



1981

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Recommended Citation

Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 *Tul. L. Rev.* 1 (1981).

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TULANE LAW REVIEW

VOLUME 55

DECEMBER 1980

NUMBER 1

THE ELABORATION OF A FRENCH COURT DOCTRINE ON INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN LIBERAL CIVILIAN JUDICIAL CREATIVITY

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INTRODUCTION

Arbitration and International Commerce

Having placed themselves outside the sphere of any one national legal system, parties to international commercial agreements encounter special problems when a contractual dispute arises. Frequently, each party is distrustful of the other's national legal institutions and both may suspect that recourse to strictly legal remedies, whether foreign or national in character, is an inappropriate way to resolve their differences. Thus, parties to international commercial agreements often provide that contractual disputes will be submitted to arbitration—a process which they see as a viable response to their particular needs.¹

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1. For a general description of the advantages of having international commercial

For instance, arbitration enables the parties to isolate themselves from the jurisdiction of national courts and to pursue less legalistic solutions in the confidentiality of private proceedings, possibly at a lower cost, and perhaps with greater speed. It affords them the opportunity to choose a neutral forum of dispute resolution with features uniquely suited to their needs, such as a flexible procedure, specialized technical knowledge, and a method of adjudication that merges equitable² and commercial considerations with substantive legal principles.

The Role of National Courts

Arbitration proceedings, however, may not be totally free from the reach of national courts. Although the parties initially agree to resolve their disputes through this form of private justice, once arbitration is invoked by one of the contractants, the other party may be unwilling to participate in the proceeding. One party may refuse to name an arbitrator or may raise objections to the arbitration by challenging either the validity of the agreement to arbitrate or the jurisdiction of the arbitrators to rule upon a given issue. Moreover, once the proceeding is termi-

disputes resolved through arbitration, see B. Mercadal & P. Janin, *Les Contrats de coopération inter-entreprises 190-94* (1974).

2. Under French domestic law, the parties can give arbitrators the power to rule as *amiable compositeurs*, a status which allows them to disregard ordinary rules of procedure and, presumably, many of the substantive rules except those having a public policy character, and to resolve the dispute according to equitable considerations. For a discussion of the concept of *amiable composition* in French arbitration law, see J. Robert & B. Moreau, *L'Arbitrage H9* (1e ed. 1971) [hereinafter cited as Robert & Moreau]. See Nou. C. pr. civ. art. 1019 (Fr.). In May 1980, the provisions of the civil procedure code that related to arbitration were repealed and replaced by some fifty new provisions that updated and completed the French procedural law on arbitration. The new provision on the *amiable compositeur* question is article 34 of the Decree of May 14, 1980, [1980] *Journal Officiel de la République Française* [J.O.] 1238, [1980] *Recueil Dalloz-Sirey, Legislation* [D.S.L.] 207 (Fr.) [hereinafter cited as the Decree]. For an analysis of the Decree, see Robert, *La législation nouvelle sur l'arbitrage*, [1980] *Recueil Dalloz-Sirey, Chronique* [D.S.C.] 189 (June 25, 1980, No. 25) [hereinafter cited as Robert]. See also Riotte, *La réforme de l'arbitrage*, 78 *Les Petits Affiches* 6 (1980). In any event, the language of article 34 of the Decree is similar to the language of former article 1019.

In United States law, although the concept of *amiable composition* is not recognized formally, the practice of having arbitrators rule in accordance with their own sense of justice and equity is not unusual. See Holtzmann, *United States*, 2 *Y.B. Com. Arb.* 116, 133 (1977). In English domestic law, however, the arbitral tribunal apparently must resolve the dispute according to the rules of law; the parties cannot authorize the tribunal to rule *ex aequo et bono* or as *amiables compositeurs*. See Gill, *United Kingdom*, 2 *Y.B. Com. Arb.* 90, 107 (1977).

nated, a recalcitrant party simply may refuse to comply voluntarily with the award that has been rendered. Resolution of such issues usually mandates recourse to the judicial process. National courts either may complement the arbitral process by upholding the validity of and giving full legal effect to arbitration agreements—thereby discounting dilatory claims which thwart the process—or they may condone the efforts of the uncooperative party, thus undermining the recourse to arbitration and preserving judicial control over the resolution of disputes. Therefore, the rulings of national courts involving challenges to arbitral proceedings or to the enforcement of awards are a significant factor in assessing the viability of arbitration as a means of resolving international commercial disputes.

The French Example

The importance of the judicial decisional law in the arbitration area is especially marked in the French system.³ There are

3. Paris is an important center for international commercial arbitrations and arbitration clauses are a fairly common feature of the commercial agreements made between French and foreign parties. As a consequence, the French courts have dealt with a not insubstantial number of cases concerning international commercial arbitration.

Paris also is the headquarters of the International Chamber of Commerce, which has extensive facilities for holding arbitral proceedings. Moreover, in terms of political ideology, Paris represents a sort of middle ground between the East and West; France neither is part of the NATO military alliance nor a country within the Eastern bloc. As a consequence, it can serve as an appropriate territory upon which to receive parties with widely divergent social, political, and economic philosophies. Another practical advantage is the fact that Paris benefits from a modern system of communications as well as modern airports and other means of transportation. Sophisticated legal services are readily available from large law firms, both French and American, and the likelihood of court intervention in the arbitral proceedings is minimal. There is, for example, no equivalent in French law of the English stated case procedure under which questions of law are submitted to a court for determination. However, it now appears that even in England the parties to certain international contracts can agree to forego that procedure. For a discussion of the recent reform of the English stated case procedure, see Littman, *England Reconsiders "The Stated Case"*, 13 Int'l Law 253 (1979). See also The Lord Hacking, *U.K. Arbitration Act (1979) and U.K. State Immunity Act (1978)*, 8 Int'l Bus. Law. 161 (1980). For an excellent discussion of this problem, see Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 Harv. Int'l L.J. 87 (1980). For a discussion of the possibility of French court intervention in the arbitral proceedings, see Moreau, *L'Intervention du tribunal au cours de la procédure arbitrale en droit français et en droit compare*, [1978] Rev. Arb. 321. See also Decree of May 14, 1980, *supra* note 2, arts. 4, 14, 16, 17, 23 (providing for limited and essentially complementary court intervention in the arbitral proceedings). Under the new Decree, the likelihood of court intervention in the arbitral proceedings remains very unlikely except when such intervention is indispensable to the successful completion of the arbitral process. *Accord*, article 45 of the Decree which provides for a substantive merits

no French statutory provisions or codal texts dealing directly with matters of international arbitration. Consequently, French courts have had the option of applying by analogy the relevant provisions of the domestic arbitration law or devising special rules to meet the unique needs of international commercial arbitration. In a word, the French courts' doctrinal methodology in the international context could have consisted of: (1) a facile and literal application of the domestic rules—an approach that would confirm the view that the French civilian courts lack the willingness or ability to be as innovative or as “transnational” as their common law counterparts—or (2) a jurisprudence which responds to the particular contours of international litigation regarding commercial arbitration—deploying, in effect, the type of creativity which would, if not dispel, at least rightly modify the systemic myths about the role of judicial decisional law in the French civilian system.

The task of the present article is to examine the historical evolution and current status of the French judicial doctrine on international commercial arbitration. It endeavors to compare this jurisprudence with the French domestic law on arbitration and to illustrate briefly its conformity to the provisions of the international conventions on arbitration to which France is a party. Its chief design, however, is to concentrate upon the court decisions themselves, underscoring their progressive quality and pointing to their systemic implications.

The rules and principles which have emerged from the case law attest to the ability of the French judiciary to devise innovative legal doctrine without extensive legislative guidance. For a number of reasons, the French courts are generally presumed to play a subordinate role in the formulation of law. First, the Codes are regarded as the primary source of law and the courts—under article 5 of the *Code civil*—are prohibited from rendering “legislative-type” rulings in cases. Furthermore, there is no formally recognized doctrine of *stare decisis* in the French system. Also, the hierarchical and civil service character of judicial offices sometimes acts as a disincentive to original and innovative judicial rulings. Despite this commonplace, and to some extent accurate, assumption, the *Cour de Cassation* (the French

ruling by the courts when an award is set aside under the *recours en annulation* procedure.

Supreme Court) and the *cours d'appel* (courts of appeal) have developed a sophisticated and creative body of legal principles tailored to the realities of international commercial life. The French courts have consistently supported the continued development of international commercial arbitration as a method of dispute resolution and have systematically eliminated many of the potential legal obstacles to the process.

Motivation for the Doctrine

Undoubtedly, the elaboration of such a doctrine is an achievement for the French courts. Moreover, as a result of the substantive character of this doctrine, France can lay claim to the status of being a jurisdiction which favors international commercial arbitration. While the liberal substantive orientation of the doctrine is unmistakable, the question still remains as to why the courts choose to articulate and consistently follow such an unequivocally liberal doctrine. The courts could have been more conservative in the exercise of their quasi-legislative authority and applied by analogy the domestic provisions on arbitration. Why did the French courts risk articulating new and special rules for international arbitration litigation? Finally, if the articulation of this doctrine may have been or might be inappropriate in systemic terms and substantively unacceptable because of its divergence from the domestic law, why has the French Parliament not taken action mandating changes in or a replacement of the court-articulated rules?

Although these questions are a central part of the inquiry of this article, an attempt to answer them must await full consideration of the doctrine itself. It is possible, however, to isolate tentatively a number of policy factors that may explain the underlying motivation of the *jurisprudence*. The unequivocal liberalism of the international commercial arbitration doctrine perhaps reflects the French judiciary's astute reading of what is in the best economic and commercial interests of France. The articulation of this doctrine, however, also seems to respond to higher-order considerations. In international commercial arbitration litigation, the French courts have acknowledged that rules appropriate for application in the domestic area may not be in keeping with the special needs of adjudicating international disputes. Recognizing the traditional demarcation made in the French system between domestic and international litigation,

and, perhaps relying upon their own sense of international comity (one apparently shared by the legislature), the courts have emphasized—at least impliedly—their view that France should respond positively to the modifications in the international economic order and, thereby, make its contribution to a stable and viable world community.

THE LIMITATIONS OF DOMESTIC LAW

French domestic arbitration law, while not generally applicable to international commercial arbitration, does contain a number of provisions that could have a significant impact on that process. If applied by the courts to international commercial arbitration litigation,⁴ these provisions could weaken the viability of arbitration as a process for resolving international commercial disputes. The French codal provisions on domestic arbitration matters are neither numerous nor exceedingly detailed in their substance. They reflect a legislative policy which attempts to balance the need to provide sufficiently comprehensive legislative regulation with the need to retain the flexibility necessary for arbitration to function properly.⁵ These provisions

4. French courts might apply French domestic arbitration law to international commercial arbitration in an effort to devise a doctrine which remains within the context of statutorily-created law.

5. For a discussion of this question before the enactment of the new Decree, see Level, *Compromis d'Arbitrage*, in [1972] *Juris-classeur civil II* arts. 2059-2061. In his article, Professor Level noted that the attitude of French courts toward arbitration, which was hostile in the nineteenth century, has changed dramatically in the last twenty years. *Id.* The early French judicial hostility, at least to domestic arbitration, was apparent in the fact that the *Cour de Cassation* had declared the compromissory clause unlawful in French domestic law. This attitude was modified subsequently by developments in the international area, e.g., the founding of the International Chamber of Commerce in Paris in the 1920s and the French ratification of international conventions on arbitration which recognized the validity of compromissory clauses. Also, there existed a growing legislative and judicial realization at this time that arbitration did not detract from judicial prerogatives and provided a better framework in which to resolve commercial disputes. These developments are discussed in part in the text at notes 40-48 *infra*.

Professor Level also noted that the French law on arbitration had not been subject to any substantial legislative reform since the enactment of the *Code de procédure civile* in 1806 and that practitioners and other arbitration specialists had been pressing for a full reform of the applicable provisions for many years without success. According to both Professor Level and the *Comité français de l'arbitrage*, this reform was needed especially in the area of the means of recourse (*voies de recours*) available against arbitral awards. This long-awaited legislative reform has been enacted recently in the form of the Decree of May 14, 1980, *supra* note 2. Articles 41-51 of the Decree do alter considerably the means of recourse procedure that is available against arbitral awards and intro-

consist of article 631 of the *Code de Commerce*,⁶ articles 2059 through 2061 of the *Code civil*,⁷ and the recently enacted provi-

duce significant changes in this area of French law generally.

For an English language (albeit somewhat dated) discussion of French domestic arbitration law, see P. Herzog, *Civil Procedure in France* 513-34 (1967). This treatment constitutes an excellent discussion of the topic even as it relates to the former provisions of the new civil procedure code but does not take into account the 1980 reforms. See also *Doing Business in Europe*, [1979] *Comm. Mkt. Rep.* (CCH) ¶ 23,031 [hereinafter cited as *Comm. Mkt. Rep.*]; Robert, *France*, in 1 *International Commercial Arbitration* 240 (1956); Cartier, *Arbitration in France*, 3 *Arb. J. (N.S.)* 25 (1948); Domke, *Arbitral Clauses And Awards, Recent Developments in French Law*, 17 *Tul. L. Rev.* 447 (1943). None of these sources takes into account the latest legislative reforms of French procedural law on arbitration. For a French language discussion of French domestic arbitration, see Giverdon, *Compromis—Clause Compromissoire*, II *Encyclopédie Dalloz (Droit Civil)* 1 (2e ed. Supp. 1980). In light of the reform, the discussion contained in this source also is somewhat dated.

Before the enactment of the Decree of May 14, 1980, the corpus of applicable law consisted of twenty-seven articles; twenty-three articles dealt principally with procedural issues. The four articles that related to more substantive matters established fundamental legal rules that could not be waived by the agreement of the parties. As a general rule, these imperative requirements did not unduly restrict the process of arbitration. The remaining articles mainly covered issues relating to the procedural implementation of the arbitral proceeding. Also, particular attention was paid to issues which might arise in exceptional circumstances, e.g., when one of the parties raised a plea of forgery (*inscription de faux*) or when the nomination of a third arbitrator (a *tiers arbitre*) was required to resolve the deadlock between the two arbitrators originally named. Few of the rules were mandatory, and the courts, recognizing the contractual nature of arbitration, declared that many of them could be modified by the parties in their agreement. All of these provisions, however, were repealed by the Decree of May 14, 1980, *supra* note 2.

6. *Code de Commerce* [C. com.] art. 631 (Fr.). This provision was modified by the Law of December 31, 1925, [1926] *Sirey—Lois Annotées* [S. *Lois Annot.*] 57-58 (Fr.), which legalized compromissory clauses in certain specified commercial cases. According to Professor Herzog, this law was first introduced in 1907, gave rise to extensive discussions, and encountered strong opposition. See Herzog, *supra* note 5, at 513 n.169.

7. *Code civil* [C. civ.] tit. 16, *Du Compromis* (Fr.). The three provisions contained in the *Code civil* are the product of a 1972 legislative enactment which repealed parts of the section of the *Code de procédure civile* dealing with arbitration. See Law of July 5, 1972, [1972] *J.O.* 7181, [1972] *Juris-classeur périodique, la semaine juridique* [J.C.P.] *Legislation* III No. 39362 (Fr.). Other than the Law of December 31, 1925, *supra* note 6, this enactment was the only legislative change preceeding the enactment of the Decree of May 14, 1980, *supra* note 2, that had been promulgated on the subject of arbitration since 1806.

It should be noted, however, that the enactment of the *Nouveau Code de procédure civile* which was published in part by the Decree of December 5, 1975, [1975] *J.O.* 12521 (Fr.), indirectly modified some of the arbitration law, although articles 1005 to 1028 of the *Code* of 1806 remained in effect until October 1, 1980. It has been argued that this legislation eliminated the *tierce opposition* procedure against the *exequatur* granted to foreign arbitral awards, that it permitted appeal against the awards rendered by arbitrators sitting as *amicales compositeurs*, and, finally, that it reduced the number of cases in which an award could be attacked by the *recours en revision* procedure. See Viatte, *La Reforme De la Procédure Civile Et Les Recours En Matière D'Arbitrage*, [1976] *La Gazette du Palais* [Gaz. Pal.] *Doctrine* I 256 (1976).

sions of the Decree of May 14, 1980, which repealed articles 1005 through 1028 of the *Nouveau Code de procédure civile* and replaced them with some fifty new provisions.⁸

Although these arguments were advanced by a very distinguished French procedural specialist, they remain conjectural in character and have not been confirmed by subsequent court decisions. In fact, a recent Paris court decision, reported in advance sheets, seemed to oppose the idea that appeal was possible against awards rendered by *amiables compositeurs*. In any event, the provisions of the Decree of May 14, 1980, seem to have resolved many of these potential problems. For example, article 42 of the Decree provides that appeal is not available against an arbitral award rendered by an arbitral tribunal sitting as *amiables compositeurs* unless the parties have expressly provided otherwise. Also, article 51 of the Decree provides that the *recours en révision* is available against arbitral awards upon the same grounds and under the same conditions as judicial judgments. Therefore, there does not seem to be any reduction in the availability of the remedy. Finally, article 41 of the Decree does state that the *tierce opposition* procedure can be invoked against arbitral awards, but the applicability of the Decree provisions relating to the means of recourse against international arbitral awards is the chief problem area of the Decree. See text at notes 159-61 *infra*. One might presume that the *tierce opposition* remedy still can be utilized in the context of international commercial arbitration, but only future court interpretations will resolve the uncertainty in this area. On this latter point, see also notes 107-09 *infra* and accompanying text.

