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I. INTRODUCTION

Prior to May 1980, the French domestic law on arbitration had not been subject to any substantial legislative reform since the early nineteenth century. The procedural part of that law, which contained practically all of the French legislative provisions applying to arbitration, was out of date and in need of reconsideration. Despite the considerable French procedural law reforms enacted in 1975, articles 1005 through 1028 of the Nouveau Code de procédure civile had not been revised to any significant extent since the enactment of the Code de procédure civile in 1806.

A. The Antecedent Legislation

The French legal system had been living with provisions on domestic arbitration which, per force, contained gaps and did not respond to many of the fundamental doctrinal issues that had surfaced in arbitral practice and court litigation dealing with arbitration since 1806. Despite the absence of modern legislation, contemporary French courts exhibited a remarkably receptive attitude towards arbitration, and recourse to arbitration was frequent in

3. See, e.g., Level, supra note 1, at 2.
4. The flexibility and moderation of the applicable legislation was evident in the fact that the relevant codal provisions were neither numerous nor exceedingly detailed in substance and covered only the most salient issues or ones which could arise in exceptional circumstances. These characteristics of the procedural law on arbitration reflected a legislative policy of giving arbitration the “breathing room” it needed in order to function properly. See Nou. C. Pr. Civ. (Fr.), bk. 3, Des arbitrages (Dalloz 72d ed. 1979).
5. For example, although the French courts rendered a number of rulings on this question, there was no codal provision relating to the extent and scope of the arbitrators’ jurisdiction. In fact, there was disagreement on this question between the French Supreme Court for private law matters (Cours de cassation) and a number of courts of appeal (cours d'appel), in particular the Paris Cour d'appel. There was, therefore, a need for a legislative text which resolved the controversy in the jurisprudence and which provided for a settled position in this area. For a discussion of this point, see J. Robert & B. Moreau, L'arbitrage H10 (1st ed. 1971) (and sources cited).
commercial practice. As a consequence, a sophisticated body of French case law and scholarly commentary pertained to the practice of arbitration and there arose a need for legislation on arbitration which would correspond to these developments.

Although flexible, the previous legislation simply did not provide sufficient guidance on arbitral matters. For over twenty years, French legal scholars and practitioners advocated reform, especially of the means of recourse which could be invoked to challenge awards. Under the now-repealed articles 1023 through 1028 of the Nouveau Code de procédure civile, court created rules and other procedural provisions, the means of recourse were numerous—sometimes duplicative—and resulted in the application of a fairly intricate legal procedure. At times, the complexity of this process must have dissuaded both French and foreign parties from resorting to arbitration (at least, under French procedural law) and/or must have suited the ends of a party who, in bad faith, intended to undermine the initial recourse to arbitration through dilatory tactics.

B. The New Legislation

The long-awaited legislative reform of the French domestic procedural law on arbitration has been enacted in the form of the Decree of May 14, 1980. The Decree repeals articles 1005 through 1028 of the Nouveau Code de procédure civile and replaces them

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6. See, e.g., Level, supra note 1, at 2.
8. For example, to inform adequately French nationals or foreign parties who were contemplating arbitration under French procedural rules. The procedural consequences of their intention to arbitrate under French law were only barely outlined in the legislation. An informed choice could be made only by consulting arbitration specialists or engaging blindly in the process and learning from that experience. Neither solution was acceptable from a practical standpoint.
10. See Level, supra note 1, at 2.
11. See, e.g., P. Herzog, Civil Procedure in France 530 (1967).
13. Decree, supra note 12, art. 1, at 1238.
with some fifty new provisions which took effect on October 1, 1980. The provisions of the Decree, of course, leave intact the other domestic legal provisions relating to arbitration.

The Decree responds to a number of critical questions left unanswered by the former legislation, most notably, the extent and scope of arbitral jurisdiction and the role of court intervention in arbitral proceedings. The Decree also implicitly confers a new legal status upon the compromissory clause and reorganizes the means of recourse that can be invoked against arbitral awards. Although it is not the purveyor of extreme or radical change, the Decree generally does contain some fundamental alterations of the French legislative conception of arbitration.

The Decree restructures the body of applicable law, which was disparate and loosely organized, into a more coherent and intelligible whole. Its substantive provisions are presented in a well-articulated, logical progression under clear subject headings which follow the actual stages of the arbitral process and address most of the key issues that are likely to arise at each stage of the process. As a balanced legislative procedural guide to French domestic arbitration, the Decree avoids the twin risks of neglecting to address fundamental questions and prescribing overly detailed rules on these and other questions. It achieves a pragmatic compromise between the need for malleable legal prescriptions and the requirement that legislation be well-organized and comprehensive.

As the French commentators have asserted, the basic intention of the new legislative text is unmistakable: it is designed to promote arbitration as an institution for dispute resolution. In fact, the Decree appears to be the offspring of recommendations of practitioners and academic lawyers who were aware of the deficiencies of the previous legislative rules and who had an accurate perception of what needed to be done. The new legislation benefits considerably from this input. For example, it maintains the desirable flexibility of the former legislation, and at the same time, resolves longstanding doctrinal controversies between the courts and scholars. As a general rule, it remedies many of the uncertainties that attended the application or interpretation of the previous legislation. More specifically, it contains an entirely new section on the rules relating to the form and content of the compromissory

14. Id. art. 52, at 1240.
clause; it defines and delimits the circumstances in which the courts can intervene in arbitral proceedings; it confers new procedural authority upon arbitrators, especially in regard to their authority to rule upon jurisdictional challenges; it aligns the arbitral proceeding with court actions, thereby clarifying basic procedural questions; it eliminates the need for provisions relating to the nomination of a \textit{tiers arbitre} by providing that arbitral tribunals will be composed of an uneven number of arbitrators; and finally, it expands the treatment applying to the \textit{exequatur} (enforcement order) granted to arbitral awards, establishing, in particular, that awards have \textit{res judicata} effect once they have been rendered.

C. Purpose of This Study

This article analyzes the new provisions on French domestic arbitration in the order in which they appear in the Decree. In doing so, it compares the new prescriptions with their counterparts or the lack thereof in the antecedent legislation and attempts to point to the underlying rationale of the new provisions and their probable impact upon French arbitral practice. The commentary outlines in an initial section some of the policy considerations which might have led to the enactment of the Decree and its substance. Although the principal focus of the analysis relates to the substantive character and implications of the provisions for French arbitral practice, the probable underlying motivation for the new legislation will punctuate the technical assessment of the provisions.

II. THE EMERGENCE OF A COMMON POLICY PERSPECTIVE: DOMESTIC AND INTERNATIONAL FRENCH ARBITRAL LAW COMPARED

The new domestic legislation contrasts with the decisional law that applies in matters of international arbitration. The \textit{jurisprudence} that governs international arbitral cases has been moulded to the special needs of that area of litigation. The French courts have rendered some of the domestic provisions inapplicable in the international context \textit{e.g.}, the requirement of a reasoned opinion, the time limit rule, and most of the means of recourse, provisions which respond primarily to internal needs. The enactment of the Decree does not modify this doctrine. Nevertheless the retention of rules in the domestic legislation which are deemed inappropriate
for application in the international context does not mean that the French domestic attitude toward arbitration is less progressive or enlightened than its international counterpart. Despite certain substantive differences, the Decree is no less liberal in regard to arbitration than the court-articulated rules in the international area. Indeed, the domestic legislation is imbued with a single and similar policy motivation: to strengthen the institutional position of arbitration, recognizing its status as a legitimate and accepted means of resolving disputes. On this score, there is absolutely no distinction to be drawn between the domestic legislation and the judicial doctrine in the international area.

A. Unresolved Jurisdictional Issues

On some critical issues which have been resolved in the international arena in a way that supports the institution of arbitration, the new domestic legislation appears to be somewhat hesitant—or at least not as explicit. On the problem of jurisdiction, for example, it is not clear whether the Decree incorporates the separability doctrine into the French domestic law on arbitration. The doctrine is part of the French jurisprudence applying to international arbitral litigation and the juridical autonomy it attributes to the compromissory clause is the centerpiece of that court-created doctrine. The Decree has unquestionably made progress on the jurisdictional issue and may well provide for the separability doctrine. Its exact import on this question is a matter of interpretation. The French commentators argue without any reservations, however, that the separability doctrine is now part of internal French law, and the courts may well follow their construction.

B. The Achievements of the Decree in Terms of a Policy Perspective on Arbitration

The unstated but clear presumption (i.e., that arbitration is a legitimate dispute resolution process and should be upheld) which characterizes the jurisprudence in the international area was also reflected in the French domestic courts’ treatment of arbitration cases under the antecedent legislation. The Decrêe essentially codifies this favorable judicial attitude, one fostered in part by a sophisticated and progressively-minded French arbitration bar of practitioners and scholars. It elaborates rules which reflect the advances made by the decisional law and approved by scholarly com-
mentators. The old judicial hostility toward arbitration which originally created a hiatus between the domestic and international arenas is no more than a remnant of a distant and forgotten past. The Decree, in effect, confirms the contemporary judicial position that arbitration is a viable and legitimate institution in both the domestic and international arenas.

While the new legislation retains the flexibility of the old, it strongly evidences a reformulated view of arbitration. The controlling regulations are built upon and mirror the realities of the arbitral process and seek to further its implementation and successful completion. Gaps are filled and the former rules are reconsidered and reorganized into a more coherent body of law that reflects the developments achieved in more than one hundred and seventy years of litigation. The Decree, however, adds a number of critical ideas that transcend even the uncodified holdings of the courts. As a whole, the new legislative rules point to a definition of the character of this private dispute resolution process, and from that definition, elaborate a view of how arbitration should coexist with the publicly authorized tribunals. Moreover, the Decree acknowledges the contractual nature of the arbitral process, emphasizing the importance of the parties' autonomy of will in establishing regulations for the process. More importantly, however, it equates arbitral proceedings to their judicial analogues as much as possible, attributing increased authority to the arbitrators and a stronger jurisdictional status to their awards.

C. The Fundamental Contribution

The originality of the Decree lies here. The crucial aspect of any legislation relating to arbitration centers around the relationship it establishes between the arbitral and judicial processes. Despite the complete absence of former legislation and a paucity of judicial rulings on this question, the Decree addresses the autonomy issue squarely and unequivocally. Under the new French law, the courts are perceived as a complement to the arbitral process, providing the public force of law to a private contractual process in those circumstances in which such intervention is necessary to the successful implementation of the process. The judiciary also can review arbitral awards to determine their conformity to basic technical requirements and strong public policy concerns, but this type of limited scrutiny, exercised by courts which are already favorably disposed to arbitration, can only add a greater sense of legitimacy
to the arbitral process. Thus, these new provisions attest to the advance character of French arbitration law and could make the Decree a model for the laws of other jurisdictions.

D. La Raison D'Étre

The question remains as to why France has such a progressively minded domestic law on arbitration. Clearly, the liberal character of the jurisprudence in the international area must have had an impact. There must have been a desire to articulate a national policy which was consistent with the rules applying internationally. This explanation provides a good orientation, but it falls short of a complete answer. Although these remarks are speculative, it seems that the French attitude toward arbitration, both domestic and international, is the product of a set of historical factors which acted in conjunction with pragmatic decision-making on the part of the judiciary, the type of decision-making which was fostered by the arbitration bar.

In the early twentieth century, the growth of arbitration in the international commercial sector and the recognition of France as a situs for holding such arbitrations led to a modification of internal French law, thereby ridding it of some of its nineteenth century judicial bias against arbitration. Crowded dockets, the highly technical character of disputes, and the popularity of arbitration in domestic commercial practice must have also had a significant impact upon the French judiciary’s perception of the arbitral process. In an age of increasing commercial litigation involving complex factual determinations, the courts were not prone to view arbitral tribunals as incompetent competitors, but rather (much like the specialized lay commercial tribunals) as parallel institutions, admittedly of inferior public rank, which provided a much needed degree of expertise and relief. The judicial and hence legislative about face, however, would not have come about so quickly or so affirmatively had it not been for the persistent activity of a specialized group of professionals dedicated to the study of arbitration and to the objective of having French law adapt as realistically as possible to the arbitral process. This reasoning is, of course, entirely conjectural, but it seems that the late twentieth century French legislative and judicial attitude toward arbitration, either international or domestic, would not have achieved its current sophistication or liberal tenor had it not been for the work of the arbitration bar. This bar consists of both academic jurists and
practitioners who have performed an indispensable pedagogical
role, advising both the courts and the legislature on the present-
day importance of arbitration and the realities of the arbitral pro-
cess. The liberal French attitude toward arbitration and the re-
markable substance of the Decree of May 14, 1980, should be at-
tributed in large measure to the continuing efforts of this group.
This set of factors helps to explain the reasons for the modifications and changes that were introduced by the Decree and which are discussed below.

III. ARBITRATION AGREEMENTS

A. The Submission and the Compromissory Clause: The Old
Regime

Under the repealed legislation, the rules relating to the form
and content, i.e., to the formal validity, of the compromissory
clause (the clause compromissoire—the agreement to submit fu-
ture disputes to arbitration) were to be deduced from the provi-
sions applying to the compromis (i.e., the agreement to submit ex-
isting disputes to arbitration).16 In the mid-nineteenth century, the
Cour de cassation17 (the French Supreme Court) held that com-
promissory clauses were unlawful in French domestic law, because
by their nature, they could not satisfy the two-fold requirements
for the validity of the compromis.

Subsequent legislation enacted in 1925 modified this judicial
doctrine by providing that compromissory clauses were lawful in
certain commercial matters.18 Despite this limited legislative ap-
proval, legislative provisions specifically applying to the com-
promissory clause had not been enacted. The legal regime applying
to the compromissory clause still was subject to the rules relating

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17. Article 1006 of the Code de procedure civile [C. PR. CIV.] provided that a valid com-
promis, the submission to arbitration of an existing dispute, must define the subject matter
of the dispute and name the arbitrators. See Nou. C. PR. CIV. art. 1006 (Daloz 72d ed. 1979)
(now repealed). In L'Alliance c. Prunier, the Cour de cassation ruled that compromissory
clauses were unlawful in French domestic law based upon a construction of article 1006 of
the civil procedure code. The court reasoned that the clause compromissoire, the arbitration
clause relating to future disputes, was unlawful since, by its very nature, it could not satisfy
the requirements applying to the compromis. See 43 Sirey, Jurisprudence de la Cour de
cassation 561 (1843) (Cr. cass. civ., July 10, 1943).
18. P. HERZOG, supra note 11, at 513 n.169. See also Code de commerce [C. COM.] art.
631 (Fr.) (Daloz 75th ed. 1979-80).
to the *compromis*. In addition, article 2061 of the *Code civil*\(^{19}\) stated that the clause was null and void unless otherwise provided by law, buttressing the notion of the limited validity of the compromissory clause in French Law. Under French legislation, the *compromis* was considered the primary arbitration agreement, a position which did not reflect the realities of actual practice or concord with the legislation of other countries.\(^{20}\)

B. The New Regime

Articles 2 to 10 of the Decree\(^{21}\) establish two separate legal regimes for arbitration agreements: one applying to the compromissory clause and the other to the *compromis*. The new legislation thereby expressly recognizes the legal validity of the compromissory clause and that it is, in fact, frequently resorted to in domestic commercial transactions.\(^{22}\) As a result, once a dispute arises, parties bound by a compromissory clause no longer need to enter into a *compromis* in order to initiate the process of arbitration.\(^{23}\) Now, once the parties have nominated the arbitrators, the arbitration can begin without any formalities relating to a *compromis*.\(^{24}\)

C. Problems Which Fall Outside the Purview of the New Regime

Despite this change in the procedure for initiating arbitration, the new provisions do not provide or pretend to provide a ready-made solution to all the problems that can arise at this stage of the arbitral proceeding. The Decree simply accomplishes the elimination of one of the formalities for initiating arbitration. The parties can still disagree as to the definition of the subject matter of the dispute submitted to arbitration and delay the arbitral proceeding in this way. While a *compromis* would not necessarily be required in such circumstances, it seems that the court articulated rules

\(^{19}\) C. civ. art. 2061 (Daloz 79th ed. 1979-80).
\(^{20}\) See Robert, *Decree Commentary*, supra note 9, at 189-91.
\(^{21}\) Decree, supra note 12, arts. 2-10, at 1238.
\(^{23}\) See Robert, *Decree Commentary*, supra note 9, at 190. Note that although this requirement formerly was contested by some practitioners and apparently limited by court interpretation in the commercial context, it seemed to be valid as a general rule.
\(^{24}\) Id.
which applied before the Decree was enacted would still be relevant and could be applied in such a situation.25

These rules provide, for example, that problems as to the definition of the subject matter of the dispute should be resolved by adopting the definition proposed in the request of the most diligent party. Also, when one party has accepted his co-contractant's offer to arbitrate, the court articulated rules provide that the offeror's definition of the subject matter of the dispute should prevail.26

If the courts interpreted the compromissory clause as an essential element of the contract (i.e., as one of the principal motives which led the parties to enter into the agreement), its invalidity, stemming from the failure to satisfy the mandatory technical requirements, could lead to the avoidance of the entire contract.27

The Decree negates the possibility of such a result; article 6 provides that, when a court rules that a compromissory clause is void, the clause is simply deemed not to have been written.28 In other words, its nullity has no effect upon the other provisions of the contract unless the parties have expressly stipulated that the validity of the entire contract is dependent upon the validity of the compromissory clause. Once a court has held the compromissory clause to be void, nothing prevents the parties, if they still wish to have their dispute resolved through arbitration, to agree to a compromis; otherwise, since no arbitration agreement exists, the resolution of the dispute lies within the jurisdiction of the courts.

