* decision. According to the Paris Court, a challenge against an award over public procurement falls within the jurisdiction of French administrative courts. Remarkably, the Court of Cassation annulled that decision based on Article 1516 CCP and Articles III, V and VII of the New-York Convention of 10 June 1958. The thrust of that decision is that, having an administrative court review the award, and potentially its merits under French administrative law, contravenes French international obligations under the New York Convention, which the Court added was part of the ‘international arbitral legal order’.

The Council of State and the Court of Cassation, the two highest French jurisdictions at the helm of their respective legal orders, therefore adopted squarely opposite positions. It is likely that the *Tribunal des Conflits* will have to settle in the future what is a disturbing lack of a uniform approach between the French judicial and administrative courts. It is to be hoped that the position consistent with the New York Convention will ultimately prevail.

### *The Tapie case*

In last year’s edition,<sup>30</sup> we described in detail the controversial case between the French businessman, Bernard Tapie, and a former French bank, Crédit Lyonnais, on the sale of Adidas in the 1990s. Following the issuance of four awards in July and November 2008 in favour of Mr Tapie, the respondents (CDR Créances, formerly Société de Banque Occidentale, a subsidiary of Crédit Lyonnais, and CDR Consortium de réalisation, the state-controlled body that took over Crédit Lyonnais’ liability) requested the revision of the awards before the French courts. In a decision of 17 February 2015,<sup>31</sup> the Paris Court of Appeal decided that fraud was proven due to manoeuvres by one of the arbitrators, and that the awards

27 Council of State, 19 April 2013, Case No. 352750.

28 CA Paris, 10 September 2013, Case No. 12/11596.

29 Civ 1, 8 July 2015, Case No. 13-25846.

30 *The International Arbitration Review*, Sixth Edition, 2015, pp. 256-7.

31 CA Paris, 17 February 2015, Case No. 13/13278.

rendered by the arbitral tribunal as a result should be revised. On 3 December 2015, the Paris Court of Appeal decided the case on the merits,<sup>32</sup> and ordered the retraction of the award of 7 July 2008 as well as of the three other awards on liquidation fees and interpretation of the first award. The Court held that Bernard Tapie, who had prevailed in the arbitration and obtained payment, should reimburse over €400 million plus interest to CDR Créances and CDR Consortium de réalisation. This case involved an exceptional remedy based on an exceptional situation.

### **III OUTLOOK AND CONCLUSIONS**

2015 was a significant year. The French courts rendered important decisions on the question of the independence and impartiality of arbitrators, and clarified the content of the adversarial principle. An important decision was also rendered regarding the matter of state immunity. New important developments are expected in future years, particularly on the extent of the control of ‘international public order’ by French courts at the annulment or enforcement stage. A number of scholars and practitioners have come to view the French position as too restrictive in this respect, which may – or may not – trigger a reaction from the courts.

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32 CA Paris, 3 December 2015, Case No. 13/13278.

## Appendix 1

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# ABOUT THE AUTHORS

### **JEAN-CHRISTOPHE HONLET**

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Jean-Christophe is a partner in Dentons' Paris office and global head of Dentons' international arbitration group. He concentrates on international arbitration, both commercial and investor–state, and acts as counsel, expert witness and arbitrator. He is in charge of the international arbitration seminar on the master's course in project finance of the École Nationale des Ponts et Chaussées/University of Paris Ouest.

### **BARTON LEGUM**

#### *Dentons*

Barton Legum is a partner in the Paris office of Dentons and the head of its investment treaty arbitration practice. He has over 20 years' experience in litigating complex cases and has argued before numerous international arbitration tribunals, the International Court of Justice, and a range of trial and appeals courts in the United States. His practice focuses on international arbitration and litigation in general and arbitration under investment treaties in particular. From 2000 to 2004, he served as chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he acted as lead counsel for the United States government defending over US\$2 billion in claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement. The United States won every case decided under his tenure. Barton graduated from Rice University, the University of Georgia School of Law and the University of Paris II Pantheon Assas. He is a member of the Paris and New York Bars, and past chair of the American Bar Association's Section of International Law, which has over 24,000 members worldwide.

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