The substance of the three provisions inserted into the *Code civil* by the Law of July 5, 1972, [1972] J.O. 7181, [1972] J.C.P. *Legislation* III No. 39362 (Fr.), is hardly new. They at least represent the transfer of the same provisions from one code to another without any substantive changes. At most, they codify existing principles of law which were not formally part of any code, but were established by the court interpretation of the codal provisions. They represent nothing new for the French domestic law on arbitration and one wonders why the legislature thought it appropriate to create a section of the *Code civil* to deal with arbitration and to separate it from the other provisions on arbitration contained in the *Nouveau Code de procédure civile*. Perhaps the reason lies in the substantive character of these provisions.

8. Prior to May 14, 1980, most of the French domestic law on arbitration consisted of articles 1005 through 1026 and article 1028 of the *Nouveau Code de procédure civile*. Nou. C. pr. civ. Bk. 3, *Des arbitrages* (Fr.). For an extensive analysis of these provisions, see [1975] J.C.P. *De procédure civile* VIII. The Decree of May 14, 1980, however, repealed those articles and replaced them with some fifty new provisions which were to take effect on October 1, 1980. See [1980] J.O. 1238-40 (Fr.). The new provisions are in some instances fundamentally different in substance from the repealed articles. The new rules appear to be organized more coherently, to fill in details that were neglected by the former articles, and to align the procedural rules relating to arbitration with the rules contained in the *Nouveau Code de procédure civile* relating to court procedure. The principal contribution of the new provisions lies in a more detailed (but nonetheless succinct) treatment of the rules applying to the arbitral procedure, the enforcement of awards, and the means of recourse which are available against arbitral awards. See generally Robert, *supra* note 2. The enactment of this legislation does not, however, modify the basic points which are discussed in the text relating to the potential restriction of French domestic arbitration law as they might relate to international commercial arbitration.

Capacity to Arbitrate and the Arbitrability of Disputes

Under French domestic law, the validity of an arbitration agreement depends upon two factors: (1) the capacity of the parties to arbitrate; and (2) the arbitrability of the subject matter of the agreement. As a general rule, all persons have the capacity to arbitrate regarding rights over which they have the power to contract.⁹ As to arbitrability of the subject matter of the agreement, French law prohibits arbitration agreements in a number of specific areas in which the principle of the autonomy of the will of the parties does not apply and in which the intervention of a court of law is deemed to be indispensable: (1) the status and capacity of persons; (2) matters relating to divorce and separation; (3) disputes concerning public collectivities and public establishments; and (4), more generally, all matters involving public policy concerns.¹⁰ It should be emphasized that the third area in which arbitration agreements are prohibited has been interpreted to entail the lack of capacity of the State and its entities to arbitrate disputes in which they are involved.¹¹ In addition, the compromissory clause, the agreement to submit future disputes to arbitration, is unlawful except in commercial cases.¹²

9. C. civ. art. 2059 (Fr.). This article repealed article 1003 of the *Code de procédure civile*, but did not modify the substance of that former provision. See note 6 *supra* and accompanying text. In other words, the parties to an arbitration agreement must have the legal capacity to enter into contractual agreements generally and the subject matter of their arbitration agreement must concern existing rights that can be validly submitted to arbitration. C. civ. art. 2059 (Fr.). See also Level, *supra* note 5.

10. C. civ. art. 2060 (Fr.). This article repealed article 1004 of the *Code de procédure civile* and its language is very similar to the wording of that former provision. See note 7 *supra* and accompanying text. Like article 2059, this article deals with the question of the arbitrability of disputes; its specificity represents a refinement of the general principle contained in article 2059. See Level, *supra* note 5, at 4.

11. See Level, *supra* note 5, at 4-5.

12. C. civ. art. 2061 (Fr.), and C. Com. art. 631 (Fr.). Article 2061 of the *Code civil* provides that the compromissory clause is null and void unless provided otherwise by law; article 631 of the *Code de commerce* establishes the validity of the compromissory clause in certain specified commercial cases. See note 6 *supra* and accompanying text.

Article 2061 probably is the most novel of the three provisions in the *Code civil*, by virtue of its mere existence. The rule that it establishes existed previously through the judicial construction of article 1006 of the *Code de procédure civile* which related to the conditions for the validity of the *compromis*—the submission. According to the courts, the compromissory clause was null and void because, by its nature, it failed to satisfy the conditions for the validity of the *compromis*. The substance of article 2061 simply codifies this well-established principle of French domestic arbitral law, leaving article 1006 of the *Nouveau Code de procédure civile* free to fulfill its primary function of regulating the validity of the *compromis*. See note 7 *supra* and accompanying text. See also Level, *supra* note 3, at 5.

The Time Limit Rule and Other Public Policy Requirements

Although a valid arbitration agreement need not set a time limit in which the arbitral proceeding and the rendering of an award are to take place, French law provides that, in the absence of an agreement by the parties on this matter, the arbitrators' terms of reference¹³ will last for a period of six months from the date upon which the last arbitrator accepted his terms of reference.¹⁴ Once the time limit—established either by the parties or by law—has expired, the arbitrators become *functus officio* and no longer have jurisdictional powers except in relatively minor areas.¹⁵ As a consequence, an award rendered after the expiration of the time limit is absolutely null and void.¹⁶ The nullity of an award also may stem from the failure to observe public policy requirements in the arbitral proceedings, such as the guarantee of basic defense rights and other fundamental procedural rules.¹⁷ In addition, arbitral awards, like court deci-

It should be noted that the new Decree contains separate provisions relating to the validity of the compromissory clause and the *compromis*. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 2-10. This modification seems to reflect the beginnings of a new French concept of the compromissory clause under which it is given its deserved primacy over the *compromis*. Article 2061 of the *Code civil* still applies and establishes the general rule that the compromissory clause is unlawful except in exceptional circumstances. This provision was the product of parliamentary law, while the Decree is a regulatory document issued by the executive branch and is, therefore, inferior in status to a parliamentary law. Thus, the new conception is merely a type of muted suggestion and would have to be taken up and adopted by subsequent legislative texts that presumably would modify article 2061 of the *Code civil*. See generally Robert, *supra* note 2. See also H. Devries, *Civil Law and the Anglo-American Lawyer* 24-53 (1976).

Notwithstanding its limited legal validity, the compromissory clause retains its importance in actual domestic arbitral practice.

13. This phrase is known in French as *la mission des arbitres*—literally, the mission of the arbitrators. It constitutes the grant of private jurisdictional authority given to the arbitrators by the parties. The terms of reference define the scope and extent of the jurisdictional authority of the arbitral tribunal, stating what the dispute involves and what questions and rulings the tribunal should address and render.

14. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 16. This provision repealed former article 1007 and modified its substance; the former article had provided for a three month time limit. See Nou. C. pr. art. 1007 (Fr.).

15. Once they have rendered an award, the arbitrators nonetheless retain the power to interpret the award, to correct material errors and omissions that affect it, and to complete it when they have failed to rule upon a claim that was presented.

16. See Nou. C. pr. civ. art. 1007 (Fr.). Although the Decree of May 14, 1980, does not mention this point expressly, it would seem that the nullity rule still would apply. *Accord*, Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 19.

17. See Robert, *supra* note 5, at 253. See also Herzog, *supra* note 5, at 254. This rule has been integrated into the substance of the new Decree in article 44 dealing with

sions, must be based upon a reasoned decision: one which mentions the subject matter of the dispute, summarizes the arguments, and sets forth the reasons for the decision.¹⁸

Appeal

As a general rule, French domestic arbitral awards, regardless of the amount in issue, are subject to judicial appeal.¹⁹ This procedure, in the French system as in most civilian systems, involves a *de novo* re-examination of the facts and the law as well as the possibility of introducing new evidence.²⁰ An appeal lies to the *cour d'appel* in the jurisdiction in which the award was rendered, and the ordinary rules of procedure governing appeal apply.²¹ In their agreement, however, the parties can and generally do waive their right to appeal the award²² since, by agreeing to arbitrate, they have intentionally removed the dispute from the jurisdiction of the courts. Despite such a waiver, the arbitral award still can be subject to another but more limited form of appeal (termed *recours en annulation*) for an alleged violation of a rule of public policy or upon other—more technical—grounds. When an award is set aside under this action, the

the *recours en annulation*, a means of recourse procedure. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 44.

18. See Robert & Moreau, *supra* note 2, at M2-M3. See also Decree of May 14, 1980 [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 31, 32. The requirement of a reasoned decision also is a public policy (*ordre public*) requirement. Although the notion of public policy concerns is elusive, it generally can be said to refer to certain imperative legal rules and principles to which no exception can be made without infringing upon the basic framework of the legal system as it stands. In practice, it is invoked by the French courts to refer to what is conceived to be, at a given moment, the fundamental legal notions which govern the French legal system. In many instances, the term public policy refers to a certain sense of procedural fairness which corresponds roughly to the American notion of procedural due process. The public policy rule is stated in C. civ. art. 6 (Fr.), which provides that one may not annul by private agreement the laws relating to public policy and good morals. For an extensive discussion of this provision, see Gégout, *Ordre Public et Bonnes Moeurs*, V Encyclopédie Dalloz (Droit Civil) 30 (Supp. 2e éd. 1980).

19. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 42. See also the repealed provision in Nou. C. pr. civ. art. 1023 (Fr.); Comm. Mkt. Rep., *supra* note 5, at ¶ 23,038. This principle is known as the *deuxième degré de juridiction* and is common to most civilian legal systems; it differs from appeal in common law systems in which only questions of law are subject to appellate review.

20. See Herzog, *supra* note 5, at 532.

21. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 46-47. See also the repealed provision in Nou. C. pr. civ. art. 1023 (Fr.).

22. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 42. See also the repealed provision in Nou. C. pr. civ. art. 1010 (Fr.).

court can render a ruling on the merits unless all the parties agree otherwise.²³

Enforceability of the Award

To be legally enforceable, a domestic arbitral award must be granted an *exequatur* (an enforcement order) by an ordinance of the *judge de l'exécution* (the enforcement judge) of the *Tribunal de grande instance* (the district court) in the jurisdiction in which the award was rendered.²⁴ The *exequatur* procedure for domestic arbitral awards consists of a simplified proceeding in which only the enforcement judge and not the entire court is sitting.²⁵ Moreover, the enforcement judge has limited powers of review: he has the authority to determine only whether the award on its face satisfies basic public policy requirements.²⁶

It should be noted that the Decree of May 14, 1980, modified in part the previous rules.²⁷ Under the provisions of the De-

23. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 44. See also the repealed provision in Nou. C. pr. civ. art. 1028 (Fr.). A recent government decree appeared to undermine the parties' prerogative to waive their right to appeal the arbitral award in their arbitration agreement, specifically, in a compromissory clause. Article 100 of the Decree of August 28, 1972 provided that the waiver of appeal could not take place before the dispute had arisen. See Decree of Aug. 28, 1972, [1972] J.O. 9300 (Fr.), art. 100. See also Nou. C. pr. civ. arts. 41 and 557 (Fr.). In Judgment of Oct. 5, 1977, Cass. civ. 2^e, Fr., [1978] J.C.P. *Jurisprudence* II No. 12803, the French Supreme Court ruled that the provisions of the Decree of August 28, 1972 did not apply to matters of arbitration. See also Rep. Quest. Ecrite No. 10.278, [1979] J.O. 775 (Debate Ass. Nat.).

24. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 37. See also the repealed provision in Nou. C. pr. civ. art. 1020 (Fr.). Prior to the 1980 Decree, an arbitral award did not have *res judicata* effect until it was granted an *exequatur*. See Robert & Moreau, *supra* note 2, at M4. Article 36 of the Decree, however, provides that, once it is rendered, an arbitral award does have *res judicata* (*autorité de la chose jugée*) effect for the dispute which it settles. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 36. See text at notes 26-28 *infra*.

25. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 37. See also Robert & Moreau, *supra* note 2, at N2.

26. See Nou. C. pr. civ. art. 1021 (Fr.) (note citation to Judgment of June 17, 1971, Cas. civ. 2^e, Fr., [1971] Dalloz *Sommaires* 177. The Decree of May 14, 1980, contains no express provision on this matter, but it can be assumed that the implied language of articles 36 and 37 of the Decree incorporates this well-settled rule. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 36, 37. See also Robert & Moreau, *supra* note 2, at N2-N3.

27. The recent reform of the French procedural law on arbitration, contained in the Decree of May 14, 1980, did not modify the potential restrictions of the French domestic procedural law relating to arbitration. Most notably, under the new legislation, arbitral proceedings still are subject to a time limit, albeit somewhat longer than under the former provisions. Public policy considerations—requiring, for example, that arbitral

cree, a domestic arbitral award, although still requiring an *exequatur* in order to be legally enforceable, has *res judicata* effect once it is rendered.²⁸ In addition, the enforcement order granted by the *judge de l'exécution* no longer is subject to any means of recourse procedure.²⁹ The recourse procedure must now be directed at the arbitral award itself through either appeal or the *recours en annulation* remedy.³⁰

awards be rendered upon the basis of a reasoned decision—still are in effect. An arbitral award still is subject to appeal. And, finally, an *exequatur* still is necessary to render the award legally enforceable in the absence of voluntary compliance. Since these requirements are expressly provided for in and not substantially modified by the new legislation, the judicial application and interpretation of these requirements, either in the context of domestic or international arbitration, are still relevant. See note 2 *supra* and accompanying text. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 16, 31, 37, 42.

28. Decree of May 14, 1980, [1980] J.O. 1238-39, [1980] D.S.L. 207 (Fr.), arts. 36, 37. For a discussion of the distinction between the concept of *autorité de la chose jugée* and *force de la chose jugée*, see Blum & Blum, *Decret No. 80-354 Du 14 Mai 1980 Modifiant Les Regles Relatives A L'Arbitrage*, [1980] Gaz. Pal. *Doctrine* II, 11. This distinction seems to refer to the following procedural status of an arbitral award. Once the arbitral tribunal has rendered an award, that award, like a court judgment, has the status of a final judgment; under the French system, it is a final determination of the dispute which, however, is still subject to appeal or other means of recourse. The award, therefore, has the *autorité de la chose jugée*. Once appeal or the other means of recourse have been exercised against the award (*i.e.*, when all judicial remedies have been exhausted) the award has a complete *res judicata* effect—*force de la chose jugée*—and it is entirely dispositive of the dispute between the two parties.

29. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 48.

30. *Id.*, arts. 41-47. Previously, a party could challenge the enforcement order itself (and hence the award) by bringing an *opposition en nullité*, formerly the most important method for obtaining the court review of an arbitral award. Under this procedure, a party could challenge the enforcement order on the ground that the award contained a procedural defect and should be set aside, *e.g.*, if the award went beyond the limits of the arbitration agreement or was rendered by an arbitrator not authorized to act. See, *e.g.*, Herzog, *supra* note 5, at 531-32. See also Nou. C. pr. civ. art. 1028 (Fr.). The *exequatur* of an arbitral award could be annulled: (1) if the award were rendered in the absence of a valid arbitration agreement or outside the terms of a valid agreement; (2) if it were rendered upon the basis of a null and void or expired arbitration agreement; (3) if it were rendered by some arbitrators who were not authorized to rule in the absence of other arbitrators; (4) if it were rendered by a third arbitrator (a *tiers arbitre*) who failed to confer with the divided arbitrators; and (5) if it represented a ruling on matters which were not presented. *Id.* This action was conducted as an ordinary suit and was brought before the court that had rendered the *exequatur*. Such an action could be brought as long as the award had not been enforced; appeal was possible against the decision rendered and further appeal could be had to the French Supreme Court. See Robert, *supra* note 5, at 265.

In addition to the article 1028 procedure described above, the parties also could have the arbitral award reviewed through recourse to the *recours en révision* (formerly called the *requête civile*). See Nou. C. pr. civ. art. 1026 (Fr.). This action was brought before the court that was to hear an appeal from the arbitral award. This method of

Possible International Impact of the Domestic Rules

This selective review of the French domestic arbitration law reveals that, despite its generally flexible and moderate character,³¹ the law does contain a number of provisions which place significant restrictions upon the process of arbitration. These provisions, if applied by analogy to litigation involving international commercial arbitration, could undermine the viability of arbitration as a mechanism for dispute resolution in a transnational commercial setting. For example, the fact that the domestic law prohibits government entities from entering into arbitration agreements³² could be a source of legal problems for foreign commercial concerns that deal with such entities and are not aware of this provision. In addition, with regard to the recognition and enforcement of international arbitral awards, French courts could apply strictly the public policy requirements of the domestic law and require a reasoned decision for international arbitral awards³³ or impose a time limit upon the arbitral proceedings.³⁴ There also is the possibility that international arbitral awards could be subject to an extensive review in the enforcement proceeding or to a general appeal before the French courts.³⁵ Finally, judicial principles, other than those elaborated in the context of the specifically applicable domestic legislation, could be called into play. For instance, in light of the fact that the French Supreme Court has held that—in domestic arbitration matters—the compromissory clause is only an accessory part of the principal contract,³⁶ the validity of an arbitration

review was not often used for ordinary judgments and seems to have had even less importance in matters of arbitration. See Herzog, *supra* note 5, at 533. Moreover, according to one commentator, the grounds upon which this action could be brought were limited by the 1975 procedural law reforms. See Viatte, *supra* note 7, at 256. For the new provisions on the additional means of recourse other than *appel*, see Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 41-48.