These new provisions demonstrate that, in those commercial cases in which it is recognized as legally valid, the compromissory clause is considered as the principal type of arbitration agreement, and the compromis is relegated to a deserved secondary status. The former prominence of the compromis probably reflected the vestiges of the judicial hostility towards the compromissory clause. The fact that the antecedent legislation spoke exclusively in terms of the compromis reflected an antiquated conception of arbitration and a misunderstanding of the realities of the dispute resolution process in the commercial area.29

25. Id.
27. Id.
28. Id.
29. That early judicial attitude was modified by a legislative enactment in 1925. This
D. Other Requirements

Articles 2 and 7 of the Decree\textsuperscript{30} elaborate definitions of the two types of arbitration agreement, a feature which was not included in the repealed legislation even in regard to the compromis.\textsuperscript{31} Both types of arbitration agreements must be in writing--presumably to avoid evidentiary problems. The chief difference between the two legal regimes is that, in order to be valid, the compromissory clause need only name or provide a pro-

modification, however, was only partial in that the lawfulness of the compromissory clause was recognized only in commercial cases. The development of arbitration has taken place chiefly in the commercial area and, in reality, the compromissory clause did not need a more extensive legal validity than was conferred upon it.

30. Decree, \textit{supra} note 12, arts. 2 \& 7, at 1238.

31. Although the Decree has explicitly recognized the compromissory clause, the recent \textit{Code civil} title on arbitration, which relates primarily to the question of the arbitrability of disputes, still speaks in terms of the compromis. Article 1061 of that title established as a general rule that the compromissory clause is void notwithstanding certain exceptions. This evident discrepancy between the attitude toward compromissory clauses that has been incorporated in the \textit{Code civil} and the concept adopted by the Decree is perhaps the sign of a forthcoming change in the official status of the compromissory clause under French domestic law. The two texts dealing with arbitration do not have the same legislative origins or stature; the provisions in the \textit{Code civil} were the product of a parliamentary law, while the Decree was enacted under the regulatory power of the executive branch and, therefore, does not have the stature of a parliamentary law. It appears, in fact, that the parliamentary route for enactment was disregarded deliberately to avoid modifications in the technical nature of the text and to guarantee that its provisions would respond to the practical realities of arbitration. In these circumstances, and in light of the obsolete character of the \textit{Code civil} attitude toward arbitration, the provisions of the Decree relating to the compromissory clause should be regarded as suggestion, \textit{i.e.}, as a discreet first step in the process of changing the language and the substance of the arbitration provisions in the \textit{Code civil}. In any event, the \textit{Code civil} provisions do not give rise to any immediate legal problems or create legal obstacles which could hamper the implementation of the Decree; nor do they place an undue burden upon the process of French domestic arbitration. Nevertheless, they are troublesome simply because the language is essentially an historical remnant that no longer has any currency in arbitral practice. The provisions of the Decree are certainly a step toward the adoption of a modern general policy in the area of arbitration agreements. For this discussion, the author has relied in part on Robert, \textit{Decree Commentary, supra} note 9, at 190, n.2.

32. \textit{Id.} arts. 3 \& 9, at 1238. There is a slight discrepancy between these two apparently similar provisions. While article 3 states that the compromissory clause “must, upon pain of nullity, be stipulated in writing,” article 9 states simply that the \textit{compromis} (submission) “is ascertained (\textit{constaté}) in writing.” In other words, when the substance of these two particular articles is compared, the mandatory formal requirement that the agreement be in writing appears to apply only to the compromissory clause. The provisions of article 8(1), stating that a submission “must, under pain of nullity, define the subject matter of the dispute,” however, seems to imply that the submission also must be in written form. The discrepancy between articles 3 and 9 does not appear, therefore, to create a disparity between the two types of arbitration agreements on this point. Both agreements, it seems, must be done in writing since it is unlikely that the submission could define the subject matter of the dispute without being in writing.
cedure for naming the arbitrators, while the *compromis* also must define the subject matter of the dispute. According to established *jurisprudence* in this area, the nullity of a *compromis* resulting from its failure to define the subject matter of the dispute is not *ordre public*, i.e., not a matter of mandatory public policy, and can be waived by the parties.

The option afforded to the parties either to actually name the arbitrators or simply provide for a procedure by which they are to be named attests to the generally liberal tenor of the enacted reforms and to the willingness of the drafters to align the new rules along the lines of actual arbitral practice. The prior legislation expressly required that the parties name the arbitrators in their agreements. Thus, in many instances and for a variety of reasons, the parties to an arbitration agreement would stipulate only that the arbitrators should be designated in a particular way rather than actually name them. The actual nomination usually was handled by an arbitration center. The new legislation, then, gives recognition, albeit implicitly, to the importance of arbitral centers and the regulations they establish to nominate arbitrators.

Finally, in regard to the *compromis* and in keeping with the spirit of the other provisions, article 8(3) of the Decree provides that, if one of the named arbitrators refuses to take up his terms of reference, the *compromis* is tainted only with a relative nullity i.e., it becomes temporarily void (*caduc*) and not absolutely void. This distinction allows the parties to reactivate a *compromis* affected by such a nullity if they consent to the nomination of another arbitrator. In addition, during a court action involving a dispute which is arbitrable, the parties can enter into a *compromis*, agreeing to submit the dispute brought before the court to arbitration. Clearly, arbitration no longer is seen as being incompatible with the judicial process and the administration of justice; it is seen as a suitable dispute resolution process even when that means discontinuing a legal action.

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33. *Id.* art. 3, at 1238.
34. *Id.* art. 8, at 1238.
38. Decree, *supra* note 12, art. 8(3), at 1238.
40. Decree, *supra* note 12, art. 10, at 1238.
E. The Possibility of Court Intervention: A First Look

The new legislation also provides for the possibility of court intervention in the event that difficulties should arise in the constitution of the arbitral tribunal or in the procedure for designating the arbitrators.41 In these circumstances, the arbitrators are named by either the presiding judge of the district court (the tribunal de grande instance), or, if the parties have expressly so provided, the presiding judge of the commercial court (the tribunal de commerce).42 The former legislation contained no provision relating to this issue which is critical to parties considering whether to bind themselves to an arbitration agreement. The Decree43 describes the circumstances in which the courts can intervene and the scope of their authority, noting that the judge rules on the issues that are raised in his capacity as the juge des référés, i.e., he treats this matter as one of special urgency and assumes emergency jurisdiction over it.44 The intention of the new legislation on this issue appears to be clear: the Decree does not lay the groundwork for a type of judicial intrusion into the arbitral process, but rather seeks to have the courts act as the indispensable complement to the arbitral process.45 In a word, the Decree does not contemplate judicial interference; it merely prescribes a limited and suitable form of judicial intervention in the necessary circumstances. This balance between the authority of the courts and the independence of the arbitral process formally introduces an element of cooperation between the two processes of dispute resolution, which, in fact, may be the most outstanding and innovative feature of the new legislation.

41. Id. art. 4, at 1238.
42. Id.
43. Id. arts. 14, 16, 17, & 23, at 1238-39.
44. On this point, see generally Robert, Decree Commentary, supra note 9, at 189, 192.
IV. GENERAL RULES OF ARBITRATION

A. The Capacity to Act as an Arbitrator

The new legislation also outlines a series of general rules relating to the arbitral process. According to a distinguished French arbitration specialist, this section of the Decree is where the “innovations of the new text will appear to be most important.” For instance, the person of the arbitrator assumes new significance under the Decree. The previously applicable legislation did not contain any provisions concerning the person of the arbitrator. It was generally recognized in early decisions of the French Supreme Court, however, that collective bodies having the legal status of an artificial person could be named to act as arbitrators. The Decree provides that only natural persons have the capacity to act as arbitrators. Accordingly, in the event that the arbitration agreement names an artificial person such as a corporate body (e.g., the Chamber of Notaries of a particular department) to act as the arbitrator, this entity has the capacity only to organize the arbitral proceeding and not act as the arbitrator. As a consequence, arbitral tribunals are equated, at least to some extent, to courts of law under this new provision. Disputes will not be arbitrated by an impersonal collectivity, but by a group of individuals sensitive to the purpose of arbitration. In addition, many of the organizational and administrative complications which could attend the process of arbitration by a corporate body will be eliminated.

B. Accepting the Terms of Reference

Under the Decree, a pre-condition to the constitution of the arbitral tribunal is that the named arbitrators accept their terms of

46. Decree, supra note 12, arts. 11-19, at 1238-39.
47. See Robert, Decree Commentary, supra note 9, at 191.
49. Decree, supra note 12, art. 11, at 1238.
50. Id.
51. Id.
52. While the role of arbitral centers in the process of arbitration is given official recognition in the new legislation, the participation of these centers in the arbitral process is subject to some regulation. Robert, Decree Commentary, supra note 9, at 191.
53. See Riotte, Decree Commentary, supra note 12, at 11-12.
54. Decree, supra note 12, art. 12, at 1238.
reference. The antecedent legislation neglected to address this issue. While the import of this provision may seem to be insignificant, this article of the Decree does have a special meaning. According to a distinguished commentator,55 the combined acts of nomination by the party and acceptance by the arbitrator have the effect of giving the terms of reference the status of an agreement which involves reciprocal duties between the parties, thereby accentuating the contractual nature of the arbitral process. Before agreeing to satisfy the conditions of his terms of reference, an arbitrator is under a duty to inform both parties of any grounds which he thinks might serve to disqualify him.56 His subsequent acceptance, then, is subject to the express agreement of both parties. Such an agreement constitutes a waiver of the right to challenge the arbitrator upon that specific ground.57

C. The Number of Arbitrators

Previously, the number of arbitrators that were required to constitute an arbitral tribunal was left indeterminate. Although, in practice, most arbitral tribunals consisted of three arbitrators,58 the lack of regulation as to the number of arbitrators left open the possibility that only two arbitrators would be named (one by each party) and that their deliberations could result in a deadlock. As a consequence, the repealed law contained a series of articles relating to the naming of a tiers arbitre who would be appointed to render a ruling in the event of a division of opinion (partage) between the two arbitrators who had been named at the outset of the process.59 The newly enacted legislation eliminated the need for the tiers arbitre procedure by providing that arbitral tribunals would consist either of a sole arbitrator or of several arbitrators of an uneven number.

D. The Time Limit Rule

The new chapter outlining general rules for arbitration also

55. Robert, Decree Commentary, supra note 9, at 191.
56. Id.
57. Id.
58. Except in the case of quality arbitrations relating to disputes in a specialized commercial field and products in which only one arbitrator would sit.
60. Id. art. 1017.
61. Decree, supra note 12, art. 13, at 1238.
modified slightly the time limit rule relating to the duration of the arbitrators' terms of reference. Previously, unless otherwise agreed by the parties, the law required that an arbitral award be forthcoming within three months from the date of the compromis.62 Under the new legislation, the parties retain their right to set their own time limit and the additional prerogative to lengthen it. The legal time limit, however, has been extended to six months and runs from the day on which the last arbitrator accepted his terms of reference.63 The latter requirement reflects the fact that the arbitral tribunal is not fully constituted until all the arbitrators have accepted their terms of reference.64 Since a compromis no longer is required to initiate the arbitral process, the extension of the legal time limit evidences a desire on the part of the drafters of the Decree to devise a set of regulations which responds to the realities of the arbitral process. In most cases under the antecedent legislation, the arbitrators could only extend the duration of their terms of reference by having the parties agree to a new submission, which was sometimes difficult to obtain.65

E. Judicial Intervention Defined: A Comprehensive Look

Unlike the repealed provisions, the Decree provisions squarely address the question of when and under what circumstances a court may intervene in the arbitral proceedings.66 As noted previously,67 judicial intervention is provided for when problems arise regarding the nomination of the arbitrators under a compromissory clause. Such intervention also may take place in three other sets of circumstances: (1) when the parties have nominated an even number of arbitrators, a court may name the additional arbitrator if the parties have failed to provide for his nomination or when the named arbitrators cannot agree upon the choice of another arbitrator;68 (2) in the absence of an agreement by the parties on this question, when one of the parties or the arbitral tribunal requests

63. Decree, supra note 12, art. 16, at 1238.
64. Id. art. 12, at 1238.
65. See Riotte, Decree Commentary, supra note 12, at 12.
66. The judge intervenes in his capacity as the juge des référs and treats the matter as being of special urgency. This power extends only to procedural difficulties which arise in the arbitral process and, in the vast majority of cases, the court rules without any possibility of appeal.
67. See text accompanying notes 41-45 supra.
68. Decree, supra note 12, art. 14, at 1238.
a court to lengthen the agreed upon or legally established time limit for the proceedings; and (3) when difficulties arise concerning the disqualification or the challenge (récusation) of an arbitrator. The intervention of the court in its référé capacity, especially in regard to an extension of the time limit, is likely to resolve many of the former uncertainties which accompanied arbitral proceedings.

The substance of these provisions clearly indicates that the new legislation envisions the possibility of judicial intervention in arbitral proceedings only in the exceptional and limited circumstances where the coercive authority of a court of law is deemed to be necessary to the successful implementation of the arbitral proceedings. The provision for judicial intervention does not undermine the autonomy of the arbitral process. In fact, the Decree strikes a reasonable and intelligent balance between competing needs; i.e., preserving the independence of the arbitral process and the flexible character of the applicable legislation, while elaborating a regulatory scheme which specifically outlines the principal instances in which the authority of a court can be invoked to remedy otherwise intractable procedural deficiencies in the process.

69. Id. art. 16, at 1238.
70. Id. art. 23, at 1239.
71. In these cases, the request is brought before the presiding judge (président) of the court which has jurisdiction to hear the matter either upon the basis of the agreement of the parties or the Decree provisions (article 17). In the absence of a designation in the arbitration agreement, the Decree refers to the court in the jurisdiction of which the agreement localized the arbitral proceedings. When the arbitration agreement fails to contain such indications, jurisdiction is proper where the defendant resides or, if the defendant resides outside of France, where the plaintiff resides.