It should be noted that the *tiers arbitre* is not simply a third arbitrator who is appointed to an arbitral tribunal consisting of two arbitrators before the arbitration takes place. Under the previous French domestic rules on arbitration, the *tiers arbitre* was appointed when the arbitral tribunal consisting of two arbitrators was at a deadlock. His task was to break the deadlock. As a consequence, translating the term *tiers arbitre* as third arbitrator is not totally accurate and should be read with this caveat in mind.

31. See note 5 *supra* and accompanying text.

32. See notes 10 & 11 *supra* and accompanying text.

33. See note 18 *supra* and accompanying text.

34. See notes 14 & 16 *supra* and accompanying text.

35. See notes 25 & 26 *supra*, notes 60-71 & 74-80 *infra* and accompanying text.

36. See Judgment of Jan. 11, 1960, Cass. com., Fr., [1960] Revue Arbitrage [Rev.

clause in an international contract could be made dependent upon the validity of the main contract. Such a ruling would provide an additional ground upon which to challenge the validity of international arbitral awards and the arbitral process from which they emerge.

The Actual International Impact of the Domestic Rules

The analysis of the French court decisions reveals that none of these possibilities has materialized. The courts have both assessed the international arbitration cases with a sense of realism—the type of pragmatism that promotes France's self-interest in the international commercial arena—and attempted to adopt a position that would best foster the stability of the international economic order and insure France's contribution to that stability. In doing so, the courts not only have isolated the litigation relating to international commercial arbitration from the potentially restrictive domestic law, but also they have created a singularly liberal body of doctrine which minimizes other possible legal obstacles to the process of international commercial arbitration. While the development of the separability doctrine is perhaps the chief accomplishment of this *jurisprudence*,³⁷ other fundamental principles have been established as well. Refusing to be bound by a servile analogy to the domestic law and recognizing the special needs of international commercial arbitration, the French courts have declared, *inter alia*, that the French State and its entities must abide by arbitration agreements in-

Arb.] 44; Judgment of June 10, 1958, Cass. com., Fr., [1958] Bulletin des arrêts de la Cour de cassation, chambres civiles [Bull. Civ.] III 208; Judgment of Oct. 14, 1957, Cass. com., Fr., 56 *Revue trimestrielle droit civile* [Rev. trim. dr. civ.] 659 (1958); Judgment of Oct. 6, 1953, Cass. com., Fr., [1954] *Sirey, Jurisprudence* [S. Jur.] I 149. See also Robert & Moreau, *supra* note 2, at H10. Article 26 of the Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), has modified the previously applicable domestic law rule, but there is some question as to whether it provides for the separability doctrine in domestic French law. Although the substance of article 26 appears to be comprehensive, it refers only to circumstances in which a jurisdictional challenge is raised upon the basis that the dispute submitted to arbitration was not covered by the terms of the arbitration agreement or that the arbitration agreement was invalid. The language of article 26 does not refer explicitly to a situation involving a jurisdictional challenge based upon the ground that the invalidity of the arbitration agreement stems from the nullity of the principal contract. It appears that only future court decisions will clarify this point. In any event, the previous lack of a separability doctrine in French domestic arbitration law acted as a disincentive to foreign parties who were contemplating arbitration under French procedural and substantive rules.

37. See notes 95-101 *infra* and accompanying text.

serted in private international contracts³⁸ and that French public policy requirements, in their international acceptance, demand only that basic defense rights be guaranteed in the arbitral proceeding.³⁹

THE EARLY COURT DECISIONS

The Alliance Decision

In their early jurisprudence, the French courts approached matters involving domestic and international commercial arbitration from distinct doctrinal perspectives. Generally, they evidenced a more liberal and favorable attitude towards arbitration involving international commercial interests. In exclusively domestic cases, the French courts exhibited greater reticence and assumed a much less amenable posture toward arbitration. For example, although arbitration has substantial historical antecedents in French law that predate the revolutionary period,⁴⁰ its status as a mechanism for the resolution of domestic contractual disputes was undermined considerably in the mid-nineteenth century. In *L'Alliance c. Prunier*, the French Supreme Court ruled that compromissory clauses were unlawful in internal French law,⁴¹ thereby significantly reducing the importance of arbitration in domestic commercial matters.⁴² The decision in *L'Alliance* contrasted sharply with other early court decisions dealing with the validity of compromissory clauses in what could be termed, according to modern judicial definitions, international arbitration cases.⁴³ This dichotomy presaged the dual doc-

38. See notes 90-95 *infra* and accompanying text.

39. See notes 117-33 *infra* and accompanying text.

40. See J. Robert, *Arbitrage civil et commercial* 9-12 (4th ed. 1967). See also Herzog, *supra* note 5, at 513-14.

41. Judgment of July 10, 1843, Cass. civ., Fr., [1843] S. Jur. I 561.

42. See Herzog *supra* note 5, at 513. The law of December 31, 1925, [1926] S. lois annot. 57-58 (Fr.), modified this ruling by providing that compromissory clauses were lawful in commercial matters. See note 6 *supra* and accompanying text.

43. At the time these decisions were rendered, the term "international arbitration" apparently had not yet come into vogue and the courts consistently characterized arbitrations which took place abroad between parties of different nationality and arbitral awards which were rendered by arbitral tribunals sitting in jurisdictions other than France as foreign. This determination was reached despite the fact that these arbitral awards involved the resolution of what could be considered as international commercial disputes. No attempt was made at this time by the courts or legal scholars to draw a distinction between foreign and international arbitral awards; the notion of foreign arbitrations and arbitral awards appeared to cover both categories.

trinal posture the French courts were to adopt in these matters.

This lack of conceptual differentiation between the two terms still exists to some extent. For example, some of the scholarly literature still refers to the enforcement of foreign, not international, arbitral awards, but it is evident that the discussion is meant to apply to both types of awards. This lack of distinction between the notion of foreign and international arbitral awards is supported by the formal title of the 1958 New York Convention which refers to the recognition and enforcement of foreign arbitral awards, despite the fact that it was intended to be the universal charter of international arbitration. The latest arbitral convention, the 1961 European Convention, however, refers to international arbitration.

A reading of the more recent French judicial opinions relating to international arbitration reveals that contemporary French courts are speaking in terms of international arbitral awards and not foreign awards, again blurring the distinction between the two. Many legal commentators have abandoned efforts to maintain a workable distinction between the two types of awards. In effect, what were formerly referred to as foreign awards are now being categorized as international arbitral awards.

The distinction between foreign and international arbitral awards seems to be of limited utility. It is unlikely to surface in the context of arbitral awards rendered abroad and sought to be enforced in France because the vast majority of such awards involve international commercial interests. The distinction could become more important in circumstances in which a French domestic arbitration and arbitral award involved the interests of international commerce. Here, the liberal regime for international commercial arbitration could apply to this "domestic" award because the subject matter of the arbitration involved the interests of international commerce.

Nevertheless, some French legal scholars have insisted upon maintaining the distinction, despite its lack of practical significance in actual litigation. For an extensive discussion of this distinction, see, e.g., Fragistras, *Arbitrage étranger et arbitrage international en droit privé*, 49 *Revue Critique de Droit International Privé* [R.C.D.I.P.] 1 (1960); Fouchard, *Quand un arbitrage est-il international?*, [1970] *Rev. Arb.* 59; Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, 1 *Cours de la haye* 359 (1963).

For the sake of consistency, the phrase international arbitration and arbitral awards has been used throughout most of the text both when discussing the early and the contemporary case law. There are some minor exceptions, but they do not reflect a difference in substance. They are introduced only for the sake of clarity in the textual discussion. See, e.g., text at notes 80-95 *infra*. Despite the difference of terminology used in the early decisions, all the cases referred to in this article, under modern definitions, deal with what can be considered to be international arbitrations and arbitral awards. According to modern definitions, a purely foreign arbitration or award, in its proper sense and under the French judicial concept of international arbitration (see note 109 *infra*), would be linked totally to the legal order of a foreign State by the procedures used and the subject matter of the dispute and would not call into play any international commercial interest. Essentially, it would be a domestic award rendered in a foreign State which would come into contact with the French legal order, usually through enforcement proceedings. None of the early cases fit this narrow definition since they involved disputes between parties of different nationality and all had some sort of impact upon what could now be considered as international commercial relations.

Although there appears to be significant practical value attaching to the distinction between domestic and international arbitral awards, the dichotomy between foreign and international arbitral awards seems, in the context of contemporary litigation and international commercial transactions, to be meaningless. The latter distinction, therefore, is without the central consideration of this article.

The decision in *L'Alliance* was based upon an interpretation of article 1006 of the old *Code de procédure civile*⁴⁴ which provided that a valid *compromis*, the submission to arbitration of an existing dispute, must define the subject matter of the dispute and name the arbitrators.⁴⁵ The French Supreme Court reasoned that the *clause compromissoire*, the arbitration clause relating to future disputes,⁴⁶ was unlawful since, by its very nature, it did not satisfy the requirements applying to the *compromis*—especially the requirement that the subject matter of the dispute be defined in the arbitration agreement. In the court's assessment, the procedural and substantive guarantees preferred by a court of law could not be waived without knowing who was to judge what matter.⁴⁷ Accordingly, the court interpreted article 1006, despite its literal reference to the *compromis*, to prohibit compromissory clauses.⁴⁸ As a consequence, French nationals who were parties to a domestic contract could lawfully agree to arbitrate once a dispute had arisen, but could not agree to arbitrate future disputes which might arise under that contract.

The Alliance Holding in the International Area

Practical considerations, however, militated against extending the article 1006 prohibition to matters involving international commercial arbitration.⁴⁹ For example, the domestic law of the United States and most European countries—the principal commercial partners of France—recognized the validity of compromissory clauses.⁵⁰ In addition, the French rules of exorbitant jurisdiction, contained in articles 14 and 15 of the

44. Nou. C. pr. civ. art. 1006 (Fr.). Reference is made to the new civil procedure code because the text of the article has not been changed since the beginning of the nineteenth century. Articles 7-10 of the Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), however, modified considerably the previously applicable provisions.

45. For a discussion of the *compromis*, see Herzog, *supra* note 5, at 514.

46. For a discussion of the *clause compromissoire*, see *id.*

47. Judgment of July 10, 1843, Cass. civ., Fr., [1843] S. Jur. I 561, 568.

48. *Id.* It is no longer necessary to articulate the rules relating to the compromissory clause through the judicial interpretation of the express provisions applying to the *compromis*. The Decree of May 14, 1980, contains a separate set of rules for each type of arbitration agreement. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 2-10. As a result, the compromissory clause has at least the beginnings of a new legal status in French domestic law which reflects its importance in actual practice.

49. See Perreau, *De la validité de la clause compromissoire insérée dans un contrat passé à l'étranger*, 37 Journal du Droit International—Clunet [J. Dr. Int'l—Clunet] 787 (1910).

50. *Id.*

Code civil, encouraged parties dealing with French nationals in an international commercial setting to provide for arbitration in their agreement. These rules could prevent the recognition and enforcement in France of foreign judgments rendered against French nationals. A mandatory agreement to arbitrate was desirable in this context since it constituted a waiver of the exorbitant jurisdiction provisions.⁵¹

In order to prevent the *Alliance* ruling from frustrating the French role in international commerce, the courts declared that the prohibition against compromissory clauses contained in article 1006 was not part of French public policy concerns and, therefore, need not be applied in litigation concerning international arbitral awards. The *cours d'appel* were the first courts to espouse and promote this view. For example, in *Roze et al. c. Victory Hill Gold Mining Company*, decided in 1894, the *Cour d'appel* of Paris recognized the jurisdictional effects of a compromissory clause contained in the by-laws of an English company.⁵² There, the English company brought an action before the French lower court against three French nationals who were members of the company. The latter opposed the action on jurisdictional grounds, arguing that the court did not have jurisdiction over the matter by virtue of the compromissory clause in the by-laws of the company, providing that any disputes between the company and its members would be submitted to arbitration.⁵³ The lower court disregarded the defendants' argument, holding it had jurisdiction. On appeal, the appeals court ruled that the compromissory clause was valid and rendered the lower court incompetent to hear the matter. According to the court, the compromissory clause—lawful under English law—was not contrary to French public policy despite the domestic prohibition in article 1006. The compromissory clause, therefore, had the effect of removing the dispute from the jurisdiction of the French courts.⁵⁴

This position was adopted by other French courts ruling in similar litigation.⁵⁵ As a general rule, the compromissory clause,

51. *Id.* See also notes 58-60 *infra* and accompanying text.

52. Judgment of Apr. 10, 1894, *Cour d'appel* 2e, Paris, 21 J. Dr. Int'l—Clunet 878 (1894).

53. *Id.*

54. *Id.*

55. See, e.g., Judgment of Dec. 27, 1907, *Cour d'appel* 2e, Alger, 37 J. Dr.

although unlawful in French domestic law, was enforceable if included in a contract validly governed by a foreign law which recognized the clause as lawful. Therefore, the French courts neither could assume jurisdiction over the dispute nor refuse to enforce the arbitral award in France on the ground that it violated the domestic French law prohibition. In 1904, the French Supreme Court lent its support to this position. In *Bernard et Lowagie c. The General Mercantil Company*, the court held that a compromissory clause in an agreement concluded in Belgium between a foreign party and French contractants effectively prevented a French court from assuming jurisdiction over a dispute arising under the agreement.⁵⁶ The court ruled that the invalidity of compromissory clauses under article 1006 was not an imperative prohibition having a public policy character.⁵⁷

Arbitration and the Exorbitant Jurisdictional Rules

In other early decisions, the French courts continued to exhibit a generally favorable and liberal attitude towards matters which, by contemporary standards, could be considered as involving international commercial arbitration. For example, even in the early case law, the French courts exempted the process of international commercial arbitration from the reach of the exorbitant jurisdictional rules. The French courts interpreted articles 14 and 15 of the *Code civil*, despite their literal language, as giving the French courts exclusive jurisdiction in matters involving French nationals.⁵⁸ The jurisdictional prerogative afforded to French parties under these provisions are especially significant if the French parties become judgment-debtors in foreign jurisdictions and all their assets are located in France. Under these provisions, if a French national is a party to an international contract, litigation concerning the performance of that contract must be brought before French courts unless the French national has waived the application of articles 14 and 15. A foreign

Int'l—Clunet 538 (1910); Judgment of Dec. 18, 1913, Cour d'appel Ire, Aix, 43 J. Dr. Int'l—Clunet 1218 (1916).

56. Judgment of June 21, 1904, Cass. req., Fr., 31 J. Dr. Int'l—Clunet 888 (1904).

57. *Id.*

58. For a detailed discussion of the implications of the French rules of exorbitant jurisdiction contained in articles 14 and 15 of the *Code civil*, see Carbonneau, *The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Article 14 and 15 (Code Civil) as Obstacles to the Enforcement of Foreign Judgments in France*, 2 *Hastings Int'l & Comp. L. Rev.* 307 (1979).

judgment, although enforceable in the foreign jurisdiction, would be denied an *exequatur* in France on the basis of the exorbitant jurisdictional rules, unless a treaty on the subject provided to the contrary.⁵⁹ In the early case law, the French courts consistently held, for example, that the provisions of article 14 of the *Code civil* did not have a public policy character and were waived by the fact that a French national had agreed to arbitrate disputes.

Foreign Judgments and Foreign Arbitral Awards Distinguished

The courts' favorable attitude toward matters involving international commercial arbitration also was apparent in other early cases involving the enforcement of arbitral awards; there, the courts drew an important distinction between foreign arbitral awards and foreign judgments. Refusing to equate the two, the courts stated that, although foreign arbitral awards shared some of the characteristics of foreign judicial judgments, arbitral awards derived their character principally from the contractual nature of the agreement in which they were included and, therefore, could not be treated as foreign judgments.⁶⁰ As a consequence, for the purposes of enforcement, a foreign arbitral award was not subject to a substantive merits review by a French court and benefitted from a simplified *exequatur* procedure.

59. *Id.* Another example of the French courts' liberal attitude is seen in Judgment of Nov. 21, 1860, Cass. civ., Fr., [1861] S. Jur. II 331, in which the French Supreme Court held that an arbitration agreement constituted a waiver of the exorbitant jurisdictional rules. There, a French national had entered into a charter party agreement that contained a compromissory clause stipulating that all disputes would be resolved through arbitration. The court ruled that, by binding himself to such an agreement, the French national effectively had submitted himself to the jurisdiction of the arbitral tribunal and waived the provisions of article 14 giving him the privilege of bringing an action before a French court.

The *Cour d'appel* of Paris followed this doctrine in Judgment of Mar. 2, 1892, *Cour d'appel* 2e, Paris, 19 J. Dr. Int'l—Clunet 879 (1892), showing that it had become an integrated part of French jurisprudence. Here, Hutchinson, a French national, brought a court action against the South African Commercial Agency, alleging that he had been removed arbitrarily from his position in the company. The company, however, maintained, *inter alia*, that the court lacked jurisdiction to hear the matter because of a compromissory clause. *Id.* at 880. On appeal, the Paris court held that the arbitration clause was valid and rendered the French courts incompetent to hear the matter. *Id.* at 881. The court ruled that the provisions of article 14 did not have a public policy character and could be and had been waived by the fact that the French national had agreed to arbitrate disputes. *Id.* at 890.

60. See, e.g., Judgment of July 15, 1928, Cass. req., Fr., 24 R.C.D.I.P. 285 (1929).

Until quite recently, foreign judgments were subjected for enforcement purposes to a substantive merits review by the French courts.⁶¹ For whatever reasons of policy, the French courts arrogated to themselves the privilege of determining to their satisfaction whether the foreign judge had isolated the relevant legal principles and applied them correctly to the facts of the case. This rule, however, was not extended to cases involving the enforcement of foreign arbitral awards. Although such arbitral awards required an *exequatur* in order to be enforceable in France,⁶² a series of early twentieth century decisions⁶³ established that the powers of the *exequatur* judge were significantly limited in the area of foreign arbitral awards and did not include the prerogative of reviewing the merits of an award.⁶⁴ The judge sitting in an enforcement proceeding only could ascertain whether the conditions for the validity of the award had been satisfied, *i.e.*, whether the parties had the capacity to agree to arbitration, whether the object of the arbitration clause was licit, whether the award had been rendered in valid form, and whether the arbitrators' decision complied with French public policy concerns.⁶⁵

Despite initial disagreement, French courts also decided that foreign arbitral awards should benefit from a simplified *exequatur* procedure. In the early part of the twentieth century, the lower French courts were divided on the issue of whether the *exequatur* of a foreign arbitral award should be rendered by the entire tribunal (the more formal and complicated procedure re-

61. See, e.g., Judgment of Apr. 19, 1819, Cass. civ., Fr., [1819] S. Jur. I 288. This case involved the enforcement in France of a United States money judgment in which the French Supreme Court held that foreign judgments had no conclusive legal effect in France and that the French courts could engage in a general review of the merits of such judgments.

62. See, e.g., Judgment of May 5, 1892, Cour d'appel 2e, Douai, 22 J. Dr. Int'l—Clunet 572 (1895).

63. See, e.g., Judgment of July 15, 1928, Cass. req., Fr., 24 R.C.D.I.P. 285 (1929); Judgment of Mar. 18, 1927, Trib. pr. inst. Marseille, 55 J. Dr. Int'l—Clunet 437 (1928); Judgment of Feb. 10, 1922, Trib. pr. inst. 1re, Seine, 49 J. Dr. Int'l—Clunet 150 (1922).

64. See note 63 *supra* and authorities cited therein.

65. See note 63 *supra* and authorities cited therein. This set of enforcement requirements, established by the French courts in the early twentieth century, bears a remarkable similarity to the article 5 grounds of the New York Convention of 1958 for the recognition and enforcement of foreign arbitral awards. See notes 131-32 & 139 *infra* and accompanying text. It should be noted that, since the Judgment of Jan. 7, 1964, Cass. civ., 1re, Fr., [1964] J.C.P. II No. 13590, the more liberal enforcement regime, proscribing a merits review, has been extended to foreign judgments.

quired for the enforcement of foreign judgments at that time) or simply by an ordinance of the presiding judge (*président*) of the tribunal (a simplified procedure which applied to the enforcement of domestic arbitral awards).⁶⁶ In a 1901 case,⁶⁷ a Paris court held that the entire tribunal should have jurisdiction to sit in an *exequatur* proceeding for a foreign arbitral award, reasoning that an arbitral award was the equivalent of a foreign judgment for purposes of enforcement. In 1932, however, another lower court advocated the adoption of the contrary view, deciding that the presiding judge of the tribunal alone should have jurisdiction to hear an *exequatur* action for a foreign arbitral award.⁶⁸

In 1937, the French Supreme Court laid the controversy to rest in its famous decision, *Roses c. Moller et Cie.*⁶⁹ There, a dispute arose between French and English nationals over a charter party agreement which contained an arbitration clause. An arbitral tribunal in Hong Kong rendered an award which obliged *Roses* to pay damages to *Moller*, and the presiding judge of a court in Haiphong granted an *exequatur* to the award.⁷⁰ On appeal, *Roses* maintained, *inter alia*, that the entire tribunal and not only its presiding judge had jurisdiction to grant the enforcement order. The French Supreme Court, however, disagreed. In a landmark opinion, the court assimilated foreign arbitral awards not to foreign judgments, but rather to their French domestic counterparts for purposes of enforcement. Because the arbitral awards were basically contractual in character, the court reasoned that they need only be granted an *exequatur* by the presiding judge of the court.⁷¹

66. See, e.g., Judgment of July 27, 1937, Cass. req., Fr., [1937] Gaz. Pal. *Jurisprudence* II 619 note.

67. Judgment of Dec. 10, 1901, Cour d'appel, Paris, [1905] D.P. *Jurisprudence*, I 128 note.

68. [1933] Recueil du Havre II 49 note.

69. Judgment of July 27, 1937, Cass. req., Fr., [1937] Gaz. Pal. *Jurisprudence* II 618.

70. *Id.*

71. *Id.* It should be noted again that, since 1972, the simplified *exequatur* procedure in which only the *juge de l'exécution* is sitting also applies to foreign judgments. See Law of July 5, 1972, [1972] J.O. 7181 (Fr.), art. 9. See also note 80 *infra* and accompanying text.

Summary

This brief examination of the French *jurisprudence* relating to the early equivalent of international commercial arbitration reveals that the French courts consistently eliminated the possible domestic law obstacles to the process of international commercial arbitration, thereby encouraging recourse to arbitration as a means of resolving disputes arising from the equivalent of international contracts. In more contemporary litigation, this liberal judicial attitude has been maintained; the French courts continue to give international commercial arbitration a privileged status in their doctrine. Contemporary judicial decision-making, in fact, reflects a progression in the liberal attitude of the French courts in this area.

THE CONTEMPORARY JURISPRUDENCE

Affirming Established Rules

The more recent jurisprudence of the French courts has confirmed the continued relevance of many of the doctrinal principles established by earlier case law. For example, in *Société Supra-Penn c. Société Swan Finch Oil Corporation et al.*,⁷² the French Supreme Court upheld the view that an arbitra-

72. Judgment of June 21, 1965, Cass. civ. com., Fr., 55 R.C.D.I.P. 477 (1966). Since the late nineteenth century, there has been a paucity of litigation on this question. As Professor Mezger notes in his commentary, 55 R.C.D.I.P. 480 (1966), the holding in *Société Supra-Penn* constitutes an important contemporary restatement of the French jurisprudence relating to the jurisdictional effects of articles 14 and 15 of the *Code civil* in cases involving arbitration agreements. The principle that an arbitration clause constitutes a waiver of articles 14 and 15 was generally recognized, but, prior to *Société Supra-Penn*, there were indeed few modern court decisions that affirmed the continued validity of that principle. Since the mid-nineteenth century, there were only a handful of relevant lower court opinions, most of which had been rendered before 1900. See 2 H. Batifol & P. Lagarde, *Droit International Prive* 427 n.45 (1976). In addition, the French Supreme Court had not considered the question since 1860 (see text at notes 58-59 *supra*) despite a very limited ruling in 1950 which was anchored in the special circumstances of a particular case. See Judgment of July 12, 1950, Cass. civ., Fr., 41 R.C.D.I.P. 509 (1952).

In this setting, the *Société Supra-Penn* holding unquestionably was a needed and useful restatement of earlier jurisprudence. There had been, however, some lower court activity in this area in the 1950s which merits some mention. Although a Paris court upheld the principle that a compromissory clause constituted a waiver of a French national's jurisdictional prerogatives under article 14 of the *Code civil* (see Judgment of June 15, 1953, Cour d'appel 1re, Paris, [1954] *Dalloz Sommaires* 22), the *Cour d'appel* of Paris in a later decision gave a rather restrictive interpretation of the circumstances in which an arbitration agreement would constitute such a waiver, albeit with the reservation that its interpretation did not call into question the general validity of the waiver

tion clause constitutes a waiver of the French exorbitant jurisdictional rules. The court ruled that, when a French national enters into an agreement providing for disputes to be brought before an arbitral tribunal, he waives his jurisdictional prerogatives under article 14 of the *Code civil*.⁷³

Other modern decisions⁷⁴ have confirmed and expanded the principle that the *exequatur* judge cannot engage in a substantive merits review of an international arbitral award, interpret-

principle.

In the Judgment of Jan. 22, 1957, Cour d'appel de Paris, 46 R.C.D.I.P. 486 (1957), the *Carlhian* case, a contract between a French and a United States company provided that disputes arising under the contract would be settled by a sole arbitrator who would be appointed jointly by the parties once a dispute arose. When a contractual difference surfaced, the French company, rather than seek agreement upon a single arbitrator, brought an action before a French commercial court. The United States company argued that the French court lacked jurisdiction to hear the matter on the ground that the French party's agreement to arbitrate disputes constituted a waiver of the provisions of article 14 of the *Code civil*.

The *Cour d'appel* of Paris, however, rejected that argument upon the basis of a narrow and technical interpretation of the provisions of the arbitration agreement. The court reasoned that the jurisdictional effects of the arbitration clause were subject to an "essential condition," *i.e.*, the agreement of both parties upon a single arbitrator—and that the French party had not surrendered his right to invoke article 14 until he had effectively participated in the nomination of an arbitrator. Despite the hair-splitting quality of the distinction that it drew (which arguably failed to differentiate between the agreement to arbitrate and the selection of a particular arbitral procedure), the court was at pains to insist upon the fact that its holding did not challenge the validity of the general principle that an arbitration agreement implied a waiver of article 14.

Such tortuous subtleties of judicial reasoning apparently were abandoned after the *Société Supra-Penn* decision. In recent litigation, the French courts have manifested a willingness to give full legal effect to the parties' general agreement to arbitrate regardless of possible quirks in the particulars of the agreement. For example, in the Judgment of Sept. 25, 1972, Cour d'appel Ire, Angers, [1973] Rev. Arb. 164, the *Cour d'appel* of Angers upheld the jurisdictional effects of an arbitration agreement despite the ambiguity of its provisions and the choice that it gave to the parties to have recourse either to a Dutch arbitral tribunal or to an ordinary court of law. The court ruled that the reference to an ordinary court of law, although it was ambiguous on its face, meant that disputes could be brought before the Dutch and not the French courts because Dutch law governed the contract and the latter contained an election of domicile clause which referred to the headquarters of the Dutch companies. Moreover, in contradistinction to the Paris court in the *Carlhian* case, the Angers court did not read a would-be "essential condition" into the arbitration agreement. It held that the option between recourse to a Dutch court or Dutch arbitration in the event of a dispute still implied a waiver on the part of the French contractant of article 14 of the *Code civil*, adding that the latter was not a provision having a public policy character.

73. See Judgment of June 21, 1965, Cass. civ. com., Fr., 55 R.C.D.I.P. 477, 478 (1966).

74. See, *e.g.*, Judgment of Jan. 11, 1972, Cass. civ., Ire, Fr., 99 J. Dr. Int'l—Clunet 621 (1972).

ing the principle to exclude any judicial examination which might approximate such a review. For example, in the *Dame Krebs* case,⁷⁵ the French Supreme Court affirmed a lower court decision holding that an arbitral award was valid despite a manifest error in the arbitrators' decision. In *Dame Krebs*, the parties entered into an exclusive distributorship agreement which contained an arbitration clause; when a dispute arose, arbitration was invoked. During the arbitral proceeding, one of the parties challenged the validity of the arbitration clause. He further contended that the arbitrators lacked jurisdiction to rule upon the validity of the arbitration clause. Although their terms of reference required a ruling on the validity issue at the outset of the proceeding, the arbitrators erroneously ruled that the nullity issue had not been raised by the parties. A lower court upheld the validity of the award, ruling that the arbitral tribunal had given a sufficiently reasoned opinion as required by the applicable procedural law.⁷⁶ The Supreme Court approved, holding that, despite the arbitrators' evident error, a contrary ruling would have set a dangerous precedent, perhaps leading to a type of judicial review of the merits of arbitral decisions.⁷⁷ Although the court stated that the judicial scrutiny of an award could take into account fundamental errors in the arbitrators' decision, its ruling in effect proscribed any serious judicial examination of the substance of an award.⁷⁸

In addition to exempting international arbitral awards from a substantive merits review, recent case law also has firmly established that these awards should be afforded a simplified *exequatur* procedure. Throughout the 1950's, judicial decisions endorsed the position taken by early courts that international arbitral awards should benefit from a simplified *exequatur* proceeding with only a single judge.⁷⁹ This position maintained, for enforcement purposes, the distinction between foreign arbitral awards and foreign judgments—the former being considered equivalent to French domestic awards. Legislation enacted in the 1970's obviated the need for these rather complicated dis-

75. Judgment of Jan. 22, 1975, Cass. civ. I^{re}, Fr., [1975] Rev. Arb. 309.

76. *Id.* at 310.

77. *Id.* at 310-11.

78. *Id.* at 311-12 note Mezger.

79. See, e.g., Judgment of Jan. 29, 1958, Cour d'appel, Nancy, 47 R.C.D.I.P. 148 (1958); Judgment of Oct. 18, 1951, Cour d'appel 2e, Douai, 42 R.C.D.I.P. 422 (1953).

tinctions by extending the single judge procedure to the enforcement of foreign judgments.⁸⁰ Accordingly, although foreign arbitral awards still are assimilated to some extent to their French domestic counterparts for purposes of enforcement, the former distinction between foreign arbitral awards and foreign judgments no longer is relevant. Faithful to a longstanding tradition, the current enforcement rules require that international arbitral awards need only be granted an *exequatur* by a single judge, now known as the *juge de 'exécution*, rather than by a full court.

The Advances Made by Contemporary Courts

In addition to upholding the principles established by the earlier jurisprudence, the contemporary case law⁸¹ makes significant doctrinal advances in the area of international commercial arbitration. Preliminarily, it should be noted that the substantive principles established by the contemporary jurisprudence apply only to arbitrations which, under French law, are considered to be international rather than domestic or simply foreign in scope.⁸² The fact that an arbitration clause is inserted in an international contract is sufficient to have the arbitration and the award deemed to be international in scope. The French courts have defined the term "international contract" as a contract linked to the legal system of different States and which acts as an instrument of international commerce.⁸³ Such arbitra-

80. Law of July 5, 1972, [1972] J.O. 7181, [1972] J.C.P. *Legislation* III No. 39362 (Fr.), art. 9, provides in relevant part that: "The district court hears with only one judge all matters concerning the forced execution of judgments and other acts, including requests for the recognition and enforcement of foreign judicial decisions and public acts, as well as French and foreign arbitral awards." (Author's trans.). See also 2 H. Batiffol & P. Legarde, *Droit International Privé* nos. 715, 730 (6th ed. 1976).

81. For a discussion of international commercial arbitration in French law, see 2 P. Fouchard, *L'Arbitrage Commercial International* (1965); J. Robert, *Arbitrage Civil et Commercial* (4th ed. 1967); J. Rubellin-Devichi, *L'Arbitrage Nature Juridique Droit Interne et Droit International Privé* (1965); Goldman, *Arbitrage (Droit international privé)*, I Encyclopédie Dalloz (Droit International) 111-42 (1968). See also H. Motulsky, *Ecrits Etudes et Notes sur L'Arbitrage* (1974). See generally 2 G. Delaume, *Transnational Contracts* xiv (1979). For a list of the principal French language and other foreign language publications on the subject of international commercial arbitration in France, see Lew & Poulet, *International Commercial Arbitration: A Selected Bibliography*, in 2 *International Commercial Arbitration* 60-62 (C. Schmitthoff ed. 1979).

82. The French judicial definition of the concept of international arbitration is flexible and conforms to the realities of international commercial life.

83. See B. Mercadal & P. Janin, *supra* note 1, at 38, no. 58 (citing, *inter alia*,

tions and awards will be assessed judicially according to the liberal rules applicable to international commercial arbitration.

The Will of the Parties

The willingness of the French courts to recognize the parties' intent to engage in arbitration is one example of the advances achieved by the contemporary jurisprudence. The French courts generally have given primary consideration to the contractual nature of arbitration agreements; consequently, the courts have sought to give full legal effect to the parties' intention to engage in arbitration. In *Société Goldschmidt*,⁸⁴ for example, the *Cour d'appel* of Paris held that the law governing the arbitration agreement and the arbitral proceeding is the law that has been freely chosen by the parties. This ruling, according to the court, was dictated not only by French choice of law rules, but also by the principle that the will of the parties is autonomous in contractual matters.

In *Société Italiban*,⁸⁵ the French courts demonstrated even more forcefully their willingness to give primacy to the parties' intention to arbitrate. There, the parties agreed to be bound by a rather unusual arbitration clause which provided that, in the event of a dispute, the parties should attempt to name a single arbitrator. Failing to do so, a Luxembourg commercial court would act as the arbitral tribunal. When a dispute arose, the aggrieved party, rather than follow the procedure set forth in the

Judgment of June 19, 1970, *Cour d'appel* 2e, Paris, [1971] J.C.P. *Jurisprudence* II No. 16927). In that case, the court established two criteria for defining an international contract: a legal criterion, *i.e.*, the link to the legal order of different States, and an economic criterion, *i.e.*, the contract acts as an instrument of international commerce or of international economic relations. This case was upheld by the Supreme Court without any challenge to or modification of the definition that was advanced. In fact, the Supreme Court appears to have approved of the Paris court's definition of an international contract and confirmed its validity as an accepted principle of French jurisprudence. Previously, the French courts had used a more general criterion: a contract was international in character when it "called into play the interests of international commerce." See Judgment of Feb. 19, 1930, Cass. civ., Fr., [1933] S. Jur. I 41; Judgment of Nov. 29, 1968, *Cour d'appel*, Colmar, [1970] J.C.P. *Jurisprudence* II No. 16246.