This provision, of course, places a foreign party who is engaged in an arbitration in France with a French national party in a disadvantageous position in that the French party has the right to bring the actions provided for before his national courts. In most cases, this recourse to the courts would take place in cases in which the foreign and French party are arbitrating in France or at least in cases in which French procedural rules relating to arbitration apply to the arbitral proceeding. In these circumstances, the foreign party can be held to have consented constructively to the jurisdiction of the French courts. This provision, therefore, does not seem to present any exorbitant jurisdictional character.

The Decree expressly provides that the presiding judge of the relevant court shall hear these matters as if they were en référé, that is, he shall treat them as matters of special urgency and assume summary jurisdiction over them and hear them in his chambers. The ruling of the court, in effect, is a type of injunction order and cannot be appealed except in those rare circumstances in which the court is unable to name the arbitrators because the compromissory clause is manifestly void or otherwise seriously deficient in substance. In this case, the action on appeal would be heard in a type of adversarial proceeding (par la voie de contredit). Robert, Decree Commentary, supra note 9, at 192.

72. See Robert, Decree Commentary, supra note 9, at 192.
F. The Jurisdictional Effects of the Agreement to Arbitrate

Unlike the repealed provisions, the new legislation (which on this question affirms the substance of the prior court decisions)\(^7\) expressly recognizes the jurisdictional implications of an arbitration agreement and seeks to give full legal effect to the parties' intention to submit disputes to arbitration. Article 18 of the general rules\(^7\) provides that a court must declare that it lacks jurisdiction to hear a dispute when that dispute is the subject of an arbitration agreement. Thus, the article\(^7\) affirms the fundamental principle that the arbitral process is autonomous and independent from the authority of the courts even though a limited form of court intervention may be necessary. The law thereby recognizes the jurisdictional implications of an arbitration agreement and seeks to give full legal effect to the parties' intention to submit disputes to arbitration.\(^2\)

V. THE ARBITRAL PROCEEDING

The new regulations relating to the arbitral proceeding also represent a rather substantial refinement of the previously applicable law. Despite the fact that arbitration is a purely contractual and private form of justice, this section of the Decree equates it as closely as possible to the rules applying to a public judicial proceeding, thereby giving recognition to the jurisdictional character

73. Robert, Decree Commentary, supra note 9, at 192.
74. Decree, supra note 12, art. 18, at 1239.
75. Id.
76. The rule established by article 18 applies in two sets of circumstances. First, the courts would not have jurisdiction to hear actions arising from a dispute presently before the arbitral tribunal. Here, the key issue for judicial determination is whether the court action actually involves the same dispute as the one submitted to arbitration. The more typical circumstance occurs when, despite an arbitration agreement, a party brings a court action before the dispute is submitted to the arbitral tribunal. In these instances, the court is still obliged to declare that it lacked jurisdiction to hear the matter. The key issue for judicial determination here is whether the dispute was included within the terms of the arbitration agreement. The article 18 rule would not apply in the second example if the court found the arbitration agreement to be "manifestly void." Such a finding, it seems, would be rare, and would consist of a clear and unequivocal violation of the requirements that the compromissory clause be written and at least provide for a procedure by which the arbitrators are to be nominated. The concept of an arbitration clause being "manifestly void" appears to preclude any judicial scrutiny of the clause which would be more than generally superficial. Finally, the article 18 rule cannot be invoked by the court on its own motion because it is not a mandatory public policy requirement. The motion raised by one of the parties is to be considered in a type of adversarial proceeding (par la voie de contredit). Robert, Decree Commentary, supra note 9, at 192.
of the arbitral proceeding. For example, the arbitral proceeding is described as an instance, a term usually reserved to describe court proceedings. Although the arbitrator cannot accompany his interlocutory orders with a daily fine or direct mandatory orders to third parties, he has powers comparable to the judge in matters of discovery and other evidence gathering procedures (l'instruction). Like court proceedings, the arbitral proceeding must be adversarial (contraditoire). The following discussion places these features of the Decree provisions in their proper context.

A. The Choice of Procedure

The old rule that the parties and the arbitral tribunal were to follow the procedural forms and time limits established for litigants and judicial hearings unless the parties agreed otherwise has been reformulated to allow the arbitrators to regulate the arbitral procedure themselves unless the parties provide to the contrary. Thus, the inversion of the syntactical ordering of the old provision transforms the exception under the old law into the rule under the new law.

Under the practice governed by the prior law, the parties frequently invoked the exception, allowing the proceeding to follow a more flexible procedure. Their choice was subject only to the constraint that the selected procedure not violate mandatory rules of public policy. The new legislation takes this reality of arbitral practice fully into account. While the parties retain the prerogative of determining the type of procedure that is to be followed in the proceeding, the arbitrators can either supplement insufficient provisions or, when the parties have not specified a particular procedure, determine which procedure is to be followed. In other words, when the parties agree to arbitrate, i.e., to remove their disputes from the jurisdiction of the courts, they no longer need to state expressly that their choice also implies a waiver of the application of the usual procedural rules to the proceeding. Now, the very existence of an arbitration agreement, without any contrary stipulation, implies a waiver of the procedural rules.

77. Id. at 193.
79. Decree, supra note 12, art. 20, at 1239.
81. Riotte, Decree Commentary, supra note 12, at 10.
The notion of procedural regularity is not alien to French domestic arbitral proceedings. The Decree requires that the chosen arbitral procedure must conform to the fundamental procedural rules which apply to all litigation and dispute resolution processes. These rules, as the Decree stipulates, are contained in the *Nouveau Code de procédure civile* and represent what can be considered to be the minimal requirements of procedural fairness common to most advanced legal systems and indispensable to any efficacious and equitable system of dispute resolution. These codal provisions define the basic role and responsibilities of the judge and the litigants and mandate that the principle of a contradictory hearing and right to legal representation be respected. The application of these rules, however, will not impair the arbitrators or the parties from devising a flexible arbitral procedure. The new legislation is simply more specific and clearer on this matter than the repealed provisions.

**B. A Grant of Increased Procedural Authority**

The Decree also provides that, if a party detains evidence (an *élément de preuve*), the arbitrator can enjoin him to bring it forth. This express grant of authority gives the arbitral tribunal procedural powers not contemplated under the former legislation and, in theory, increases the authority of the arbitral tribunal in matters of evidence gathering. This grant of authority corresponds generally to the power that is vested in a court of law under article 11(2) of the *Nouveau Code de procédure civile* to enjoin a party to submit evidence that it has in its possession, and that the court may buttress its order by the threat of the imposition of an

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82. Decree, *supra* note 12, art. 20, at 1239.
83. Id.
84. For example, article 11(1) provides that the parties must cooperate in the evidence-gathering process and that the judge can take their lack of cooperation into account in his ruling. Article 12 states generally that the judge must proceed under a ruling according to the applicable rules of law; article 13 authorizes the judge to request that the parties submit the legal conclusions and arguments which he deems necessary to resolve the litigation.
86. In addition to article 1009, the former provisions of the civil procedure code contained no other provisions relating specifically to the procedural details of the arbitral proceeding and certainly did not align the procedure to be followed by the arbitrators according to the basic rules of French procedural law, thereby creating some degree of uncertainty as to how the arbitral proceeding should take place.
87. Decree, *supra* note 12, art. 20, at 1239.
astreinte, a daily fine for the failure to comply with the court order. Since the Decree explicitly excluded a reference to article 11(2), there is some question as to whether the arbitral tribunal, under the new legislation, has the authority to attach an astreinte to its order.

Although, under previous arbitral practice, it was generally recognized that the arbitral tribunal could accompany its award with an astreinte, it was unclear whether this power applied both to the final award and to interlocutory awards. The decisional law drew a distinction between the comminatory and non-comminatory astreintes. Since the non-comminatory astreinte was the equivalent of compensatory damages (dommages-intérêts), the courts held that the arbitrators did not have the power to impose such fines without being specifically authorized to do so by the parties to the arbitration agreement. The Decree does not state expressly that such pecuniary sanctions can accompany an interlocutory award rendered by the arbitral tribunal ordering one of the parties to produce evidence. It seems that the principal recourse of the arbitral tribunal, under the Nouveau Code de procédure civile, is to take the non-complying party's lack of cooperation into account in rendering the final award. While the Decree recognizes the jurisdictional character of the arbitral process, its contractual nature is not totally erased and the legislation cannot avoid the undeniable fact that the arbitral tribunal has no public authority or mandate.

Other remedial procedures are available in these circumstances. When a party refuses to comply with the interlocutory award, the other party or the tribunal itself could request that a court intervene to order compliance. Alternatively, the tribunal or the party could seek an enforcement order for the award. Since the recourse to such procedures would prolong (perhaps considerably) the arbitral proceeding, a more expedient solution might be to have the arbitral tribunal rely upon its article 11(1) powers in these circumstances.

The arbitral tribunal's express power to enjoin the production of evidence extends only to the parties to the arbitration and does not apply to third parties. When asked to give legal force to awards

89. Nou. C. FR. CIV. art. 11(2) (Dalloz 72d ed. 1979).
91. See, e.g., J. Robert & B. Moreau, supra note 5, at H8.
rendered against third parties, the courts may be somewhat reluctant to satisfy such requests since the third parties in question are not involved in the arbitration, which is a private form of justice applying only to the contracting parties. On this issue, the drafters of the Decree could be accused of being timid and failing to address the problems in this area squarely. The drafters’ reticence may be due in large part to the fact that, no matter how advanced the legislative concept of arbitration may be, arbitral proceedings and rulings by themselves can never have the full authority of law. While this new grant of procedural authority is a welcomed addition to the powers of the arbitral tribunal, its effectiveness as a tool for facilitating the gathering of evidence in French domestic arbitral proceedings can be determined only in the course of future arbitral practice.

C. Other Provisions

Many of the other provisions in this section restate the substance of the previously applicable rules without any significant modification either in language or in meaning. The issues treated by these provisions essentially concern: (1) the termination, disqualification, and challenge of the arbitrators;93 (2) under what conditions, other than the rendering of an award, the arbitral proceeding will end;94 and (3) how many arbitrators conduct the evi-

93. Decree, supra note 12, arts. 22 & 23, at 1239. The former provision on this subject consisted of Nou. C. PR. CIV. art. 1014 (Daloz 72d ed. 1969). There are, of course, some differences, albeit of relatively minor consequence, between the former and the newly-enacted provisions. Former article 1014 provided that the arbitrators could not resign from their functions once the proceeding had begun and that they could not be disqualified except on grounds which had surfaced since the compromis (submission) had been entered into. The new provisions essentially restate these basic rules with some minor modifications. Article 22 provides that all arbitrators must pursue their terms of reference until they have been fulfilled and that an arbitrator cannot be disqualified except by the unanimous consent of the parties. Article 23 provides that an arbitrator cannot refrain from adjudicating or be disqualified except for a ground of challenge which surfaced since his nomination. Moreover, difficulties arising from the application of article 23 are to be brought before the presiding judge of the competent tribunal. Except for the latter point—the significance of which has already been discussed in the text (notes 67-74 supra)—there is nothing of substance which is fundamentally new in these provisions. They simply provide for clearer and somewhat more detailed rules in this area. But see Riotte, Decree Commentary, supra note 12, at 12.

94. Decree, supra note 12, art. 24, at 1239. The former provision on this question consisted of Nou. C. PR. CIV. art. 1012 (Daloz 72d ed. 1979). Again, there are certain minor differences between the respective texts. Former article 1012 provided that the compromis (submission)—hence one would assume the arbitral proceeding—would end in three sets of circumstances: (1) by the death, refusal to adjudicate, resignation or inability to arbitrate of an arbitrator unless there was a subsequent agreement or the choice of a replacement for
dence gathering process and the establishing of the record.95 On this latter point, the Decree states that the parties can agree to have one expert arbitrator handle technical matters.96

D. Witnesses

In regard to witnesses, the Decree expressly states that third parties will not testify under oath,97 reflecting the fact that the arbitral tribunal does not have the authority to reach a finding of perjury and to prosecute the allegedly culpable party.98 This provision, however, does not prohibit the arbitral tribunal from hearing the parties under oath—a procedure which was admitted in previous French domestic arbitral practice,99 although not expressly provided for in the former law. Under previous practice,100 there also was the possibility of questioning the parties under a limited

the arbitrator was left to the parties or to the remaining arbitrator(s); (2) by the expiration of the time limit established by the parties or—in the absence of the former—by the law (in the latter case, a 3-month time limit); (3) by a deadlock (division of opinion—partage) among the arbitrators if the latter did not have the authority to name a tiers arbitre.

The new provisions basically simplify and modify to a certain extent the previous rules. Article 24 of the Decree provides specifically that the arbitral proceeding will end in three sets of circumstances: (1) by the disqualification, death, or inability to adjudicate of an arbitrator as well as by the fact that an arbitrator loses the full exercise of his legal rights (droits civils); (2) by the abstention or challenge of an arbitrator; (3) by the expiration of the time limit for arbitration. The article, which eliminates any reference to the compromis, adds that these rules can be modified by the particular agreements of the parties. The most notable feature of the new rules consists in the fact that reference no longer is made to the partage (deadlock) between the arbitrators, since that situation no longer is possible under the new procedural rules (see text accompanying notes 53-61, supra). Also, the reference to the arbitrator's loss of full exercise of his legal rights is new. This situation can occur either when an arbitrator is imprisoned or when he is placed under legal guardianship for a serious alteration of his mental and/or physical capacities. In this sense, the arbitral provisions are in keeping with the latest reforms of the Code civil dealing with the law of persons. C. civ., Bk 1 (Dalloz 79th ed. 1979-80). Otherwise, article 24 of the Decree does not introduce anything of a substantive nature which is new, although the reason underlying the distinction it establishes between the disqualification (r évocation) and the inability to adjudicate of an arbitrator (first ground for termination of the arbitral proceeding) and the abstention (abstention) or the challenge (r écusation) of an arbitrator is not altogether clear.

95. Decree, supra note 12, art. 21(1), at 1239. The former provision consisted of Nou. C. FR. CIV. art. 1011 (Dalloz 72d ed. 1979). A comparison of the relevant parts of the two provisions reveals that, despite an extra noun in the former article 1011—du ministère—there is no significant semantic or stylistic difference between them.

96. Riotte, Decree Commentary, supra note 12, at 10.
97. Decree, supra note 12, art. 21(2), at 1239.
98. Robert, Decree Commentary, supra note 9, at 194.
100. Id. at J5. See also Judgment of December 3, 1965, Cour d'appel, Paris, [1966], J.C.P. II No. 14625 (Boulbès, Note) and [1966] Rev. Arb. 23.
form of cross-examination (contradictoirement) when the parties entered a special appearance (a comparution personnelle). The new legislation, however, is silent on this issue and fails to address the question of how much weight the arbitral tribunal is to attribute to oral testimony. The omissions of the Decree on these matters may stem from the fact that oral testimony is not generally considered fundamental under French procedural law and from an intent to align arbitral proceedings with generally applicable procedural rules.

E. Submission of Arguments and Deliberations

The antecedent legislation provided that the parties were required to submit their evidence and present their arguments fifteen days before the expiration of the time limit for arbitration. The Decree makes no such restriction, leaving the matter to the discretion of the arbitral tribunal. The flexibility of the new rule reflects the type of pragmatism that accommodates the nature and realities of arbitration.