See Judgment of Jan. 11, 1972, Cass. civ. 1re, Fr., 99 J. Dr. Int'l—Clunet 621 (1972); Judgment of Apr. 28, 1976, *Cour d'appel* 5e, Paris, [1977] Rev. Arb. 151; Judgment of Oct. 24, 1975, Trib. gr. inst. 1re, Paris, 65 R.C.D.I.P. 538 (1976); Judgment of May 6, 1976, Trib. gr. inst. 1re, Paris, 66 R.C.D.I.P. 718 (1977).

84. Judgment of Dec. 9, 1955, *Cour d'appel*, Paris, [1956] D. Jur. 217. See also Judgment of Oct. 18, 1951, *Cour d'appel* 2e, Douai, 42 R.C.D.I.P. 422 (1953).

85. Judgment of Nov. 14, 1975, *Cour d'appel* 1re, Paris, [1976].

arbitration clause, brought an action before its national court in Beyrouth which, when the other party failed to appear, rendered a default judgment.⁸⁶ A number of lower French courts,⁸⁷ ultimately with the approval of the Supreme Court,⁸⁸ refused to grant an *exequatur* to the judgment. The courts reasoned that because the aggrieved party failed to bring the action before the competent court, namely, the one designated in the arbitration clause, the court rendering the decision lacked jurisdiction to hear the matter.

Although this decision related in large measure to the question of the enforcement of foreign judgments in France, the reasoning which led to the denial of the *exequatur* had important implications for the French judicial doctrine on international commercial arbitration. In effect, the refusal to enforce the foreign judgment was premised upon the foreign court's failure to abide by the stated requirements of the arbitration clause. Thus, for the first time, the French Supreme Court recognized that the *exequatur* judge had the authority to ascertain whether a foreign tribunal had respected the requirements of an arbitration clause in an international contract; if the foreign court ignored the arbitration clause without justification, the French court could deny the request for an *exequatur*.⁸⁹ Accordingly, under the liberal reasoning of the French courts, the parties' intention to submit their disputes to arbitration should be given full legal effect, no matter how eccentric the arbitral procedure chosen may be.

The Capacity of the Government to Arbitrate

A second advance made by the contemporary jurisprudence concerns the incapacity of government entities to enter into domestic arbitration agreements. With the increasing international economic activity between States and private commercial firms, the lack of capacity of the French State and its entities to enter into arbitration agreements⁹⁰ in domestic law could have become an obstacle to the successful implementation of the process of

86. *Id.* at 251.

87. *Id.* at 252.

88. Judgment of May 3, 1977, Cass. civ. 1re, Fr., [1978] Rev. Arb. 28.

89. *Id.* at 29-30 note Fouchard.

90. See text at notes 11 & 12 *supra*.

international commercial arbitration. Despite a provision in the contract calling for arbitration, a French government entity could claim a type of sovereign immunity defense based upon the provision of French domestic law⁹¹ to impede the arbitral proceeding. The *cours d'appel* and the French Supreme Court (the latter albeit with some caution) have rendered a number of decisions on this issue which in essence eliminate the utility of raising such an argument before the French courts.

In *Ste Myrtoon Steamship*,⁹² for example, the *Cour d'appel* of Paris held that the domestic legal provision prohibiting the State and its entities from submitting disputes to arbitration applied solely to domestic contracts, not to international agreements. Rejecting the argument of a French government entity that the arbitration clause inserted in its contract with a foreign company was invalid because the French State was not a trader, the court declared that the domestic law prohibition was not part of French international public policy concerns. The court reasoned that the interests of the French State would not be served by prohibiting its representatives from agreeing to a means of dispute resolution which was part of the usages of international trade.⁹³

91. The cases discussed below were decided at the time when article 1004 of the *Code de procédure civile* still was in effect. The doctrine established by that jurisprudence remains valid, however, in that the substance of article 1004 simply was transferred from the *Code de procédure civile* to the *Code civil* where it became article 2060. To the knowledge of the writer, no cases have been decided which deal specifically with the new article 2060. See notes 8 & 12 *supra* and accompanying text. It should be noted, however, that article 7 of the Law of July 9, 1975, [1975] J.O. 7076, added a clause to the substance of article 2060 of the *Code civil*. That clause provides that "categories of public establishments which have an industrial and commercial character can be authorized by decree to engage in arbitration." This additional clause does not change the general rule, but only recognizes the possibility of having a limited exception to it and only by way of government decree.

92. Judgment of Apr. 10, 1957, *Cour d'appel* 1re, Paris, 85 J. Dr. Int'l—Clunet 1002 (1958) [hereinafter textually referred to as *Myrtoon*].

93. *Id.* at 1007-09. See Judgment of May 2, 1966, Cass. civ. 1re, Fr., [1966] D.S. Jur. 575 [hereinafter textually referred to as *Galakis*]; Judgment of May 5, 1959, *Cour d'appel* 1re, Aix-en-Provence, 87 J. Dr. Int'l—Clunet 1077 (1960) [hereinafter textually referred to as *San Carlo*].

In the *San Carlo* case, the *Cour d'appel* of Aix-en-Provence reiterated much of the ruling in *Myrtoon*. The Aix court ruled that, although the domestic prohibition was part of internal public policy and applied to all internal contracts, it did not have unlimited effect and could not be applied to international agreements. Otherwise, the State not only would be deprived of agreeing to an accepted and recognized means of resolving international commercial disputes, but also would be excluded from valuable contractual

The Separability Doctrine—the Gosset Holding

The chief innovation of the *jurisprudence* lies in the elaboration of the separability doctrine, which addresses the problem of the legal status of the compromissory clause as it relates to the principal contract. In French domestic law,⁹⁴ the majority position among the French courts is that the compromissory clause, which the courts in domestic litigation deem to be an accessory part of the principal contract, is nullified by the invalidity of the principal contract.⁹⁵ In matters of international commercial arbitration, however, the legal rule governing the relationship between the principal contract and the compromissory clause is just the opposite. In the celebrated decision, *Société Gosset c. Société Carapelli*,⁹⁶ the French Supreme Court established the principle that the compromissory clause had a

dealings. The French Supreme Court upheld the ruling that the prohibition was part of domestic and not international public policy concerns. The Court added, however, the reservation that the domestic prohibition was inapplicable only when the foreign law governing the arbitration clause recognized the capacity of the State to arbitrate and the agreement in which it was inserted was international in scope. Finally, in the *Galakis* case, the Supreme Court reiterated the view that the domestic prohibition did not apply to international contracts—in this case, relating to maritime commerce—and overruled a lower court decision holding that the domestic prohibition was not subject to exception and was a matter of strict public policy. See Judgment of April 14, 1964, Cass. civ. 1re, Fr., 92 J. Dr. Int'l—Clunet 646 (1965) (Supreme Court rendering of the *San Carlo* decision). See also Judgment of May 2, 1966, Cass. civ. 1re, Fr., [1966] D.S. Jur. 575 (Supreme Court rendering of the *Galakis* decision). In discussing this case, one commentator has noted that “[t]his decision foreshadowed by eight years that of the United States Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).” *Id.* note. This comment attests to the advanced liberal orientation of the French courts in this area. See Park, *Judicial Supervision of Transnational Commercial Arbitration*, *supra* note 3, at 115 n.184. See also Judgment of June 25, 1959, Trib. gr. inst. 1re, Seine, 87 J. Dr. Int'l—Clunet 489 (1960) (original disposition of *Galakis*).

94. At least, this was the position prior to the enactment of the Decree of May 14, 1980, and its article 26—the exact meaning of which is still in doubt.

95. See J. Robert & B. Moreau, *supra* note 2, at E8. The authors write that, in the current state of French domestic jurisprudence, the compromissory clause cannot be said to be separable from the main contract. See Judgment of Feb. 19, 1958, Cass. civ. 2e, Fr., [1958] D. Jur. 531. There, the court held that the nullity of the principal contract on the ground that there was a lack of consent brought about the nullity of the compromissory clause. *Id.*

Although a few decisions from the courts of appeal have held that the compromissory clause is separable from the main contract, the Supreme Court has rejected that position consistently and recognized the separability doctrine only in international arbitration. The latter may possibly lead to a modification of the domestic law position. *But see* note 36 *supra* and accompanying text (especially the commentary relating to the meaning of article 26 of the Decree of May 14, 1980).

96. Judgment of May 7, 1963, Cass. civ. 1re, Fr., [1963] D. Jur. 545.

fully autonomous juridical character and, hence, was separable from the principal contract. Consequently, its validity could not be affected by the nullity of the principal contract.⁹⁷

In *Gosset*, the plaintiff, a French concern, agreed to purchase a large quantity of grain from Carapelli, an Italian company, under an agreement containing an arbitration clause. Although advised by French officials that a special authorization would be required to pass the merchandise through customs, Gosset, nevertheless, requested its Italian cocontractant to deliver the grain. In addition, without obtaining the necessary authorization or informing Carapelli of the need for the special authorization, Gosset had Carapelli agree that payment for the grain would become due only after the merchandise had gone through customs. As expected, the grain shipment never went through customs and Gosset refused payment. Carapelli invoked arbitration and obtained an award against Gosset. Subsequently, a French court granted an *exequatur* to the award. Gosset challenged the decision granting the *exequatur*, arguing that the principal contract was invalid and that its invalidity engendered the nullity of the compromissory clause.⁹⁸ In a landmark opinion, the French Supreme Court rejected Gosset's argument, holding that "in matters of international arbitration, the compromissory clause, whether concluded separately or inserted in the juridical act, always presents, save in exceptional circumstances, a complete juridical autonomy, excluding the possibility that it could be affected by the eventual nullity of the juridical act."⁹⁹

The statement of the separability doctrine in *Gosset* had far-reaching consequences upon the process of international commercial arbitration. It attributed a large measure of independence to the process by recognizing fully the parties' intention to have their disputes resolved through arbitration. In a word, when a valid arbitration clause is inserted in an international contract, the arbitration will take place notwithstanding the legal fate of the principal agreement.¹⁰⁰ While the court referred to certain exceptional circumstances which could defeat

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 545-48 note Robert.

the application of the separability doctrine, the exact character of these exceptional circumstances has not been defined. They have never materialized in litigation. Moreover, French legal scholars have attempted unsuccessfully to devise a hypothetical example describing and explaining the exact nature of these exceptional circumstances. It is indeed difficult to imagine a situation which would give rise to such exceptional circumstances—unless the parties, in their agreement, expressly made the validity of the arbitration clause dependent upon the validity of the principal contract. In light of its legal consequences, however, such a clause is extremely unlikely in actual practice.¹⁰¹

The Procedural Holding in Gosset

Gosset also established an important procedural principle under which third parties could challenge the validity of an *exequatur* granted to an international arbitral award on public policy grounds. The French Supreme Court held that, in addition to challenging the *exequatur* for procedural defects under article 1028 of the *Code de procédure civile*, the *exequatur* of an international arbitral award could be challenged through a form of third-party opposition (*tierce* opposition). Under this procedure, one of the parties seeks to have the order retracted in a type of adversarial proceeding held before the judge who rendered the enforcement decision. In recognizing for the first time the admissibility of this form of procedural opposition—which had been encouraged and supported by practitioners in arbitration litigation—the court provided for a remedy by which international arbitral awards could be challenged on public policy

101. See Goldman, *supra* note 81, at 117, § 57. The separability doctrine had other important consequences which further isolated international arbitration from the potential restrictions of French domestic law. In French domestic law, allegations that the principal agreement is void can have the effect of removing the dispute from the jurisdiction of the arbitrators since the arbitration clause, because of its accessory character, would also be void. The arbitral tribunal, as a consequence, would be denied jurisdiction to rule upon a matter involving its competence.

In matters of international arbitration, because the compromissory clause is legally autonomous and separable from the principal contract, the arbitrators retain jurisdiction to rule upon their competence despite allegations that the main agreement is null and void. This principle appears to be a well-established rule in the French jurisprudence relating to international arbitration. See, e.g., Judgment of May 18, 1971, Cass. civ. 1re, Fr., 99 J. Dr. Int'l—Clunet 62 (1972); Judgment of Feb. 21, 1964, Cour d'appel 5e, Paris, 92 J. Dr. Int'l—Clunet 113 (1965); Judgment of Jan. 22, 1957, Cour d'appel 1 re, Paris, [1957] J.C.P. *Jurisprudence* II No. 10165.

grounds, a ground not among those expressly enumerated in article 1028.¹⁰²

The importance of this procedural principle must be assessed in light of the contrast that exists between the appeal process applying to domestic arbitral awards and the recourse procedure established for international arbitral awards. In French domestic law, unless the parties have expressly waived their right to appeal, a domestic arbitral award is subject to judicial appeal—a process which involves a *de novo* consideration of the case.¹⁰³ While the French courts and recent legislation have to some extent assimilated international arbitral awards to domestic awards for enforcement purposes, in that both benefit from a simplified *exequatur* procedure,¹⁰⁴ the assimilation is limited to that specific purpose. Unlike domestic awards, international arbitral awards are not subject to an appeal involving a *de novo* consideration of the dispute.¹⁰⁵ The elaboration of this rule, however, left unresolved the question of what method of

102. See Robert, *supra* note 100, at 546. The viability of the *tierce opposition* procedure has been upheld by more recent courts. See, e.g., Judgment of Jan. 16, 1974, Cass. civ. 2e, Fr., [1974] Rev. Arb. 294; Judgment of Apr. 6, 1970, Cour d'appel Ire, Reims, [1971] Gaz. Pal. *Sommaires* I 13. It has been argued, however, that, according to an interpretation of the combined effect of articles 546(2) and 583(3) of the *Nouveau Code de procédure civile*, the legislative reform of French procedural law enacted in 1975 eliminated this means of recourse created by the courts. These articles provide in relevant part that, in non-adversary matters (*matière gracieuse*), the recourse of appeal is available to third parties who have been served notice of the judgment. Also, third-party opposition is available only to third parties who have not been served notice of the decision. Because the enforcement action is essentially an *ex parte* proceeding which is non-adversarial in character, and notice of the enforcement order must be given before enforcement can take place, see article 503, the party against whom the arbitral award was rendered cannot have recourse to the third-party opposition procedure against the *exequatur*. He must bring an appeal against the enforcement order before the court which rendered it. See Viatte, *supra* note 7, at 256. The English translation of the text of these articles was obtained in 1 New Code of Civil Procedure in France 106 (art. 503), 115 (art. 546), 123 (art. 538) (F. de Kerstrat & W. Crawford trans. 1978). To the knowledge of the writer, this interpretation has not been confirmed by subsequent court decisions and a 1978 Paris court decision seems to hold to the contrary. See note 130 *infra* and accompanying text. See also Judgment of July 5, 1979, Trib. gr. inst. Ire, Paris, [1979] Gaz. Pal. *Jurisprudence* II 424.

103. See text at notes 19-23 *supra*.

104. See text at notes 66-71 & 79-80 *supra*.

105. See Judgment of Nov. 3, 1960, Cass. civ. Ire, Fr., 50 R.C.D.I.P. 564 (1961). Here, the French Supreme Court upheld a lower court decision that declared that a foreign arbitral award could not be submitted by way of appeal to the French courts. *Id.* at 564-65. For a discussion of this question, see J. Robert & B. Moreau, *supra* note 2, at Q1-Q2 (appeal of domestic arbitral awards) and at X1 (no appeal against foreign arbitral awards).

review or what type of recourse procedure should be available against the *exequatur* granted to an international arbitral award—especially when public policy concerns allegedly had been violated.

Prior to *Gosset*, it was generally recognized that the *exequatur* given to an international arbitral award could be challenged under the provisions of article 1028. The grounds for challenging the award were limited and pertained primarily to procedural matters, such as whether the award went beyond the limits of the arbitration agreement or was rendered by an arbitrator not authorized to act.¹⁰⁶ *Gosset* established an additional means of challenging international arbitral awards on grounds other than those provided in article 1028. Accordingly, although the means of recourse available against international arbitral awards were neither numerous nor extensive, they at least provided for judicial scrutiny on the basis of fundamental legal grounds in addition to a limited number of more technical procedural grounds. This limited judicial scrutiny was perfectly compatible with the needs of international commercial arbitration and did not create obstacles to the process.

Since the Decree of May 14, 1980, repealed article 1028 without replacing it with another action, only the third-party remedial procedure established in *Gosset* remains as a means to challenge the *exequatur* granted to an international arbitral award. In theory, at least, such an award, as in the domestic setting, could be challenged by the *recours en annulation* remedy, which is brought directly against the award itself and not the enforcement order.¹⁰⁷ The grounds for challenging the award under the *recours en annulation* action include many of the procedural grounds formerly contained in the article 1028 action as well as general public policy grounds.¹⁰⁸ The latter feature may lead to the demise of the *tierce opposition* action established in *Gosset*. It is not certain from a reading of the language of the Decree, however, whether the *recours en annulation* action will apply against international arbitral awards. An assessment of the possible consequences of the application of this action in the context of international arbitration and of the likely French

106. See note 30 *supra* and accompanying text.

107. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 44.

108. *Id.*

court action will be made in the concluding section of the article.¹⁰⁹

Public Policy Concerns

Had the French courts construed public policy concerns to invalidate simultaneously the principal contract and the arbitration clause, the advantages of the separability doctrine would have been limited considerably. The legal autonomy of the arbitration clause in these circumstances would have been meaningless. For example, in a typical case, an English company and a French concern enter into an export contract which provides for arbitration in London in the event of a dispute. Some time later, the French company informs its English cocontractant that it is impossible for it to perform its obligations under the contract due to a government order prohibiting the export of the goods in question. Having obtained an award against the French company from an English arbitral tribunal, the English concern applies for and receives an *exequatur* from a French court. The French company, however, challenges the *exequatur* upon the ground that the compromissory clause is null and void since it provides for arbitration upon a public policy matter, that is, for a dispute relating to the export of goods which is proscribed by a government order.

In considering the issue raised by such factual circumstances, the French courts have upheld the validity of the arbitration clause, despite the public policy objections. They have drawn a distinction between the invalidity of the principal contract for reasons of public policy and the continued arbitrability of subsidiary disputes to which the nullity of the principal contract gives rise. In the *Tardits* case,¹¹⁰ for example, the *Cour d'appel* of Orleans ruled that a compromissory clause was not invalid simply because the dispute submitted to arbitration concerned an agreement which, in some respects, was governed by an imperative regulation. In the court's assessment, the invalidity of the principal contract for reasons of public policy gave rise to disputes which were arbitrable and which did not concern public policy, namely, the eventual liability of one of the parties

109. See text at notes 133-163 *infra*.

110. Judgment of Feb. 15, 1966, *Cour d'appel*, Orleans, [1966] D.S. Jur. 340.

for the lack of performance of its contractual obligations.¹¹¹ As a consequence, even in cases in which the principal contract is void because it is contrary to French public policy, the compromissory clause remains effective; the arbitrators still have jurisdiction to rule on a dispute which involves an alleged failure of performance entitling one of the parties to compensatory damages. This holding lends invaluable support to the separability doctrine elaborated in *Gosset*, demonstrating that the separability doctrine has been integrated into the mainstream of French *jurisprudence*.¹¹² Moreover, *Tardits* establishes that French public policy concerns are the source of only narrow limitations upon the process of international commercial arbitration.¹¹³

That public policy concerns have been interpreted and applied quite restrictively by the French courts in matters of international commercial arbitration also is evident in cases involving issues other than separability. For instance, while French domestic law makes imperative the requirement that the decision of the arbitrators, like that of the courts, be reasoned,¹¹⁴ interna-

111. *Id.* at 340-41.

112. The *Gosset* doctrine has been followed in a long line of cases. See, e.g., Judgment of July 4, 1972, Cass. civ. 1re, Fr., 63 R.C.D.I.P. 82 (1974); Judgment of Dec. 13, 1975, Cour d'appel 4e, Paris, [1977] Rev. Arb. 147; Judgment of Feb. 15, 1966, Cour d'appel, Orleans, [1966] D.S. Jur. 340; Judgment of Feb. 21, 1964, Cour d'appel 5e, Paris, 92 J. Dr. Int'l—Clunet 113 (1965). For an assessment of the Hecht case, see Francescakis, *Le principe jurisprudentiel de l'autonomie de l'accord compromissaire après l'arrêt Hecht de la Cour de cassation*, [1974] Rev. Arb. 67.

113. See Judgment of Feb. 15, 1966, Cour d'appel, Orleans, [1966] D.S. Jur., 342-43 note Robert. The French Supreme Court upheld the validity of the distinction established in the Judgment of Feb. 15, 1966, Cour d'appel, Orleans, [1966] D.S. Jur. 340 in the Judgment of May 18, 1971, Cass. civ. 1re, Fr., 99 J. Dr. Int'l—Clunet 62 (1972). There, the performance of an international sales contract containing an arbitration clause again was frustrated by the lack of the necessary export certificates; this led the French concern involved to claim impossibility of performance and to allege that the arbitration clause was invalid on public policy grounds. The Supreme Court held, however, that arbitration could be resorted to when the arbitration itself did not touch upon public policy matters, but related solely to the question of the lack of performance of the contract and the damages that ensued from such failure of performance. *Id.* at 62-65. Therefore, according to the jurisprudence of the French courts, an international commercial dispute is not unarbitrable because the principal contract from which it arises violates French public policy concerns. Such a dispute can be submitted to arbitration provided the mission of the arbitrators is not to rule upon a public policy violation, but rather to establish the consequences of a lack of performance of a contract which would be null and void if a rule of public policy were applied.

114. See text at note 18 *supra*. See also J. Robert & B. Moreau, *supra* note 2, at M3.

tional arbitral awards rendered in a jurisdiction that does not require a reasoned opinion are enforceable in France.¹¹⁵ In *Société Elmassin*,¹¹⁶ a party alleged that the requirement that judgments be rendered upon the basis of a reasoned opinion was a public policy concern of French law and, therefore, applied to international arbitral awards. Accordingly, it was argued that international arbitral awards rendered upon the basis of an unreasoned decision, despite their conformity to the applicable foreign legislation, should be denied enforcement in France.¹¹⁷ The French Supreme Court, approving the decision of a lower court,¹¹⁸ held, however, that the recognition and enforcement of an unreasoned award in France was not contrary to French international public policy considerations, provided the applicable foreign legislation did not require a reasoned decision.¹¹⁹

French public policy concerns also could have been interpreted to mandate the imposition of a restrictive time limit on international arbitral proceedings. As noted previously,¹²⁰ article 16 of the Decree of May 14, 1980, requires that, unless the agreement of the parties provides otherwise, the award in domestic

115. See, e.g., Judgment of Dec. 9, 1955, Cour d'appel, Paris, [1956] D.S. Jur. 217. There, the *Cour d'appel* of Paris held that a foreign arbitral award rendered upon the basis of an unreasoned decision was enforceable in France. The court reasoned that English law, which governed the arbitral procedure, did not require the arbitrators to give a reasoned opinion. This provision was not found contrary to French international public policy. *Id.* at 218-19.

116. Judgment of June 14, 1960, Cass. civ. 1re, Fr., 49 R.C.D.I.P. 393 (1960). See also Judgment of Jan. 29, 1958, Cour d'appel 1re, Nancy, 47 R.C.D.I.P. 148 (1958).

117. See Judgment of June 14, 1960, Cass. civ. 1re, Fr., 49 R.C.D.I.P. 393, 394 (1960).

118. See Judgment of Jan. 29, 1958, Cour d'appel 1re, Nancy, 47 R.C.D.I.P. 148 (1958).

119. See Judgment of June 14, 1960, Cass. civ. 1re, Fr., 49 R.C.D.I.P. 393, 395 (1960). The doctrine established in this case has been followed by the lower courts in subsequent cases. For example, in Judgment of May 30, 1963, Cour d'appel 1re, Paris, 91 J. Dr. Int'l—Clunet 83 (1964), the *Cour d'appel* of Paris ruled that French international public policy concerns did not require that an international arbitral award be rendered upon the basis of a reasoned opinion, provided the law of the foreign forum did not require such an opinion. See *id.* at 87. See also Judgment of July 11, 1978, Cour d'appel, Paris, [1978] Gaz. Pal. *Sommaires* 26-28, [1978] Rev. Arb. 258. There, the court held that the lack of a reasoned decision affected only domestic awards and that the *tierce opposition* procedure could be brought against foreign awards only if they violated French international public policy. The lack of a reasoned opinion, the court continued, was not in itself contrary to this public policy as long as the silence of the opinion did not hide a decision which was incompatible with the rules of public policy or a violation of defense rights and the arbitration had an international character.

120. See text at note 16 *supra*.

proceedings must be forthcoming within a six-month period. Initially, in *Société Bruynzeel Deurenfabrik*,¹²¹ the *Cour d'appel* of Paris interpreted this time limit rule (contained in the previous legislation and essentially left intact by the new Decree) to have an imperative character, to be part of French domestic and international public policy concerns, and, consequently, to apply to international arbitral awards. The court ruled that, since the arbitral tribunal assumes its jurisdictional powers from the private agreement of the parties, its authority to rule in a specific dispute always is limited to time.¹²² While the time limit could be set either by the parties or by law, the arbitrators could not be allowed the discretion to prolong the duration of their jurisdiction indefinitely. Thus, an arbitration clause in an international contract authorizing them to do so was null and void according to French international public policy concerns.¹²³

In so doing, the court, for the first time in French international arbitration litigation, denied the enforceability of an international arbitral award upon the basis of the time limit rule contained in domestic law. Nevertheless, the time limitation imposed upon international commercial arbitration was not excessive, but rather represented a reasonable procedural requirement.¹²⁴ The French Supreme Court, however, reversed this decision.¹²⁵ Espousing a remarkably liberal attitude, the court again reiterated the need to isolate international commercial arbitration from the restrictions of domestic law. The court held that the provisions of article 1007 of the civil procedure code,¹²⁶ imposing a three-month time limit upon arbitral proceedings, applied only to proceedings governed by French procedural law. In the court's assessment, French international public policy concerns did not require that an arbitral proceeding governed by foreign law take place within a specific time limit.¹²⁷ Therefore, according to the court's holding, when the parties failed to indicate a time limit in their agreement, the jurisdictional power of

121. Judgment of May 27, 1974, *Cour d'appel* 1re, Paris, [1975] *Rev. Arb.* 318.

122. *Id.* at 321.

123. *Id.*

124. *See id.* at 323-27 note Rubellin-Devichi.

125. Judgment of June 30, 1976, *Cass. civ. 1re, Fr.*, [1977] *Rev. Arb.* 135.

126. Article 1007 has been replaced by article 16 of the Decree of May 14, 1980, which prolongs the time limit to six months.

127. Judgment of June 30, 1976, *Cass. civ. 1re, Fr.*, [1977] *Rev. Arb.* 135, 135-38.

the arbitral tribunal could be extended for as long as the arbitrators deemed it necessary to resolve the dispute satisfactorily (provided the applicable foreign procedural law did not impose a time limitation).

The beneficial impact of this ruling upon the process of international commercial arbitration can be debated.¹²⁸ While the decision conflicts, for example, with the fact that arbitration usually offers the parties a fairly rapid means of resolving disputes, it represents the culmination of a process involving the gradual effacement of the possible public policy obstacles to the enforcement of international arbitral awards in France. The French courts have lessened consistently the impact of public policy considerations upon international arbitral awards. In the present state of French jurisprudence, public policy concerns are not contained in specific legislative texts, but rather emerge from the application of general legal principles common to most advanced legal systems. These general principles seem to pertain exclusively to the guarantee of basic defense rights, namely, the right of the parties to have notice of the action and to present their case fully and completely before the arbitral tribunal. Furthermore, these public policy concerns can be invoked only by means of the *tierce opposition* procedure to the *exequatur* and, now, possibly through the *recours en annulation* action.¹²⁹ These limited public policy obstacles to the enforcement of international arbitral awards are especially significant since the public policy exception is one of the principal grounds for denying recognition and enforcement of awards under the New York Convention.¹³⁰

The New York Convention in Light of the Judicial Doctrine

Although an extensive consideration of the French judicial interpretation of the provisions of the New York Convention is beyond the focus of this study, it should be noted that the substantive principles of the jurisprudence reflect the basic spirit of

128. See, e.g., *id.* at 138-45 note Rubellin-Devichi.

129. See J. Robert & B. Moreau, *supra* note 2, at X2. *But see* note 76 *supra* and accompanying text, relating to the elimination of the third-party opposition procedure by the 1975 procedural reform.

130. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5(2)(b), *reprinted in* J. Robert & B. Moreau, *supra* note 2, at Annex 16.

all the important international conventions on arbitration.¹³¹ These conventions, to which France is a party, sought to achieve international recognition of the validity of arbitration agreements and to facilitate the recognition and enforcement of international arbitral awards. The New York Convention is especially important since it was designed to supercede previous agreements and to act as the universal charter of international arbitration. Although the provisions of the Convention have surfaced only in a few French cases¹³²—and where the Convention applies, its provisions take precedence—the French judicial doctrine unquestionably promotes the letter and the spirit of the Convention. In fact, in its refinement of the public policy ques-

131. There are four principal international conventions on arbitration; France has ratified all of them. The first two agreements are now mainly of historical interest. The Geneva Protocol of September 24, 1923, Concerning Arbitration Clauses provided that the contracting States would recognize the validity of the submission and the arbitration clause between parties who are respectively submitted to the jurisdiction of different contracting States. The substance of the Protocol further provided that the arbitral procedure would be governed by the will of the parties and by the law of the country in which the arbitration took place. Just prior to the ratification of the Protocol, the French legislature enacted legislation providing that arbitration clauses were lawful in commercial matters. The Geneva Convention Of September 26, 1927, On the Enforcement of Foreign Arbitral Awards set forth the conditions for the recognition and enforcement of foreign arbitral awards in the contracting States. Like the 1923 Protocol, it was destined to be replaced by the New York Convention.

The New York Convention of June 10, 1958, On the Recognition and Enforcement of Foreign Arbitral Awards was intended to act as the universal charter of international arbitration. It provides only a limited number of grounds upon which foreign arbitral awards can be refused recognition and enforcement. The final agreement is the European Convention of April 21, 1961, On International Commercial Arbitration. The application of the Convention depends upon the international subject matter of the dispute, the duality of jurisdiction of the parties, and their habitual residence, not their nationality. The texts of all these agreements are reprinted in J. Robert & B. Moreau, *supra* note 2, at Annexe 5-22. The text of the New York Convention also is reprinted in 1 G. Gaja, *International Commercial Arbitration* pt. II (1978). For a recent assessment of the Convention, see Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 *Int'l Law*. 269 (1979). For a discussion of the recognition and enforcement of international arbitral awards in France when the Convention does not apply, see Carbonneau, *The Recognition and Enforcement of International Arbitral Awards in French Law*, 11 *Int'l Law*. 603 (1977).

France is also a party to numerous bilateral conventions which relate to arbitration. For an analysis of these conventions, see Goldman, *supra* note 81, at §§ 37-39 *et passim*. See also J. Robert & B. Moreau, *supra* note 2, at W6-W7.

132. According to 1 Y.B. Com. Arb. 184 (1976), 2 *id.* 244 (1977) and 2 G. Gaja, *supra* note 131, the provisions of the Convention have surfaced in only three French cases and were apparently of only minor importance. *Accord*, Oppetit, *Le refus d'exécution d'une sentence arbitrale étrangère dans le cadre de la Convention de New York*, [1971] *Rev. Arb.* 97. See 98 J. Dr. Int'l—Clunet 312 (1971).

tion, the French jurisprudence goes a step beyond the liberalism advocated by the Convention. As a consequence, the French courts have established a distinguished reputation for France in this area of international litigation and guaranteed that French domestic legal obstacles will not be raised to hamper the recourse of private international commercial parties to arbitration. In regard to enforcement criterion, the *jurisprudence* and the Convention not only are compatible, but also are complimentary. The Convention establishes a public policy obstacle to the enforcement of international arbitral awards. French courts have advanced a very narrow definition of the French public policy concerns that can be applied in this context.

IMPACT OF RECENT DOMESTIC ARBITRATION LEGISLATION

The Decree of May 14, 1980, and the Means of Recourse

Before reaching a final assessment of the French judicial doctrine in matters of international commercial arbitration, a comprehensive account should be made of the likely impact of the new French domestic arbitration legislation upon the substance of the judicially-elaborated rules in the international area. As a general rule, the Decree of May 14, 1980,¹³³ pertaining essentially to domestic arbitral matters, does not alter the principal tenets of the judicial doctrine applying to international arbitration. As noted previously,¹³⁴ however, the courts have relied upon domestic remedies to create means of recourse actions against international arbitral awards. Because some of these remedies were repealed by the Decree and new provisions introduced,¹³⁵ the Decree articles relating to the means of recourse, especially the *recours en annulation*, do have potentially important implications for the French enforcement regime relating to international arbitral awards.

The Recours en annulation—its Applicability in International Cases

At first blush, given the basic similarity between the

133. See note 2 *supra* and accompanying text.

134. See *id.*

135. See *id.* The article 1028 action was repealed and the *recours en annulation* action introduced. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), arts. 44, 48.

grounds upon which an arbitral award can be challenged under the *recours en annulation* procedure and the grounds that could be invoked under the formerly applicable article 1028 action,¹³⁶ the new remedy, as it appears in the Decree, should be available as a means by which to challenge the enforcement of international arbitral awards before the French courts. Closer scrutiny, however, of the literal provisions of articles 44 and 45 of the De-

136. For the *recours en annulation* grounds, see Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art 44. For the article 1028 action (now repealed), see Nou. C. pr. civ. art. 1028 (Fr.). Under the *recours en annulation* action, an award can be set aside only in the following cases: (1) if the arbitrator ruled without an arbitration agreement or upon the basis of a void or expired agreement; (2) if the arbitral tribunal were constituted irregularly (meaning that it was not done according to accepted procedural requirements) or the sole arbitrator were nominated irregularly; (3) if the arbitrator ruled without conforming to the terms of reference that were given him; (4) when the principle of contradiction (requiring a full presentation on both sides before a ruling is made) was not observed; (5) in all cases of nullity provided for in article 40 (*i.e.*, awards must be rendered upon the basis of a reasoned decision, contain the names of the arbitrators and be dated and signed by all the arbitrators); and (6) if the arbitrator violated a rule of public policy. Previously, under article 1028 of the civil procedure code, an award could be set aside: (1) if the award were rendered without a *compromis* or outside of its terms; (2) if it were rendered upon the basis of a void or expired *compromis*; (3) if it were rendered only by a few arbitrators not authorized to rule in the absence of other arbitrators; (4) if it were rendered by a *tiers arbitre* who failed to confer with the divided arbitrators; and (5) if it were rendered upon claims not brought before the arbitral tribunal.