F. Staying the Proceeding

Other innovations relate to the conditions under which the arbitral proceeding can be stayed. Under the former legislation, the arbitral tribunal was required to stay the proceeding when a party made a plea of forgery (inscription de faux) or the proceeding gave rise to a point of criminal law (incident criminel). While the former legislation did not address this issue specifically, it seems that a proceeding would be stayed in the event that one of the parties, arguing that the arbitration agreement was void, challenged the jurisdiction of the arbitral tribunal to hear the matter. Many French legal scholars argued that arbitrators had the power to rule upon such a jurisdictional challenge. The French Supreme

102. Id. art. 1016.
103. Decree, supra note 12, art. 28, at 1239. The date for concluding arguments and for taking the matter into deliberation (la mise en délibéré) is set by the arbitral tribunal when it deems the evidence-gathering process to be complete. The tribunal’s decision should take into account the applicable time limit rule, but that time limit can always be extended. After this date, the parties no longer can present arguments or introduce new documentation, unless the arbitral tribunal so requests.
105. See, e.g., J. Robert & B. Moreau, supra note 5, at H10.
106. J. Rubellin-Devichi, supra note 7, at § 315; Klein, in [1961] Rev. Arb. 48; Metz-
Court, however, consistently held that arbitrators could not assume jurisdictional authority upon the basis of an allegedly invalid agreement. A number of cours d’appel, however, had held to the contrary, and this crucial point of French arbitration law remained unsettled.

G. Jurisdictional Authority to Hear Jurisdictional Challenge (Kompetenz-Kompetenz)

The substance of articles 26 and 27 of the Decree appears to settle the kompetenz-kompetenz controversy. Under the Decree, any stay of the arbitral proceeding is governed by the provisions of articles 369 to 376 of the Nouveau Code de procédure civile. These provisions contain basic procedural rules which describe, inter alia, the specific and rather limited circumstances in which an action will be stayed, when a stay can be terminated voluntarily, and the effect of a stay upon the court’s jurisdiction over the matter.
Most significantly, the Decree provides that arbitrators have the power to rule upon a question concerning their own jurisdiction, obviating the need to stay the arbitral proceedings in order to take this matter directly before a court of law. Article 26\textsuperscript{113} states that in the event that one of the parties makes a motion before the arbitral tribunal challenging its jurisdictional power (either in its principle or in its scope), the arbitral tribunal may rule upon the validity or the limits of its investiture.\textsuperscript{114} This provision seems to put an end to the longstanding debate on this issue between the French Supreme Court, French legal scholars, and the \textit{cours d'appel}.\textsuperscript{115}

H. The Implications of the Jurisdictional Rule

The drafters must have chosen the language of this provision with great care. For example, the substance of the provision applies when a jurisdictional challenge is raised before the arbitral tribunal.\textsuperscript{116} This qualification implies that when such a motion is made before a court (usually, once an award has been rendered through a means of recourse action), the latter can still rule upon the issue. In other words, the grant of authority to the arbitral tribunal does not preclude the courts from ruling on this question. The new rule, however, does not expressly prohibit a party objecting to the jurisdiction of the arbitral tribunal from addressing the jurisdictional motion directly to a court at the outset of the arbitral proceeding. In doing so, however, the party exhibits bad faith and an intention to undermine the parties' original intention to arbitrate disputes. In light of the arbitrators' express authority to rule upon matters involving their own competence, and since court scrutiny can be exercised at the means of recourse stage of the process, the courts may be reluctant in these circumstances to assume jurisdiction over the matter. In any event, the arbitral tribunal no longer needs to stay the proceedings when a jurisdictional

\textit{(acte authentique)}, the arbitral proceeding must be stayed and an action brought before a court of law. \textit{See Decree, supra} note 12, art. 27, at 1239; \textit{Nou. C. PR. CIV.} art. 313 (Daloz 72d ed. 1969). This distinction between the two types of the pleas of forgery was not clearly drawn under the old law, although court rulings had acted as a supplement to the former legislation on this question. \textit{See} \textit{Nou. C. PR. CIV.} art. 1015 (Daloz 72d ed. 1979); \textit{Robert, Decree Commentary, supra} note 9, at 194.

\textsuperscript{113} \textit{Decree, supra} note 12, art. 26, at 1239.

\textsuperscript{114} \textit{See text accompanying notes 106-08 supra.}

\textsuperscript{115} \textit{Decree, supra} note 12, art. 26, at 1239.

\textsuperscript{116} \textit{Id.}
challenge arises.

I. Challenge to the Principle or Scope of Jurisdiction

A jurisdictional challenge can attack either the principle or the scope of arbitral jurisdiction. This double qualification refers to the two sets of circumstances in which jurisdictional objections can be raised: (1) on the ground that the arbitration agreement itself is void; and (2) on the ground that the dispute, brought before the arbitral tribunal, goes beyond or is not included in the terms of the arbitration agreement. Accordingly, when a jurisdictional challenge is raised in the proceedings, the arbitral tribunal has the authority to rule upon either the validity (corresponding to the challenge of the principle of jurisdiction) or the limits (corresponding to a challenge of the scope of jurisdiction) of its investiture.

J. The Separability Controversy

Despite its careful wording and its apparent comprehensiveness, article 26 leaves one fundamental problem unresolved, namely, whether the arbitral tribunal retains its newly established jurisdictional authority when a party alleges that the arbitral tribunal lacks jurisdiction because the principal contract in which the arbitration agreement is contained is void and this defect implies the nullity of the arbitration agreement. Although the French courts recognized the juridical autonomy of the compromissory clause through the separability doctrine in matters relating to international commercial arbitration, the French Supreme Court had refused to incorporate this doctrine in domestic arbitral jurisprudence. The courts deemed the arbitration agreement to be an accessory part of the principal contract; as a consequence, its validity was dependent upon the validity of the main agreement.

The language of article 26 simply is not specific enough to justify the conclusion that the separability doctrine has become part of French domestic arbitration law. One distinguished commenta-

117. Id.
118. Id.; J. Robert & B. Moreau, supra note 5, at H10.
119. Decree, supra note 12, art. 26, at 1239.
121. See text accompanying note 107 supra.
tor described the import of article 26 by stating that it "resolves in the most liberal way a quarrel which for the last twenty years has divided the courts," and that its language "leaves no doubt in one's mind" as to the separability issue. Another commentator agreed, but upon the basis of a close reading of the text itself. In his view, the reference to the notion of investiture implied that the granting of jurisdictional authority extended to circumstances in which the parties contested the validity of the compromissory clause upon the basis of the fact that the principal contract in which it was included was void. He buttressed his interpretation with a reference to a 1971 French Supreme Court decision in which the court apparently adopted the position advanced by the cours d'appel that arbitrators could rule upon questions relating to their investiture. The substance of this holding, it is argued, was incorporated into the new legislation.

A single case, however, may not be enough to reverse the consistent hesitation in the prior decisional law. Moreover, the implications of this ruling, in the final analysis, depend upon what meaning is attributed to the concept of investiture and its validity. Usually, investiture is juxtaposed to competence. Competence refers to a jurisdictional challenge alleging that the dispute submitted to arbitration is not covered by the terms of the arbitration agreement. Investiture refers to a jurisdictional challenge alleging that the arbitration agreement itself is void and, therefore, that the arbitrators do not have the jurisdictional basis upon which to assume their powers. The challenge to the investiture of the arbitral tribunal does not necessarily include circumstances in which the alleged nullity of the arbitration agreement is based upon the invalidity of the principal contract. In any event, one would think that the integration of the separability doctrine in domestic law would represent such a fundamental change that the Decree would have addressed the issue squarely. Article 26 should have contained some express language referring to the juridical autonomy of the compromissory clause similar to the Gosset holding in the area of international arbitration.

123. Robert, Decree Commentary, supra note 9, at 194.
124. Id.
126. Riotte, Decree Commentary, supra note 12, at 8.
127. Id.
129. See text accompanying note 120 supra.
It may be more prudent to interpret the grant of increased jurisdictional powers and the contradistinctive silence on the separability question as constituting an implicit invitation to the courts ruling in future litigation to recognize and adopt the separability doctrine in domestic arbitral matters by using the broad language of article 26 as a means of justifying that recognition and adoption. Such an interpretation not only would eliminate the somewhat unjustifiable disparity between the legal regimes applying to domestic and international arbitration matters, but also would give article 26 its full potential impact and attribute an even greater measure of autonomy to the process of arbitration in French domestic law. On its face, article 26 appears to be a moderate step forward which leaves the question of whether the separability doctrine should be adopted as part of the domestic law for future judicial determination.

The substance of article 26 deserves a final remark. In one clause describing the challenge that a party may bring, the article refers to the “jurisdictional power” of the arbitral tribunal, while in the following clause it speaks about the arbitral tribunal’s authority to rule upon the validity and the limits of its “investiture.” At first blush, these different terms seem to refer to the same idea; both clauses contain parallel constructions which refer to the basic validity and scope of the arbitral tribunal’s jurisdiction. Although the absence of the word “competence” in this context is somewhat surprising in light of the fact that it is usually employed to refer to issues and problems relating to jurisdictional matters, the phrase “jurisdictional power” is synonymous with that term and perhaps is a more transparent expression of the notion to which it refers. It seems that the use of two different terms, i.e., jurisdictional power and investiture, may have been a response by the learned drafters to a distinction made by the French Supreme Court in the mid-nineteenth century between the notion of competence and that of investiture.

In an 1842 case, the Court stated that although an arbitral tribunal could interpret the substance and scope of a compromissory clause in relation to its competence, it could not rule upon its ability to hear a matter when the act which invested it with its mission was alleged to be void. The court reasoned that since ar-

130. Decree, supra note 12, art. 26, at 1239.
bitral tribunals did not have the permanent judicial character of a public body, but rather were specially created by private individuals for certain particular cases, the question of ascertaining whether they had legally been instituted as judges did not raise a competence issue. According to the court, this gave rise to a question of investiture which could not be resolved by the arbitral tribunal.\(^\text{132}\)

Despite the fact that this distinction between competence and investiture was established at a time when the French courts, especially the Supreme Court, exhibited a strong hostility to domestic arbitration,\(^\text{133}\) it is possible that the drafters had it in mind when they wrote the substance of article 26. Although this early distinction did not surface expressly in the more contemporary jurisprudence, the French Supreme Court, in its modern rulings, continued to oppose the position that arbitrators had the power to rule upon their own jurisdiction,\(^\text{134}\) thereby supporting the conclusion that the competence-investiture distinction could still be resorted to in the circumstances of an appropriate case.

In light of this history, the use of the term investiture in the Decree clearly affirmed the position that the arbitral tribunal has the power not only to rule upon whether its jurisdiction extends to the resolution of a particular dispute, but also to challenges that are based upon the alleged invalidity of the arbitration agreement itself. As noted previously, this interpretation is supported by the two double references to the validity and scope of the jurisdictional powers. Despite arguments to the contrary, it seems that it cannot fairly be said that the reference to the validity of the arbitral tribunal’s investiture implies the recognition of the separability doctrine in circumstances in which the invalidity of the arbitration agreement is alleged to stem from the fact that the principal contract is void.

VI. THE ARBITRAL AWARD

A. The Prior Legislation

Only two articles of the repealed provisions directly concerned the arbitral award.\(^\text{135}\) First, in order to be legally enforceable, do-

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132. Id.  
133. See text accompanying note 17 supra (reference to L'Alliance c. Prunier).  
134. See text accompanying note 107 supra.  
135. Nov. C. Pr. Civ. Arts. 1020-21 (Dalloz 72d ed. 1979). In addition, former article
mestic arbitral awards had to be granted an *exequatur* from a court. Secondly, the enforcement order was to be granted by the presiding judge of the district court (*président du tribunal de grande instance*) of the jurisdiction in which the award was granted.\(^{138}\) Despite the existence of these provisions, there was debate between the courts and legal scholars as to when an arbitral award acquired *res judicata* effect or *autorité de la chose jugée*. The courts, including both the *cours d'appel* and the Supreme Court, took the position that an arbitral award had *res judicata* effect only when it had been granted an *exequatur*;\(^ {137}\) legal scholars maintained that arbitral awards had *res judicata* effect once they were rendered by the arbitral tribunal.\(^ {138}\)

B. The New Regime

The new legislation has expanded and substantially reorganized the provisions relating to the arbitral award. It includes some twelve articles which, although they are not all new in substance, fill in gaps, confirm the validity of existing jurisprudential principles, and restructure the body of applicable law into a more coherent whole. In general, this title of the Decree establishes a very close parallel between the basic procedural requirements applying to court judgments and the rules it lays down for arbitral awards, aligning, for the sake of clarity and coherence, the procedural law relating to arbitration upon the basic provisions of the *Nouveau Code de procédure civile*.

1022 provided that arbitral awards could not be brought against third parties. The third title of the Decree outlines rules regarding the arbitral award. *See Decree, supra* note 12, arts. 29-40, at 1239. According to the French commentary (Robert, *Decree Commentary, supra* note 9, at 195), this was an area in which the Decree had the least to innovate. That observation, however, takes into account actual arbitral practice, court articulated rules regarding the arbitral award and, to a lesser degree, the isolated provisions of the antecedent legislation.


1. Confidentiality of Deliberations and the Majority Character of Awards

The Decree\textsuperscript{139} requires that the deliberations between the arbitrators be confidential\textsuperscript{140} and that arbitral awards, like court decisions, need to be rendered only upon the basis of a majority vote.\textsuperscript{141} The previous legislation made no mention of these matters, but, in a 1967 decision, the Cour d'appel of Paris held that the principle of secrecy applied to arbitrators as well as to judges of the ordinary courts.\textsuperscript{142} There was, however, some doubt as to whether this isolated decision actually resolved the issue insofar as the old provisions permitted arbitral tribunals to be composed of two arbitrators, and provided for the naming of a tiers arbitre in the event of a division of opinion (partage) between the two named arbitrators.\textsuperscript{143} This procedure required the divided arbitrators to give their separate reasoned opinions in the same or separate records,\textsuperscript{144} thereby requiring them, in effect, to reveal the substance of their deliberations. The new legislation obviates the need for the tiers arbitre procedure,\textsuperscript{145} and, as a consequence, it seems that arbitrators can be held professionally liable for failing to keep the deliberations concerning an award confidential.

The secrecy requirement explains in part the implications of the rule which provides that arbitral awards need be rendered only upon the basis of a majority vote.\textsuperscript{146} By law, arbitral awards, like court decisions, reflect only the majority opinion among the arbitrators, thereby implying that, in some cases, the award will not be a unanimous determination. Dissenting court opinions are never expressed or published in France since the courts render only one opinion.\textsuperscript{147} The equating of arbitral awards with court judgments in this regard and the application of confidentiality to arbitral deliberations, then, might preclude dissenting opinions of the minority arbitrator(s) from being made available to the parties either with the award or afterwards.

\textsuperscript{139} Nou. C. Pr. Civ. arts. 448-49 (Dalloz 72d ed. 1979).
\textsuperscript{140} Decree, supra note 12, art. 29, at 1239.
\textsuperscript{141} Id. art. 30, at 1239. See also Robert, Decree Commentary, supra note 9, at 195.
\textsuperscript{143} Nou. C. Pr. Civ. art. 1017 (Dalloz 72d ed. 1979).
\textsuperscript{144} Id.
\textsuperscript{145} Decree, supra note 12, art. 13, at 1238.
\textsuperscript{146} Id. art. 30, at 1239.
\textsuperscript{147} See P. Herzog, supra note 11, at 202.
The previous legislation did not exclude the possibility that dissenting opinions could be disclosed since the tiers arbitre procedure obliged divided arbitrators to give their separate opinions. Arguably, this disclosure did not violate the principle of secrecy since the dissenting opinions did not necessarily reveal the actual substance of the debate that took place, but rather the minority arbitrator’s findings on the facts and issues.\textsuperscript{148} The new legislation can be interpreted as establishing a different rule, one which no longer permits the parties to have access to dissenting opinions of the arbitrators. Since the deliberations are to be confidential and the resulting award reflects only a majority opinion, the absence of a statutory provision relating to dissenting opinions seems to have eliminated altogether the procedure for making public dissenting views in the arbitral determination.\textsuperscript{149}

2. Further Assimilation of Arbitral Awards to Court Judgments

In establishing the legal regime governing the arbitral award, the Decree also borrows from the requirements of article 455 of the \textit{Code de procédure civile},\textsuperscript{150} which regulates the content of judicial decisions. This assimilation of the arbitral proceeding to its judicial counterpart attests to the jurisdictional character of the arbitral award and of the arbitral proceeding from which it results.\textsuperscript{151}

The Decree requires that the arbitral award elaborate succinctly the respective allegations and arguments of the parties and, more importantly, that the arbitral tribunal render a reasoned decision.\textsuperscript{152} Although it was well established by court opinions that arbitral awards, even those rendered by \textit{amiabes compositeurs} had to be—as a matter of public policy—rendered upon the basis of a reasoned opinion,\textsuperscript{153} the former legislation was completely si-

\textsuperscript{148} See, Robert, \textit{Decree Commentary, supra} note 9, at 195.