One of the significant aspects of article 44 of the Decree in comparison with article 1028 is that it no longer refers to the *compromis* but to the arbitration agreement, indicating that the *compromis* has been relegated to a secondary status and that proper importance is beginning to be placed upon the compromissory clause. *But see* C. civ. art. 2061 (Fr.) (providing that the compromissory clause is unlawful as a general rule unless provided otherwise by law). There is an evident conflict between the concept of the compromissory clause advanced by the statutory legislation in the *Code civil* and the concept advanced in the regulatory legislation of the Decree, with the latter having a closer relation to the status of the compromissory clause in actual practice.

The grounds for setting aside an award under the new and old means of recourse are similar, especially grounds 1 to 3 under the *recours en annulation* and grounds 1, 2 and perhaps 5 under article 1028. Grounds 3 and 4 of former article 1028 concern circumstances in which a *tiers arbitre* was named. The Decree, by providing in its article 13 that arbitral tribunals were to be composed of an uneven number of arbitrators, abolishes the need for that procedure. Such grounds for setting aside an award, therefore, do not appear in article 44 of the Decree. Some divergence can be seen in grounds 4, 5, and 6 of article 44 of the Decree which essentially incorporate basic public policy grounds upon which to attack an award. Previously, in international arbitral matters, these objections would have been raised through the *tierce opposition* action which now may fall into disuse. The invocation of article 44(5), however, may have some undesirable consequences in the context of the enforcement of international arbitral awards. The other means of recourse procedure—the *tierce opposition*—presumably also still applies despite some conjectural arguments to the contrary made before the Decree was enacted.

cree of May 14, 1980,¹³⁷ reveals that the application of the *recours en annulation* action to international arbitral awards in France would be incompatible with the tenets of the previously applicable judicial doctrine in this area.

The existence of such incompatibility raises a number of questions. For example, although the Decree is meant to regulate domestic arbitral matters, will the French courts interpret the means of recourse provisions, like former article 1028, to apply to international arbitral awards? If that determination is made in the affirmative, would the means of recourse provided for in the Decree, specifically the *recours en annulation* action, be applied in the same manner and to the same extent as in cases dealing with domestic arbitral awards?

These questions reveal that some degree of uncertainty surrounds the means of recourse provisions in the Decree at least as they relate to the enforcement of international arbitral awards in France. Such uncertainty could dissuade foreign parties from arbitrating under French procedural rules and could introduce novel difficulties in the enforcement of international arbitral awards in France. Such a development could compromise the liberal quality of the advances made by French case law in this area. Arguably, the liberal judicial construction that characterized the decisional law before the enactment of the Decree would continue to apply and provide solutions favoring international commercial arbitration. The literal application of the provisions of the Decree regarding the means of recourse, however, remains possible. Conceivably, this type of interpretation could create significant obstacles in the process, frustrating the enforcement of international arbitral awards in France.

Conflict with the New York Convention

One of the more evident problems stems from the fact that a disparity exists between the grounds for setting aside an award under the *recours en annulation* action¹³⁸ and the grounds for denying recognition and enforcement to a foreign arbitral award under the New York Convention.¹³⁹ While it is true that the pro-

137. See note 2 *supra* and accompanying text.

138. See note 136 *supra* and accompanying text.

139. See note 130 *supra* and accompanying text. Under article 5 of the New York Convention, recognition and enforcement can be denied to a foreign arbitral award: (1) if

visions of the Convention have surfaced in very few French cases,¹⁴⁰ this phenomenon is largely accidental and is attributable to the way in which the cases have been brought before the French courts as well as to the character of these cases. As noted previously,¹⁴¹ France has signed and ratified the Convention. Its provisions, therefore, would apply when a suitable case arises. In addition, it is a well-settled principle of French constitutional law that international agreements which have been ratified take precedence over inconsistent domestic laws.¹⁴² It would appear, therefore, at an initial analytical level, that the disparity between the grounds contained in the Convention and those provided for in the articles relating to the *recours en annulation* action should not present an intractable problem. The Convention grounds simply would take precedence over the domestic law provisions relating to the means of recourse.

The foregoing statement, however, does not account for all possible judicial constructions. For example, the French courts could deem that the provisions relating to the *recours en annulation* action are merely a supplementary, and not inconsistent, domestic legal provision which simply provides additional grounds for opposing the recognition and enforcement of an international arbitral award in France—thereby safeguarding to

the parties lacked the capacity to engage in arbitration or if the arbitration agreement were invalid; (2) if a party failed to receive sufficient notice of the arbitral proceeding or were unable to present his arguments; (3) if the award were rendered upon a dispute not covered by the arbitration agreement or if the award goes beyond the terms of the agreement; (4) if the constitution of the arbitral tribunal or the arbitral procedure followed were not in conformity with the agreement of the parties or the law of the country of arbitration; (5) if the award were not yet obligatory for the parties or were set aside or suspended by a competent authority of the country in which it was rendered; (6) if the subject matter of the arbitration cannot be submitted to arbitration under the law of the country in which enforcement is requested; and (7) if the recognition and enforcement of the award would be contrary to the public policy of the country in which enforcement is sought.

It is quite clear that the article 5 grounds of the Convention were meant to apply to enforcement matters in an international context, whereas article 44 of the Decree was meant to apply in a domestic context. Although there is some basic concordance between the procedural grounds included in the two articles and the basic public policy rule in each, ground 5 of article 44 responds solely to French domestic arbitration considerations. Its unrestricted application in the international context, then, could become a source of problems.

140. See note 132 *supra* and accompanying text.

141. See notes 131 & 132 *supra* and accompanying text.

142. Constitution art. 55 (Fr.), cited in H. Devries, *Civil Law and the Anglo-American Lawyer* 161, 164 n.1 (1976).

some extent the interests of the French legal order against the enforcement of undesirable international arbitral awards. Although the New York Convention arguably already fulfills this function, such reasoning, while somewhat extreme, is not totally inconceivable. In these circumstances, the disparity between the Convention and the Decree would take on new doctrinal significance.¹⁴³

The Requirement of a Reasoned Decision and Other Problems

Article 44(5) of the Decree¹⁴⁴ provides that an arbitral award can be set aside if certain mandatory requirements are not satisfied. For instance, the award must be rendered upon the basis of a reasoned opinion, must be signed by all the arbitrators or, in exceptional circumstances, by a majority of the arbitrators, and must contain the names of the arbitrators and the date of the award. None of these requirements appear explicitly in article 5 of the New York Convention. If the enforcement of an award can be challenged under both article 5 and article 44, a number of problems might be created which could have a negative impact upon the French enforcement regime for international arbitral awards. First, in those cases in which the New York Convention applies, if the *recours en annulation* is available,¹⁴⁵ the enforcement of Convention-governed awards could be challenged upon grounds not expressly contemplated by the Convention. This integration of the *recours en annulation* grounds into the recognition and enforcement regime of the Convention would do violence to the liberal character of the Convention. The French judicial interpretation of the Convention's provisions would stand as an anomaly. Moreover, it would create a situation in which a duplication of remedies exists—those available under the Convention and those provided for in the Decree. Such duplication would cause confusion in the procedural implementation of the enforcement process and also

143. While there is some basic concordance between certain of the article 5 grounds of the Convention and the article 44 grounds of the Decree (*i.e.*, between article 5(1)(c)(d), (2)(b) and article 44(1)(3)(2)(6) respectively), there is either a partial or a total difference between the remaining grounds, especially between article 44(5) of the Decree for which there is no counterpart in article 5 of the Convention.

144. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 44(5).

145. The *recours en annulation* may be available either as a supplement to the provisions of the Convention and/or decreed by the courts to be part of French *ordre public* or strong public policy concerns.

possibly encourage the use of dilatory tactics by non-complying parties. The adoption of a policy integrating the *recours en annulation* action into the Convention regime inevitably would compromise the liberal character of France's reputation in matters relating to the enforcement of international arbitral awards.

Non-Convention Awards

It should be recalled that the New York Convention has not been applied in the vast majority of international arbitration cases¹⁴⁶ decided by French courts before the Decree was enacted. In these cases, the literal application of the *recours en annulation* provisions of the Decree would appear again to undermine some of the tenets of the liberal *jurisprudence* applying to the enforcement of international arbitral awards. Most notably, awards rendered under the application of a foreign procedural law nonetheless would have to satisfy the mandatory requirements for the validity of awards under the French law, *e.g.*, they would have to be rendered upon the basis of a reasoned opinion.¹⁴⁷ Thus, the incorporation of the literal provisions of the *recours en annulation* action into the French policy relating to the enforcement of international arbitral awards, even in a context which does not involve the New York Convention, would have a retrogressive impact upon French law.

Multiplicity of Enforcement Regimes

Even if the courts adopted the most progressively-minded attitude, a difference in treatment would remain between cases under the New York Convention and non-Convention cases. Specifically, where the Convention applies, its provisions would govern the enforcement questions exclusively, but in non-Convention cases a separate and considerably different regime would be applicable. This dichotomy between the enforcement regimes, in effect, existed previously: a non-Convention award was subject to a different procedure, consisting of the article 1028 action and the *tierce opposition* action.¹⁴⁸ What is new and problematic is the fact that the substantive grounds for challenging the enforcement of an international arbitral award under the non-

146. See note 132 *supra* and accompanying text.

147. See note 136 *supra* and accompanying text.

148. See J. Robert & B. Moreau, *supra* note 2, at X1-X2.

Convention procedure differ radically in some respects from the article 5 grounds of the Convention. These substantive differences relate primarily to the mandatory formal requirements of the award such as the rendering of an award upon the basis of a reasoned decision. Previously, under their liberal reasoning, the French courts had aligned the non-Convention enforcement requirements with the provisions of the Convention, thereby providing a measure of uniformity between the two enforcement regimes.¹⁴⁹ If markedly different regimes now could be applied in the same area of litigation, this not only would create confusion in this area, but also would lead to an inequitable application of different enforcement rules for Convention and non-Convention awards.

The Problem of Hybrid Awards

This same problem also might surface, albeit with a lesser intensity, when the international arbitral award has some procedural link to the French legal order. Such a situation would arise either when an award, although rendered abroad and involving international commercial interests, was the result of a proceeding governed by the French procedural law on arbitration, or when a French domestic award resulted from a proceeding applying French procedural rules but involved the interests of international commerce. In both sets of circumstances, the awards would be linked simultaneously to the interests of international commerce (by the subject matter of the arbitration) and to the French legal order (via the application of the French procedural rules on arbitration). Assuming, with some confidence, that some difference would remain between the enforcement rules applying to domestic and international arbitral awards, the question becomes one of determining which rules should apply to the "hybrid" awards: Should the courts institute a type of sharing arrangement between the two applicable enforcement regimes? How should the respective international and domestic character of these awards be assessed legally for purposes of enforcement?

The question is not easy to resolve. Again, potential problems stem from the fact that international arbitral awards traditionally have benefitted from a more liberal enforcement re-

149. *See id.*

gime than domestic awards.¹⁵⁰ Considering for the moment only the grounds upon which the *recours en annulation* action can be invoked, a possible problem may arise in that an award can be set aside if the arbitrators fail to render the award upon the basis of a reasoned decision.¹⁵¹ This ground would apply to the two types of awards described above because they are subject to the French procedural rules on arbitration. Under French judicial definitions, however, they are international, not domestic, awards¹⁵² and can be enforced in France without having been rendered upon the basis of a reasoned decision.¹⁵³ At first blush, there appears, therefore, to be a discrepancy between the domestic law provision and the special court-articulated rule in the international area, both of which seem to apply to hybrid awards.

Further scrutiny reveals, however, that this specific problem is not as acute as it initially appears. Even under the previously applicable means of recourse procedure, the determination of whether hybrid awards should be rendered upon the basis of a reasoned decision did not constitute an irreconcilable conflict. Then, as now under the *recours en annulation* action, the courts would reason that the parties have freely chosen French procedural law to govern the arbitral proceedings. Accordingly, despite the international character of the award, the arbitral tribunal still should be obliged to render its award upon the basis of a reasoned decision since the parties contracted for that result. Moreover, such reasoning is not contrary to the rule of *jurisprudence* relating to international arbitration since it dispenses awards from the requirement of a reasoned decision only if the applicable procedural law does not require such an opinion. In this case, the applicable procedural law does require that a reasoned decision accompany the award. In this sense, an acceptable accommodation of the international and domestic character of these hybrid awards can be reached.

The difficulties, then, which the *recours en annulation* procedure might cause in the context of ordinary international arbitral awards do not surface in the context of hybrid awards. Therefore, the application of the *recours en annulation* ac-

150. This fact is evident from a consideration of the entire preceding discussion.

151. See note 136 *supra* and accompanying text.

152. See note 108 *supra* and accompanying text.

153. See text at notes 161-67 *infra*.

tion—which has other grounds that correspond either directly to the provisions of the New York Convention or are included in French international public policy concerns—in regard to hybrid international awards would not be contrary to established policy in this area. Other features of the *recours en annulation* action, however, indicate that the remedy cannot be integrated fully or literally into the enforcement rules applying either to ordinary or hybrid international arbitral awards.

A Number of Possible Interpretations

The variety of ways in which the *recours en annulation* action can be adapted to accommodate different enforcement circumstances creates a potential problem. Depending upon how the courts ultimately interpret the means of recourse provisions of the Decree, there may be, in effect, three different sets of enforcement rules applying to three possible types of international arbitral awards. One enforcement regime would apply to awards which are to be enforced under the New York Convention. Here, it is likely that, in the interests of international comity, the courts would rule that the provisions of the Convention would apply exclusively. A second enforcement regime, incorporating the *recours en annulation* action but eliminating the grounds incompatible with the established *jurisprudence*, would apply to awards not to be enforced under the New York Convention. Finally, a third enforcement regime would apply to hybrid international arbitral awards. This regime presumably would include many of the grounds for challenge outlined in the *recours en annulation* provisions, while excluding other more radical features of the action which are incompatible with any type of international arbitral award, no matter what link the award may have to French procedural law.

While the multiplicity of possible enforcement regimes is not totally unacceptable in theory or practice, it does create an enforcement framework which is unnecessarily cumbersome and complex. For example, it is true that the rules of the third enforcement regime correspond to a basic feature of arbitration, namely, that the parties may freely choose the law governing the proceedings and thereby require the arbitral tribunal to render an award, under French law, upon the basis of a reasoned opinion. It should be recalled, however, that the determination of the applicable means of recourse by reference to the nationality of

the governing procedural law, rather than by reference to the subject matter of the arbitration, runs counter to the accepted methodology applied by French courts to determine the principal character (international as opposed to foreign or domestic) of the arbitration itself and the arbitral award. Therefore, some inconsistency, albeit somewhat insignificant, between the criteria used to reach separate determinations regarding the same award would exist. In addition, the application of three separate enforcement regimes to international arbitral awards, while reflecting the complexity of this area, could lead to confusion.

Attacking the Award Directly

Other features of the *recours en annulation* action could make its literal application in the context of international arbitration not only problematic, but also totally unacceptable. For example, at least when the action is invoked against domestic arbitral awards, it is directed at the award itself¹⁵⁴ and not at the enforcement order (*exequatur*) since, under the Decree, the *exequatur* no longer is subject to any means of recourse.¹⁵⁵ In theory, therefore, reading the language of the Decree literally and assuming that the provisions of the Decree are applicable by analogy to matters of international commercial arbitration, this Decree article would lead to a situation in which an international arbitral award, rendered in a foreign jurisdiction under a foreign procedural law, could be attacked directly by a party before a French court when—or even before—its enforcement was sought in France.¹⁵⁶ In contrast, under the court-created

154. See Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 44.

155. *Id.* art. 48.

156. The Decree further provides that the *recours en annulation* action can be invoked once the award is rendered, *i.e.*, against an award which has not as yet been granted an *exequatur*. It is, therefore, possible for one party to attack an international arbitral award directly before the French courts without waiting for the other party to obtain an enforcement order (an *exequatur*) for the award.

As discussed above, under now-repealed article 1028, an international arbitral award could be challenged only by attacking the *exequatur* granted to the award upon the grounds provided for in that article. Moreover, perhaps in an effort to promote the interests of international comity and the equitable adjudication of international disputes, the enumerated grounds of article 1028 could be invoked against the award only when the foreign procedural law governing the arbitral proceeding recognized these grounds for challenging the award (unless these grounds were considered to be part of French international public policy concerns). A form of third-party opposition—described in the text previously and known as *tierce opposition*—also could be invoked; but, again, this action—used primarily to challenge an award upon other public policy grounds not in-

rules applying to enforcement matters, a party could not attack an international arbitral award before it had been granted an *exequatur*. Moreover, the two then-recognized means of recourse could be invoked only to challenge the enforcement order and not to attack the award directly before the French courts.

The possibility of attacking the award itself not only conflicts with the basic intention of the international conventions on arbitration, in particular the New York Convention ratified by France, but also effectively undermines the established French judicial position which allows challenges only against the *exequatur* and primarily upon fundamental public policy grounds.

Substantive Merits Ruling

Perhaps more importantly, under article 45 of the Decree,¹⁵⁷ the *recours en annulation* action could lead the French courts to exercise a type of judicial power totally incompatible with the idea of international arbitration. The language of article 45 provides that, if a court sets aside an award under a *recours en annulation* action, it then can render a ruling on the merits within the terms of reference of the arbitral tribunal—unless all of the parties involved agree that the court should not render such a ruling.¹⁵⁸ Clearly, this provision is unacceptable in the context of international commercial arbitration. It is violative of the international consensus, reflected in international agreements, concerning the enforcement of international arbitral awards. Moreover, its integration into the French enforcement framework would lead to an unequivocal regression of the French law in this area.

Recommendations

The substantive disparity between the Decree and the New York Convention and the collateral consequences stemming from the literal integration of the *recours en annulation* action into the French enforcement regime relating to international arbitral awards indicate the need for the type of judicial interpre-

cluded in article 1028—could be resorted to only when the award had been granted an *exequatur*.

157. Decree of May 14, 1980, [1980] J.O. 1238, [1980] D.S.L. 207 (Fr.), art. 45.

158. *Id.*

tation that has characterized past French practice in this area. Such a task, obviously, is not beyond the reach of the creative capabilities of the French courts. As this study demonstrates, the French courts have shown a willingness to innovate—to be “transnational”—and to depart from the provisions of domestic law. The result has been a considerable amount of judicial originality and sensitivity in elaborating a *jurisprudence* which is tailor-made to fit the needs of international commercial arbitration. The enactment of the Decree of May 14, 1980, should not change the basic tenor of this case law; there is no reason why the French courts could not adapt the *recours en annulation* action to accommodate the requirements of international commercial arbitration.

There are several possible solutions to the problems created by the Decree of May 14, 1980.¹⁵⁹ One judicially-contrived solution to the dilemma created by the literal application of the *recours en annulation* action is for the courts to rule that, since the Decree is a domestic legal document, its provisions simply are not applicable to international arbitral matters. Such an interpretation would have the advantage of eliminating the undesirable effects of the *recours en annulation* action in the context of international arbitration. For example, in cases in which the New York Convention applied, the disparity between the Decree and the Convention no longer would be relevant. In this setting, awards which have not been granted an *exequatur* could not be attacked directly before the French courts. Also, the refusal to

159. An initial, albeit somewhat elementary, point must be emphasized before outlining the possible solutions to the problems created by the Decree of May 14, 1980. The Decree applies to domestic arbitral matters and is not intended to stand as a legislative document which regulates international arbitral matters. But, by the same token, its internal character does not prevent the courts from reasoning by analogy from its provisions in cases involving international arbitration. Since the Decree repealed article 1028 of the civil procedure code—which formerly could be invoked against the *exequatur* granted to an international arbitral award—the Decree provisions should be made to provide some suitable replacement for that action. The substituted remedy comes in the form of the *recours en annulation* action. These provisions, however, are not totally congruous with the established jurisprudential rules that respond to the particular needs of international commercial arbitration. There is no legal provision or policy consideration to prevent the French courts from engaging in a selective incorporation of the provisions of the domestic Decree in the international context—taking certain provisions and molding them to the basic contours of the *jurisprudence* in this area. This pretorian procedure and methodology were invoked before the Decree was enacted and there is no reason to think that the French courts have abandoned or need to abandon their basic approach and attitude.

enforce an award in a non-Convention setting would not result in a merits ruling by the courts. This somewhat extreme position, however, might not permit parties to invoke the *recours en annulation* in circumstances in which they provided for its application, that is, in cases of hybrid international arbitral awards. In addition, it would have the effect of limiting the means of recourse available against international arbitral awards since the article 1028 action would not be replaced by any equivalent remedy. Only the *tierce opposition* action, with its restrictive grounds for challenge, would remain in a non-Convention setting.

The better interpretation and one more in keeping with previous case law is to recognize the applicability of the *recours en annulation* action in the international context, but with modifications of the literal language of its provisions and with the creation of special rules regarding its scope and effects. For instance, the remedy could be invoked only against an award which has been granted an *exequatur* and could be directed only against the *exequatur* and not the award itself. Thus, the domestic law rule stating that the means of recourse cannot be exercised against the enforcement order granted to an award would not be followed in international cases. Moreover, the setting aside of an international arbitral award under the *recours en annulation* action would result, not in a substantive merits ruling by the court, but simply in the annulment of the enforcement order. The *tierce opposition* action would remain available to invoke public policy considerations not contemplated under the *recours en annulation* action.¹⁶⁰ When the provisions of the New York Convention govern the enforcement of an international arbitral award in France, it seems only logical and desirable to have the Convention grounds apply exclusively to a determination of enforceability. In effect, this rule would exclude only article 44(5) in the Convention setting, a provision which relates primarily to domestic requirements for arbitral awards. The French legal order could be protected sufficiently against undesirable international arbitral awards under the Convention grounds.

The potentially more difficult problems under this second interpretation might arise when the courts are faced with actions

160. See note 23 *supra* and accompanying text.

involving hybrid international arbitral awards. The *recours en annulation* action would have special relevance in circumstances in which an award resulted from a proceeding governed by French procedural rules on arbitration. The international character of the arbitration seemingly would dictate that the resulting award should be enforced according to the liberal rules applying to international commercial arbitration. The fact, however, that the French procedural rules on arbitration were selected by the parties to apply to the arbitral proceedings perhaps would justify minimizing the importance of the international character of such an award and emphasizing its procedural link to the French legal system.

The accommodation of the international and French character of an award, arguably, should not be taken any further than, for example, the application of the "reasoned opinion" requirement of the *recours en annulation* procedure.¹⁶¹ Although the parties may agree to the application of French procedural rules to the arbitration, the interest in a uniform and consistent enforcement policy and the interest in maintaining a special regime in regard to international arbitral awards outweigh the need for the greater extension of the domestic means of recourse action in these cases. Those international arbitral awards with a procedural link to the French legal order should be treated in all other respects as regular international arbitral awards. The other *recours en annulation* grounds should be directed against the *exequatur* granted to the award and should not result, in the event of a successful challenge, in a merits ruling by the court, but simply in the annulment of the enforcement order.

Summary

To summarize the solutions to the problems created by the enactment of the Decree, there is a need to integrate some parts of the means of recourse provisions into the enforcement policy relating to international arbitral awards. This integration, however, should be pursued by the courts in a selective fashion consonant with the basic spirit of established *jurisprudence* in this area. The recommendations that have been advanced appear to respond adequately to these objectives and to the policy goal of

161. *Id.*

maintaining a certain uniformity in the enforcement area. In light of the substance of the previous *jurisprudence*, one can be reasonably optimistic that the French courts will construe the Decree provisions appropriately.

THE POLICY UNDERPINNINGS

No statements regarding the underlying motivation for the elaboration of this doctrine have surfaced in the judicial decisions or comments of French scholars, magistrates, or practitioners. Perhaps this is due to the brevity of French judicial opinions and other features of French judicial writing. Although some speculation as to the underlying policy assessments is necessary to complete the *tour d'horizon* of the French law on international commercial arbitration, such an endeavor must be approached with caution and circumspection—given the conjectural quality of the enterprise, the reticence of the French to address this issue, and the fact that the doctrine is the creation of a foreign legal culture and tradition. With these reservations in mind, one can isolate systemic, historical, and more explicit policy factors which must have encouraged the courts to elaborate this doctrine. This set of factors serves to explain—at least, in part—the substantive *raison d'être* of the judicial doctrine.

Systemic Considerations

Private international law, according to French definitions, perhaps is the least statutorily-regulated area of French law. Consequently, private international law has been, in effect, formulated through the cumulation of substantive judicial holdings and the writings of academic lawyers.¹⁶² Traditionally, private international law has been seen as the “island of customary or common law” within the French system—a substantive area in which the courts can exercise their “praetorian” powers almost unimpeded in collaboration with academic jurists. There is, in fact, an implicit consensus among the French legal community that little or no codification should take place in this area of the

162. The few legislatively-prescribed rules consist of *Code civil* provisions: article 3 (a conflicts of law provision relating to the application of the French law on the status and capacity of persons); articles 14 and 15 (the French rules of exorbitant jurisdiction); article 2123 (dealing in relevant part with the effect of foreign judgments and the *hypothèque judiciaire* [the mortgage ordered by a court]); and article 11 (describing the legal status of foreigners in France).

law—perhaps because of the special characteristics of the area, the difficulty of devising stable general rules, and the almost instinctive reticence to disregard an established tradition of non-regulation by statute.¹⁶³

This systemic consideration provides an insight into why the French courts have had a free hand in matters of international commercial arbitration and why the applicable law consists exclusively of decisional law. This factor even may be dispositive of the question of why the French Parliament has never intervened in this area of litigation. The lack of legislation may thus not indicate approval, but rather the view that this area of litigation, like many other private international matters, is within the exclusive province of the courts. The particular substantive orientation of the doctrine, however, is not accounted for by this systemic consideration. The departure from domestic law and the exemption of international arbitration cases from its potential restrictions are major policy choices that remain unexplained by a purely systemic analysis.

Historical Factors— Alliance Reconsidered

The holding in *Alliance*, making the compromissory clause unlawful in French domestic law, was the origin of the dual doctrinal posture of the French courts in arbitration matters. While the result in that case was premised formally upon an interpretation of former article 1006 of the civil procedure code, the accepted view of the case is that the reference to the legal provision was no more than a formal legal justification for an important policy decision. The primary motivation for the holding seemingly is found in the following phrase: “we do not find in arbitrators the qualities which we are certain to find in magistrates: probity, impartiality, competence, the refinement of sentiments necessary to render judgments.”¹⁶⁴

A year later, the same court limited the impact of this policy consideration by holding that the article 1006 prohibition established in *Alliance* was not part of internal French public pol-

163. See generally Mayer, *Les Réactions De La Doctrine A La Creation Du Droit Par Les Juges En Droit International Privé—Rapport français* (paper delivered to a meeting of the Henri Capitant Association in Florence in May of 1980) (to be published).

164. See *id.*

icy.¹⁶⁵ Despite this qualification, the implications of the *Alliance* holding for the process of arbitration remained significant. *Alliance* clearly evidenced strong judicial doubts about the quality of arbitration and implied a certain judicial jealousy of the institution. There also was an obvious concern that the arbitral process inadequately safeguarded interests of the parties involved. In light of these considerations, it was entirely appropriate for the highest French court to express its distaste for private commercial dispute resolution and to hold that because of the dubious qualities of arbitrators when compared to magistrates, such a mechanism could not be invoked until a dispute had actually arisen. The French courts, perhaps relying upon the traditional distinction between domestic and international law, quickly realized that the application of these policy views in litigation with international ramifications could impair international commercial relations.

In their early decisional law, the French courts acknowledged that applying narrow and parochial domestic rules to litigation involving international commercial arbitration would impede international cooperation. The integration of domestic policy considerations, which arguably were at the heart of the *Alliance* holding, into international commercial arbitration no longer seemed as necessary or legitimate—in fact, it could be seen as counterproductive. In addition to the French courts' perception that an extension of the article 1006 prohibition would severely damage the economic interests of French commercial parties, a number of other more juridical factors also explain why the *Alliance* holding was inapplicable in international commercial cases.

The Policy Justifications

The practical considerations that rendered the *Alliance* rule unacceptable in international litigation certainly had a great deal of influence upon the French courts' subsequent rulings in international arbitration cases. Unrealistic decision-making and the articulation and application of economically counter-productive rules, however, are not without the ambit of judicial discretion. The French courts, as a result, at least must be credited

165. See J. Rubellin-Devichi, *supra* note 81, at 20-21.

with reasonable and perceptive pragmatism, refusing to compromise the French interest in international commercial dealings for the sake of the wooden application of doctrine. To quote a well-known phrase, "the life of the law is experience, not logic"—experience reflecting a type of economic realism in judicial decision-making. This early realism and pragmatism continue to have an impact upon current litigation and doctrine.¹⁶⁶

Realistic decision-making does not, however, account exclusively, or even in major part, for the liberal quality of the French judicial doctrine or for the fact that it arguably has received the tacit approval of the French Parliament. Certain substantive principles have been influential in this process which discount the self-serving quality of the doctrine and emphasize its juridical character.

Commercial transactions increasingly are being done on an international level. There is, however, an absence of international tribunals to deal with the litigation that arises from this type of commercial activity. As a consequence, the parties to such arrangements, unwilling to submit themselves to the jurisdiction of foreign courts, have had recourse to arbitration. Arbitration is a praetorian creation of international commercial activity. The French courts have given an unqualified recognition to the legitimacy of such an institution, recognizing that justice in these circumstances should not emanate from the law of any one country. Moreover, the notion of having specialized courts conducted by lay experts (*les juridictions d'exception*) is an integral part of the French legal system and the process of arbitration is roughly equivalent to these special courts.

That the parties have agreed to resolve their disputes through arbitration is particularly important, for such agreement is effectuated through the principle of party autonomy, a central principle of French law. This principle states that the agreement of the parties should be fully respected—that is, in contractual matters, their intent as expressed in the original

166. For example, if France is to continue to grow as a center for the holding of international commercial arbitration and if French commercial parties are to achieve and retain an important international commercial status, the French legal position on international commercial arbitration—given the importance and necessity of the latter as a mechanism for the resolution of international commercial disputes—must be accommodating and favorably disposed.

contract is autonomous and dispositive of how their relations should be effectuated.

Moreover, the French legal system distinguishes between two types of public policy concerns—mandatory rules which apply to domestic law and those which apply in international litigation. The elaboration of a judicial doctrine for international commercial arbitration differing from the rules for domestic arbitration reflects the traditional substantive distinction between domestic and international matters. Such a distinction constitutes a clear recognition that certain domestic policy concerns—no matter how fundamental within the national legal system—may not be appropriate for application in or cannot be literally transposed into the international sector. Thus, the principle of comity and the need to transcend the differences that exist between national legal cultures may dictate the creation and application of special rules.

Relatedly, the chief motivation for this judicial doctrine may lie in what the French courts perceive to be the commitment and responsibility of their country to foster a viable international legal order in which the practical mechanisms for the resolution of disputes—freely chosen by the parties involved—are supported by the legal rules and principles of various nations. While the French courts arguably may have been coerced into adopting their liberal position by an astute perception of what was in the best economic interests of their country (and such a policy determination in reality is of sufficient weight to stand on its own), it is equally plausible that they have been and remain inspired by more high-minded considerations. It may appear to the French judiciary that it is simply unfair to allow the dictates of a particular national law to infringe upon the agreed provisions of international contracts. The French courts also may believe that it would be irresponsible for France not to give legal effect and recognition to a development which makes the international order more stable and orderly in its commercial activities.

The combination of these various factors probably best explains why the French courts have articulated a doctrine having very liberal substantive principles. The exact weight that should be attributed to each factor is difficult, if not impossible, to ascertain. Finally, one should not minimize the role of French academic jurists in this development; given the quality of their

work, they obviously had a very strong impact upon the perspectives and perceptions of the courts in the international cases. Their guidance, although it cannot be isolated directly, must have been a significant factor in encouraging the courts to take a realistic and high-minded view of the international litigation relating to arbitration. The doctrine in this area may stand as unique precisely because it is a merger of pragmatic policy-making enlightened or inspired by the writings of academic jurists.

CONCLUSION

That international commercial arbitration is viewed by the French courts as an important area of litigation¹⁶⁷ is beyond question. It is, in fact, an area of litigation in which the French Supreme Court itself has been particularly active, both in establishing basic principles and confirming the innovative reasoning of lower courts. The elaboration of such a progressively-minded *jurisprudence* dispels many of the commonplace assumptions about the French civilian courts. Their ability to be creative doctrinally and to respond appropriately to the special needs of a given area of litigation is well-demonstrated. What is especially interesting and remarkable about this case law is its establishment of a clear demarcation between domestic and international arbitration. In the international area, the courts not only have refused to be guided by domestic legislative provisions, but also have refrained from relying upon the substance of international conventions—the only legislation of direct relevance in this area.

Since the nineteenth century, the French courts have relied upon their own perceptive assessment of the needs of international commercial arbitration and have not neglected opportunities to foster the growth and continued development of international commercial dispute resolution through arbitration. Their doctrinal achievement is a substantial one—not only discrediting to some extent the commonplace assumptions about civilian

167. See *id* at 21. See also the remarks of Mr. Justice Bellet, until recently Chief Presiding Judge of the French Supreme Court, at the Sixth International Arbitration Congress held in Mexico in March, 1978, in Bellet, *The Evolution of French Judicial Views on International Commercial Arbitration*, 34 *Arb. J.* 28 (March 1979) and, in French, [1978] *Rev. Arb.* 313. The fact that the highest ranking judge of the French Supreme Court participated in a conference on international arbitration is itself testimony to the fact that international commercial arbitration is viewed with some importance in France.

courts, but also, in effect, challenging the usually unfettered validity of certain systemic principles regarding the formulation of law in civilian legal systems. In any event, the *jurisprudence* in this area could serve as a lucid substantive basis upon which to construct a statutory codification in France regarding matters of international commercial arbitration—an area of activity which merits the attention of the French legislator given the increasing importance of arbitration in transnational commercial matters.