\textsuperscript{149} Id. The secrecy requirement and the possible majoritarian character of awards are not inconsistent principles. In fact, the possibility of announcing that a decision simply reflects the views of a majority of the arbitrators has the advantage of not obliging the dissenting arbitrator to invoke article 33(2) and refuse to sign the award. His dissent already has been recorded, albeit anonymously, and he need not invoke a procedure which reflects a type of absolute discordance between the majority and the minority arbitrators.

\textsuperscript{150} Nou. C. PR. CIV. art. 455 (Daloz 72d ed. 1979).

\textsuperscript{151} See Robert, \textit{Decree Commentary, supra} note 9, at 195.

\textsuperscript{152} Decree, \textit{supra} note 12, art. 31, at 1239.

lent on this matter.\textsuperscript{154} The Decree also formalizes other rules which had been followed in practice and continues to align arbitral procedure with its judicial counterpart. Like court judgments, arbitral awards must now indicate the names of the arbitrators, the date and place where the award was rendered, the names of the parties, and the like. Requirements relating to the name of the arbitrators, the date of the award, and the reasoned character of the award are mandatory and indispensable to the validity of the award.\textsuperscript{165}

3. Powers of the Arbitrators After the Rendering of the Award

The making of an award renders the arbitrators \textit{functus officio} in regard to the dispute.\textsuperscript{156} Once they have rendered an award, arbitrators nonetheless retain the power to interpret the award, to correct the material errors and omissions, and to complete it when they have failed to rule upon a claim that was presented.\textsuperscript{157} These exceptions to the \textit{functus officio} principle are subject to the caveat that, if it is impossible to reconvene the arbitral tribunal, the court will exercise these powers.\textsuperscript{168} The new legislation not only codifies principles which were followed in actual adjudication and were ignored by the antecedent legislation, but also adds the significant provision that the arbitral tribunal can resume its adjudication if it failed to rule upon a claim that was presented.\textsuperscript{159}

4. The Article 464 Problem

The incorporation of article 464 of the Civil Procedure Code into article 35 of the Decree conflicts on its face with the other provisions of article 35 and must have been due to an oversight on


\textsuperscript{155} It should be noted that the failure to produce a reasoned opinion renders the non-conforming award void. This nullity rule for formal deviations reveals a certain rigor on the part of the Decree in this regard.

\textsuperscript{156} Decree, \textit{supra} note 9, art. 40, at 1239.

\textsuperscript{157} \textit{Id.} art. 35, at 1239.

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} The summary character of the previous legislation did not treat these points; it provided no remedy by which to cure problems which surfaced after an award had been rendered. However, it was generally recognized that arbitrators could correct material errors and interpret the award until the time limit (established either by the parties or by the law) of the arbitration agreement had expired. \textit{See} J. ROBERT \& B. MOREAU, \textit{supra} note 5, at M4. \textit{See also} Judgment of June 27, 1968, Trib. gr. inst., Paris, [1968] Rev. Arb. 109; Judgment of November 22, 1968, Cass. civ. [1969] Rev. Arb. 24. \textit{See generally}, Perrot, [1969] Rev. Arb. 7.
the part of the drafters. Article 464 allows a court to revise its decision if it ruled upon claims which were not presented or if it made an award beyond the claims which were requested. One could argue that the drafters may have wanted to give the arbitral tribunal the possibility of repairing its errors, thereby removing the need to have a party invoke the means of recourse action. Such a procedure would not only shorten the arbitral process by eliminating the court review of the award on this ground, but would also give arbitration yet another degree of independence and autonomy from the judiciary.

While the language of article 35 does not expressly exclude the authority to revise an award, it does speak in terms of completing an award, not revising it. Moreover, if the substance of article 464 were applied in the arbitral context, it would refer to a situation in which the arbitral tribunal would have exceeded its private jurisdictional powers rather than failed to exercise them. Its integration into arbitral jurisprudence, therefore, could have the effect of extending arbitration beyond its private jurisdictional character. Despite the liberal character of the Decree, this breach of the traditional distinctions between arbitration as a form of private justice and court action as a form of public justice seems unwarranted.

Moreover, the means of recourse section specifically provides that an award can be set aside if the arbitral tribunal renders a ruling beyond its terms of reference. An award, then, should be set aside and not revised when it rules upon a claim which was not submitted to the arbitral tribunal. The fact that a court can exercise these powers of revision if the arbitral tribunal cannot be reconvened is incongruous with the very idea of arbitration. Instead of setting aside an award for a basic violation of a fundamental rule, the courts could simply rewrite the award to have it conform to the provisions of the terms of reference.

The status of the reference to article 464 will be resolved conclusively only by future court interpretation. Giving arbitrators the

160. See Robert, Decree Commentary, supra note 9, at 195 (upon whose analysis the author relies in the following discussion).

161. See Nou. C. pr. civ. art. 464 (Dalloz 72d ed. 1979). See also Robert, Decree Commentary, supra note 9, at 195.

162. The French commentary concludes that the incorporation of article 464 must have been an oversight without even mentioning the possible advantages of the provision. Again, a conclusive interpretation of the Decree can only be had by way of future court decisions which focus upon the issue.

163. Decree, supra note 12, art 44(3), at 1240.
authority to revise awards obviously would confer an even greater autonomy upon the arbitral process. Such autonomy, however, would create too great an imbalance between the principle of contractual autonomy in arbitration and the need for some form of judicial scrutiny of the private dispute-resolution process. In light of the general tenor of the Decree and its objectives, the reference to article 464 should be considered simply as an error.\footnote{164. See Robert, Decree Commentary, supra note 9, at 195.}

5. The Global Impact of Article 35

Despite this problem of interpretation, the substance of article 35 conforms to the underlying policy aims of the new legislation, strengthening the arbitral process by granting it new powers and emphasizing its simultaneous autonomy from and similarity to the judiciary. Despite the private contractual character of their jurisdictional authority, French arbitral tribunals are assimilated as closely as possible to the courts, especially in procedural matters. This assimilation not only reinforces and solidifies the institutional position of arbitration under French internal law, but also and more importantly, it clarifies the basic procedural questions left unanswered by the previous legislation. The official grant of continuing adjudicatory and emendation powers (limited to claims actually presented and within the scope of the arbitration but not ruled upon) attributes a considerable measure of independence to the arbitral process. Such prerogatives on the part of the arbitrators effectively eliminates many of the minor problems which could give rise to contention after an award has been rendered.\footnote{165. Id.} Moreover, it reduces the lapse of time between the rendering and enforcement of an award and guarantees that the parties' intention to have disputes resolved through arbitration will be given full effect despite relatively minor errors in the process.

In the event that the arbitral tribunal cannot be reconvened to treat the enumerated matters, the court which would have had jurisdiction to hear the dispute in the absence of an arbitration agreement has the authority to rule upon these questions.\footnote{166. Decree, supra note 12, art. 35, at 1239.} Once again, the new legislation does not avoid the question of judicial intervention in arbitral proceedings, but rather articulates rules which have the courts act as the indispensable complement to the
arbitral process. The limited character of the possible judicial intervention provided for in the Decree can be seen only as an act of cooperation between similar processes. In addition, the generally liberal attitude of the French courts toward arbitral matters excludes any form of intervention which could amount to an interference with the arbitral process. According to the new legislation, recourse to the courts before, during, or after the arbitral proceeding is available only when the sanction of a public authority is necessary to give full legal effect to the arbitration agreement. Under the express terms of the Decree, the process of arbitration is on a quasi-equal institutional footing with the judicial process and the courts are to work hand in hand with arbitral tribunals to give effect to the parties’ intention to arbitrate and to further the principle of contractual autonomy.

6. The Res Judicata Effect of Arbitral Awards

The new legislation also settles the longstanding debate between the French courts and legal scholars concerning the legal effects of the award. Previously, while legal scholars argued that an arbitral award should have res judicata effect (autorité de la chose jugée) upon its rendering, the French Supreme Court and the cours d’appel generally ruled that the res judicata effect took place only after an exequatur had been granted.

The Decree provides that the arbitral award, once it is rendered by the arbitral tribunal, will have res judicata effect. In order to be legally enforceable, the arbitral award still must be granted an exequatur from the enforcement judge (juge de l’exécution) of the district court (tribunal de grande instance) in the jurisdiction of which the award was rendered. These two provisions again evidence the intent to assimilate arbitral awards as much as possible to the status of court judgments. Since an arbitral award emanates from a tribunal constituted by the private authority of individuals, it cannot have the coercive force of a decision rendered by a court of law. Nonetheless, the award represents

167. Id. arts. 4 & 14, at 1238; id. arts. 16 & 17, 23, at 1239.
168. See text accompanying note 138 supra.
170. Decree, supra note 12, art. 36, at 1239.
171. Id. art. 37, at 1239.
a definitive ruling upon the controversy that was voluntarily brought before the tribunal by private individuals. Once an award is made, the specific dispute upon which it rules is not to be relitigated, except to the extent that the means of recourse imply a re-hearing of the matter.

7. The Decision Denying an Exequatur

The Decree\textsuperscript{172} requires that a judicial decision denying an \textit{exequatur} to an arbitral award must be based upon a reasoned opinion. Previously, the state of the law on this point was not absolutely clear.\textsuperscript{173} Seemingly, the drafters of the Decree wanted to give arbitral awards every chance of enforcement by having a court, which created obstacles to the process, outline the reasons for its action, thereby giving the prejudiced party clear grounds upon which to bring an appeal. This requirement applies despite the fact that the enforcement proceeding is a nonadversarial, \textit{ex parte} action; its purpose remains clear to allow the disappointed party sufficient grounds upon which to appeal the decision denying the enforcement order. Despite the clarity of its logic and purpose, this provision contains a potential problem of implementation which may encourage the recourse to dilatory tactics.\textsuperscript{174}

The appeal of a court decision denying an \textit{exequatur} to an arbitral award lies for a period of one month after notice of it has been given \textit{(la signification)}.\textsuperscript{175} This appeal involves a consideration of the arguments on both sides. In ordinary circumstances, notice of the decision denying an \textit{exequatur} should be given to the party against whom it was rendered under the two-fold assumption that the losing party is the one who is less likely to be aware of the decision, and that the underlying rationale of the notice requirement is to protect the interest of the losing party in exercising his right of appeal.

The \textit{exequatur} proceeding for an arbitral award, however, is not analogous to the ordinary situation. On the one hand, the pro-

\textsuperscript{172} Id. art. 38(2), at 1239.


\textsuperscript{174} See Robert, Decree Commentary, supra note 9, at 196 (upon which the author relies in the following discussion).

\textsuperscript{175} Decree, supra note 12, art. 49, at 1239.
ceeding is an *ex parte* action; only the party requesting an enforce-
ment order need be present before the court and the ordinance of
the court deciding on the enforcement question is the result of a
non-adversarial (*non-contradictoire*) proceeding. On the other
hand, the party against whom the award was rendered need not be
present; the proceeding is not a setting in which he can present his
substantive arguments against the award.

When a court denies enforceability to an award, its decision
favors the interests of the party against whom the award was ren-
dered (in this setting, the absent party) and rejects the motion of
the requesting party (who is present). The requesting party has *de facto*
notice of the decision, but the non-requesting party may not
have such notice, either *de facto* or *de jure*. Under the usual appli-
cation of the notice procedure, the party in whose favor the deci-
sion was rendered has the responsibility of serving notice of the
decision rendered. This rule would have the bizarre result of re-
quiring the party whose request for an *exequatur* was denied to
serve notice of that decision upon the party against whom the
award was rendered so that the latter party could serve him, in
turn, with notice of the *exequatur* decision, permitting him to ex-
ercise his right of appeal. The literal and technical application of
this procedure, which is seemingly required by the provisions of
the Decree, could become a fertile source of dilatory tactics on the
part of the party against whom the award was rendered.

Of course, only future practice will determine how this provi-
sion is actually used and applied. Nonetheless, it remains a proce-
dural reality of perhaps some, albeit limited, consequence. In ac-
tual practice, a decision refusing an *exequatur* to an award should
be something of a rarity and the notice problem insignificant. The
*exequatur* judge can refuse enforceability to an arbitral award only
when it becomes apparent from a very limited and superficial scrut-
tiny of the award that it violates strong public policy concerns (*or-
dre public apparent*). The notice procedure implied in the article
38 requirement points only to the possibility of theoretical
problems. While no appeal lies from an affirmative decision grant-
ing enforceability to the award, the means of recourse procedure
can be invoked against the award itself once the award is rendered
or within one month after the award has been granted an
*exequatur*.176

176. Id. art. 38 at 1239; id. art. 46, at 1240.
8. Other Provisions

The remaining rules contained in this section either restate the substance of the repealed provisions or affirm principles followed in actual arbitral practice which were absent in the previous legislative text. As before, the legal provisions relating to the provisional enforcement of court judgments can be applied to arbitral awards. This provision can be useful in circumstances in which the creditor of the award wants to avoid the dilatory tactics of the debtor party who invokes a means of recourse action against the award only to gain enough time to file a petition in bankruptcy. The provisional enforcement of an award acts as a guarantee to a creditor who is awaiting the final decision of a court on the award. The Decree contains more specific rules relating to the effect of the means of recourse when provisional enforcement has been granted and when means of recourse have been invoked requesting the provisional enforcement of the award. The Decree thereby achieves a coordination between these two procedures.

177. Id. arts. 33, 34, 38(1), 39, & 40, at 1239.
179. Decree, supra note 12, art. 39, at 1239.
180. See Rottet, Decree Commentary, supra note 12, at 11.
181. Id.
182. Decree, supra note 12, art. 39(2), at 1239. The substance of article 39(2) confirms the holdings of previous judicial decisions on this question. Although these decisions related to the former means of recourse actions which were available against arbitral awards, the courts had held that the provisional enforcement granted to arbitral awards should be respected (as for court judgments) even though a means of recourse action had been invoked against the award. See Judgment of April 12, 1948, Cass. civ. com., [1948] S. Jur. I 98, [1948] Gaz. Palais I 244; Judgment of April 18, 1948, Cour d'appel, Paris, [1949] S. Jur. II 17; Judgment of February 27, 1952, Cour d'appel, Besançon, [1954] D. Jur. 733. The provisional enforcement of an award could be suspended or attacked in certain exceptional circumstances. See Judgment of February 27, 1952, Cour d'appel, Besançon, [1954] D. Jur. 733; Judgment of March 18, 1948, Cour d'appel, Paris [1949] S. Jur. II 17. See generally J. Robert and B. Moreau, supra note 5, at 51. Article 39(2) of the Decree confirms the basic rules established by this jurisprudence and coordinates them with the new means of recourse procedure. Its more detailed provisions represent an improvement over the former legislation. Finally, it aligns the procedure which it prescribes with the provisions of the civil procedure code relating to the provisional enforcement of judgments, namely, articles 525 and 526 of that code. The substance of article 39(2), therefore, is in keeping with the basic thrust of the Decree. Decree, supra note 12, art. 33, at 1239. For the substance of the previous law on this subject which is identical to the new provision, see Nou. C. Pr. Civ. art. 1016 (Daloz 72d ed. 1979). See also Judgment of March 24, 1960, Cour d'appel, Paris, [1960] Rev. Arb. 50; Judgment of February 12, 1963, [1967] J.C.P. II No. 13281. Decree, supra note 12, art. 40, at 1239.
9. Ruling According to Substantive Legal Rules

The new legislation also provides that the arbitrators will rule in accordance with the rules of law,\textsuperscript{183} unless the parties have authorized them to rule as \textit{amiables compositeurs}, a status which allows them to disregard legal rules if they so choose and to resolve the dispute according to equitable considerations.\textsuperscript{184} This provision should be contrasted with the substance of the previous article which provides that the arbitral tribunal will not be held to follow the procedural rules established for the courts.\textsuperscript{185}

Such a requirement guarantees the seriousness of arbitral decisions\textsuperscript{186} despite the benefit of a flexible arbitral process. Accordingly, commercial parties who have submitted disputes involving large sums of money to arbitration can have the merits of the dispute resolved according to established principles of law. This provision should relieve (and was perhaps designed to relieve) apprehensions that the arbitral tribunal would engage in haphazard or purely arbitrary adjudication. The parties have the benefit of a merits ruling which is anchored in the consistency, predictability, and relative certainty provided by established legal rules.

The reassurance proffered by article 34, however, may be illusory. The fact that the arbitrators usually are technical experts (actually selected for this reason) and not professional judges obviously will lead them to interpret the relevant legal principles according to their professional bent and to season their interpretation of these principles with a pinch (or two) of their business experience, and their knowledge of the customs and usages of the trade. Moreover, in a system where the doctrine of \textit{stare decisis} has meager official currency, court decisions (in theory) have little

\textsuperscript{183} Decree, \textit{supra} note 12, art. 34, at 1239. Previously, although the former legislation did not contain a specific provision on this point, it was generally recognized that the arbitrators were held to rule according to the rules of law which applied in court actions. The Decree, then, merely codified the rule which was observed in practice. \textit{See J. Robert \& B. Moreau, supra} note 5, at H9. \textit{See also} Judgment of February 4, 1966, Cour d'appel, Paris, [1966] \textit{Rev. Arb.} 27.


\textsuperscript{185} \textit{See text accompanying note} 77 \textit{supra}.

\textsuperscript{186} \textit{See Robert, Decree Commentary, supra} note 9, at 195; Riotte, \textit{Decree Commentary, supra} note 12, at 11.
weight in the formulation of law; the same perception of decisional
law would apply even more forcefully to arbitral awards. In other
words, there would be little institutional concern about how arbi-
tral tribunals apply, interpret, or otherwise read the established
principles of law in a particular dispute submitted to arbitration
except where strong public policy concerns are involved.

The role that is afforded to appeal and the general means of
recourse procedure that is available against arbitral awards illus-
trate even more clearly the ambiguity and perhaps restrained
meaning of the article 34 provisions in the arbitration context. The
right of appeal which can be invoked against arbitral awards in-
volves a *de novo* consideration of the facts and the law. Since a
court, under this procedure, can rewrite the arbitral decision com-
pletely on appeal, the procedure, in effect, provides the parties to
an arbitration with the guarantee that the dispute will be resolved
according to the established rules of law. However, if appellate re-
view were invoked regularly, there would be little incentive to have
recourse to arbitration initially since the ultimate decision on the
matter would be taken by professional judges and not expert lay-
men. Consequently, in the vast majority of arbitration agreements
the parties waive their right to appeal, and rely upon more limited
means of recourse to invoke a more restrained form of judicial
scrutiny. The means of recourse cannot be invoked upon grounds
directly relating to the arbitral tribunal's application of the law;
instead remedies are provided in cases involving technical viola-
tions of basic procedural provisions, failure to respect mandatory
requirements for the award, and violations of strong public policy
considerations. In short, the question of whether the arbitral tribu-
nal correctly applied the established rules of law to the dispute
escapes the scrutiny of the courts. It is therefore probable that
these established principles will have a markedly different texture
when applied by arbitrators rather than by professional judges.

Additionally, the former legislation and the Decree both ex-
clude the possibility that appeal (*pourvoi en cassation*) can be
made directly from an arbitral award to the French Supreme
Court. The chief task of the French Supreme Court is to assure the
uniform application of the law by the lower courts; an appeal to
the highest private law court can be made only upon a question of
law. The decisions of arbitral tribunals specifically escape this form
of scrutiny. Thus, arbitrators have a measure of freedom in deter-
mining and applying the applicable legal principles. Judicial deci-
sions relating to arbitral awards, of course, can be the subject of an appeal to the French Supreme Court, but it seems that the question of law submitted to the court would deal with the lower court’s application of the French law on arbitration rather than with the way in which the arbitral tribunal selected and applied substantive legal principles.

Finally, since arbitration is a form of private contractual justice done by lay experts and subject primarily to the scrutiny of the courts on procedural matters and basic public policy grounds, many arbitral decisions remain unpublished. Even journals specializing in arbitration report only the court decisions dealing with arbitration cases. The specific jurisprudence of the arbitral tribunals, then, is completely outside the mainstream of the evolution of the formal case law dealing with the established legal principles. Despite its practical importance and the possible innovations it could create in the interpretation of law, it is an area of adjudication which goes officially unnoticed.

That arbitral decisions must be rendered according to the rules of law does not guarantee the parties that they will have the equivalent of a court-rendered merits ruling. Such expectations, which can be drawn from the literal language of article 34, are unrealistic; the meaning of the article must be qualified by taking into account the realities of the arbitral process. The arbitrators will apply the substantive principles of law to the dispute, but they will do so within and according to their particular competence and experience. The parties did not bargain for any more than this.

10. The Amiable Composition Problem

The article 34 rule does not apply when the parties, in their arbitration agreement, have conferred the status of amiable compositeur upon the arbitrators.\textsuperscript{187} One French commentator, Maitre Robert, maintains that the Decree provides that the parties will be deemed to have conferred the status of amiable compositeur upon arbitrators if, in their arbitration agreement, they have waived their right to de novo appeal.\textsuperscript{188} In his estimation, the substance of this provision is justified because in actual arbitral practice, the parties often provide for this effect, \textit{i.e.}, the waiver of the right to appeal carries with it the parties’ desire that the arbitrators rule as

\textsuperscript{187} Decree, \textit{supra} note 12, art. 34, at 1239.
\textsuperscript{188} Robert, \textit{Decree Commentary, supra} note 9, at 195.
Maitre Robert further argues that those parties who wish to waive their right of appeal and have the arbitrators render a ruling based on legal principles need only so specify this in their agreement. According to this interpretation, the general rule articulated in article 34, providing that the arbitrators rule on the merits according to the rules of law, would not apply in cases in which the parties to the arbitration have waived their right to appeal since the arbitrators impliedly rule as amiables compositeurs.

There is nothing particularly objectionable about this interpretation. It has the evident systemic consequence that few arbitral decisions will be based upon established rules of law. Given the prior considerations relating to the arbitrators' probable use of these rules, the result does not seem unacceptable. The substantive basis upon which this interpretation is anchored, however, is somewhat enigmatic. Since the express language of article 34 neither mentions nor implies such a possibility, the statement must be based upon a reading of another article of the Decree; the most likely candidate is article 42. This provision states that: (1) the arbitral award is subject to appeal unless the parties have waived their right to appeal in the arbitration agreement; and (2) the award is not subject to appeal when the arbitrator has been given the authority to rule as an amiable compositeur, unless the parties have expressly reserved their right to appeal in the arbitration agreement. On appeal, the court will rule in an amiable composition capacity if the arbitrator had this status.

These are the only provisions of the Decree which are directly relevant to the question under consideration; they neither expressly nor impliedly support the view that the waiver of appeal implies that the parties have given the arbitrators the authority to rule as amiables compositeurs. As a general rule, article 42 estab-

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189. Id.
190. Apparently, a similar proposal had been considered by the commission for the reform of civil procedure. Under this proposal, which was in draft form, arbitrators would have been deemed by law, as a general rule, to have the status of amiables compositeurs and have the capacity to rule according to equitable considerations. Only an express stipulation by the parties to the contrary could defeat this general rule. The proposal, however, never was adopted in light of the concern that it raised among legislators especially in regard to its implications upon international arbitration matters. See Written Question No. 27884., J.O. January 18, 1979 (Sen. Debates), at 168.
191. See Decree, supra note 12, art. 42, at 1239.
192. Id.
lishes that appeal lies against arbitral awards, subject to certain exceptions noted in the preceding paragraph. If the parties give the arbitrators the authority to rule as amiables compositeurs, this implies a waiver of appeal. The latter presumption of waiver can be rebutted by an express stipulation to the contrary in the arbitration agreement. Article 43 covers the exceptional case in which the parties have maintained their right to appeal and given the arbitrators the status of amiables compositeurs by providing that the appeals court also can rule according to equitable considerations.

There appears to be nothing in these provisions which confirms the theory advanced between the waiver of appeal and the conferring of the status of amiable compositeur upon the arbitrators, at least not in terms of cause and effect. While it is clear that the status of amiable compositeur implies a waiver of appeal (as a rebuttable presumption), the converse is not necessarily true. Under the terms of the Decree, the waiver of appeal seems to be quite independent of any intention of the parties to confer the status of amiable compositeur upon the arbitral tribunal. In theory at least, it is possible that parties might waive their right to judicial appeal of the award in order to avoid a de novo consideration of the dispute by a court and thereby to preserve the viability of their initial recourse to arbitration. At the same time, the parties may intend to have the arbitrators rule according to legal principles in order to provide traditional substantive structure to the arbitral discussions and deliberations. The Robert interpretation seems to reflect certain axioms of arbitral practice and it may well be adopted by future courts construing the Decree. Nonetheless, the express language of the Decree and the logic of the syntactical ordering of article 43, do not, on their face, accomodate this interpretation with great ease.

VII. REMEDIAL PROCEDURE FOR CHALLENGING ARBITRAL AWARDS: THE MEANS OF RECOURSE

Under the previously applicable legislation, the means of recourse (les voies de recours) that could be invoked to obtain the judicial review of arbitral awards were numerous and overlapped to some extent. The terminology used to describe these various ac-

tions itself led to some confusion, and, while there was a multiplicity of remedies, they could be invoked only under certain conditions and upon fairly narrow grounds. The remedial panoply involved an intricate procedure, and the astute party who wanted to defeat the enforceability of an award at all costs could at least create delay by combining certain of the remedies into a solid web of procedural opposition. The penultimate title of the Decree contains the final substantive provisions on arbitration; its purpose is to reformulate the rules relating to the means of recourse procedure and, in effect, to unify and simplify the remedies and their procedural implementation. While an improvement unquestionably has been achieved, the modifications that have been introduced may fall short of reaching the desired goal.

A. The Previous Regime

An assessment of the Decree reforms first requires a description and an evaluation of the antecedent regime. It should be noted at the outset of this description that the exequatur proceeding itself (invoked to obtain the legal enforceability of the award) was not, and still is not, envisaged in the French system as a procedure for obtaining the judicial review of arbitral awards. In this ex parte and non-adversarial proceeding, the exequatur judge had and continues to have only limited authority. The judge merely can ascertain whether the arbitral award satisfies on its face the most basic public policy requirements.

194. See P. HERZOG, supra note 11, at 530.
196. Robert, Decree Commentary, supra note 9, at 189, 196.
197. P. HERZOG, supra note 11, at 531, n.285.
1. **Opposition**

Under the now-repealed articles of the *Nouveau Code de procédure civile*, opposition (a remedy by which a party in default could obtain a reopening of the case) was not available in arbitration matters. The parties to an arbitration proceeding, which usually was instituted upon their mutual request, were never deemed to be in default.\(^{199}\)

2. **Pourvoi**

Moreover, no appeal could be made directly from an arbitral award to the French Supreme Court.\(^{200}\) In effect, only judicial judgments dealing with arbitral matters could be the subject of a *pourvoi*.\(^{201}\) Under this form of appeal, the Supreme Court usually would review only the lower court's application of domestic law, and not the legal reasoning and the legal conclusions reached by the arbitral tribunal.\(^{202}\)

3. **Appel-réformation**

A general appeal, known as *appel-réformation* and lodged before the relevant cour d'appel,\(^{203}\) involving a *de novo* consideration of the case,\(^{204}\) did lie against arbitral awards, provided the parties had not waived their right to *de novo* appeal\(^{205}\) or implied the same\(^{206}\) by authorizing the arbitrators to rule as *amiables compositeurs*.\(^{207}\) In actual practice, since the parties by agreeing to ar-

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199. Nou. C. Pr. Civ. art. 1016(3) (Daloz 72d ed. 1979). See also P. Herzog, supra note 11, at 531.
200. Nou. C. Pr. Civ. art. 1028(s) (Daloz 72d ed. 1979). See also P. Herzog, supra note 11, at 533.
201. P. Herzog, supra note 11, at 533.
202. Id. at 533.
204. P. Herzog, supra note 11, at 532.
206. Id. art. 1019.
207. P. Herzog, supra note 11, at 532. The Decree basically maintained this rule by providing that an arbitral award could not be subject to appeal when the arbitrators are authorized to rule as *amiables compositeurs* unless the parties have expressly reserved this possibility in their agreement. See Decree, supra note 12, art. 42, 1239. The Ministry of Justice has defined *amiable composition* as a status which does not prohibit the arbitrators from ruling according to law, but rather it gives them the possibility of disregarding legal rules relating to the merits and the procedure which are not of an imperative or public policy character which appear to be overly rigorous and contrary to equity. See Written Question No. 27844, supra note 190.
bitrate intended to remove the dispute from the jurisdiction of the courts, they usually waived their right to the judicial appeal of the award, thereby preventing the courts from reconsidering the entire case anew.\textsuperscript{208} Under the former article of the Civil Procedure Code,\textsuperscript{209} parties to a \textit{compromis} could waive their right to appeal, and this prerogative had been extended by court interpretation to parties to a compromissory clause.\textsuperscript{210}

4. \textit{Appel-nullit\'e}

Despite a waiver of the right to \textit{de novo} appeal (of \textit{appel-r\'eformation}), the parties still had a number of remedial options available. The courts, in true pretorian fashion, had devised another form of appeal, \textit{appel-nullit\'e}, which could be invoked despite a waiver of the right to judicial appeal. This form of recourse was created as a supplementary action designed to cover instances in which there was an alleged violation of strong public policy (\textit{ordre public}). \textit{Appel-nullit\'e} could be invoked in the following circumstances: (1) when the arbitral tribunal had failed to include certain substantive considerations (e.g., the subject matter of the dispute or the arguments of the parties) in the award; (2) when the award was not rendered upon the basis of a reasoned decision; (3) when there had been a violation of the principle that judgments be rendered only after full argument on both sides (\textit{principe de la contradiction}) or of basic defense rights (\textit{droits de la d\'efense}); and (4) when there otherwise had been a direct violation of a strong public policy rule.

The \textit{appel-nullit\'e} action essentially was a remedial procedure of tertiary importance; it functioned as a backdrop to the other means of recourse. When \textit{de novo} appeal had been waived and the other two applicable means of recourse were available and covered the alleged grounds for challenge, the \textit{appel-nullit\'e} could not be invoked. If successful, however, the \textit{appel-nullit\'e} would result in the partial or total annulment of the award. It was not clear from the case law whether the court then had the authority to render a new ruling on the merits. Usually, in these circumstances, the parties would either litigate the dispute before a lower court or initiate a new arbitral proceeding.

\textsuperscript{208} See, e.g., J. \textsc{Robert} \& B. \textsc{Moreau}, \textit{supra} note 5 at Q1.
\textsuperscript{209} Nou. C. Pr. Civ. art. 1010 (Daloz 72d ed. 1979).
\textsuperscript{210} \textsc{Riotte}, \textit{Decree Commentary}, \textit{supra} note 12, at 8.
5. **Opposition en nullité**

The *opposition en nullité* was perhaps the means of recourse most frequently invoked against arbitral awards.²¹¹ This action was a special remedy which the legislature created especially for arbitration; it had nothing to do with default and was totally distinct from *opposition*.²¹² The action could be invoked only upon a limited number of grounds. The restrictive character of these grounds, outlined in the Civil Procedure Code, reflected a legislative policy of affording parties a certain amount of protection against the most salient potential abuses of the arbitral process while limiting the reach of that court protection because of the contractual nature of arbitration.²¹³

Under this procedure, a party could attack the validity of the enforcement order because of a procedural defect in the award itself. Some examples of these procedural defects include: (1) if the award were rendered in the absence of a *compromis* (submission) or outside the terms of the submission; (2) if it were rendered upon the basis of a void or expired submission; (3) if it were rendered by arbitrators who were 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 two divided arbitrators; and (5) if it went beyond the terms of the submission.²¹⁴ The *opposition en nullité* applied both to awards that had been rendered according to the rules of law and awards rendered by arbitrators sitting as *amiables compositeurs*. It was conducted as an ordinary action brought against the *exequatur* of the award before the court that had rendered the award enforceable.²¹⁵

6. General Features of the Former Remedial Actions

It appears that, in an appropriate case, an award could be challenged upon the basis of both *appel-nullité* and *opposition en nullité* if the award violated both a public policy rule and a technical procedural requirement relating specifically to arbitration.²¹⁶

²¹¹ See, e.g., J. ROBERT & B. MOREAU, supra note 5, at P1.
²¹² P. HERZOG, supra note 11, at 531.
²¹³ See, e.g., J. ROBERT & B. MOREAU, supra note 5, at P1.
²¹⁵ P. HERZOG, supra note 11, at 531. See also Nou. C. Pr. Civ. art. 1028(7) (Daloz 72d ed. 1979).
²¹⁶ On this question, see Robert, *Decree Commentary*, supra note 9, at 196-97; Riotte, *Decree Commentary*, supra note 12, at 13.
Obviously, this could make the choice of the appropriate remedy difficult and lead to two separate yet concurrent legal actions against the same award before different courts. What was perhaps a lesser problem, which could still arise, was that some of the grounds under the opposition en nullité could be interpreted as involving public policy and, therefore, as being duplicative of the grounds for invoking appel-nullité. This made the choice between remedial options even more difficult.

As a general rule, however, there was a hierarchical ordering among the available remedies when the right to de novo appeal (appel-réformation) had been waived. As a consequence, when the grounds for challenging an award were covered by the provisions of all three remedial options—appel-nullité, opposition and recours en revision (to be discussed, infra), the opposition en nullité usually controlled. This general rule, however, was not followed consistently in practice by parties anxious to preserve all of their legal rights and seeking to oppose the enforceability of an award upon all available grounds nor by parties simply wanting to create delay in the enforcement process.\textsuperscript{217} Admittedly, the distinction between these remedies was not entirely clear and led at times to considerable confusion.

In regard to other features of these actions,\textsuperscript{218} a waiver of opposition was not possible (at least before the award had been rendered) since it was deemed to be a strong public policy provision. It could be waived, however, after the award had been rendered, and such a waiver was implied in the fact that the parties voluntarily complied with the award or the legal enforcement of the latter was unopposed. Presumably, the appel-nullité action could not be waived either, since it related expressly to strong public policy concerns. Nonetheless, the resort to this remedy was within the discretion of the parties and could be effective only when the parties actually brought such an action before the courts. Moreover, it seems that, when there was a flagrant violation of public policy, the party against whom the award was rendered would not hesitate to demand judicial scrutiny if such an action favored his interests. It should be emphasized that both of these means of recourse could be invoked only when the award had been granted an exequatur and notice of the decision granting the enforcement order

\begin{flushright}
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\end{flushright}
had been given to the other party. These actions resulted, as a general rule, in the setting aside of an award and not in a new court ruling on the merits.\textsuperscript{219}

7. *Recours en revision* and *requête civile*

Finally, the parties could invoke the *recours en revision* action\textsuperscript{220} to have an arbitral award reviewed again upon certain specified grounds. This action, formerly called the *requête civile*,\textsuperscript{221} was brought before the competent court of appeal, and was invoked to obtain relief in circumstances in which there had been some form of fraud during the arbitral proceeding.\textsuperscript{222} The action could be invoked only when the requesting party, through no fault of his own, had been unable to make these claims before the award had been given *res judicata* effect. The purpose of the action was to have the award set aside and to have the court render a new ruling on the merits of the dispute (usually not involving any additional evidence gathering (*instruction*) or relitigation).\textsuperscript{223} In light of the exceptional grounds upon which this procedure could be invoked, its limited substantive scope, and the fact that it would lead to a judicial ruling on the merits, the *recours en revision* was not often invoked in arbitral matters.\textsuperscript{224}

Its predecessor, the *requête civile*,\textsuperscript{225} also played a limited role in arbitral matters. The *requête civile* could be invoked upon grounds similar to those for the *recours en revision*, i.e., when the award was based upon evidence which was subsequently found to be false or intentionally undisclosed and upon other grounds (e.g., the failure to respect mandatory forms when the parties had not waived this requirement).\textsuperscript{226}

Since these grounds were provided for in the *opposition en nullité*,\textsuperscript{227} the *requête civile* became a rarity and essentially acquired the status of a paper remedy.\textsuperscript{228} Moreover, not only was the remedy available only when the right to *de novo* appeal had been

\textsuperscript{219} Id.
\textsuperscript{220} Nou. C. Pr. Civ. art. 1026 (Daloz 72d ed. 1979).
\textsuperscript{221} J. Robert & B. Moreau, supra note 5, at O1-O2.
\textsuperscript{222} Nou. C. Pr. Civ. art. 1026(2) (Daloz 72d ed. 1979).
\textsuperscript{223} Id. arts. 593 & 595.
\textsuperscript{224} See P. Herzog, supra note 11, at 533.
\textsuperscript{225} J. Robert & B. Moreau, supra note 5, at O1-O2.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
waived, but also the right to resort to the action (except in a case of personal fraud) could be waived by the parties at the outset of an arbitral proceeding or thereafter. In addition, a fairly intricate procedure accompanied the action which, at least in theory, could result both in the setting aside of the award and a new court ruling on the merits. In this sense, the *requête civile* was similar to its successor, the *recours en revision*, but in both cases no one attached much importance to the possibility of a judicial ruling on the merits since neither action was invoked very frequently.

8. *Tierce opposition*

In addition to the usual host of remedies, a form of challenge, known as the *tierce opposition*, was available to third parties. Although there was some debate upon this question, this remedy was available despite the fact that former article 1022 of the Civil Procedure Code provided that arbitral awards could not be brought against third parties. In regular proceedings, *tierce opposition* consisted of a challenge by a third party to a judgment which resulted from an action to which he was not a party but which nonetheless prejudiced his rights. By invoking this action, the third party could obtain a reopening of the matter. In the arbitration context, *tierce opposition* was brought before the district court that had the authority to grant an *exequatur* (the *tribunal de grande instance*). It usually was invoked by creditors whose interests had been affected by a collusively obtained award. In actual practice, this form of third-party opposition was invoked chiefly against foreign arbitral awards and was of limited utility in the domestic arbitral context.

B. The Purpose of the New Legislation

The purported aim of the new legislation was to simplify the
means of recourse procedure and to arrive at a semblance of unity among the various remedial options. Its principal innovations consist of having all of the means of recourse actions brought at the same appellate level, creating essentially a bifurcated means of recourse system, and combining the grounds contained previously in several actions into one remedy.

1. Appeal

The new legislation maintains the principle that arbitral awards are subject to *de novo* appeal, and also that parties have the prerogative of waiving their right to judicial appeal of the award in their agreement. This statement of the traditional law has been given new meaning and functions as the central organizing principle of the reform. Rather than have a multiplicity of sometimes duplicative remedies, the new legislation provides for a dual system of recourse premised upon whether the parties have retained their right to judicial appeal.

When the parties have maintained their right to *de novo* appeal, the Decree provides that lodging an appeal is the only means of recourse available against an arbitral award either to obtain reversal and revision of the award, or to have it annulled or set aside. In other words, when the right to *de novo* appeal is maintained, the parties advance all their arguments for a new merits decision or to have the award simply set aside. In applying this provision, the courts will probably give preference to the less drastic remedy if it actually does lead to having the award set aside. This procedure, however, will not prejudice the rights of the parties to a judicial ruling on the merits since the *recours en annulation* can result in that type of ruling in any case.

2. *Recours en annulation*

In the event that the parties have waived their right to *de novo* appeal, they can avail themselves of the *recours en annula-*)

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235. See text accompanying notes 193-196, supra.
236. Nonetheless, a court decision denying a request for an *exequatur*, which must be reasoned (*motivée*), is subject to appeal.
238. See text accompanying notes 199-234 *supra*.
239. Decree, *supra* note 12, art. 43, at 1239.
240. *Id*.
241. *Id*. art. 45, at 1240.
tion remedy (the action for cancellation or setting aside the award) against the award despite any stipulations in their agreement to the contrary. Seemingly, this gives an ordre public status to this action. In any event, since it cannot be waived by the agreement of the parties, this action assures that some form of judicial scrutiny will be given to arbitral awards when de novo appeal does not apply. This procedure essentially combines the grounds that were formerly available under the article 1028 action, the opposition en nullité, and the appel-nullité action and may be invoked only in the following circumstances: (1) if the arbitrator ruled in the absence of an arbitration agreement or upon the basis of a void or expired agreement; (2) if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly nominated; (3) if the arbitrator did not rule in accordance with the terms of reference that were given to him; (4) when the principle that judgments be given after full argument on both sides (principe de la contradiction) was not respected; (5) in all cases of nullity provided for in article 40 of the Decree which relates to the requirement of a reasoned decision and that the award contain the names of the arbitrators, be dated, and signed by all the arbitrators; and, finally, (6) if the arbitrator violated a public policy rule.

3. The Effect of Amiable Composition

The Decree provides that, when the parties have given the arbitrators the status of amiables compositeurs, that stipulation implies a waiver of de novo appeal, unless the parties have expressly provided to the contrary. On this matter, the Decree essentially confirms the validity of a rule that had been articulated previously by the courts. In the event that the parties have authorized the arbitrators to rule as amiables compositeurs, and expressly retained their right to appeal, the court which hears this appeal will rule in an amiable composition capacity. This provision is quite new and important; it reflects the substance of the recent decisions of the Cour d'appel of Paris, interpreting article 12(3) of the Civil Procedure Code which allows parties in an ordinary court ac-

242. Id. art. 44, at 1240.
243. Id.
244. Id. art. 42, at 1239.
245. See Robert, Decree Commentary, supra note 9, at 196 (sources cited in n. 12).
246. Decree, supra note 12, art. 43, at 1239.
247. See Robert, Decree Commentary, supra note 9, at 196.
tion to authorize the court to rule in an *amiable composition* capacity. This rule applies only in cases in which the parties have maintained their right of appeal. The grounds that can be invoked under the *recours en annulation* action are strictly legal grounds and cannot be judged in equity. This application of this rule will also have the effect of eliminating the *pourvoi en cassation*, at least in regard to questions of law but probably not in regard to the requirement that the arbitral award satisfy mandatory forms. Thus, the implementation of this provision is likely to fall short of its promise. While the courts have the authority to rule in equity in these circumstances, they are likely to remain true to the reasoning and legal principles they apply in traditional court actions. The rule, then, may be of only limited utility and gain its importance only in circumstances in which law and equity would lead to contrary results. Here, the court might use its new authority to give preference to equitable considerations.

4. The Possibility of a Merits Ruling by the Court

When the court before which the *recours en annulation* is brought annuls, (or sets aside) the arbitral award, that court then rules upon the merits of the dispute within the limitations of the arbitrators' terms of reference, unless all the parties express a contrary intention. This provision should be regarded as the most far-reaching and audacious article in the Decree. In effect, it empowers a court of law, in certain limited circumstances, to act in the same capacity as the arbitral tribunal chosen by the parties. Some commentators have advanced the view that the underlying rationale of this provision stems from the fact that it will dissuade parties from invoking the *recours en annulation* to a dilatory end. Since the setting aside of an award can result in a merits ruling by the court, a party will presumably think twice before invoking that action.

This explanation, however, does not seem to square with the reality of dilatory practices. Usually, the party against whom the

249. *Id.*
250. *Id.*
251. See *Riotte, Decree Commentary, supra* note 12, at 14.
252. Decree, *supra* note 12, art. 45, at 1240.
253. See, e.g., Robert, *Decree Commentary, supra* note 9, at 197.
award was rendered and who knows that the award is valid will invoke the *recours en annulation*. In these circumstances, the award will not be set aside and, therefore, the justification advanced for the merits ruling by the court simply is not persuasive. Other commentators\(^{254}\) have described this provision as "very original and interesting," asserting that the courts are well placed at this stage of the process to render a ruling on the merits. In their opinion, it is more economical to have a final decision at this point than to initiate a new arbitral procedure. This positive assessment, however, ends with the statement that the parties' attachment to arbitration probably will lead them to agree that a judicial ruling on the merits is not warranted even at this late stage of the process.\(^{255}\) Whether this provision will have a beneficial or negative impact upon French domestic arbitration can only be answered with certainty in future arbitral practice. Its innovative character, both in isolation and in conjunction with the other provisions of the Decree, justifies some speculation as to its likely impact and function in the arbitral adjudication.

Article 45 in effect establishes a rebuttable presumption that the court which sets aside an arbitral award in a *recours en annulation* action will then rule upon the merits of the dispute originally submitted to arbitration. This presumption can be rebutted only when *all* the parties to the arbitration express a contrary intention. The formulation of the rule demonstrates that the drafters intended to have a judicial ruling on the merits become the accepted procedure in French arbitral practice when the award was set aside.

It would be unusual for parties to have the foresight, the willingness, and the mutual cooperation necessary during their negotiations to insert a provision dealing with the possibility of a judicial ruling that would take place in the distant future by means of the recourse procedure.\(^{256}\) A contrary intention could be expressed during or at the end of the *recours en annulation* action itself.\(^{257}\) In most cases such an agreement would mean a return to the first stage of the arbitral process. Given that at least one party could hope for a more favorable judgment from the court, it is unlikely

\(^{254}\) See, e.g., Riotte, *Decree Commentary*, supra note 12, at 14.

\(^{255}\) Id.

\(^{256}\) Once the parties became aware of the substance of article 45, however, such stipulations might become commonplace in arbitration agreements.

\(^{257}\) See Riotte, *Decree Commentary*, supra note 12, at 14.
that all the parties would refuse to have the dispute settled by a court ruling at this stage of the process. Thus, the probable rationale for such a provision needs to be explored.

First, given the grounds upon which an award may be set aside under a *recours en annulation* action, it is unlikely that a court decision on the merits would be dramatically different from the conclusions reached by the arbitral tribunal. These grounds, in large part, deal with procedural defects and not the misapplication of substantive legal rules. In contrast, the violation of a procedural public policy concern (for example, the fact that one party was not afforded the opportunity to present his case fully) could impinge quite substantially upon the merits. In all probability the violation of fundamental procedural requirements in the arbitral proceeding would be a rare and exceptional occurrence. In the more usual case, a court is likely to confirm the substantive part of the arbitral tribunal’s award and thereby avoid infringing upon the parties’ original intention to have their disputes resolved through arbitration. That intention also probably would be upheld in the event that only part of the award was set aside on a ground that somehow touched upon the merits; the court simply would only revise that part of the award that was annulled.

Second, the apparent objective of article 45 was to promote efficiency and economy in adjudication. Although the award is set aside, the parties still have the benefit of a final decision on the matter without having to reconstitute or name another arbitral tribunal. From the terms of the Decree, it is unclear whether the court would have the parties relitigate the matter. One would assume that the court would render its ruling on the basis of the existing record and not require the parties to go through the procedure of reintroducing evidence and restating their arguments. Moreover, to limit any intrusion upon parties’ intention to arbitrate, the Decree confines the court’s jurisdictional authority to the terms of reference which were originally given to the arbitral tribunal.

In the event of a full relitigation, however, certain obvious problems would surface. First, does the reference to the arbitral tribunal’s terms of reference also imply that the court will apply the flexible arbitral procedure for which the parties may have origi-

258. See, e.g., Decree, supra note 12, art. 18, at 1239.
259. Id. art. 45, at 1240.
inally bargained? Second, despite the delimitation of the court's jurisdiction to the arbitral tribunal's terms of reference, what guarantee do the parties have that the court will interpret the applicable legal principles as would a group of specialized laymen? In these circumstances, the rebuttable presumption of a merits ruling by the court, protected by the requirement that it can be defeated only by the contrary intention of all the parties, could lead to an undisputable violation of the original intention of the parties to arbitrate.

In the exceptional case in which the award is set aside upon a ground which involves the evidence gathering process, the additional power afforded to the court to rule upon the merits could amount to a *de novo* appeal against the award despite the parties' specific waiver of their right to appeal (a prerequisite of the *recours en annulation* action). In these circumstances the possibility of a merits ruling would have the practical effect of dismantling the bifurcated means of recourse structure by eliminating the distinction between the *recours en annulation* (intended as a more moderate remedy) and appeal (which involves more drastic judicial action). Both means of recourse would lead to the same result, although the *recours en annulation* requires that the award be set aside before the case is given *de novo* consideration. Relitigation and a merits ruling completely disregard the parties' original intention to waive their right to judicial appeal and to resolve their disputes through arbitration. Obviously, the application of such a rule would benefit a party acting in bad faith and seeking to undermine the initial recourse to arbitration.

In light of the manifestly liberal tenor of the other provisions of the Decree, especially those providing for a limited form of judicial intervention in the arbitral proceeding, it is difficult to read article 45 as providing a substantive basis for judicial encroachment into the arbitral process. It seems that the article is a poorly drafted attempt to promote efficient litigation or even to dissuade parties from using the *recours en annulation* as a purely dilatory tactic. This, in conjunction with the French courts' generally favorable attitude toward arbitration, leads to the conclusion that the intended objective of article 45 must be to provide the parties a final resolution of the dispute at this stage of the arbitral process. Moreover, the possibility of relitigating the dispute originally sub-

260. Decree, *supra* note 12, arts. 4, 14, 16, 17, & 23 at 1238-1239.
mitted to arbitration before a court of law and the concomitant possibility of having a court ruling on the merits which might differ radically from the arbitral award would appear likely only in the exceptional case in which there was a violation of a fundamental procedural safeguard affecting the merits.

These considerations, however, are not compelling enough to silence the objections to article 45. While the same result was possible under the antecedent legislation, no one ever paid any attention to these provisions because the remedies were never invoked and the courts never made use of their would-be power. When an award was set aside, the parties were free to reinstitute arbitration or take their unresolved grievances to the appropriate court of first instance. Although costly and time-consuming, this procedure maintained a necessary distance between the judicial and arbitral processes and strengthened the legal effect given to the parties' original intention to arbitrate. It also safeguarded the integrity of the parties' initial decision to waive their right to de novo appeal.

In summary, the terse language of article 45 can lead logically to the most unanticipated results, i.e., it provides the possibility for fundamental divergence between what is desired and what is actually done. Under the language of this article, once an award has been set aside, on whatever ground that is provided for in the recours en annulation, the court can engage in a full relitigation of the dispute. The possibility of a merits ruling may violate the original and continuing intention of at least one of the parties to resort to arbitration and disregard the agreement to waive the right of appeal. It allows a party to change its mind unilaterally about arbitration and to thwart the effectiveness of the arbitral process with the support of the law. In systemic terms, article 45 has the consequence, in theory at least, of lessening the institutional independence and autonomy of the arbitral process. Obviously, this provision stands in contradistinction to the other articles and needs to be reconciled with the general intention of the Decree. As had been the case under the antecedent legislation, the courts probably will provide the necessary guidance on this problem. Given their generally favorable attitude toward arbitration, it can be predicted with reasonable certainty that they will construe article 45 in a manner which protects the institutional status and independence of arbitration.
5. Appeal Against a Decision Denying Enforceability

This section considers the remedies that are available against a judicial decision denying an exequatur to an arbitral award. Previously, this issue had not been treated in the applicable legislation, although the courts had recognized that appeal was possible when the enforcement order had been denied.\(^{261}\) The Decree provides that the decision denying an exequatur can be appealed essentially upon the same grounds as those available under the two principal means of recourse that can be invoked against an arbitral award.\(^{262}\) The drafters, it seems, intended to lessen the difficulties that could attend the appeal of an unreasoned judicial decision.

6. The Retention of Traditional Rules

The remaining articles under this section generally codify, albeit with some slight modifications, the traditional rules established either by law, court interpretation, or actual arbitral practice. For example, under the new legislation, the two principal means of recourse are to be brought before the cour d'appel in the jurisdiction of which the award was rendered.\(^{263}\) Previously, while the appeal of the award was brought before a cour d'appel,\(^{264}\) the opposition en nullité was brought before the court which had granted an exequatur, namely, the district court (the tribunal de grande instance).\(^{265}\) This grouping of the means of recourse before a single appellate jurisdiction promotes uniformity and simplicity. The court's denial of an appeal action or of a recours en annulation action amounts to a grant of an exequatur,\(^{266}\) expressly eliminating the need for additional court action (a point not mentioned in the antecedent legislation). In addition, an award can be granted an exequatur even when the means of recourse actions have been invoked. For example, if the arbitral tribunal has ordered that the award be enforced provisionally, the presiding judge of the court before which the means of recourse is brought can grant an exequatur to the award. If this same judge accords provisional en-


\(^{262}\) Decree, supra note 12, art. 38(2), at 1239; id. art. 49, at 1240.

\(^{263}\) Id. art. 46, at 1240.

\(^{264}\) Nou. C. Pr. Civ. art. 1023 (Dalloz 72d ed. 1979).

\(^{265}\) Id. art. 1028(7).

\(^{266}\) Decree, supra note 12, art. 50, at 1240.
forcement to the award, that decision amounts to an *exequatur*. These provisions have the effect of simplifying and expediting the procedure applying after the award has been rendered and of giving greater jurisdictional authority to arbitral awards.\(^{267}\)

The Decree also maintains the rule that *opposition* or *pourvoi en cassation* cannot be invoked against arbitral awards.\(^{268}\) Moreover, it states that the *recours en révision* remedy is still available against an award on the same grounds which apply to court judgments;\(^{269}\) namely, (1) for fraud on the part of the party in whose favor the award was rendered; (2) upon the discovery of important evidence that was withheld by one of the parties; or (3) upon the discovery that fraudulent evidence was used or that the testimony of witnesses was fraudulent.\(^{270}\) This particular means of recourse can be invoked only in fairly limited circumstances; specifically, by the injured party if he was unable, through no fault of his own, to make these claims before the decision had *res judicata* effect.\(^{271}\) The *recours en révision* is infrequently used in ordinary procedural matters, and probably will have even less importance in arbitral practice.\(^{272}\)

Finally, the *tierce opposition* action remains available against arbitral awards.\(^{273}\) This action is to be brought before the court which would have had jurisdiction over the dispute had there been no arbitration agreement.\(^{274}\) The import of this article is clear except for its reference to a provision of the Civil Procedure Code.\(^{275}\) According to that provision, the court hearing the principal action has jurisdiction to hear the *tierce opposition* motion, provided it is a higher court than the one which rendered the decision in the action challenged by the incidental plea of *tierce opposition*. If it is a court of equal degree, there must be no jurisdictional rule of a strong public policy character which opposes that court’s assumption of jurisdiction.\(^{276}\)

Although the direct relevance of this provision to the sub-

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\(^{268}\) *Id.* art. 41, at 1239.

\(^{269}\) *Id.* art. 51, at 1240.

\(^{270}\) *Nou. C. Pr. Civ.* art. 595 (Dalloz 72d ed. 1979).

\(^{271}\) *Id.* art. 595(6).

\(^{272}\) See text accompanying notes 224-31 supra.

\(^{273}\) Decree, *supra* note 12, art. 41(2), at 1239.

\(^{274}\) *Id.*

\(^{275}\) *Nou. C. Pr. Civ.* art. 588(1) (Dalloz 72d ed. 1979).

\(^{276}\) *Id.*
stance of article 41(2) is not immediately apparent, it appears to have the following meaning in this context: under ordinary circumstances, the tierce opposition action to an arbitral award is brought by a third party as a principal action before the court which would have had jurisdiction to hear the dispute had there not been an arbitration agreement. That court, however, may not have jurisdiction to hear the tierce opposition action if the latter is brought as an incidental plea in a main action before another court. The court hearing the main action has jurisdiction to hear the tierce opposition motion if it is at least equal or superior in degree to the tribunal which rendered the challenged award. In matters involving arbitral awards, this is always the case.

VIII. CONCLUSIONS

A. Assessment of the Means of Recourse Reforms

The Decree, in large measure, must have been enacted in response to the continuing scholarly criticism of the means of recourse procedure available against arbitral awards in French domestic law. It cannot be said with equal certainty, however, that the new means of recourse procedure is the Decree’s sole innovation, or even its principal contribution to the legislative reform of the French procedural law on arbitration. After an examination of the section dealing with the means of recourse, one wonders what is so innovative or fundamental about the Decree provisions on this matter. Undoubtedly, there is progress in the sense that, rather than a disorganized and disparate choice of possible remedies, the parties now have two basic alternatives; appeal or recours en annulation. The entire framework is organized upon the parties’ exercise of their prerogative to waive their right to de novo appeal of the award. In a recours en annulation action, the power of the court to render a merits ruling on the dispute under certain conditions is indeed a provision having radical implications. There are serious questions as to whether this provision is in harmony with the generally progressively-minded substance and spirit of the Decree, and whether it is acceptable as it stands in the arbitration context. The fact that a court’s rejection of either of the two principal means of recourse, amounts to the grants of an exequatur, of course, is a welcomed addition to the procedural arbitration law.

That much is clear and new.

Although the means of recourse procedure may be easier to understand, some of the would-be innovations still cling to the mold established by the past legislation. While it is clearly established that opposition and pourvoi en cassation never have and still do not apply against arbitral awards, the Decree retains all the other former means of recourse.\textsuperscript{278} For example, the recours en révision and the tierce opposition actions, can still be invoked. In addition, the Decree expressly provides that a decision denying exequatur is subject to appeal. The opposition en nullité action has been abolished since the decision granting an exequatur cannot be challenged by any means of recourse. This categorical statement, however, is somewhat misleading. On the one hand, in the same article stating that the decision granting an exequatur is not subject to recourse, the drafters quickly added that the two principal means of recourse, although not exercised directly against that decision, carry with them a challenge of it.\textsuperscript{279} On the other hand, many of the grounds upon which the opposition en nullité could be invoked have been incorporated into the grounds for bringing the recours en annulation.\textsuperscript{280} What can be seen as a structural difference in the procedure does not, therefore, amount to a change in substance.

In the final analysis, it may be quite impossible, in the light of certain systemic considerations, to hope for a more simplified means of recourse procedure than the one elaborated in the Decree. The key consideration appears to lie in the fact that, in the French system, an appeal (specifically, l'appel en réformation) involves the de novo consideration of the facts and the law with the additional possibility of introducing new evidence.\textsuperscript{281} This procedure is clearly incompatible with the concept of arbitration under which the parties intend to remove the resolution of their disputes from the jurisdiction of the courts.\textsuperscript{282} While the willingness to elaborate flexible regulations for arbitration has led the drafters to leave open the possibility of appeal, the competing consideration of attenuating the effects of the appeal procedure has also encouraged

\textsuperscript{278} I.e., the opposition en nullité.
\textsuperscript{279} Decree, supra note 12, art. 48(2), at 1240.
\textsuperscript{280} Id. art. 44, at 1240.
\textsuperscript{281} See P. Herzog, supra note 11, at 530.
\textsuperscript{282} Id.
them to state the rule in terms of an option. In strictly systemic terms, the law could not categorically deny the parties to an arbitration their right to *de novo* appeal. One is tempted, however, to argue that the elimination of that form of appeal would have been the simplest, most effective, and most broad-minded reform of the means of recourse.

The provision for appeal and the fact that it is often waived leave two competing considerations unresolved. First, what means of recourse can be invoked in order to provide relief to a party whose interests were allegedly injured by an arbitral award? Second, will this relief at the same time allow the courts to have some sort of basic supervisory control over arbitral awards when the right of appeal has been waived? The answer to this dilemma comes in the form of the *recours en annulation*, with its procedural and fundamental public policy grounds for having arbitral awards set aside. The other means of recourse are only of ancillary importance and are designed primarily to respond to exceptional circumstances which give rise to a ground for challenging an award. These factors constitute at least a partial explanation for the need in the French system for the bifurcated means of recourse procedure against arbitral awards. Nonetheless, the restructuring of the means of recourse does not necessarily constitute the chief advance of the new legislation.

**B. The Principal Innovation: Judicial and Arbitral Cooperation**

Unquestionably, the repealed provisions needed to be overhauled and replaced by provisions which reflected the jurisprudential advances in this area and the realities of arbitral practice. In this writer's opinion, the fundamental contribution of the Decree of May 14, 1980, is not to be seen in any one particular provision or title, but rather in its general tenor and in the basic legislative attitude that it reflects toward arbitration. The Decree achieves a remarkably intelligent balance between the recognition that it affords to the contractual nature of arbitration and the uncompro-mising exigency that all forms of justice (*i.e.*, any dispute resolution process be it private or public in character) sometimes need the coercive sanction of public authority in order to function effectively. The provisions relating to the possibility of judicial inter-

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vention in the arbitral proceedings represent a delicate orchestration of competing needs that results from the fruitful collaboration between the courts and arbitral tribunals. "Judicial facilitation" rather than "judicial intervention," more accurately describes the process in which the arbitral process retains its near-complete autonomy and ultimately achieves its fundamental purpose.

C. A Global Assessment

The new legislation should be hailed as an undeniably creative achievement, filling gaps, resolving longstanding doctrinal debates, and innovating changes. The French procedural law on arbitration as it relates to fundamental matters and key issues now is a matter of public knowledge and available to interested parties in a clear, well-organized, and comprehensive form. The jurisdictional effects of an arbitration agreement are officially recognized, and the arbitrators have increased jurisdictional powers. In general, the arbitral proceeding follows the fundamental procedural principles contained in the Nouveau Code de procédure civile, a factor which also provides a much needed degree of clarity.

In light of some of the sweeping changes that were introduced, it is somewhat regrettable that the drafters did not venture down the path of introducing expressly the separability doctrine into the substance of the Decree. That innovation, it seems, remains a thing of the future, perhaps to be decided by courts following the implied suggestions of the Decree.

In the last analysis, the Decree of May 14, 1980, is a landmark of progressively-minded legislation which confirms one's thinking that arbitration is regarded as an important institution in French legal and commercial practices. Furthermore, in light of the sophistication and favorable tenor of the applicable procedural law, it establishes France as a particularly hospitable jurisdiction in which to hold arbitral proceedings.

284. Decree, supra note 12, art. 18, at 1239.
285. Id. art. 26, at 1239.
286. Id. arts. 20, 25, 27, 35, 39, & 41, at 1239 (this list only refers to the explicit references in the Decree to the civil procedure code; other articles, e.g., arts. 29-32, nevertheless borrow from the provisions of that code without any explicit cross-reference).
287. See text accompanying notes 117-134 supra.